IN THE LABOUR COURT OF LESOTHO LC/REV/112/2007

HELD AT MASERU

IN THE MATTER BETWEEN:

PRESITEX ENTERPRISES APPLICANT

AND

SEKOATI NTSEKHE RESPONDENT

JUDGMENT

Date : 28/10/08
Reasons for judgment reserved.
Review of DDPR award – Arbitrator must not lightly substitute his decision for that of the employer – The Arbitrator misapplied the rules of evidence and rejected evidence he ought to accept and dubbed evidence tendered first hand a hearsay – Evidence – Arbitrator refused representative of the employer to testify even before he heard his testimony – The award was in the circumstances based on inadequate evidence and as such is irregular – Matter remitted to DDPR for hearing of full evidence by different arbitrator.

1. This is an application for the review of the award of the 2nd respondent in which it had ordered the reinstatement of the 1st respondent. The application was heard on the 28th October 2008. At the conclusion of the submissions by Counsel, the ruling was made that reviewed corrected and set aside the award of the 2nd respondent and the matter was remitted to be heard *de novo* by a different arbitrator. Reasons for the ruling were reserved. These are now those reasons.

2. The 1st respondent was employed by the applicant company as a cutting supervisor. He was dismissed, following a disciplinary hearing in which he was charged and found guilty of fighting at

work. Applicant referred a dispute of unfair dismissal to the DDPR claiming that he was dismissed for a wrong that he did not commit.

3. Following failure of conciliation the dispute was arbitrated. At the start of the proceedings the arbitrator invited the representative for the company to call his witnesses. The representative was the Personnel Manager Mr. Letsie. He requested the learned Arbitrator to swear him so that he could testify. The learned Arbitrator enquired whether he knew anything related to the fighting. The representative told him that he knew through enquiry that he conducted before the hearing. The Arbitrator was concerned whether Mr. Letsie had seen "the incident occur." Mr. Letsie tried to explain that there are some documents which he would be handing in. The learned Arbitrator ruled that even those documents cannot help him decide the issue at the hand because Mr. Letsie had not personally seen the fight.

4. The representative of the applicant was then forced to abandon his efforts to testify and submit documents which would hopefully include the record of the disciplinary proceedings themselves. He called in the Factory Manager Mr. Kalum Edirisinghe to testify. He testified that he worked closely with the 1st respondent and the Chinese supervisor whom he fought with, one Ms Xhi Xheng also known as Jane. He testified that when ever the cutting room team had a problem he was the one who would be called to help solve the problem. (See p.6 of the record).

5. On the day that applicant fought with Xhi Xheng, he had been called in by the line manager to help with a problem relating to a sticker. He came to the cutting room to help sort out the problem. The witness testified that he was with four staff of cutting i.e. applicant, Xhi Xheng and line manager and the cutting manager. It is clear from his evidence that he was in the midst of them and that they were standing on both sides of him. (See p.9 and 14 of the record). He testified that he was at the time facing to the right to speak to people on that side. When he turned to the left he saw applicant hit Xhi Xheng.

6. DW1 testified that the fight occurred right in front of his eyes. (See p.21 of the record). He said that since they were so close to him he was able to quickly separate them by pulling applicant to his office while he escorted Xhi Xheng to the Factory Manager's office. He testified that the incident was discussed in the Factory Manager's office and that in his presence; the picture of the bruised face of Xhi Xheng was taken. Asked who took the picture he said it was taken by the Factory Manager. The Photo was handed in as part of evidence but was reluctantly accepted but the learned Arbitrator because he was worried that he could not tell that the photograph was that of Xhi Xheng. The representative of the applicant calmly told him to accept it because his witness (DW1) had testified in support of it.

7. The evidence of DW1 remained solid even after cross-examination by the representative of the 1st respondent. In his own defence the 1st respondent (PW1)flatly denied that he fought with Xhi Xheng. His version of what transpired is to be found on page 25 of the record. It is in four parts which I will attempt to summarize. First, PW1 averred that there was a work related argument between him and Xheng which they passed and got over with. The relevance of this part of the evidence is not clear because by PW1's own admission they got past the argument. No attempt was made to relate that past argument to events that followed either.

8. The PW1 testified further that on the 22nd of May 2005, they had a quarrel with Xheng about the work that came from sewing line. He went on to say that the work had been brought by DW1 with mistakes that required it to be sent to sewing room for correction. He testified that Xheng refused that the work be sent there to be corrected. The PW1 testified that "from there I was doing another work. I was fixing some fencing on the table. (inaudible) arrived …." (See p.25 of the record). Once again there is no ostensible relevance that the evidence relating to work that came with mistakes from cutting had to do with the matter at hand. This is more so because that story is then abandoned and PW1 says he was busy with something else

when we suppose (because the record is inaudible in this part) Xhi Xheng arrived.

9. Then come the fourth version which clearly contradicts what I have for convenience classified as the second version. I will quote this one in full. The learned Arbitrator intervened after 1st respondent said he was already doing another job and asked:

> **Arb :** You say there was what?
>
> **App :** There had been a mistake done in relation to a certain job from sewing line and had to be fixed and Xheng made a decision on her own without telling the cutting manager and she corrected it. Kalum then came and indicated that the job had not been done properly." (emphasis added).

We have emphasized the phrase that Xheng made a unilateral decision to correct the mistake in order to highlight the contradiction with the witness's earlier version that Xheng was refusing when the work had to be corrected.

10. The story of the PW1 reverted to what he said earlier and said it was this work (work from cutting room) which DW1 came and said it had not been properly done, which he left with DW1 to go and do another work which the latter had assigned him to do. He testified that Xheng came and forcefully tried to take away the pieces he was working on. I pause her to observe that earlier this witness testified that the job that he had left DW1 and others to go and do was to fix fence on the table. This is where Xheng had purportedly come and provoked him.

11. According to his new version however, he was working on small pieces which Xheng wanted to take away from him in order that she could throw it away. He averred that they struggled for the cloth, and when Xheng realized that she could not win possession she kicked him twice. She also tried to poke him with a finger which he says he averted by moving "…my hand like this." No attempt was made to explain what was meant by "like this." It remains to infer from other parts of the record that the witness was actually saying that he pushed away Xheng's hand. (See p.34 of the record).

12. PW1 testified that it was when he was pushing away Xheng's hand that DW1 saw what was happening and he separated them. He was asked who else were there when this happened, he said it was the cutting room staff. Asked to say who those were he said they were, DW1, the cutting manager and the line manager. These are infact the people who DW1 said he was with. Asked if those were the only people present he answered in the affirmative. (See p.28 of the record).

13. Despite this evidence PW1 called PW2, Mr. Mojalefa Mosebo who testified that he works as a layer in the cutting room and that he was there when PW1 was assaulted by Xheng. His testimony was that applicant was repairing the fencing when "Ms Xheng came to him and took them away from him." (See p.38 of the record). He, PW1 asked her what she was doing but Xheng kicked him twice without attempting to furnish any answer. He averred that he was very near PW1 and that the latter never slapped Xheng. Asked what happened he stated that DW1 intervened and separated the two. A million dollar question that goes unanswered is why he (PW2) did not intervene and separate the two if he was so close to them? That is if his evidence is to be believed.

14. Against the backdrop of the foregoing summary of the evidence the learned Arbitrator found that the version of the 1st respondent is more probable than that of the applicant's witness. In particular he found that PW1's testimony had been corroborated by PW2 who testified that he was near PW1 when the so-called fight took place. The learned arbitrator was oblivious of the fact it is only PW2 who said he was next to PW1. In his testimony PW1 confirmed the testimony of DW1 with regard to the people who were around at the time of the fight. According to PW1 his witness i.e. PW2 was not one of them. The finding that PW1's testimony is corroborated in this regard is certainly not justified.

15. The learned arbitrator also found for the 1st respondent on the conflicting versions whether the two fought at the work place. The learned arbitrator made this finding solely on the denial of PW1 and the support he was given by PW2 that he (PW1) did

not hit Ms Xheng. The learned Arbitrator made his finding without alluding to the finding of the disciplinary enquiry namely whether given the facts available to the disciplinary enquiry the employer acted fairly in deciding to dismiss the 1st respondent. As it was held in TYM Ltd (1989) 10 ILJ 755 at p.761:

> *"(The) Court has in a number of decisions emphasized that it should be careful not simply to substitute its own assessment for that of the employer. In Du Pleesis .v. Meditex (Pty) Ltd NHK K/2/99 (unreported) the Court said: 'Consideration must necessarily be given to the employer's judgment and unless such judgment is shown to have been clearly unreasonable in the circumstances pertaining to a particular industry and work situation this court would not be disposed to interfere'*
> *This applies particularly to the standard of conduct which an employer expects from its employees. That is a clear management prerogative."*

16. The learned Arbitrator further disregarded the fact that the evidence of DW1 regarding what happened between applicant and Ms Xhi Xheng was not shaken by cross-examination. He justified his rejection of DW1's evidence by making an unjustified inference that "it would seem, in terms of the evidence of Kalum, that he was, at the time of the incident, in the cutting room but not as close to the place of the incident as the applicant's witness." (See p.3 Para 9 of the award). This finding is completely not justified by the evidence. On at least three occasions DW1 says the incident took place very close to him. In one occasion he says it happened right in from of me. In another he says they were close to me that is why I was able to stop them. On another occasion he says he was actually talking to the four of them trying to sort out the problem. he said "I am talking to my right side people. When I looked on the other side, I saw applicant hitting the lady." (See pp9, 10 and 21 of the record). Accordingly, the rejection of the evidence of DW1 on the basis of a wrong inference was totally unjustified and constituted a gross irregularity.

17. The applicant filed a review in which they essentially raised points of appeal. However, subsequent to the certification of

the record and upon distributing it to the parties, in terms of rule 16(5) of the Rules of the Labour Appeal Court, the applicant availed itself of rule 16(6) which allows the applicant to either deliver a notice to amend, add, or vary the terms of the notice of motion or deliver a notice that that applicant stands by its notice of motion. To this end the applicant filed a supplementary affidavit in which they raised the following new grounds of review:

(i) The learned Arbitrator erred and acted irregularly by failing to consider the photograph which was tendered in evidence.
(ii) The arbitrator further erred in disallowing the applicant to present evidence that he had brought to the arbitration.

18. It is common cause that the learned Arbitrator rejected the evidence of a photograph of Xhi Xheng which was meant to show that her face had infact suffered bruises sustained during the fight. He dubbed the photograh a hearsay because the person who took it did not testify and the person whose face it purported to show was also not called to testify. This was yet another gross misapplication of the rules of evidence. To start with the 1st respondent did not dispute the identity of Xhi Xheng. Infact the learned Arbitrator denied the representative of the 1st respondent to ask him questions to rebut the photograph. Irregular though that was, it left DW1's evidence unchallenged in this regard.

19. Secondly, when the learned Arbitrator tried to refuse to admit the photograh into evidence, the representative of the applicant correctly told him that DW1 had testified about the photograph. He, (DW1) stated emphatically that it was the photograh of Xhi Xheng and that it was taken by the Factory Manager in his presence. This evidence was not challenged. There was therefore no need to seek a further corroboration of the person who took the photograph or even that of Xhi Xheng whom the Arbitrator was told that she had been dismissed and that she had since returned to China. The Arbitrator was clearly asking for the impossible in a situation where it was absolutely not necessary.

20. As we indicated at the start of this judgment the representative of the applicant was prevented from presenting his evidence on the assumption that it would not help the arbitration process. We say assumption because it was totally premature for the learned Arbitrator to prevent the representative from testifying even before he heard what evidence he was going to give. This was a grossly irregular act which has resulted in the award of the learned Arbitrator being based on inadequate evidence. Whether that evidence would result in the finding that favours the applicant or it would go to confirm the finding that has been made in favour of the 1st respondent, we are not in a position to say because we have not seen or heard that evidence. It was for these reasons that the award was reviewed, corrected and set aside and the matter was remitted to the DDPR for hearing of full evidence by a different arbitrator. We made no order as to costs.

THUS DONE AT MASERU THIS 26TH DAY OF NOVEMBER 2008

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE MEMBER	I CONCUR
L. MATELA MEMBER	I CONCUR
FOR APPLICANT:	MS. SEPHOMOLO
FOR RESPONDENT:	MR. MOLISE