

**IN THE LABOUR COURT OF LESOTHO**

**LC/REV/51/2006  
LAC/REV/60/2002**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**SIMON TAU**

**APPLICANT**

**AND**

**LESOTHO FLOUR MILLS  
DIRECTORATE OF DISPUTE  
PREVENTION AND RESOLUTION**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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*Date : 27/02/08*

*Review - Onus of proof distinguished from evidentiary burden of proof - Applicant failing to discharge evidentiary burden which had at the time shifted on him - Application dismissed.*

1. Applicant was employed by the 1<sup>st</sup> respondent as a cashier. On the 29<sup>th</sup> June 2002 he was disciplinarily charged of fraud and negligence. The charges arose out of the fact that on the 10<sup>th</sup> May 2002, the applicant had allegedly issued two receipts amounting to M6,239.06. It later turned out that the applicant had short banked the amount collected by M1.646.21.

2. On the 19<sup>th</sup> June 2002, a spot check was made on the applicant which reflected that he had received cash amounting to M24,323.51. However, when he was checked only M11,134.80 was found reflecting a shortage of M13,188.71. On the 18<sup>th</sup> June 2002, the applicant made a report conceding the shortage of M1,646.06 and admitting that a mistake had occurred. (See a copy of the report handed in court by consent which was admittedly made by the applicant.).
3. The applicant was disciplinarily charged of fraud and negligence of duty. He was found guilty of both charges and dismissed. He referred a dispute of unfair dismissal to the Directorate of Dispute Prevention and Resolution (DDPR). He challenged both the procedural and substantive fairness of his dismissal. On the 24<sup>th</sup> October 2002, the arbitrator who dealt with the referral dismissed both claims.
4. On the 12<sup>th</sup> December 2002, the applicant filed the present application for review. The application was filed with the Labour Appeal Court as the Court vested with the power of review of DDPR awards at the time. The matter remained pending on the roll of the Labour Appeal Court until the 28<sup>th</sup> June 2007 when Mosito AJ referred the matter to this court following the enactment of the Labour Code (Amendment) Act No.5 of 2006 which vested powers of review of DDPR awards in this court.
5. The matter was scheduled to proceed before this court on the 27<sup>th</sup> February 2008. At the start of the proceedings it turned out that counsel for the parties had already filed heads of argument which they were going to use before the Labour Appeal Court. They applied to associate themselves with them as their heads of argument even before this court. The arrangement was accepted by the court.

6. It must be repeated for the sake of clarity that the applicant had been charged with two counts of fraud and negligence. The first charge related to applicant's failure to account for the amount of M1,646.12. The second concerned his inability to account for M13,168.96 when a spot check was made on the 21<sup>st</sup> June 2002. The DDPR found that applicant had rightly been convicted of the first count but absolved him on the second count.
7. Applicant sought to have the award reviewed on the ground that he ought not to have been found guilty even on the first count. He contended that there was no iota of evidence to support the charges and that the Presiding Officer misdirected himself in that he placed the burden of proof on him while the onus correctly lied on the 1<sup>st</sup> respondent. He averred that the facts relating to these counts were similar and that the arbitrator ought to have arrived at the same conclusion in both.
8. According to the record of the proceedings of the disciplinary hearing which was handed in by consent, the Financial Controller of the 1<sup>st</sup> respondent gave evidence of the banking discrepancies. The applicant himself admitted the same save that he sought to put blame on his colleague one Mrs. Motsoehli. He asked for more time to enable him to call her as his witness. However, at the resumed hearing he failed to bring her along as his witness.
9. At the hearing before the DDPR three witnesses testified on behalf of the 1<sup>st</sup> respondent. The first witness Khobolane Lekomola was called to quash applicant's allegations of procedural impropriety at the hearing. The second witness Mrs. Makhahliso Kanetsi testified that at the disciplinary hearing 1<sup>st</sup> respondent led evidence that showed that applicant had shortages which he could not account for. The arbitrator found that the applicant had failed to controvert the evidence of these two witnesses.

10. The third witness was applicant's immediate supervisor Mr. Tsiliso Sibolla. He testified that he became involved with the investigation of the shortage of M1,646.06 as the supervisor of the applicant and his co-worker Mrs. Maleoma Motsoehli. He testified that records of the applicant and Mrs. Motsoehli showed that on the 29<sup>th</sup> April 2002 Mrs. Motsoehli had received money for which she did not issue receipts. Mrs. Motsoehli did that because there was a credit note which her daily report did not reflect and she decided to remove it manually. When her report reflected a difference she duly made a receipt for that difference.
11. Notwithstanding that she had removed the credit note manually the previous day, the following day the system removed it thereby creating a duplication. On the 10<sup>th</sup> Mrs. Motsoehli had proceeded on leave and Mr. Tau was charged with doing her work as well. He realized the discrepancy and thought there must have been over banking of the amount in question.
12. The testimony of Mr. Sibolla went on that "it happened that on the 10<sup>th</sup> his receipts when he summed them, they were two receipts. They made six thousand and something I have forgotten there. He then made a receipt with the difference. Now my question was what did you do with the cash? Because that cash was there, but then you deducted it from the total of these your receipts and then made a receipt with the difference. What did you do with the cash? Truly this is where I was unable to get the answer." (See p.78 of the paginated record).
13. Mr. Sibolla testified further that he reported the matter to his superior who also called applicant to find out what happened. He testified that applicant was still "....not able to give explanation as to what he did with the cash, because he had subtracted it like he explained." The witness testified that he thereafter proceeded on a ten day leave.

14. Whilst he was on leave his supervisor called him to report to work. On arrival his supervisor told him that he had on that day suspended the applicant because when a spot check was made he was found to be short of M13,000.00. It is not clear how the applicant explained this shortage at the disciplinary hearing.
15. Even at the hearing before the DDPR applicant did not proffer any explanation for the shortage during his evidence in chief. He was however able to advance an explanation during cross-examination as a result of very probing questions that were put to him by the representative for the 1<sup>st</sup> respondent. It turned out from that explanation that the confusion must have been caused by the way the cashiers in the cash office do their work. The cashiers served different customers for the different companies falling under the 1<sup>st</sup> respondent. However, they in practice served them jointly and interchangeably despite each one of them being responsible for particular set of companies.
16. This work arrangement resulted in a situation where one would serve another cashier's company collect the cash and put it in their cash box; while the cashier actually responsible for the company issues the receipt for the transaction for which they at the time have not received cash themselves. Now when the spot check was done applicant had receipts totaling more cash than he had at the time because part of the cash was in his co-worker's cash box. Applicant stated that action was taken against him without a check being made whether his co-worker did not have more cash than the receipts she issued. Applicant's co-worker even later wrote a letter explaining that part of the money for which receipts were issued by applicant was with her. (See p.53 of paginated record).
17. It is against the backdrop of these facts that the Arbitrator found applicant rightly convicted of the first count and found that no fraud was proven in the second count. Coming to counsel's contention that the arbitrator should

have absolved applicant on both because, as the argument went, “the circumstances or facts relating to these counts were similar...” A simple reference to the facts as narrated in the preceding paragraphs shows that this argument is false. One count concerned cash which was subtracted and was never returned. The other involved discrepancy between receipts issued and cash at hand.

18. The second contention was that there was no evidence to prove fraud in both counts. Evidence was led and applicant conceded the same that he had deducted the cash which he had thought his colleague had over banked. When he was asked to produce the cash he was unable to do so. The only conclusion to draw is that he had committed a fraud of that amount. With regard to the second count he was able to explain what he believed could have resulted in the shortage and the 1<sup>st</sup> respondent could not contradict him. I believe the 2<sup>nd</sup> respondent rightly absolved him of a charge of fraud although he may not have also escaped the charge of negligence on the evidence given.
  
19. Lastly counsel for the applicant contended that the Arbitrator placed the burden of proof on him while the onus rightly lied on the 1<sup>st</sup> respondent to prove the fraud. It is true that the onus of proof lies on him who alleges. However it is significant that the onus or the burden of proof is distinguished from the evidentiary burden which “refers to one party’s duty of producing sufficient evidence for a judge to call on the other party to answer and it also encompasses the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent.” (See P.J. Schwikkard et al Principles of Evidence; Juta & Co. 1997 at p.393.)
  
20. As the saying goes once a *prima facie* case is established the evidentiary burden shifts to the accused to adduce evidence in order to escape conviction. (Ibid p.394). This is what happened in casu. In the case of the amount of M1,646.06 a *prima facie* case was established that the

money was there and that the applicant subtracted because he thought it had been overstated. The evidentiary burden shifted on the applicant to adduce evidence of what he did with the money. It is common cause that he failed to discharge the burden which correctly lied on him at the time. We are unable to find fault with the Arbitrator's award that the applicant was rightly found guilty of fraud. It is also incorrect that the arbitrator had inappropriately placed the burden of proof on the applicant. As it is the rule the burden or onus of proof remained with the 1<sup>st</sup> respondent. What had shifted was the evidentiary burden which the applicant failed to discharge.

21. In the case of the M13,000.00, the applicant was clearly able to discharge the burden which had shifted to him when he was able to explain how the imbalance between the receipts and the cash came about. The 1<sup>st</sup> respondent in turn was not able to put across a credible version that would show that applicant had indeed defrauded it of the amount in question. Accordingly even in this regard we cannot find any fault or irregularity with the award of the learned arbitrator. For these reasons the review application ought not to succeed and it is accordingly dismissed.

THUS DONE AT MASERU THIS 18<sup>TH</sup> DAY OF MARCH 2008

**L. A. LETHOBANE**  
**RRESIDENT**

**L. MATELA**  
**MEMBER**

**I CONCUR**

**M. MOSEHLE  
MEMBER**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**ADVOCATE SHALE  
ADVOCATE SEPHOMOLO**