IN THE LABOUR COURT OF LESOTHO

LC/REV/574/2006

HELD AT MASERU

IN THE MATTER BETWEEN:

WATER AND SEWERAGE AUTHORITY APPLICANT

AND

SEEISO MASUPHA 1ST RESPONDENT
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION 2ND RESPONDENT

JUDGMENT

Date: 19/06/08
Review – The question whether an arbitrator commits an irregularity by calling on an employer to prove that it dismissed the employee fairly before the employee can testify considered – Section 66(1) of the Code protects employee against dismissal unless valid reason exists – Onus is on the employer to prove that there are valid reasons – Evidence – Employer acting on unsubstantiated suspicion to dismiss an employee – Arbitrator's finding that such dismissal is substantively unfair cannot be faulted – Application dismissed and arbitrator's finding confirmed.

1. This is an application for the review and setting aside of the award of the 2nd respondent in which the latter had found the dismissal of the 1st respondent substantively unfair. The 2nd

respondent proceeded to award 1st respondent compensation of 10 months salary for the said unfair dismissal.

2. The facts are brief. They are that sometime in 2004, the 1st respondent who was the Electrical Workshop Manager had sought and obtained quotations for the purchase of two pumps. One was for Ratjomose while the other was for Maseru Bridge. These are said to have been sewerage pumps.

3. He duly submitted three quotations to purchasing office which in turn raised an order for the purchase of the pipes from one of the three suppliers. The pipes were delivered and were duly installed. Sometime later, it is not even said after how long, the purchasing office also asked for quotations from the same supplier who supplied the two pumps for the same type of pumps. The quotations they got were much lower indicating that the 1st respondent's quotations had been inflated by as much as twice the actual price of the pumps.

4. The purchasing office asked the office of the Internal Auditor to investigate. Mr. Lekhotla Sefako who testified before the 2nd respondent as DW3 was assigned to go and investigate. He testified that he went with the Head of Internal Audit to inspect the Ratjomose pump. On arrival they requested the permission of the manager in charge whom they also asked to help them to inspect the pump.

5. DW3 testified that they inspected the pump and they observed that "it was a little bit tinted and not nicely smooth." He went on to testify that:

> *"when you touched it you could feel as if it was old. Looking at some parts they were originally painted with red, but at that time it looked as if it was painted in blue."* (p.36 of the paginated record).

He was asked under cross-examination how he would distinguish between an old and a new pump. He said he could distinguish it by touching it and that a new pump would not be rough or display colours that suggest it had previously been differently painted.

6. He was asked further whom he suspected to have re-sprayed the pump in particular whether it could have come from the firm already like that or whether the middle man from whom it was bought did the repainting. He said it could have been painted in that manner from the firm. Then came the catch, "how can it be old if it is painted from the firm?" 1st respondent asked. He answered:

> *"I think if a pump has not been nicely painted it gives a suspicion that it is old."* (see p.41 of paginated record).

7. This response, in our view summarized the evidence of DW3. It was all suspicion. However, 1st respondent went further and asked whether a paint expert was called to assess whether the pump had indeed been resprayed. It is not clear what the answer was from the record. However, it is clear from the record that no such person was called.

8. DW3's testimony confirms DW1's testimony Ms Puseletso Rangoako. She is the Human Resources Manager of the applicant. She testified about purchasing office's suspicion about inflated prices. She testified that Internal Audit was tasked to examine the pumps that 1st respondent requisitioned their purchase. All she could say about the investigation was that "when the Internal Audit people had gone (to investigate) they found that the pump at Ha Ratjomose <u>seemed</u> to be secondhand, not new." (P.7 of paginated record) (emphasis added).

9. I have emphasized the word "seemed" to underscore that even this witness was well aware that the naked eye observation could only give rise to a suspicion but certainly not conclusive proof. DW1 went further in the same paragraph of her testimony and stated:

> *"There was no way investigation could be made because it (the pump) had already been fitted."*

Clearly therefore, the suspicion was not investigated further and it remained unproven.

10. Mr. Letlama Jobo was the Sectional Manager of Sewerage and was responsible for where the pump was fitted. He was part of

its inspection. He testified at DDPR as DW2. His testimony was clear and straight forward. He stated that the audit team asked him if the pumps were new. In response he said they may be new but said the manner they were painted was unusual.

11. Following the investigations the audit team compiled a report on the basis of which the 1st respondent was disciplinarily charged of fraud and dishonesty. These two charges followed from the allegation that the 1st respondent had inflated the prices of the two pumps and that the pumps appeared not to be new. He was found guilty and dismissed.

12. The 1st respondent referred a dispute of unfair dismissal to the DDPR. The referral was arbitrated on the 26th September 2006. On the 25th October the arbitrator handed down an award in which she found the dismissal of the 1st respondent substantively unfair. She ordered that he be paid M102,120.00 representing salary for ten months as compensation for the said unfair dismissal.

13. On the 13th November 2006, the applicant filed the present application for review of the award of the learned arbitrator. The grounds of review can be found in the Founding Affidavit of Puseletso Rangoako. They can be summarised as follows:
    (i) The arbitrator failed to consider questions put in cross-examination which destroyed applicant's evidence. Consequently the award of the arbitrator is not rational and justifiable.
    (ii) 1st respondent led the evidence of an alleged expert witness whose expertise was not established and yet arbitrator relied on his evidence.
    (iii) The arbitrator failed to consider the fact that the so-called Expert witness had also been disciplinarily charged.
    (iv) Evidence of the expert must be rejected because he never saw the pumps and was not part of the investigations.
    (v) The applicant was forced to state their case first when They were not the ones alleging.

14. These in our view can be narrowed down to essentially three grounds of review. The allegations in (ii), (iii) and (iv) are basically elements of one and the same ground, whether the so-called expert was infact an expert. On the 16th August 2007 counsel for the applicant filed what he called an amendment of the Notice of Motion in terms of rule 17(5) of the Labour Appeal Court Rules 2002. Rule 17(5) deals with "Reviews Generally." It does not deal with amendments either to the Notice of Motion or the founding affidavit which sets out the factual and legal grounds upon which the applicant relies to have the decision or proceedings reviewed and set aside. It follows that the notice of amendment was irregular. It cannot therefore stand.

15. In order to understand the relevance of the grounds of review it is apposite to state briefly the evidence led on behalf of the 1st respondent. He was the first witness to testify on behalf of himself. His testimony related mostly to the question whether the pumps were new or second hand as suspected. He stated that pumps are made to order. When one requires a pump, he places an order stating the specifications like how much quantity of water it should be able to drain and the type of water, whether clean or muddy; that it is going to drain. The pipe is then made and tested whether it meets the purchaser's specifications. It is then tagged with a number, date of manufacture, kind of pump and the manufacturer's name.

16. Applicant stated that the pump he ordered had all the necessary information on its tag. Its date of manufacture was 24/06/04. It had been made by SPP Pumps. He personally called the manufacturer and asked them whether the particular pump he ordered was new. The manufacturer confirmed with the information from the tag that the pump was made by them and it was a new pump. They confirmed that they had made it for H & M which is the company from whom the 1st respondent ordered it. He asked them to make him a confirmation that the pump was indeed theirs and it was supplied to H & M as a new pump. They sent him a fax confirmation which he produced and handed in at the arbitration.

17. The 1st respondent also called an engineer Mr. Letsoela Baholo who said he was a pump expert, with 27 years experience. He also said he studied pumps for two years at a college in Germany. He was asked to explain how one determines that a pump he buys is new or old. He explained in details, which are not necessary to outline, because that is clearly what the applicants did not do. He concluded by stating that for certainty one can enquire from the manufacturer of the pump and that usually suspicion arises if the pump's serial numbers are older than 20 years. The witness categorically denied any knowledge of the status of the pumps in question because he never saw them and he was never part of their investigations.

18. On the basis of 1st respondent's evidence supported by that of Mr. Baholo, the arbitrator concluded that there was no conclusive evidence that the pumps were second hand pumps. She found that the applicant failed to carry out necessary tests to conclusively determine whether the prices of the pumps had been inflated. As such the complaint was not substantiated in as much as the applicant failed to call purchasing office staff who allegedly discovered the discrepancy to testify on their allegation that the prices were hugely different. She concluded that assertions by Ms Rangoako and Mr. Jobo that the prices were inflated was hearsay and therefore not admissible.

19. We come now to the grounds of review. Starting from the bottom up. Applicant avers that the arbitrator committed a gross irregularity by compelling the applicant to state its case before the first respondent. Applicant accordingly stated its defence before any allegations were advanced by the first respondent. There is no evidence on the record that the applicant was compelled to lead its evidence first. The claim is therefore unfounded.

20. The applicant alleged further that it was made to state its defence before any allegations were made by the 1st respondent. Once again this allegation is not supported by the evidence adduced on behalf of the applicant. From the evidence of DW1 through to that of DW3, the tenor of the evidence point to one thing, and that is establishing the basis

for the decision to dismiss the 1st respondent. Section 66(1) provides that:

> *"an employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment…"*

21. It is clear from this section that an employee is by law protected from dismissal. A person who dismisses has the onus to prove that there are valid grounds for interfering with the legally protected terrain of not interfering with an employee's employment status. This answers the question I posed in United Clothing .v. Phakiso Mokoatsi & DDPR LC/REV/153/05. In that case the arbitrator had made a general unsubstantiated statement that in cases of unfair dismissal the employer has the legal duty to begin. While upholding his approach, I had predicated my remarks on a statement that the learned arbitrator had not stated where he derived the rule that in unfair dismissal cases the employer has the duty to begin. The answer to that question is therefore found in section 66(1) of the Code which makes it unlawful to dismiss an employee unless valid reasons exist. See also paragraph 17 of this court's judgment in the United Clothing case supra where we stated that, "by terminating someone's employment the employer is interfering with the status quo (which is protected by the law) and he must justify why he is doing so." Accordingly this ground of review cannot succeed.

22. It was further argued that the arbitrator relied on the evidence of an expert whose expertise was not established. Mr. Baholo, stated he was an engineer, with a diploma on working with pumps obtained at a college in Germany. He stated further that he had 27 years experience working with pumps. Whilst Mr. Masoabi cross-examined him at length on his expertise, he was not able to challenge his qualifications, experience and professional status. That would infact be a mountain to climb because Mr. Baholo is infact an employee of the applicant who is doing the same job that he said had earned him the experience of 27 years.

23. It was further contended that the arbitrator failed to consider that Mr. Baholo had also been charged with a disciplinary offence. There is no such evidence on the record. The closest it came to being raised was when Mr. Masoabi asked Mr. Baholo during cross-examination whether ever since he arrived at applicant he had ever been charged with a disciplinary offence. The arbitrator immediately intervened and asked "where are you taking us with that evidence of yours Mr. Masoabi?" (see p.71 of the paginated record). The question was abandoned and that was the end of any questions relating to the witness's disciplinary record. There was therefore no evidence pertaining to Mr. Baholo's disciplinary record which the arbitrator failed to take into account.

24. It was further contended that the evidence of Mr. Baholo ought to have been rejected because he never saw the pumps. Throughout his testimony Mr. Baholo declined to answer any question that related to the pumps in dispute directly, because he conceded he never saw them. His testimony was solely on what should be done to satisfy oneself that the pump he has bought is not a second hand pump. It is common cause that his propositions in that regard were not challenged.

25. Applicant argued further that the arbitrator failed to consider questions put in cross-examination which destroyed 1st respondent's evidence. We were not shown a single question that informs the applicant's complaint. Infact from our reading of the record, the evidence of both the applicant and his witness Mr. Baholo was not at all shaken by the cross-examination. The key element of that evidence was to buttress applicant's witnesses own evidence that the suspicion they had about the pump not being new was not fully investigated.

26. Infact the 1st respondent went an extra mile and secured the confirmation of the manufacturer that the pump was theirs and that it was new. Mr. Baholo narrated the procedures the applicant should have followed to satisfy their suspicion that the pump was not new. It is clear that there was no evidence on which a reasonable man could have concluded that the pump was not new in the circumstances. Evidence which applicant

adduced from the manufacturer which was not challenged established that the pump was infact new. The arbitrator cannot therefore be faulted for concluding as she did.

27. Her rejection of the evidence of Ms Rangoako and Mr. Jobo as insufficient hearsay to support allegations of inflated prices cannot be faulted either. The purchasing office staff who are the ones who made the allegations ought to have come forward to testify on the issue. The two persons who testified were clearly not vouching to the allegation that 1st respondent inflated the prices. Each time they testified they were saying purchasing people had suspicions.

28. Purchasing office staff were therefore, the correct people to come forward and defend their suspicion. Infact even if their suspicion of inflated prices were found to be well founded, the enquiry would not stop there. It would further have been necessary to establish that 1st respondent was complicit in the whole affair. On these grounds alone, the arbitrator's finding that the 1st respondent's dismissal was substantively unfair cannot be shaken. The applicant clearly had no justifiable reason to find 1st respondent guilty and dismiss him as the allegations and suspicions were not proved.

29. In his heads Mr. Masoabi suggested that the 1st respondent had contravened the procurement rules that quotations should be obtained from at least three suppliers. No evidence was lead on this before the DDPR. Neither is there evidence that the 1st respondent was charged with that offence at the disciplinary hearing. A suggestion that further investigations pointed to the three companies that 1st respondent got quotations from as agents of one company; masquerading as three different companies, came from Ms. Rangoako's testimony at p.8 of the paginated record. She was however quick to caution:

> *"Now what I have just submitted here are the things we have again found out, as the process went through my office, namely Human Resources."*

30. The discovery was made at a very belated stage when the charges had already been drawn on the basis of the Audit Team

Report. There is no indication that the latest findings were included in the charges to enable the 1st respondent to answer them. Neither were they raised as part of the applicant's case to justify their decision to dismiss the 1st respondent. For these reasons the review application cannot succeed. It is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 8TH DAY OF AUGUST 2008

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU
MEMBER — I CONCUR

J. M. TAU
MEMBER — I CONCUR

FOR APPLICANT: MR. MASOABI
FOR RESPONDENT: MR. CHOBOKOANE