IN THE LABOUR COURT OF LESOTHO

LAC/REV/147/04
LAC/REV/148/04
LC/REV/272/06

HELD AT MASERU

IN THE MATTER BETWEEN

BUSHY SEOTSANYANA	**APPLICANT**
AND	
CASHBUILD (SA) PTY LTD	**1ST RESPONDENT**
DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION	**2ND RESPONDENT**
AZAEL ROBERTS	**APPLICANT**
AND	
CASHBUILD (SA) PTY LTD	**1ST RESPONDENT**
DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION	**2ND RESPONDENT**

JUDGMENT

Date of hearing: 27/06/2007.
Practice and procedure –there is no rule of this court requiring a resolution empowering executives to act on behalf of a juristic person Review –the labour court has no jurisdiction to determine issues that legislature has made a subject of determination by arbitration -Review - distinguished from an Appeal.

1. The two review applications were consolidated per the order of Peete J. on the 24th June 2006. The two applicants were employed by the 1st respondent as Branch Managers. Mr. Bushy Seotsanyana whom we shall for convenience refer to as the 1st applicant was employed as the Branch Manager of the Leribe Store of the 1st respondent. Mr. Azael Roberts whom we shall refer to as the 2nd applicant was employed as the Branch Manager of the Maseru Store of the 1st respondent.

CASE OF 1ST APPLICANT

2. A stock controller at the 1st respondent's Leribe Store made stock adjustments on the computer without the 1st applicant's approval. Approximately five different adjustments were made between January and February 2004.

3. The stock adjustment's related mainly to unaccounted for or allegedly damaged bags of cement. These resulted in the loss of 143 bags to the value of M4,500-00. Admittedly these adjustments required the authorization of the 1st applicant, which was not obtained.

4. According to evidence presented at the Directorate of Disputes Prevention and Resolution (DDPR), the 1st applicant ought to have known of these illegal adjustments as he pulls out daily reports from the computer. He would then be expected to investigate and take the necessary disciplinary action against the person responsible.

5. The evidence further shows that from his weekly reports 1st applicant was indeed aware of the adjustments. He however gave false reports of what occasioned the adjustments. In one week he had said the adjustments were as a result of mouldings and paints which were unaccounted for. In the second weekly report, he gave the reason for adjustments as doors that had been transferred. (see pages 44 and 45 of the transcribed DDPR record).

6. When the Divisional Manager called at the store and checked the stock against the last stock take, he immediately came across the adjustments. The computer print out that he pulled out clearly told him they were in respect of cement. It was obvious to the

Divisional Manager that the 1st applicant had been giving false information about the true nature of the stock adjustments in his weekly reports.

7. The Divisional Manager asked the 1st applicant to investigate the unauthorized stock adjustments and to take appropriate disciplinary steps against the culprit. The 1st applicant's report to the Divisional Manager was that he did not know who did the adjustments. However, evidence presented at the DDPR by the Divisional Manager was that it was impossible for the Branch Manager not to be aware of five different occasions that adjustments were done without his approval. The reason given was that the Branch Manager pulls out daily reports that would show the adjustments and what they were for. (see P.41 of transcribed record).

8. The Divisional Manager did his own investigation which led him to the person responsible. Through the use of a lie detector they were able to establish that the stock controller one Meshack was the one responsible even though he was denying it.

9. The 1st applicant was subsequently disciplinarily charged of gross negligence in that on five different occasions he failed to detect irregular stock adjustments and to carry out appropriate disciplinary action. He was further charged of dishonesty in that in his weekly reports he had furnished false information about the adjustments.

10. The 1st respondent contracted an independent Labour Consultant to chair the disciplinary proceedings. The hearing commenced on the 20th February. The proceedings were inconclusively conducted. It was postponed to the 23rd February 2004, on which date the proceedings were concluded. The 1st applicant was found guilty and he was dismissed that same day.

11. The 1st applicant unsuccessfully appealed the decision. He subsequently made a referral to the DDPR where he challenged the fairness of his dismissal on the ground that the 1st respondent did not afford him enough time to prepare his defence. He further challenged the substantive fairness of his dismissal by disputing

that he was not guilty of gross negligence or dishonesty as charged. At the close of the arbitration, the arbitrator found that 1st applicant had been fairly dismissed for the misconducts he was charged of. The arbitrator however ordered the 1st respondent to pay 1st applicant two weeks wages because the 1st respondent had not furnished the 1st applicant with written statement of reasons for dismissal in terms of section 91 of the Labour Code Order 1992 (the Code).

CASE OF 2ND APPLICANT

12. The 2nd applicant was served with the notification of a hearing on the 18th February 2004. The hearing was scheduled for the 20th February 2004. At the hearing he faced essentially three charges.

13. The first charge was unsatisfactory performance in that 2nd applicant failed to exercise due care and attention in dealing with daily cash register analysis (DLRA). This charge arose out of 2nd applicant's failure to adhere to the rule that requires that all four deposit slips generated by the system be signed in their original form. The 2nd applicant had in some cases signed photocopied copies.

14. In his statement of case before the DDPR 2nd applicant denied ever signing photocopies. Under cross-examination however, he was presented with three separate incidents where he had signed photocopies of deposit slips as opposed to originals. He conceded that the signature appearing thereon was his. He however sought to show that this was a campaign to get rid of him because he was never informed about the fault by either the accounting department or the Divisional Manager.

15. In his evidence in chief as well as under cross-examination the Divisional Manager averred that after he was informed about the breach by the 2nd applicant's store, he went to the store with the photocopies in question. He confronted both the accountant and the 2nd applicant about them. The 2nd applicant could not deny the Divisional Manager's evidence in this regard.

16. The other charge was of negligence in that the 2nd applicant never did a proper follow up of queries emanating from the Divisional Accountant in Johannesburg concerning banking irregularities, whereby bank statements did not correspond with bank deposits. Thirdly he was charged with failure to carry out instruction to discipline his systems supervisor for the amount of M1,656-00 that got lost as a result of the said banking discrepancies.

17. He sought to establish a defence in respect of both these charges by saying that he sought the service of an auditor to help him to find out what happened. It was however, put to him that the auditor did determine that money is missing and he advised him (2nd applicant) to investigate further or to discipline the system supervisor and he did none of those. The Divisional Manager had to do the investigations himself and finally charged and dismissed the system supervisor.

18. 2nd applicant could not deny that suggestion. It is common cause that the disciplinary hearing which was chaired by an independent chairperson contracted from South Africa found him guilty and recommended his dismissal.

19. 2nd applicant made a referral to the DDPR in which he complained that there had been procedural and substantive unfairness in his dismissal. Procedurally he contended that deposit slips which he was charged of signing in duplicate were not availed to him. It is common cause that in evidence before the DDPR those slips were shown to him and he conceded that he was the one who signed them.

20. The crux of 2nd applicant's contention would however seem to be that he wished to have been availed of the documents before he came to the hearing. Evidence of the Divisional Manager which was not denied was that the 2nd applicant was told by the Divisional Manager to ask for those documents from the accounts division. However by his own admission applicant asked for the slips from the Human Resources Department which had nothing to do with those slips.

21. It would seem to this court that even assuming that he had contacted the right department namely, accounts, the best the latter could do would be to show him the deposit slips. They would not be able to release them to him as he required because they were the basis of the charge and the employer had to retain possession of them. As we said however, they were finally shown to him as proof of the charge at the hearing and he could not but admit them. Accordingly, the arbitrator found that there was no procedural fairness.

22. The 2nd applicant had further queried the finding of the chairperson that he had failed to improve his performance despite management's previous efforts to help him to improve. He argued that there had never been any previous disciplinary measures where his performance was sought to be corrected. Under cross-examination however, 2nd applicant conceded he had a previous final written warning for breach of company policies. He conceded further that at one stage the Divisional Manager even brought a branch manager from another store to come and assist him in his branch. (see pp14 and 15 of the record of the DDPR proceedings). Again the learned arbitrator found no unfairness on this ground.

23. Substantively the 2nd applicant simply disputed the factual findings against him. However evidence was led before the DDPR on the basis of which the arbitrator found that the 1st respondent was justified in finding him (2nd applicant) guilty as charged.

THE REVIEW

24. The two applicants launched review proceedings before the Labour Appeal Court. Their grounds of review were exactly the same. These were the following:

    (a) The composition of the disciplinary committee that heard both applicants' cases was flawed in as much as the committees were chaired by a person who is not a senior manager of the 1st respondent.
    (b) No person was present to take the minutes. The chairperson herself took the minutes of the proceedings.

(c) The chairperson failed to introduce herself and to tell the meeting what her position is or was within the 1st respondent.

(d) The arbitrator erred in dismissing their claim that there was procedural irregularity at the hearings.

25. The 1st applicant had a further ground that the chairperson erred in that she took into account his previous disciplinary record which had lapsed. The said disciplinary record was said to be 1st applicant's first written warning which he avers had lapsed. He contended further that his disciplinary hearing was chaired by an outsider who had no power in law to hear his disciplinary case.

26. It is common cause that pursuant to section 5 of the Labour Code (Amendment) Act No.5 of 2006, the Labour Court is now the right forum for determination of the reviews of the awards of the DDPR. Accordingly, the application of the two applicants was referred to this court by the Labour Appeal Court for determination in terms of the said section.

27. At the start of the hearing, Mr. Thoahlane for the applicants raised a point from the bar to the effect that the opposing affidavit of the Divisional Manager, Mr. Mokobori should be disregarded because there is no resolution of the Board of Directors authorizing him to defend these proceedings. It suffices to refer to section 27(2) of the Code which provides that:

> *"(2) The Court shall not be bound by the rules of evidence in civil or criminal proceedings and it shall be the chief function of the court to do substantial justice between the parties before it."*

28. It is pertinent that the court always reminds itself of this section, because some of the objections raised by counsel appearing before this court are either strict rules of evidence or formalistic and procedural objections which tend to sacrifice the substantive issues that the court is enjoined to consider. There is no requirement in the rules of this court that juristic entities should file resolutions authorizing deponents to defend proceedings on their behalf.

29. This should rest this argument that concerns resolution. I must however add that in his affidavit Mr. Mokobori has clearly stated in paragraph 1 that he is a "*Divisional Manager of the 1st respondent responsible for supervision of all of the 1st respondent's stores and businesses in Lesotho and (he is) duly authorised to represent the respondent in this matter and to depose to this affidavit*." This deposition which is on oath has not be contradicted. (See LTC .v. M. Nkuebe & Others 1997-1998 LLR-LB 438 at 445-447 and the cases cited therein.).

30. Mr. Thoahlane contended further that the deponent to the opposing affidavit has not averred that he deposes to the facts that are personally known to him. He referred to the case of Matime & Ors .v. Moruthoane & Anor. 1985-1989 LAC198 at p.199 where Schutz P. said the following:

> *"The next difficulty that I have with the application in the High Court is that the deponents who purported to give evidence did not say that they had personal knowledge of the facts deposed to. It is true that in respect of some of the facts it appears from the affidavits themselves that knowledge is established. But when one has regard to the basic facts that had to be established there is a lack of admissible evidence to make the simple case that was sought to be made.* (emphasis added).

31. It is clear from the emphasized parts of the excerpt that the court cannot just speculate that because no averrement has been made as to personal knowledge then deponent is deposing to hearsay. Quite clearly knowledge of the facts can be established from the affidavit of the deponent. There has to be objective facts that lead the court to the conclusion that deponent lacks personal knowledge of the facts to which he is deposing.

32. It is common cause that Mr. Mokobori is not only the Divisional Manager of the 1st respondent, but he was complainant in the cases of both applicants and he testified at length in both cases both at the disciplinary hearing and before the DDPR. He is therefore the person best placed to depose first hand in both cases as to the true facts of each case. Unless the court is shown specific aspect of his evidence that is not within or that is not capable of being within his

personal knowledge we are satisfied that given the central role he has played in these matters from their inception he is deposing to what he knows.

33. Coming now to his pleaded grounds of review, Mr. Thoahlane contended that the disciplinary committees hearing the disciplinary cases of both applicants were improperly constituted in as much as the chairperson was not a senior manager of the respondent but some one that was contracted from outside the company to conduct the disciplinary hearings.

34. It is not disputed that the chairperson was not someone from the establishment of the 1st respondent. It may however just be remarked without making a finding that to be a senior manager one need not necessarily be on a permanent establishment. Section 62 of the Code recognizes three types of employment contracts. These are a contract without reference to limit of time, a contract for one fixed duration or a contract to perform some specific work or to undertake a specified journey. It would appear that the contract of the chairperson of the hearings could well be a contract to perform specific work.

35. We make the above observations without making a finding because the legislature in its wisdom has made issues such as that raised by counsel herein determinable by the DDPR through arbitration. As for this court it has no jurisdiction to make a determination on them.(See Cotzee v. Lebea No & another (1999)20 ILJ 129 at p 134)

36. It was contended further that the chairperson failed to introduce herself and that she doubled as a secretary as well. These may well be so, especially when the record does not show where she introduced herself. The minutes were admittedly kept by her. But whether these failures or infractions

> of the chairperson constitute any unfairness to the dismissal of the applicants is the matter that should have rightly been raised at the DDPR as they can by law only be determined by arbitration. The function reserved for this court being confined to overseeing whether the DDPR has exercised its powers in

that regard within the limits of the enabling statute and according to the dictates of the principle of legality.

37. The last two grounds were that the arbitrators erred in finding that there was no procedural irregularity in the conduct of both applicants' disciplinary hearings. Furthermore the 1st applicant contended that the chairperson of the disciplinary hearing erred in taking into account a disciplinary record that had lapsed.

38. It seems from the two records and the two awards pertaining to the two applicants that the person who complained about the previous record is the 2nd applicant Mr. Roberts. (see p.62 of the record of the proceedings of the 2nd applicant and pp.7, 14 and 15 of the transcribed record of DDPR proceedings). Even then the 2nd applicant was the one who brought up the question of the previous record by saying he had never been assisted to improve his record. When it is shown to him that he had previously been warned, he moves the goal posts and raises a new defence that that record should not have been considered because it had lapsed. This cannot be allowed.

39. Both applicants sought to argue that their hearings were riddled with procedural irregularities. The arbitrators in both cases considered their evidence and came to the conclusion that there were no procedural flaws. That should be the end of the matter because awards of the DDPR are final and non-appealable. (See section 228E(5) of Act No.3 of 2000).

40. To seek to challenge a decision of the arbitrator purely because one is not happy with it is an appeal which is not allowed by the law. As it was stated in Cotzee .v. Lebea NO & Another supra at p.133:

> *"A review concerns itself with the manner in which a tribunal comes to its conclusion rather than with its result. An appeal on the other hand is concerned with the correctness of the result."*

See also County Fair Foods (PTY) LTD .V. CCMA & Ors (1999)20 ILJ 1701 at 1706 D-E.

41. The same argument should equally apply to the contention that the chairperson considered a disciplinary record which had lapsed. The arbitrator addressed herself to that issue and on the basis of facts alleged before her came to a conclusion that there was no unfairness occasioned thereby. To seek to reopen it before this court in the manner applicants have done is clearly an appeal which the law does not allow. For these reasons the review applications of the two applicants cannot succeed. They are accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 5TH DAY OF JULY 2007

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI **I CONCUR**
MEMBER

R. MOTHEPU **I CONCUR**
MEMBER

FOR APPLICANTS: **MR. THOAHLANE**
FOR RESPONDENTS: **MR. MOKOBOCHO**