**IN THE LABOUR COURT OF LESOTHO**

**LAC/REV/99/04**
**LC/REV/216/06**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

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| **CENTRAL BANK OF LESOTHO** | **APPLICANT** |
| **AND** | |
| **DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION** | **1ST RESPONDENT** |
| **MR. M. J. SHALE – ARBITRATOR** | **2ND RESPONDENT** |
| **MPHO YVONNE MOFOKENG** | **3RD RESPONDENT** |

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# JUDGMENT

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***Date of hearing: 16/05/07***
***Date delivered: 15/06/07***
***Review – Award of the Arbitrator failing to take into account evidence adduced at arbitration Disciplinary Code – No evidence of prejudice suffered for not following the Code to the letter – Employee failing to raise objection to the composition of the committee at disciplinary hearing – The approach is irregular as it denies employer right to respondent and deal with the query – Employee pleading guilty to the charges – Even if procedural impropriety is found reinstatement order has to be weighed against that plea and the broken trust – award reviews and set aside – no costs ordered.***

1. This is an application for the review of the award the 2nd respondent dated 19th July 2004. In that award, the 2nd respondent had:

   (a) declared the dismissal of the 3rd respondent by the applicant as unfair;
   (b) ordered the applicant to pay the 3rd respondent an amount of M60,338-46 as payment for lost wages;
   (c) ordered that he 3rd respondent be reinstated to her position as banking officer.

2. On the 11th August 2004 the applicant bank filed a notice of motion in which it sought an order in the following terms:

   (a) That the award issued by the 2nd respond on the 19th July 2004, under referral No. A551/04 and declaring the dismissal of the 3rd respondent by applicant unfair be reviewed and set aside.
   (b) That the dismissal of the third respondent by applicant be confirmed with effect from 8 March 2004.
   (c) That the applicant be granted such further and/or alternative relief as the Honourable Court may deem fit.

3. The application arises out of the dismissal of the 3rd respondent on the 8th March 2001 for her involvement in the irregular disbursement of M595,000-00 which was paid out by the applicant purportedly on behalf of the Government of Lesotho, to local firm of attorneys, Dupreez Liebetrau and Co.

4. The 3rd respondent was employed as a banking officer with effect from November 2000. On the 6th October 2003, she processed an instruction letter No.547, allegedly emanating from the Government of Lesotho Treasury Department. The letter instructed that the said sum of M595,000-00 be paid to the said local firm of lawyers.

5. The instruction was fraudulent. However, the 3rd respondent who claims to have found it on her desk on the morning of the 6th October 2003, processed it and passed it to Reserves Department who effected payment the same day. On or around the 8th October another instruction bearing the same number 547 was received by the 3rd respondent.

6. The second instruction was a genuine instruction from the Treasury for payment of One Million Maluti. The instruction was again received by the 3rd respondent who again processed it and it was once again paid. Both the 3rd respondent and the Reserves Department claim to have detected that the instruction was a duplication.

7. A few days later the duplication was detected by the Treasury Department which queried the payment of the first instruction. The bank mounted an investigation made up of personnel from Internal Audit and the Security Division. One of the stated objectives of the investigation was to establish who committed the fraud. The investigation established that the 3rd respondent and her supervisor one Mr. Mereki Monku had played a parting the fraud and recommended that disciplinary measures be taken against them.

8. At the hearing before the 1st respondent a representative of the applicant Mr. Makara gave testimony in which he narrated how the 3rd respondent bungled the procedure which she ought to have known in processing the first "instruction". He stated that by her own account before the disciplinary hearing the 3rd respondent said she found the instruction for payment of the said sum of M595,000-00 on her desk.

9. She did not know how it came into the bank. She however, processed it. The procedure which the 3rd respondent knew or ought to have known as a banking officer of at lest three years, is that such instruction is received through the Registry, who stamp it, register it and then pass it to Banking Division which is the 3rd respondent's office.

10. When it gets to banking, it (instruction) must be accepted by one of the seniors, and those are listed as "section head banking, head banking or banking officers". (see p.125 of the record). The witness went on to say that these are people "whom we call professionals". (p.126 of record). They sign for the instruction and ensure that it has all the relevant details like, names of the payee, account number, name and account of the bank being paid, amount of the payment order, value date and reinvestment instructions if they exist.

11. The witness testified further that, having satisfied themselves of the details, they (banking division) take the instruction to the person who will give the permission that it be paid. Those the witness testified are the signatories in the bank. They will counter check the authenticity of the authorizing signature against the specimen they have before giving permission. When the permission has been obtained the instruction goes back to banking where the payment voucher will be made.

12. The payment voucher is done by the banking clerk who will pass it to either section head banking, banking head or a banking officer for checking and authorization. After that the voucher is passed to Reserves Management for payment on the SWIFT machine.

13. The witness also stated that the purpose of so many stages is that there should be controls, checks and balances. This is what he said:

> *"That so many stages exist is because they should satisfy themselves that the payment being made is the right one. A wrong person is not paid. Now 'Me Mofokeng did not do that. She did everything from when the thing arrived, it was received by her, and she recorded it on the register when at least that was supposed to be done by someone else. There is no one who checked 'Me Mofokeng, that this thing should be paid until it went through Reserves and was paid."* (p.127 of the record).

14. The witness also testified that the genuine instruction No.547 was later received from the Treasury. It was again registered by the 3rd respondent. In a surprise turn of events all the documents which related to the fraudulent instruction disappeared as well as the register in which they were registered. Those documents had been returned to the banking division by Reserves Management and they had admittedly been received by the third respondent. The register was also used by her and she was the first to see that it had disappeared. The register was later found but entries relating to the fraudulent transaction had been tempered with.

15. The 3rd respondent was in due course charged of three offences relating to failure to observe established procedure for receiving payment instruction in her Division. She was further charged of failing to recognize only two days later a payment instruction bearing the same number as the fraudulent one she had processed. Finally she faced a charge relating to the disappearance of the Register which though later discovered was found to have been tempered with in respect of the entry relating to the fraudulent instruction payment.

16. The 3rd respondent pleaded guilty to the first two charges, but not guilty to the third charge. She was duly found guilty on her own plea and was not found guilty of the third charge in accordance with her plea. The committee recommended that she be suspended for one month without pay. However, the Director of Administration to whom recommendation had to be made in terms of the rules, imposed the penalty of dismissal.

17. The 3d respondent appealed to the Governor who after hearing her, confirmed the decision of the Director of Administration that she be dismissed. She then referred a dispute of unfair dismissal to the 1st respondent on a number of grounds. However the pertinent one for the purpose of this review is that the disciplinary committee that conducted her hearing was not

properly constituted in as much as the Chief Internal Auditor was not present.

18. It is common cause that clause 1 of the applicant's Disciplinary Procedure provides that:

> *"There shall be established a Disciplinary Committee of not more than five people to hear cases of misconduct against staff below the rank of Head of Department. The committee shall comprise:-*
> *"Head Human Resources Division, who shall be chairman or in his absence, the Governor may appoint another staff member of equivalent rank to act as chairman.*
> *"Section Head Personnel Administration who shall serve as Secretary.*
> *"Director in whose Department the staff is assigned except in the case of Governor and Director of Administration in whose place any other Department may be appointed by the Governor.*
> *"Chief, Internal Audit and*
> *"A representative of the staff association."*

19. It is also common cause that because of his involvement at the investigation stage the Chief Internal Auditor recussed herself from the proceedings of the disciplinary committee. For this reason the 2nd respondent found that the committee was improperly constituted and that the dismissal of 3rd respondent was consequently unfair.

20. The applicant sought the review of that award on the grounds that the award is entirely based on the single argument that the disciplinary committee had not been properly constituted by reason that the Internal Auditor of the applicant did not sit on the panel. The applicant went further to argue that the award is based upon a gross misinterpretation of the evidence and that the arbitration proceedings were therefore irregular.

21. In coming to the conclusion that the dismissal was unfair, the arbitrator relied on an incomplete passage from the judgment

of Landman P. in National Education Health and Allied Workers' Union & Others .v. Director General of Agriculture & Another (1993) 14 ILJ 1488 at 1500. We wish to quote it in full. The learned Judge President stated:

> *"It has become the practice of the court in dealing with the private sector to hold an employer to his unilateral or negotiated code including a retrenchment code. There is merit in this. An employer should live up to the expectations created amongst his staff by his unilateral code. Even more so should the employer comply with a collectively bargained undertaking. Unfortunately this approach of the court has developed a life of its own. We are daily faced by counsel, trade union officials and consultants who laboriously and minutely (and sometimes tediously) examine the employer's code or the agreement and pounce with relish on any and every minute deviation from the Code. This tendency is especially prevalent in regard to procedural obligations. Such an approach is in conflict with the concept of the Labour Relations Act of 1956 (the Labour Code Order 1992 in our case) which requires the court to promote good labour relations practices by striking down and remedying unfair labour practices. The jurisprudence and legislative intention was that a move should be made away from strict legality to the equitable, fair and reasonable exercise of rights. We believe that our jurisprudence has strayed too far away from this path and that the time has come when we should turn our backs on a legalistic interpretation and insistence on uncompromising compliance with a code and ask a general question: Was what the employer did substantially fair, reasonable and equitable? If the answer is positive that will ordinarily be the end of the matter".* (emphasis added).

22. This passage was quoted by this court in the case of Matee Phatela .v. LHDA LC/115/00 (unreported). However, it was not quoted in full as it has been done herein. The learned arbitrator also placed heavy reliance on the decision in the

Phatela case *supra* in arriving at his decision that the dismissal of the 3rd respondent was unfair.

23. There are however, three features which distinguish the Phatela case from that of the 3rd respondent herein. Firstly, the 3rd respondent pleaded guilty to two of the charges. Accordingly, even if her dismissal might be procedurally unfair, it remained substantively unfair. This was not the case in the Phatela case. Secondly, the 3rd respondent acquiesced to the absence of the Chief Internal Auditor in as much as the latter sought to be recused and there was no objection from the 3rd respondent or anyone for that matter. Thirdly, the issue of the Internal Auditor not being present in the panel was raised for the first time at the DDPR. On the contrary in the Phatela case, the composition of the committee was objected to right at the disciplinary hearing itself.

24. These three factors should suffice to deal a fatal blow to the order of the 2nd respondent. We must however add that the respondent are very correct in contending as they did that the 2nd respondent's finding was based upon misinterpretation of the evidence before him.

25. A representative for the respondent, Mr. Makara put very pertinent questions to the 3rd respondent during cross-examination which have simply been ignored by the learned arbitrator in his award. At page 80 of the record the 3rd respondent was asked by the representative if she asked why the Chief Internal Auditor left and if she did not why she did not ask?

26. Her response was that she did not ask because at that time she "…had not yet read the bank's rules and regulations properly to see that it was a rule that she should be present in the committee". She was again asked what advantage she believed she would specifically gain if the Chief Internal Auditor was present. Her response was, whether it would be an advantage or disadvantage but her presence would influence the committee's decision either way.

27. She was asked at p.81 if she knew that the Chief Internal Auditor was part of the investigations, she said that she knew. She was then asked if she would have liked it if a person who had been a part of the investigation, who had seen that she was suspected was present when she was judged. Her answer was clear, that she would not have liked it.

28. The answers to the questions in the above three paragraphs are a clear indication that, the 3rd respondent suffered no prejudice as a result of the committee being constituted as it was. Infact the employer and the Chief Internal Auditor were evidently fair by not making a person who had already formed an opinion as to the 3rd respondent's culpability a part of the hearing that was going to determine her guilt. It must be remembered that the objectives of the investigation was, inter alia, to determine who was responsible. Clearly therefore the Chief Internal Auditor was clear from the investigations they conducted that the 3rd respondent had played a part in the irregular disbursement. The 3rd respondent herself was aware that the involvement of that person would not benefit her, but would rather open the disciplinary proceedings to challenge for being patently unfair.

29. At page 82 she was asked when she taught herself about the rules to realize that the Chief Internal Auditor should have been part of the committee. She said later after she had contacted her legal advisors. In the case of Slagment (Pty) Ltd .v. Building Construction & Allied Workers Union (1994) 15 ILJ 979(A), a recognition agreement provided that appeals from disciplinary hearing would be made to the Factory Manager. However, the appeals of the dismissed two members of the 1st respondent were heard by a Mr. Hartzenberg who was Works Manager because the Factory Manager had heard the initial hearing, and dismissed the 1st respondent members. Since no objection was raised at any time, to the hearing of the appeals by Hartzenberg the

Appellate Division found no fault with the parties' failure to follow that procedure to the letter.

30. In casu no objection was raised to the composition of the committee at the hearing even on appeal 3rd respondent says she only became aware of the "error" in the composition of the committee after she met with her lawyer. In a further devastating cross-examination Mr. Makara puts it to the 3rd respondent that in terms of the rules she has 30 days to appeal and that is enough time for her to have consulted with her lawyer to identify any shortcomings in the composition of the committee. He asked her further "so do you find it proper to come and say that the Governor did not decide properly on the point that you did not contest at all?" (p.86 of the record).

31. The 3rd respondent's answer to that question was a candid, "I am not able to answer this question." All this evidence was not considered by the arbitrator. It is not available to the 3rd respondent to come and contest for the first time before DDPR that the applicants erred on an issue that she never canvassed before the applicant. The maxim *audi alteram partem* applies both ways. In other words if it had been raised timeously the applicants would have been able to deal with it. (see also Puleng Mathibeli .v. Sun International 1999-2000 LLR-LB 374 (CA) and Maleshoane Bohloa and Others .v. Jet Store Maseru (Pty) Ltd & Others LC/REV/48/04 at p.7 paragraph 24 of the typed judgment (unreported).

32. At the hearing before the DDPR, 3rd respondent handed in her letter of dismissal dated 14th January 2004. (p72 of the record). The letter expressly stated in the second paragraph that 3rd respondent had been found guilty as charged on the basis of her own admission of guilt. Even at the DDPR she did not dissociate herself from the letter's claim that she had pleaded guilty. Furthermore, witnesses of the applicant gave chilling details of how she had breached established procedure which act, resulted in the reputation of the bank

being put on the line. She did not challenge any of these accounts.

33. Regrettably the learned arbitrator once more ignored all of that evidence and placed reliance purely on the fact that the Chief Internal Auditor was not part of the committee that heard 3rd respondent's case. The truth of the matter is that she was a part of the committee until she was excused from the hearing with the concurrence of all present, 3rd respondent included. Not only was an objection not raised but her departure was actually meant to ensure that the accused employee is given a fair hearing. This picture fits hand in glove with the remarks of the learned Landmark P. quoted in paragraph 21 above where he says:

> *"……the time has come when we should turn our backs on legalistic interpretation and insistence on uncompromising compliance with a code and ask a general question : was what the employer did substantially fair, reasonable and equitable? If the answer is positive that (should) ordinarily be the end of the matter."*

34. These remarks of the learned Judge President as he then was are apposite in the instant matter. From her own evidence it is clear that the 3rd respondent is pursuing a simple case of strict and uncompromising compliance with the code at the expense of substantially reasonable and equitable approach of the applicant in the light of the facts of the case. In any event the objection to the composition is being raised belatedly contrary to established practice. All these coupled with the 3rd respondent's admission of guilt do not justify the learned arbitrator's finding that the "applicant's dismissal is a non-starter and (that) its findings cannot be relied upon."

35. Even assuming that the learned arbitrator had rightly taken the point that the disciplinary committee's composition was irregular and therefore constituted a procedural flaw, reinstatement would certainly not have been the right remedy. In considering whether it was suitable to order

reinstatement the learned arbitrator would have had to consider the 3rd respondent's plea of guilty, the fact that she has not challenged the applicant's chilling account of her total disregard of important procedure of checks to prevent fraud and the question of the trust relationship which is at the centre of employment relationship in a banking sector. For these reasons we have come to the conclusion that the award of the 2nd respondent is irregular in material respects, thus warranting that this court interferes with it. Accordingly, the 1st and 2nd respondents award in referral No.A551/04 is reviewed, corrected and it is set aside. There is no order as to costs.

**THUS DONE AT MASERU THIS 7th DAY OF JUNE 2007.**

# L. A. LETHOBANE
# PRESIDENT

**L. MOFELEHETSI** **I CONCUR**
**MEMBER**

**D. TWALA** **I CONCUR**
**MEMBER**

**FOR APPLICANT:** **MR. FISCHER**
**FOR RESPONDENT:** **MR. L. MOLAPO**