IN THE LABOUR COURT OF LESOTHO

LAC/REV/48/04
LC/REV/181/06

HELD AT MASERU

IN THE MATTER BETWEEN

MALESHOANE BOHLOA	**1ST APPLICANT**
AGNES THAMAE	**2ND APPLICANT**
MAMOSA SIBOLLA	**3RD APPLICANT**

AND

JET STORES MASERU (PTY) LTD	**1ST RESPONDENT**
ARBITRATOR – M. TLHOELI	**2ND RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION	**3RD RESPONDENT**

JUDGMENT

Date : 17/04/07
Review – Practice – It is wrong to direct attention of the other party to one issue and then canvass another – Arbitrator cannot be said to have erred on an issue that he was never called upon to decide – sec. 69(5)(a) of the Code – Arbitrator declaring reason for dismissal pursuant to the section not preferring a new charge – A person who is duly delegated can dismiss employees – Application dismissed.

1. The three applicants were until their dismissal in 2003, long term employees of the 1st respondent. The 1st applicant was employed in April 1984 and was terminated in August 2003. The 2nd applicant was employed in March 1980 and was terminated on the 9th September 2003. The 3rd applicant was

employed in July 1980 and was terminated on the 11th September 2003.

2. The three applicants were admittedly the senior most employees at the store at the time of the incident that gave rise to these proceedings. The 1st applicant was head cashier. The 2nd applicant was store controller, but moved to become acting store manager. The 3rd applicant then became the store controller.

3. According to the evidence of the 2nd applicant she became acting manager since January 2003, after the then Store Manager proceeded on retirement. Both the 1st and the 3rd applicants were in the Cash Department and they reported directly to her.

4. It was the responsibility of the 1st and the 3rd applicant to ensure that the money collected daily was safely locked away in the safe and that it was banked the following day. Indeed even the bank deposit slips bore the signatures of both these two applicants. (See pp133-134 of the record).

5. The 2nd applicant in turn had to check daily as Acting Store Manager, that bank deposits are done on time according to the rules and regulations and that all the money collected the previous day is banked the following day. (See p.138 of the record).

6. Sometime in May or June 2003, the Head Office of the 1st respondent in Johannesburg spotted that an amount of M18,100-00 that ought to have been banked on the 21/05/03 was missing from the bank statement. A Mr. Lapis, Assistant Store Manager in Bloemfontein was appointed to investigate.

7. Mr. Lapis, came to Maseru where he met with the three applicants and showed them the e-mail message that he received about the missing money and asked them what happened to the money. At that point the applicants told Mr. Lapis not to worry because the problem was with the bank. Infact at one point the 1st applicant said the money had been

misbanked, meaning it had been deposited into a wrong account.

8. Mr. Lapis took the 1st applicant as the head cashier and went with her to the bank to verify their excuse. The bank officer in charge of deposits denied that the bank was in anyway at fault. The bank went further to clarify that the M18,100-00, which was due to be banked on the 21/05/03 was only banked on the 16/07/03. However, the 1st and 3rd applicants who signed for the deposit had misrepresented that the money was deposited on the 13/07/03, which was a Sunday and as such a non-banking day.

9. It became clear that the mistake was not with the bank and the money had not been misbanked as alleged. The three applicants apologized and sought forgiveness for breaching the company rules. However when the deposits for the whole of June were checked more startling revelations of abnormal delays in banking daily collections were found. In June alone a total of M223,862-00 had not been banked in accordance with the company rules. Between June and 18th August 2003 a total of M247,329-80 had not banked in accordance with the rules.

10. Needless to overemphasize this was substantial amount of money. Furthermore, the potential risk of theft or robbery that could result from such huge sums of money being kept in the store when it should be safely kept in the bank, cannot be overemphasized as well. The three applicants were then disciplinarily charged of serious dishonesty in that they "rolled money in the shop amounting to M247,329-80 that led to the loss of interest which would have accrued to the company and hightened the risk of robbery instead of banking it in accordance with the United Retail Banking Procedures."

11. The disciplinary hearings were held in Ladybrand, South Africa. They were conducted by a Ms AnneMarie Viljoen the Manageress of the Ladybrand Jet store, assisted by a Mr. Ephraim, who is the Manager of the Thaba-Nchu Jet store in

the Orange Free State. At the close of the hearings each of the applicants were found guilty and they were dismissed by the chairperson of the hearings.

12. The applicants made a referral to the DDPR challenging their dismissal on the grounds that firstly they were dismissed by a person who had no authority to dismiss them. Secondly, they contended that they never understood the charge in as much as they did not understand what "rolling money" meant. Thirdly, they contended that they were not aware that rolling money as the charge stipulates was an offence under the 1st respondent's personnel rules.

13. Quite lengthy proceedings were entered into and elaborate evidence on both sides was led before the DDPR. With regard to the first contention the applicants were arguing that it was not proper for them to be dismissed by the chairperson of the disciplinary enquiry who is not the Manager of Jet store Maseru. They argued that the Maseru Store had a manageress by the name of Nthabiseng Kuoe who was the one who had the power to dismiss them. At best Ms Viljoen could only make a recommendation to Ms Kuoe about the action she proposes to be taken against them, but only Ms Kuoe could take such an action.

14. The arbitrator found that there was nothing wrong with the dismissals of the applicants by Ms Viljoen because the applicants:

> "*were top most senior employees of the company in the Kingdom of Lesotho (and) as logically sunrise follows nightfall, the situation that existed….reasonably transferred management authority to the United Retail Holding Company which is EDCON Group South Africa. EDCON is entitled to delegate any of its employees to execute such authority in its company in the Kingdom of Lesotho. According to the evidence given Ms. AnneMarie Viljoen and Mr. Ephraim were mandated to exercise management prerogative in the company's affairs in the Kingdom of Lesotho. No evidence was adduced by*

applicants to disprove respondent's version." (p.6 of the award).
We may just add that according to the evidence of the 2nd applicant she was acting until 04/08/03 when Nthabiseng as new manageress was appointed (see p.88 of the record). It is clear from this that at the time of the occurances of the acts which led to applicants' dismissal, Nthabiseng was not yet appointed manageress of the 1st respondent.

15 In the same manner the other two grounds on which the dismissals were challenged were dismissed by the arbitrator. The arbitrator found that the applicants had understood the charge. He found that they only happened to be unhappy with the words "rolling money." He found that their failure to appreciate those otherwise plain English words had no prejudicial effect on their preparations for the disciplinary hearing.

16 With regard to the contention that applicants were unaware that rolling of money is an offence; the arbitrator found that the respondent had been able to prove that there were banking rules and procedures which the applicants were aware that they had to follow and obey. The arbitrator concluded that evidence before him pointed to the offence committed by the applicants as one of gross negligence as opposed to "serious dishonesty." In the end the three applicants' referral was dismissed.

17 The applicants have approached this court for the review and setting aside of the award of the 2nd respondent on three grounds. Firstly, they contend that the arbitrator erred in finding them guilty of gross negligence when the charge they faced and defended before the disciplinary hearing was that of serious dishonesty. They contended that since the arbitrator found that the facts and evidence adduced did not show dishonest practice he should have dismissed the charge rather than to find them guilty of a charge they were never confronted with.

18 The second ground of review was that the arbitrator erred in holding that the applicants understood the charge and yet they did not understand what the rolling of money meant. It must be mentioned that counsel for the applicants did not pursue this ground of review at the hearing. We commend him for doing so because this is by no means a ground for review. It is obviously an appealable issue and as we know awards of the DDPR are final and non-appealable. (see section 228E(5) of Act No. 3 of 2000).

19 Thirdly the applicants contended that the arbitrator erred in finding their dismissal not to be unfair when they had been dismissed by a person who had no authority to do so as that person holds no office in Lesotho.

20 At the hearing hereof Mr. Motsoari for the applicants introduced a new ground that the dismissals of the applicants were bad in law due to the disciplinary hearings that were held in Ladybrand, South Africa. He relied on the case of Queen Komane .v. City Express Stores (Pty) Ltd LAC/CIV/A/5/02, (unreported) where the Labour Appeal Court held that "….it is both unlawful and against public policy that an employee who is a *domicile* of Lesotho and who is employed exclusively in Lesotho should be disciplinarily tried outside the country when there is still a branch of the employer in the country." (pp12-13 of the typed judgment).

21 Mr. Moiloa for the 1st respondent objected to the raising of this new ground. He contended that the applicants are confined to deal with the review on the basis of the issues that were pleaded before the DDPR. He argued further that it was not available for the applicants at review to introduce fresh material which never formed the basis of their claim. He referred to the cases of Frasers Lesotho .v. Hata Butle 1995-1999 LAC 698 and Malerotholi Sekhonyana & Another .v. Standard Bank Ltd 1999-2000 LLR – LB 416. To these we may also add the Queen Komane case supra

and Pascalis Molapi .v. Metro Group Ltd & Ors; LAC/CIV/R/ 09/03 (unreported).

22 The essence of the principle canvassed in these cases was aptly captured in the Frasers Lesotho case and it is that "it is wrong to direct the attention of the other party to one issue and then attempt to canvass another." There is nowhere in the record of the proceedings of the DDPR where the latter was invited to decide on the propriety of the hearings having been held in the RSA.

23 Infact the applicants were called to clarify precisely what their objection to the hearing was. They all answered alike, albeit at different times when they gave their respective testimony. At p13 of the record the 1st applicant clearly stated:

> *"We are challenging the unfairness of being dismissed by a manager of a branch different from where we were working while we were working at Jet Maseru under 'Me Nthabiseng's supervision as a manager."*

24 At p.84 of the record, the 2nd applicant stated that "our claim is all about being dismissed by a person who had no authority". This is the issue that the 2nd respondent was seized with throughout the arbitration process. The one being sought to be raised now never arose before him. He cannot therefore be said to have misdirected himself or in any way erred in dealing with it because he never dealt with it. For these reasons Mr. Moiloa's objection was upheld and Mr. Motsoari's secret weapon was not allowed to form part of his case as it did not even arise in the review papers which founded this application.

25. It remains now to deal with the remaining two grounds of review which we will deal with *seriatim*. Firstly, it is argued that the arbitrator erred in finding applicants guilty of gross negligence, a charge they never defended themselves against. Mr. Motsoari contended that if the arbitrator found

that evidence before him did not support the charge of serious dishonesty he should have dismissed the charge and found applicants not guilty, instead of finding them guilty of a new offence with which they were not charged.

26. This approach would without doubt receive a sympathetic ear in a criminal trial. However, in *hoc casu* the arbitrator's empowered by section 69(5)(a) of the Labour Code Order 1992 as amended to declare the reasons for the dismissal if the material details of the statement given by the employer are incorrect. What the arbitrator did was simply to declare the reason for the dismissal as gross negligence because that is what he said in his view the facts pointed to as opposed to serious dishonesty.

27. The declaration of the reason by the arbitrator did not amount to finding the applicants guilty of a new charge. The alleged facts against the applicants were not changed. They remained the same and the arbitrator was saying with these facts you wrongly described the charge as dishonesty, it ought to be gross negligence instead.

28. We see no ground for finding fault with that approach. Firstly, because it is sanctioned by the law viz sec.69(5)(a) of the Code. Secondly, nothing turns on what label one gives the offence because the acts which the applicants are charged of committing which is the most important thing in labour law, remain the same. Infact Mr. Moiloa went so far as to suggest that the two labels namely dishonesty and negligence are two side of the same coin. We share that view.

29. The second ground was that the arbitrator erred in holding that the dismissal of the applicants was fair when they had been dismissed by a person who had no authority to do so. This contention looses sight of a clear and categoric finding of the arbitrator that the two managers who conducted the hearings, were according to evidence before him, mandated to exercise affairs of the company

in the Kingdom of Lesotho and that this evidence was not controverted.

30. It is trite that a company can delegate the exercise of managerial authority to any individual it deems fit to delegate the power to. If the arbitrator satisfied himself by evidence that this is what the company did, *cadit questio*. (See Pulelng Mathibeli .v. Sun International 1999-2000 LLR-LB 374 (CA). There cannot therefore be talk of misdirection in the circumstances. This review application is accordingly dismissed.

There is no order as to costs.

THUS DONE AT MASERU THIS 23RD DAY OF MAY 2007.

L. A. LETHOBANE
PRESIDENT

D. TWALA **I CONCUR**
MEMBER

L. MOFELEHETSI **I CONCUR**
MEMBER

FOR APPLICANTS: **MR. MOTSOARI**
FOR RESPONDENT: **MR. MOILOA**