

IN THE LABOUR COURT OF LESOTHO

LC/REV/387/06

LAC/REV/100/05

HELD AT MASERU

IN THE MATTER BETWEEN

LEWIS STORES (PTY) LTD

APPLICANT

AND

TLEBERE MAKHABANE

1ST RESPONDENT

DANIEL SELITSE

2ND RESPONDENT

ARBITRATOR – MOLAPO – MPHOFE (NO) 3RD RESPONDENT

JUDGMENT

Date of hearing 11/10/07.

Review of award of the DDPR - Evidence - witness giving evidence without being sworn - such evidence inadmissible and as such it was struck off - It was irregular for the arbitrator to rely on the evidence not taken on oath - Evidence - Arbitrator disregarding uncontroverted evidence of applicant's witnesses and relying instead on contradictory and clearly unreliable evidence of complainants - such evidence incapable of supporting the finding the arbitrator arrived at - Award reviewed, corrected and set aside.

INTRODUCTION

1. This review application arises out of arbitration proceedings conducted by Arbitrator Malika Molapo-Mphofe on the 9th May 2005. On the 9th June 2005 the learned Arbitrator issued an award in which she found the dismissal of the 1st

and 2nd respondents substantively unfair and ordered their reinstatement and payment of their wages from date of purported dismissal to the date of reinstatement.

2. The facts giving rise to the proceedings are very much in dispute. It follows that the finding of the arbitrator had to be based on acceptance of one side's version and rejection of the other side's version. We will revert to this aspect later.
3. The 1st respondent was disciplined and dismissed for driving the applicant company's vehicle without permission. In the process the vehicle got involved in a collision which led to the death of the driver of the other car. 2nd respondent was disciplined and dismissed for giving the vehicle to the 1st respondent, when the vehicle had been given to him by the Manager for him to use it to do his official duties.
4. Following the award of the DDPR, the applicant filed an application for the review of the award of the learned Arbitrator. A long list of grounds on which the review was sought was listed in paragraph 5 of the founding affidavit of the Manager of the applicant Mr. Tseka. They can however be classified into four groups and these are that:
 - (a) The learned arbitrator misdirected herself in concluding that the employer bore the burden to prove that the dismissal of the complainants was fair.
 - (b) It was irregular and improper to disregard the proceedings and evidence led in the disciplinary hearing.
 - (c) It was improper to ignore the evidence of the Manager Mr. Tseka and to conclude that it was not corroborated when there was evidence that he never authorised 1st respondent to drive the company vehicle.
 - (d) It was improper to ignore the disciplinary code and procedure of the applicant.

RESPONDENTS' EVIDENCE

5. Since there were two complainants, most of the witnesses testified for each of the complainants thus giving them two opportunities of going into the witness box. The first witness to testify in support of 1st respondent's case was his co-accused Mr. Daniel Selitse who is the 2nd respondent herein.
6. His evidence in chief was that on the 14th August 2004, he was at work with the 1st respondent. On the afternoon of that day he gave the keys of the vehicle that is normally used by him to the 1st respondent because the latter had work to do with it the following day. The following day was a Sunday. Asked how he got to know that 1st respondent had work to do he answered that "I was instructed by Mr. Tseka to take the vehicle to Mr. Makhabane he had some PC's on Sunday."
7. He was asked "did you fulfill the instruction of your Manager?" He responded, "Yes I did." "Tell us what happened or what you did?" He answered:
"I went to Maputsoe Sunday morning to take a bakkie to Mr. Tseka and on my arrival to Mr. Makhabane I gave him a bakkie and as I had nothing to do on my side we went together to serve PC's then after lunch I left and left the key to Mr. Makhabane with the bakkie." See p.3 of the record.
8. PW1 testified that after he left the vehicle with 1st respondent he went home. He later received a message that the bakkie had overturned. Asked if he was asked any questions about the accident, he said yes Mr. Tseka asked him why he gave the bakkie to Mr. Makhabane and why he did not go with him. He gave no answer why he gave 1st respondent the vehicle. On the question why he did not go with him he said it was because he was going on leave. (See p.5 of the record).
9. For reasons that are not reflected by the record, this witness was not cross-examined. However since he testified twice it is apposite that we immediately deal with his testimony as a witness in his own defence, so that we can easily discern the consistency or inconsistency of his testimony.

10. In testimony in support of his own claim, 2nd respondent testified that on Saturday 14th August 2004, the Manager told him that he would bring the bakkie to him so that he can take it to Mr. Makhabane, because Makhabane was going to do accounts the following day. He testified that after delivering the vehicle to Makhabane he went with Makhabane to do his work because he had nothing to do. He later left the vehicle with Makhabane. When asked why he left it with him he said “he had the right to use it that day.”
11. Under cross-examination he was asked if it has happened before that the Manager give him a job to do and he passed it to Mr. Makhabane. He said he did not remember. He was further asked what time he gave Mr. Makhabane the bakkie he said around 1700 hrs. He was further asked what was supposed to happen to the bakkie at the end of that day and he said “Mr. Makhabane was supposed to hand the bakkie to me after work.”
12. He was further asked when the Manager delivered the bakkie to him, he said around 3.30 am and he asked him to take it back, he would come to fetch it in the morning. He was asked where the manager stays and where he and Mr. Makhabane stay. He said the manager stays in Maputsoe while he and Mr. Makhabane stay at Hlotse. He said he fetched the bakkie at around seven in the morning. He was then asked:
 - Q. “When you came back from Mr. Tseka in the morning what happened?
 - A. When I arrive?
 - Q. Yes
 - A. I handed over the bakkie to Mr. Makhabane.
 - Q. At what time?
 - A. I do not remember.”
13. The next testimony was that of the 1st respondent. However for reasons that are not reflected by the record his testimony was not taken on oath. It is trite that courts do not regard unsworn evidence as admissible evidence. (See SA Manucipal Workers Union on behalf of Mahlangu .v. City

Council of Pretoria (2001) 22ILJ 2360 at p.2364. Mr. Makhabane's unsworn evidence must therefore be struck from the record.

14. The next witness was Mr. Theko Ernest Moholisa. Like PW1 he also testified twice on behalf of 1st and 2nd respondents respectively. Testifying on behalf of the 1st respondent Mr. Moholisa stated that on Saturday 14/08/04 there was a meeting at the store between himself, Mr. Makhabane and the Manager Mr. Tseka. The issue was PC's they were going to do the following day. He averred that following the Manager's instruction at the meeting they divided the PC's between himself and the 1st respondent.
15. He specifically stated that it was the Manager who allocated them those PC's (see p.8 of the record). Asked how many PC's he took and how they divided them he answered:
 "I took my bundle of PC's and Mr. Makhabane took his as though I am not quite sure whether he took them at that time or either he got them from somebody else."

This clearly contradicts what he earlier said that following the instruction of the Manager they divided the PC's between themselves.

16. Regarding transport he said he was going to use his bakkie while 1st respondent was supposed to use the Manager's car. He was asked, "why do you say he was supposed to use the manager's car?" His answer was that it is normal practice that when there are PC's to be done the manager's car is used. He was asked who usually uses the manager's car he said it is Mr. Selitse - 2nd respondent.

ANALYSIS OF THE EVIDENCE

17. PW2's evidence under cross-examination was a different story altogether. In answer to a question under cross-examination he said it was him who divided the PC's between himself and the 1st respondent. Asked when he

gave Mr. Makhabane his PC's he said it was after the funeral. He agreed that he cannot give away the keys of his vehicle to a co-worker unless the manager instructs him to do so.

18. In his testimony on behalf of the 2nd respondent he repeated the earlier story that at a meeting they had with the manager it was agreed that they would divide the PC's between himself and Mr. Makhabane. He testified that Mr. Makhabane was going to use Mr. Selitse's car. Asked how Mr. Makhabane was going to get the vehicle from Mr. Selitse he said that they "...were going for a funeral at Pitseng and after the funeral Mr. Makhabane would arrange with Mr. Selitse how they would meet the following day." This is completely new as this witness never raised it in his earlier evidence on behalf of the 1st respondent. Indeed even the 2nd respondent never alluded to anything like that during his testimony.
19. The evidence of these two witnesses is very contradictory. It will be recalled that according to Mr. Selitse he did not know that he had to deliver the bakkie to Mr. Makhabane until the early hours of Saturday morning when the manager allegedly came to leave the bakkie at his place at around 3.30 am. PW2 suggests instead that by Saturday Mr. Selitse already knew he had to give the vehicle to Mr. Makhabane.
20. These two witnesses evidence is inconsistent even with itself. We have already shown above how that of Mr. Moholisa is contradictory. The testimony of Mr. Selitse is no better. In chief he testified that he gave the bakkie to the 1st respondent on Saturday afternoon because the latter had PC's to do the following day. (See paragraph 6 of this judgment). Still in chief he changed his story and said he went to fetch the vehicle from the Manager on Sunday morning so that he could give it to Mr. Makhabane.
21. In his second testimony on his own behalf, he mentioned for the first time that the manager told him on Saturday that he would bring the bakkie to him so that he would take it to Mr.

Makhabane, because Mr. Makhabane was going to do accounts the following day. He again mentioned for the first time that the bakkie was brought to him at 3.30 am in the morning of Sunday 15th August 2004. He was asked when he gave the bakkie to Mr. Makhabane, he said at 5.00 pm because he had been doing work with him. When he was asked under cross-examination what happened in the morning after he collected the bakkie from Mr. Tseka (the Manager)? He said he handed it over to Mr. Makhabane. He was asked further “at what time?” He said he did not remember. All these are serious contradictions and evasiveness pointing to a clear case of fabrication.

APPLICANT’S EVIDENCE

22. The Manager Mr. Tseka gave evidence on behalf of the applicant. His testimony was that on Saturday 14th August he gave Mr. Moholisa (PW2) the PC’s and instructed him to give others to Mr. Selitse (2nd respondent). He said those who were present were Mr. Tseko and Malekhanya. He testified further that a person is given a company vehicle by the manager and that in this instance he gave the bakkie to Mr. Selitse and he even signed for it. (See p.15 of the record). He concluded by stating that Mr. Makhabane knew that he was not authorised to drive company vehicles, and that that is the reason for his dismissal.
23. Under cross-examination he stated that he is the one who gives any person who is going to drive the vehicle the keys so that no one can drive without permission. In this regard he was gainsaid by all the witnesses who testified. They all conceded that the manager is the only one who authorises use of the vehicles.
24. The manager agreed that there was work to be done on Sunday, but that the persons who were instructed to do the work were Mr. Moholisa and Mr. Selitse (2nd respondent). He testified and in this respect was supported by Mr. Tseko that he gave the instruction in the presence of Mr. Tseko, Mr.

Moholisa and Mrs. Lekhanya. He categorically denied that Mr. Makhabane was present.

25. He testified further that Mr. Makhabane would not be present to do the work on Sunday because he works a six day week from Monday to Saturday. He testified further that if he had wanted Mr. Makhabane to utilize the vehicle he would have given it to him directly and not give it to one person to deliver it to him. (See p.18 of the record). This is consistent with the manager's corroborated testimony that he is the one who authorises use of vehicles and that he usually gives the person who will use the vehicle in question the keys directly.
26. The manager's direct evidence was that he gave instruction to the 2nd respondent to come and fetch the vehicle so that he could be able to do the work he was assigned to do on Sunday. It was put to him under cross-examination that he had given instruction that Selitse would deliver the bakkie to Mr. Makhabane. His answer was "what made me fail to hand the car to Mr. Makhabane when I returned it?"
27. The arbitrator urged him to answer the question. His response was then more direct and this is what he said:

"I could have taken the car to Mr. Makhabane because at the end the bakkie was in my hands. If ever I have anything with Mr. Makhabane I could have delivered the bakkie to him straight not to give him PC's and take the car to a different person and tell him to take it to Mr. Makhabane. It does not make sense."

This is not only consistent with the tenor of his evidence throughout that he gives keys to a person to use the vehicle directly. It is also consistent with what emerged during cross-examination of 2nd respondent that infact both 1st and 2nd respondent stay in Hlotse. There would therefore be no reason for the manager to ask Mr. Selitse and not Mr. Makhabane himself to collect the vehicle from him in Maputsoe when both Mr. Selitse and Mr. Makhabane stay in Hlotse.

GROUNDS FOR REVIEW

28. The first ground is that the learned arbitrator misdirected herself in law in placing the burden to prove the fairness of the dismissal on the applicant. We fail to see any misdirection here. It is the employer who is alleging that the dismissal is fair and in accordance with the principle that “he who alleges must prove” the employer must prove the alleged fairness. Whether the employer begins or the employee begins, it is more for the convenience of the presiding officer, but that will not change where the onus to prove the alleged fairness of the dismissal lies. (See *United Clothing .v. Phakiso Mokoatsi & Another* LC/REV/436/06 (unreported)).
29. Applicant contended further that the 3rd respondent acted irregularly in disregarding the proceedings and evidence led at the enquiry. The court enquired from Mr. Tsenoli on behalf of the applicant if the record of the proceedings of the disciplinary hearing and the evidence led thereat was presented before the arbitrator. He answered that it was not, but that the arbitrator had the duty to have recourse to what took place at the disciplinary hearing. While it is true that the arbitrator cannot overlook what transpired at the disciplinary hearing, however for failure to do so to be reviewable, the material must have been presented before the arbitrator. He cannot be said to have improperly overlooked something that he did not have the opportunity to consider.
30. Counsel contended further that it was irregular and improper to conclude that applicant did not give evidence to corroborate the testimony of the manager while there is evidence to show that the manager did not authorize the 1st respondent to use the vehicle. It is indeed incorrect to say that the manager’s evidence is not corroborated, when Mr. Tseko gave corroborating evidence that Mr. Makhabane was

not one of the persons authorised to do PC's on Sunday. The evidence of Mr. Tseka and Mr. Tseko was never challenged when they said Mr. Makhabane was not there when instructions to do PC's were being given.

31. Furthermore, evidence abound as even respondents' own witnesses confirmed that instructions to drive company vehicles are only given by the manager. Now the manager's testimony as the authority regarding whom he has permitted to drive and not permitted to drive is self corroborating. Unless it is found that the manager is a liar his evidence cannot be faulted on the basis that it lacks corroboration. It is common cause that the learned arbitrator has not made any adverse finding as to the bona fides or credibility of the manager as a witness. It follows therefore that there is merit in counsel's contention that the learned arbitrator acted irregularly and improperly in concluding as she did in this regard.
32. Counsel for the applicant contended that it was irregular and improper for the learned arbitrator to ignore the evidence of the manager Mr. Tseka that he never authorised the 1st respondent to drive the company vehicle on the Sunday it got involved in an accident and that he never instructed 2nd respondent to deliver the said vehicle to the 1st respondent. The manager's evidence was indeed that he had authorised 2nd respondent himself to use the vehicle to do the work he was assigned on the 15th August 2004.
33. That the learned arbitrator ignored the evidence of the manager in this regard begs no question. The learned arbitrator failed to give due weight to the evidence of Mr. Tseka despite the fact that it remained unshaken by respondents' representative's cross-examination. On the contrary she relied on the unsworn evidence of Mr. Makhabane which as we said is no evidence at all. She further sought to place reliance on the contradictory evidence of Mr. Selitse and Mr. Moholisa. These two witnesses' evidence is highly unreliably due to its contradictory nature.

It could not therefore support the findings that the learned arbitrator arrived at. There is

therefore substance in the learned counsel's submission that the learned arbitrator improperly ignored the evidence of the manager Mr. Tseka regarding the instructions he gave and those he did not give in relation to work to be done on Sunday 15/08/04.

CONCLUSION

34. There is no doubt in our minds that the irregularities complained of are sufficiently serious to warrant this court's interference with the award of the learned arbitrator.
35. Quite clearly the evidence that ought to have been considered has been totally ignored consequently leading to a conclusion that would not have been reached had that evidence been considered. On the contrary wholly unreliable and self conflicting evidence was improperly relied upon as well as evidence which was not sworn. For these reasons the award of the learned falls to be and it is hereby reviewed corrected and set aside.

There is no order as to costs.

THUS DONE AT MASERU THIS 25TH DAY OF OCTOBER 2007

L. A. LETHOBANE
RRESIDENT

**L. MOFELEHETSI
MEMBER**

I CONCUR

**R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR 1ST RESPONDENT:
FOR 2ND RESPONDENT:**

**MR. TSENOLI
MR. CHOBOKOANE
MR. RATAU**