

IN THE LABOUR COURT OF LESOTHO

LC/REV/496/2006

HELD AT MASERU

IN THE MATTER BETWEEN:

LESOTHO BREWING CO.

APPLICANT

AND

SELLO MAFEREKA
TSOEU MOHLOKI
DDPR
MR. M. KETA : ARBITRATOR

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

JUDGMENT

Date : 09/07/08

Review - Arbitrator hearing evidence of witnesses who he had not sworn - Record - Incomplete record of arbitration proceedings - Award reviewed and remitted to DDPR for hearing by different arbitrator.

1. The 1st and 2nd respondent were employed by the applicant as forklift drivers at Mafeteng. Their deport duties included stacking beer pallets. The procedure was to stack the pallets in such a way that stock taking would not be inhibited and any missing pallets could be able to be detected without delay.
2. On the 7th November 2005, the Depot Manager carried out an inspection of the warehouse. He discovered that the stacking

- pattern had not been followed as there was a big gap at the back which could not be easily detected. He also found out that three pallets costing M19,000-00 were missing. It was his view that the unprocedural stacking was deliberately made to conceal the missing pallets.
3. The 1st and 2nd respondent were charged with negligence and found guilty and dismissed. They referred a dispute challenging the fairness of their dismissal to the DDPR. The latter found their dismissal substantively unfair and ordered their reinstatement. The employer filed an application for the review of the award of the 4th respondent.
 4. The record was called for and it was duly transcribed. In preparation to act in terms of rule 16(5) and (6) of the Labour Appeal Court Rules Counsel for the applicant requested that exhibits "A" and "B" which were handed up at the arbitration be delivered in order to complete the record. These were the notice of disciplinary hearing and the record of the disciplinary hearing.
 5. In response the Deputy Director of the 2nd respondent indicated that whilst it is true that such exhibits were handed up and they had always been kept in the file, he was dismayed that at the time they needed the exhibits to transfer them to the Registrar as requested they could not be found. He requested the Registrar to ask the applicants to avail their own copies as they might have retained copies for themselves.
 6. There is no indication that the Registrar did so. However, on the date of the hearing the said exhibits had still not been filed thus making the record manifestly incomplete. It is trite that in such a situation the reviewing court is laden with an arduous task which often leads in the court not being able to fulfil its review mandate.
 7. Even if we might have sought ways of overcoming the problem of incomplete record, we soon discovered that the difficulties with the award of the 4th respondent did not end with the incomplete record. It turned out that all the three witnesses who

testified on behalf of the applicant testified without taking oath. That was the last straw and when these were brought to the attention of Messrs Loubser for the applicant and Shale for the respondent they both agreed that the award falls to be reviewed, corrected and set aside for these reasons. Accordingly, the matter is remitted to the DDPR to be heard *de novo* by a different arbitrator.

There is no order as to costs.

THUS DONE AT MASERU THIS 14TH DAY OF AUGUST 2008

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA
MEMBER

I CONCUR

L. MOFELEHETSI
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. LOUBSER
MR. SHALE