

IN THE LABOUR COURT OF LESOTHO      LC/REV/125/2007

HELD AT MASERU

IN THE MATTER BETWEEN:

PRESITEX ENTERPRISES

APPLICANT

AND

RELEBOHILE KATIBA  
DDPR

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

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## JUDGMENT

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*Date : 04/11/08*

*Review - Arbitrator found that evidence of applicant was not challenged and went on to dismiss that evidence as hearsay - The court found that the evidence was not hearsay, as such it was wrongly rejected - Award reviewed, corrected and set aside.*

1. This is an application of the review of the award of the 2<sup>nd</sup> respondent which ordered the applicant company to pay 1<sup>st</sup> respondent ten months salary as compensation for unfair dismissal. The 1<sup>st</sup> respondent was dismissed on or around the 15<sup>th</sup> December 2006, following a disciplinary enquiry in which he was found guilty of misconduct in that he had taken part in an unauthorized possession of company property.
2. At the arbitration the applicant adduced the evidence of three witnesses to show that it acted fairly in dismissing the 1<sup>st</sup> respondent. Both parties conceded prior to the commencement of arbitration that the procedure for termination was not in dispute. Only the reason for dismissal was being challenged. The testimony of the three witnesses of the applicant accordingly concentrated on the substantive fairness of the dismissal.

3. The 1<sup>st</sup> witness (DW1) was the Line Manager Motumi Kompfi. His testimony essentially concentrated on identifying the property that the 1<sup>st</sup> respondent was accused of taking part in possessing them unlawfully. DW2 was the security officer, Mr. Francis Mosiuoa who effected the arrest. He testified that on the morning of the 22<sup>nd</sup> November 2006, he arrested one Lesole Ramateneng along the visitor's passage, leading from the washing room.
4. DW2 testified further that he caught Ramateneng with three trousers of a Chaps label. He was carrying them in a bag. He testified further that he asked Ramateneng where he worked. He told him that he worked in sewing. He asked him further how he got possession of the three trousers if he worked in sewing. Ramateneng answered that the trousers were given to him by the 1<sup>st</sup> respondent who worked in washing.
5. It is common cause that Ramateneng was charged of unlawful possession of the three pairs of trousers and was dismissed. The 1<sup>st</sup> respondent was then charged with taking part in their unauthorized possession. Ramateneng's implication of the 1<sup>st</sup> respondent was given substance by DW3 Mantsabeng Letsaba.
6. She testified that she worked at the CCTV. She testified further she knew the 1<sup>st</sup> respondent very well. She testified further that two days before the arrest of Ramateneng they observed a bag placed in the washing room through the CCTV camera. The bag was placed near the washing machines. They kept watch on it to see who would remove it. They saw the applicant come towards the bag pushing a trolley filled with trousers. When he got to where the bag was he took a bunch of trousers from the trolley and put it in the bag they were keeping under watch.
7. She testified further that when the 1<sup>st</sup> respondent was doing this it was already around knock off time. He thereafter removed his working clothes and put them away. After that he took the bag and locked it away in the drawers near the watching machines. They left the camera focused on the spot to film any movement. They then alerted the security.

8. The following day they saw the 1<sup>st</sup> respondent took out the bag and give it to a gentleman whom DW3 said she did not know. Asked if the bag still contained its contraband she said it did. She testified that the person who took the bag went out of washing through sewing room. She testified further that since security had been alerted they arrested the person. Asked if she could see this person right up to the point where the security arrested him she said he was in full view throughout.
9. 1<sup>st</sup> respondent's testimony was essentially to deny everything that has been ascribed to him. He called Ramateneng who confirmed everything concerning himself except to deny that he said he got the bag from 1<sup>st</sup> respondent. At the start of her assessment of the evidence, the learned arbitrator observed that; *"the kind of evidence presented to me by respondent's witnesses to a large extent was not contested by the applicant."* i.e. 1<sup>st</sup> respondent.
10. After making this observation, the learned arbitrator proceeded to make startling conclusions. Firstly, she said DW2's testimony was hearsay because he did not see 1<sup>st</sup> respondent give the bag to Ramateneng. That would be a justified finding if DW2's statement was the only testimony on which 1<sup>st</sup> respondent's culpability was founded. The events narrated by DW2 from the passage where he arrested Ramateneng are consistent with the version of DW3 who was watching the movements of 1<sup>st</sup> respondent from the washing room. DW2's testimony cannot therefore be thrown away as inadmissible hearsay.
11. She went further to state that DW3 was not convincing. She based her conclusion on the wrong understanding that DW3 adduced camera evidence which she said is not admissible. This is a complete misconception of the evidence. DW3 did not adduce camera evidence or even video evidence if that is what camera evidence is supposed to mean. She adduced direct evidence of what she observed with her naked eye albeit through a camera.

12. The learned arbitrator went on to say that *“the respondent brought no film for the court to see and come to its own conclusion based on what it saw. Mrs. Letsau’s evidence is hearsay as well as she is narrating to the court what she saw on camera and fails to give the court the opportunity to see for itself. Such evidence is certainly inadmissible. How do I know there was even such a camera when I am not allowed to observe it.”*
13. The remarks of the learned arbitrator clearly contradict her earlier remark that camera evidence is not admissible evidence. Now all of a sudden she would like to have been presented with the same material that she earlier said is inadmissible. As we said DW3’s testimony was not camera evidence. It was a first hand account of the movement of the bag from washing room through sewing up to where Ramateneng was caught with it. There is nothing hearsay about it. The learned arbitrator misdirected herself by saying she needed to see the camera herself. That was irrelevant because the sworn evidence of DW3 is what ought to convince her that any such thing as is alleged existed, moreso when that evidence was not challenged.
14. It is common cause that the learned arbitrator finally concluded that the dismissal of the 1<sup>st</sup> respondent was substantively unfair. This finding cannot be justified in the light of what the learned arbitrator herself said that the evidence of the witnesses of the respondent i.e. the applicant herein was not challenged. This immediately lends credibility to the applicant’s attack that the award falls to be reviewed in that the learned arbitrator failed to consider the evidence of the respondent and its witnesses. The finding that the dismissal is substantively unfair is totally unjustified in the light of the unchallenged evidence that directly links him to the attempt to steal the property of the employer. Accordingly, the award is reviewed, corrected and is set aside. There is no order as to costs.

THUS DONE AT MASERU THIS 4<sup>TH</sup> DAY OF DECEMBER 2008

**L. A. LETHOBANE**  
**PRESIDENT**

**M. MAKHETHA**  
**MEMBER**

**I CONCUR**

**M. THAKALEKOALA**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MS. SEPHOMOLO**  
**MR. MOLISE**