

IN THE LABOUR COURT OF LESOTHO

LC/REV/306/2006

LAC/REV/15/05

HELD AT MASERU

IN THE MATTER BETWEEN

IMPERIAL FLEED SERVICE

APPLICANT

AND

RAMAILI LESAOANA
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION
H. MOSHOESHOE N.O.

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

Date 23/04/08

Review of DDPR award –whether documents handed in during arbitration should be marked as exhibits –there is no requirement in the regulation for documents to be so marked-evidence-Arbitrator seeking additional evidence to corroborate what is already corroborated and is in fact admitted by the other side – such not necessary as available evidence suffice especially given that it was admitted -Arbitrator disregarding evidence on the basis of an irrelevant requirement – Award reviewed corrected and set aside

1. This is a review application arising out of the award of arbitrator Moshoeshoe date 28th January 2005. The 1st respondent was employed by the applicant company as a panel beater at Imperial workshop commonly referred to as Impcrash. On the 11th October 2004 he was served with a notice to attend a disciplinary hearing, scheduled for 26th October 2004. He was charged with insubordination in that he “*refuses to take instruction from white supervisors and that he would only be instructed by black supervisors.*” He was said to have confirmed the same in front of the Managing Director on the 11th October 2004,
2. Following the hearing, the 1st respondent was found guilty as charged. He was dismissed on the 19th October 2004. The 1st respondent referred a dispute of unfair dismissal in that he did “*....not agree with the reason for his dismissal.*” The dispute was arbitrated on the 21st January 2005. Evidence led on behalf of applicant was given by three witnesses namely, the National Workshop Manager Mr.Palo Julius Lesupi, the training officer Mr.Fransisco Ferreira also known as Chicco and the chairperson of the disciplinary enquiry Ms Mary Lepota.
3. The 1st witness Mr. Lesupi testified that on the 11th October 2004 he had met with Chicco, one Eddie and the Managing Director Mr. Cornelius Johan Scheepers. They asked him to accompany them. They headed towards Impcrash workshop 2 which is an extension of the original Impcrash 1. Upon arrival the Managing director asked for 1st respondent. He was said to be at Impcrash 1. He sent someone to call him.
4. On arrival the managing Director asked him what he was doing that afternoon. He said he was reading a newspaper. He asked him why he was reading a newspaper at that time. He said the supervisor to whom he was answerable a Mr. Seroeng Mphenetha had not given him any job to do. The Managing Director asked him if Chicco and Eddie had not given him any work to do he said he did not take instructions from them. The witness stated that this showed that 1st respondent would only take instructions from Mr. Mphenetha.

5. DW2 Was Chicco, and he testified that he worked at the workshop and he gave out the work to be done. He testified further that 1st respondent did not want to take the orders from him. He started that 1st respondent

“..... Would ask me who am I he will not listen to me he will only listen to Jerry, the supervisor at the workshop” (p.48 of the paginated record)

Asked how long this had been going on, he said it had been going on since he started at Impcrash in November 2001.

6. Asked what triggered the events of the 11th October 2004, he stated that there was a vehicle that had to be assembled and that work had to be done by Ernest who happens to be the 1st respondent. When he came around to check he found that the vehicle was being worked by Mr.Mphenetha. He asked him where 1st respondent was, he said he did not know. He looked for him, but hiding himself. He noticed the 1st respondent sitting in a car reading a newspaper.
7. This was said to be around 2.15pm which was long after lunch break. (DW2) testified that since this was not the first time this happened he went to report to one Engelbrecht also known as Eddie. They both decided to go and report the incident to the Managing Director. The latter went with them to the workshop to see for himself what was happening. On the way they met Mr. Lesupi and they asked him to accompany them. Upon the managing Director inquiring why he was reading a newspaper at the time he was supposed to be working, 1st respondent answered as already testified by DW1. When DW2 tried to chip in to contribute to the exchange between 1st respondent and the Managing Director, the 1st respondent shouted and said he must shut up. He repeated before the Managing Director that he did not recognize them (White Management).
8. The third and last witness was Ms. Mary Lepota. She testified that over and above the evidence that was tabled before the disciplinary hearing to support the charge, the 1st respondent himself admitted the charge. She stated that,

“In the statement he gave, he made it clear that he did not recognize the authority of the personnel of his work place. That being department Impcrash workshop.” (see p. 59 of paginated record).

She stated further that due to these reasons she found that there would be no place for him in Imperial if he is not prepared to work with his superiors.

9. In his own testimony 1st respondent said he finished the work he was doing before lunch. When someone realized that he was not doing anything he asked for his help. He informed Mr. Mphenetha and he agreed. He asked him where he could work the part of the vehicle that he was dealing with and he said anywhere. During lunch he sat in the car and read a newspaper. He testified that he saw Chicco close the boot of the car next to the one he was sitting in, but he has forgotten what time it was. He decided to go and continue with the work he was doing because he,

“Realized that they were looking for me time and again. I kept on checking on them and then came back to Impcrash 2.”(see p. 67 of the paginated record).

10. He testified that the Managing Director came to him with Chicco and Eddie. He stated that he was in a fit of rage and told him to take his hands out of his pockets. He enquired what he was doing that afternoon. He confirmed that he was reading a newspaper. He asked him why he only came out (of the car) when he saw Chicco. He answered that it was only then he realized it was after 2:00pm.
11. (PW1) confirmed that he argued with the Managing Director and that he told him that he was unjust. He confirmed that he told Chicco to *“keep quite”* when the latter tried to intervene in what he calls *“noisy argument”*. He goes on,

“And I told him in front of the manager that I honestly will not accept any work that he gives me to do, I am employed there as panel beater. He asked exactly what is it that you

want? And I replied sir all I want is to work as a panel beater”.

He testified further that the Managing Director reacted by saying that these people say that you don't want to do any work referring to Chicco and his party. In reply he said

“It was then that I explained to him that the person who could give me work to do is Mr. Mphenetha..... I said that the person who gives me work instructions is Mr. Mphenetha and here he is ask him if there has ever been work instructions that he gave me that I refused to carry out.”(p. 68 of the paginated record).

12. The 1st respondent testified that the Managing Director did not ask Mr.Mphenetha anything but said that Mr.Mphenetha fears him i.e 1st respondent. He went further to state that they and the Managing Director were arguing angrily and that the “conversation was not a very polite one.” To demonstrate this he stated that he said to the Managing Director:

“It seems you undermine me because I am black and since these kids are white like you they call on you from your office and you come to me and lay judgment already decided.”
(p.69 of the record).

Thereafter the Managing Director and his team left. However before knock off the 1st respondent was served with the notification of disciplinary hearing charged with insubordination as aforesaid.

13. The 1st respondent called his former supervisor Mr. Mphenetha to come and strengthen his defence. Mr. Mphenetha stated that on the 11th October 2004, at around 2.00 pm Chicco had come to the place where he was working and asked him where 1st respondent was. He told him that since it was lunch time he would soon be arriving. It is now common cause that it was infact after lunch already. It follows that Mr. Mphenetha's response to Chicco about 1st respondent's whereabouts was not truthful.

14. He testified that Chicco left but soon came back to check the vehicle he was working on and again left. After Chicco's departure the 1st respondent came out of a car and came to him as he says they were both working on the vehicle that Chicco had just checked. He (1st respondent) realized that they were almost done with that vehicle. He then told him that during lunch he had "discussed with one of our co-workers who he saw working on the front part of a car. (He asked me) whether he could help him with its long body." (p. 83 of the record). This is inconsistent with what 1st respondent said in his testimony. His version was that the co-worker asked him for help when he realized he was not doing anything.
15. Mr. Mphenetha testified further that he agreed but instructed 1st respondent to bring the part he was going to work to their department because "I wanted him to come and do the work in our department." (p.84 of the record). After he went to fetch that part, Chicco arrived with the Managing Director and he was directed to go and call him (1st respondent). On his arrival the exchange of words ensued and later 1st respondent told him he had been suspended. Asked what his relationship with Chicco at work was, he said they worked together in the panel beating workshop and that he (Chicco) is his superior. He was asked further if that answer means that Chicco is 1st respondent's Manager he said that was so.
16. It is common cause that following the disciplinary hearing the 1st respondent was found guilty and dismissed. As DW3 said in her testimony she found 1st respondent guilty on the basis of evidence presented and 1st respondent's own plea that he did not recognize Chicco and Eddie, both managers at the Impcrash Workshop where he worked because they were non-nationals.
17. The 1st respondent referred a dispute of unfair dismissal to the DDPR. The dispute was duly arbitrated and the learned arbitrator came to the conclusion that there was no valid reason for dismissal. The reasons the learned arbitrator advanced for her finding were, inter alia, that even though the charge is given

as one it was put in two separate paragraphs which contained two different meanings. For this reason she split the charge into two separate charges requiring two separate proofs.

18. She observed that the first charge was: insubordination which is amplified by the statement that 1st respondent said he did not recognize management structures of Impcrash Workshop. She observed that even though Lesupi testified to this, the Managing Director and Eddie who were part of that conversation were not called. As for Mary she said even though she said 1st respondent uttered those words she “could not explain in response to what 1st respondent was making that statement.” (see p.4 of the award).
19. With regard to what she styled the second part of the charge regarding 1st respondent’s refusal to take his manager’s orders, she found that there was no evidence of any instruction which 1st respondent was given and he refused to carry out. She stated further that Chicco himself had in his evidence said he had not given the 1st respondent any instruction on the day in question. She concluded by awarding 1st respondent compensation of 12 months salary in place of reinstatement because she considered that 1st respondent’s disrespectful utterances had strained his relations with management.
20. The applicant applied for the review of the learned arbitrator’s award on a number of grounds. Some of the grounds were subsequently withdrawn. Three main grounds that remained were firstly that the learned arbitrator failed to mark the minutes which were handed in during the arbitration as an exhibit. We have looked at the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations 2001 and the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004. None of these contain a regulation rule or even a guideline requiring that, when a document is handed in at the arbitration it must be marked. Accordingly we cannot find any reviewable irregularity in this regard.
21. The second ground was that the learned arbitrator disregarded counsel for applicant’s submission that the evidence of Mr.

- Mphenetha be not accepted because he had not been called as a witness before the disciplinary enquiry; he was surprisingly suddenly called at the DDPR. This is becoming a common trend that employees and their unions fail to call readily available witnesses to testify at a disciplinary enquiry and only call them for the first time when they challenge the employer's decision at the DDPR.
22. It is as a general rule accepted that the DDPR is not a review or appellate tribunal to the employer's disciplinary enquiry. A full rehearing takes place before the DDPR. This approach must however be handled with caution that in the process the DDPR does not find itself allowing trial by ambush. Even more importantly, the fairness of the employer's decision to discipline the employee ought to be able to be assessed on the basis of evidence available to the employer at the time of dismissal or if not presented which ought to have been readily available to the employer.
 23. What the employees and the unions are doing to spring surprise witnesses which ought to have in the normal course of things been called at the hearing and for unexplained reasons were not called, ought to be seen for what it is. That is unscrupulousness aimed as a belated answer to the employer's reason for dismissal and not the charge the employee faced in the first place. While this will not necessarily be the case in all cases, in general however, such evidence ought to be looked at and evaluated with necessary care and caution as it may be an afterthought or a fabrication. It must however, be emphatically stated that there is no irregularity in the arbitrator per se choosing to accept such evidence as was in fact the case in casu.
 24. It was further contended that the learned arbitrator did not properly evaluate the evidence in as much as the 1st respondent had himself admitted that he acted impolitely before his superiors and indeed told them to the face that he would not take their instructions. It seems to this court that much confusion arose from the learned arbitrator ascribing two meanings to a glaringly single charge. The 1st respondent was

- charged with insubordination and in amplifying the charge the employer said this was demonstrated by 1st respondent's remarks that he does not recognize his management structure at Impcrash and that he will not accept instructions from white supervisors. Both these examples constitute insubordination if proved.
25. The learned arbitrator correctly observed in her award that DW1 Mr. Lesupi testified that in his presence 1st respondent told the Managing Director that he would not take the instructions given to him by the two white supervisors namely Chicco and Eddie. This testimony was corroborated by Chicco (see p.52 of the record). In his own evidence 1st respondent confirmed that he said so. Despite this direct evidence and its confirmation by the complainant, the learned arbitrator said the evidence was insufficient because Eddie and the Managing Director who were also allegedly present when the remarks were made were not called. That was not necessary. The evidence presented sufficed and it ought to have been taken into account especially when the person accused of the utterances admits them. Failure to consider that evidence constituted gross irregularity on the part of the arbitrator.
26. DW3 Ms Mary Lepota also testified that 1st respondent said before her that he did not recognize the management structure at Impcrash. In her award the learned arbitrator records that "applicant agreed that he made such a statement." (see p.4 of the award). Notwithstanding this corroboration, the learned arbitrator disregarded the testimony of DW3 because in her words "Mary could not explain in response to what applicant (1st respondent) was making this statement." That was an irrelevant requirement especially when the remark is not disputed. Clearly the learned arbitrator again committed gross irregularity in disregarding evidence which she ought to have considered in making her award.
27. The learned arbitrator also found that the dismissal was unfair because there was no evidence of an instruction which applicant was given and he refused to obey. The learned arbitrator made this finding at page 4 of the award, despite

- having observed at page 2 of the same award that in his evidence Chicco had said “the disciplinary charge given to applicant was not in relation to any specific instruction he refused, but to the overall.”
28. Indeed the charge which the applicant handed in through Chicco at the arbitration hearing does not accuse the 1st respondent of refusing a particular instruction on the 11th October. He was instead charged on the basis of an attitude he displayed over a period of time of not honouring certain members of management. This unbecoming attitude had according to the testimony of Chicco sought to be peacefully addressed, but as Chicco said at page 59 of the record he finally realized “that it does not help as I talked to him.” He then decided to involve the Managing Director, but 1st respondent had the nerve to repeat that he would persist with that unbecoming behaviour of not accepting the instructions of Chicco.
29. As if that was not enough he referred to the Managing Director’s team that was talking with him as “these kids who are white like you...” However, even assuming that an enquiry had to be made into a specific instruction; Chicco did testify that 1st respondent ought to have been assembling a vehicle; but it was found to be Mr. Mphenetha who was doing the job. That Chicco had in fact instructed 1st respondent to do the assembly work is confirmed by Mr. Mphenetha in his testimony at page 86 of the record where he says that before they went to lunch, Chicco had come and found them jointly working on the vehicle which 1st respondent ought to have been working himself.
30. He testified that Chicco came and told him to “leave the car and let the owner work on it.” (see p.86 of the record). As we now know, 1st respondent did not do so. He was sitting in the car reading a newspaper; and Mr. Mphenetha was the one working the vehicle instead. When he came out he decided to go and help someone else in his work and left the work he ought to have been doing. When the Managing Director confronted him that Chicco says he refuses to do work he is given he in his own words says “I explained to him that the person who could give

me work to do is Mr. Mphenetha.” (see p.68 of the record). There is therefore clear and undenied evidence that the 1st respondent did refuse Chicco’s instruction because it had not been given by Mphenetha.

31. There is a clear irregularity committed by the learned arbitrator which has materially affected the award she made. If the evidence adduced had been, considered as it ought to have been the learned arbitrator would not have arrived at the conclusions she reached. The irregularity is so gross that it requires interference with the award. Accordingly, the award is corrected, reviewed and set aside. There was clearly a valid reason for the dismissal of the 1st respondent. There is no order as to costs.

THUS DONE AT MASERU THIS 23RD DAY OF JUNE 2008

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE
MEMBER

I CONCUR

L. THAKALEKOALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. DE BEER
MR. METSING