IN THE LABOUR COURT OF LESOTHO

LC/REV/125/2006
LAC/REV/77/2003

HELD AT MASERU

IN THE MATTER BETWEEN

TZICC CLOTHING MANUFACTURERS APPLICANT

AND

DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION 1ST RESPONDENT
NTHATI MAHLAPHA 2ND RESPONDENT

JUDGMENT

Date of hearing: 06/03/08
Judgment reserved
Review of DDPR award – Evidence- hearsay – Person who recorded minutes of disciplinary hearing testified before DDPR about evidence led at the enquiry – such evidence not hearsay as witness heard it first hand – Review and appeal distinguished – Hearing de novo does not mean that arbitrator substitutes herself or himself as a disciplinary enquiry – Award reviewed corrected and set aside.

1. This review application arises out of the award of the Directorate of Dispute Prevention and Resolution (DDPR)

dated 3rd September 2003. The review was filed on the 12th November 2003. The record of the proceedings being sought to be reviewed was only filed in September 2005. There is no record to show if the matter was ever placed on the roll of the Labour Appeal Court as the court empowered to deal with the review of DDPR awards at the time.

2. The matter was taken up by this court following the amendment of the Labour Code (Amendment) Act 2000 that was published in the Government Gazette in August 2006. The said amendment removed the power of review of DDPR awards from the Labour Appeal Court and vested them in the Labour Court.

3. Following the amendment the matter was placed on the roll for hearing on the 25th October 2007. It turned out that Mr. Molati for the 2nd respondent had two matters set down for the same day. Accordingly, the matter was postponed and was rescheduled for the 6th March 2008. It then proceeded as scheduled and reached finality. The judgment was however reserved. This is now that judgment.

4. The 2nd respondent was employed by the applicant on the 2nd June 2002. She was dismissed on the 8th July 2003. She was at the time holding the position of supervisor of line E10. Events leading to her dismissal are very short. On the 1st July 2003, one Anna who was a Personnel Manager came to 2nd respondent's line and found that the score registered on the board was only 88 which was admittedly very low.

5. She enquired from the applicant why that was so? Applicant's own testimony is that "I answered that she just came when I had just asked and scolded 'Me 'Mandlela that she has not been able to make a score of 112 on the hour because the other machine had problems. It had broken since around ten." (see p.8 of the paginated record). This was in the morning hours.

6. In the afternoon Anna again came to 2nd respondent's line. She found that the score was 146. Anna was again not happy and once again enquired why the score was that low. 2nd respondent says she told her that the 146 had been "made by one person because the machine of one Mannini was still broken." The testimony of the 2nd respondent is that Anna became angry said:

> *"I am not able to understand when the table does not have work like this why don't you stand up and go to see where work has got stuck because I don't see any work there."* (see p.8 of paginated record).

7. 2nd respondent went further and said that:

> *"I showed her the bundles that were there on the table, there were five of them. The bundle that we said contained the lowest quantity at that time contained 28. There were 32, 38 and 72. I then said 'Me Anna right now as you arrive here I have just sat down, I have just checked each person's hourly score and I found that they have achieved it and now truly I don't know what I can do."* (see pp 8-9 of paginated record).

Clearly this contradicts her response in paragraph 6 above that the score of 146 had been made by one person because machines were broken.

8. It would seem that more exchanges went on between Anna and the 2nd respondent even though they do not come out clearly from her evidence in chief. What is evident however, is that 2nd respondent complains that Anna insulted her by saying that she had made herself a "Mokabase," whatever that means. She stated that she appealed to Anna not to insult her.

9. 2nd respondent testified further that around 3.00 pm one of the Personnel Managers by the name of Tsitoe Molekane was sent by a Personnel Manager called Mamoipone to

call her. She duly answered the call and the said Mamoipone intervened in the dispute and asked her if she deemed it necessary that she asked Anna if she was a Personnel Manager or a Production Manager. Apparently 2nd respondent rudely enquired from Anna exactly what her job was given that she was pestering her about issues of production. She testified that after Mamoipone's intervention she apologized to Anna (see pp 9-10 of the paginated record).

10. The following day Mr. Molekane was again sent by Mamoipone to call 2nd respondent . She went to the office where she found that Mamoipone was not there but she found Anna, Tsitoe and another Personnel Manager called David Nthathakane. She testified that Anna told David that even though they had discussed the issue the previous day she was now afraid to work with her. She was then served with a charge sheet and told to attend a hearing on the 4th July 2003.

11. On the 4th the hearing did not proceed because Anna was absent. It proceeded with on the 8th July 2003. 2nd respondent's version is that the hearing was not finalized because the chairperson "…indicated that it was beyond him." (see p.12 of the paginated record). They were asked to come back the following day and on that day the chairperson delivered a verdict dismissing 2nd respondent. Clearly the decision of the chairperson to dismiss 2nd respondent contradicts her testimony that he had said the case was beyond him. She stated further that the chairperson said he was dismissing her for refusing to carry out instructions.

12. It is significant to note that in her evidence in chief the 2nd respondent never disclosed what she was charged with. Under cross-examination she said that the charge against her was misconduct. She did not say what misconduct she was charged with, but sought to show surprise that the letter of dismissal was specific that she was being

dismissed for refusing to carry out instructions. (see p.20 of paginated record).

13. The applicant herein adduced the evidence of Tsitoe Molekane the Personnel Manager who admittedly took the minutes of the disciplinary hearing. (see p.5 and 12 of the paginated record). He sought to testify on the events that took place between Anna and the 2nd respondent after Anna found that the score was unsatisfactory. He was abruptly stopped by the arbitrator on the ground that he did not have personal knowledge of those events.

14. He then testified about the events that took place at the hearing where he was present. He stated that the chairperson of the hearing David Nthathakane dismissed 2nd respondent for insubordination. He stated that Anna had tabled:

> *"…her matter (and) indicated that 'M'e Nthati refused to carry out her instruction, it being at the time when she said that she should move away from the machine, stop sewing and go and check on the rear what had stopped the work when on the board the score was low and 88 had been registered. And I did not hear him say he was dismissing her for any other thing."*

15. The Arbitrator sought to know if there was anything else that the witness knew concerning 2nd respondent's matter. The witness answered that "…yes it is true that 'Me refused because she was saying that 'Me Anna talked improper words to her." (see p.26 of the paginated record). He was asked by the Arbitrator if she had proof that that is what happened. He answered in the affirmative and the question that followed was "what convinces you that it happened in that manner if you were not there in the factory when that happened…..such that you can come here and testify that the reason for which she had been dismissed is valid?" (see p.27 of the record).

16. The witness testified in response that 2nd respondent's answer to the charge is the one that taught her that it happened that way. Now this question of the learned Arbitrator and a number of them that followed were way of the mark. As we said Tsitoe was now testifying about what took place in the hearing not in the factory. Furthermore, he did have to be convinced because he was not the presiding officer. He merely related the evidence of the parties that the presiding officer heard before he dismissed 2nd respondent.

17. The learned arbitrator continued to ask yet another inappropriate question. "So you should extrapolate and tell why you say that you were correct. Are you able to prove the reason for dismissal right now… Besides these statements that were told to you by 'Me Anna is there any other evidence that you can give?" (P.27 of the record). The witness answered quite correctly, "besides what 'Me Anna stated there, there is no other evidence I can give." I say the answer was correct because he followed it with the clarification that at that hearing both sides did not have witnesses. "It was a matter between the complainant and respondent after that a decision was reached." (see p.28 of the paginated record).

18. Before we proceed further it is significant to point out that the learned arbitrator's enquiry at this stage of the proceedings was clearly irregular in as much as it lost side of the fact that Tsitoe was not the one who made the finding. At that time he was testifying on evidence that the chairperson heard before he made the conclusion that he made. Since these statements were made in his presence they cannot properly be adjudged hearsay.

19. It is common cause that the learned arbitrator finally handed down an award in which she found that Mr. Molekane's testimony was hearsay because he had stated under oath "that Anna had informed him that applicant (2nd respondent herein) had refused to take her order relating to the low score." (see p.2 of the award).

She accordingly concluded that applicant had failed to prove the validity of the dismissal. That analysis landed her with the inevitable wrong conclusion that 2nd respondent's dismissal was substantively unfair. She accordingly awarded her six months salary as compensation.

20. Applicant took the award on review on a number of grounds suffice to single out the following:
    (a) The Arbitrator erred and misdirected herself in holding that the dismissal was substantively unfair due to absence of a reason for dismissal in as much as the reason given by the person who conducted the disciplinary hearing being Tsitoe Molekane is that of poor performance or performing below standard.
    (b) In making the award the Arbitrator did not take all relevant facts into consideration nor were such advanced by the 2nd respondent regarding efforts made by the 2nd respondent to mitigate her damages.

21. It has been held that the test applicable in review proceedings is whether the decision is justifiable, that is whether it is able to be legally or morally justified. This test should be distinguished from that applied in appeal proceedings which is whether the decision is just justified or correct. (see Carephone (Pty) Ltd .v. Marcus NO & Others (1998) 19 ILJ 1425 (LAC). The issue to decide is whether it is justifiable for the arbitrator to conclude as she did that the applicant herein had failed to give a reason for applicant's dismissal?

22. Counsel for the applicant suggested that the conclusion is not justifiable in as much as Tsitoe Molekane who is the one who conducted the hearing gave the reason as poor performance. Since we have the benefit of the record we know that it is not Mr. Molekane who conducted the disciplinary hearing. It was instead chaired by one Mr. David Nthathakane. We also know from the record that

the reason that repeatedly arises is insubordination or failure to obey instructions. It is possible for Counsel for the applicant to make such errors as he made since he was not part of the DDPR proceedings and he had not seen the record at the time that he prepared the review papers on behalf of the applicant.

23. The answer to the question in paragraph 21 above is a straight forward unjustifiable. Evidence of the reason for the dismissal was given by the 2nd respondent herself that she was dismissed for refusing to carry out the instructions. (see page 20 of the paginated record). This reason was confirmed by Mr. Molekane who testified on behalf of the applicant.

24. It is common cause that the arbitrator reached the conclusion that applicant had not given the reason for dismissal because she rejected the evidence of Mr. Molekane as hearsay. She reached that conclusion as a result of her serious misconstruing of Mr. Molekane's evidence at page 2 of her award where she says Mr. Molekane said under oath that Anna informed him that 2nd respondent refused to take her instruction. Mr. Molekane never said Anna told him, he said Anna told the disciplinary enquiry of which he was a part, her complainant which the chairperson Mr. Nthathakane accepted and dismissed the 2nd respondent for that alleged infraction. (see p.26 of the paginated record). We have already said that this evidence cannot be said to be hearsay in as much as Mr. Molekane heard it first hand at the disciplinary hearing. (see Maseru E. Textile .v. DDPR & Another LC/REV/212/06). This is certainly a serious irregularity which has tainted the outcome of the arbitration in a material way. As such it calls for interference with the award.

25. Before we close it is significant to make a comment about the approach of the learned arbitrator in this matter which is the one that landed her in the wrong conclusion that evidence of Mr. Molekane was hearsay. This approach is

that the learned arbitrator sought to substitute herself as the disciplinary panel, forgetting that her work was not to second guess the employer's decision to dismiss the 2nd respondent. It is at this juncture apposite to refer to the words of Midgley C. in SA Food Restaurant & Allied Workers' Union OBO Isaac .v. Grahamstown Golf Club (2001) 22 ILJ 800 at 809 where the following remarks were made:

> *"(The Arbitrator) should not second-guess the club's decision to dismiss even if I would have given a different sanction in the first instance. The discretion is that of the employer and my role is merely to determine whether the sanction imposed was a reasonable one in the circumstances. Only if that sanction would make me whistle should I interfere."*

26. Section 66(4) of the Labour Code Order 1992 (the Code) enjoins an employer to hold an enquiry in which the employee against whom adverse action is to be taken will be afforded a chance to present his or her side of the story. Once the hearing has been held it is not the duty of the Arbitrator to duplicate that process. The duty of the Arbitrator is to oversee that the process was done fairly. Thus in Cronje .v. Toyota Manufacturing (2001) 22 ILJ 735 Lyster C. stated that:

> *"the courts have made it clear that an Arbitrator may not, at my whim, substitute his or her view for that of the employer which in this case has seen fit for reasons given to dismiss applicant."* P.748.

27. The principle that a hearing before the DDPR is said to be a hearing *de novo* has been largely misunderstood to mean that the role of the Arbitrator is to retry the case in such a way that the Arbitrator substitutes the disciplinary process. As this court held in the case of Thato Liphoto .v. Lesotho Agricultural Development Bank LC21/95 (unreported) p.4 of the typed judgment:

> *"The Labour Court has (been held) not to be an appeal court or review tribunal in relation to the procedural restrictions that would normally be applicable in hearing an appeal or review application. For instance the court would not be limited to the evidence adduced at a disciplinary hearing or the record of the employer's disciplinary enquiry. As it was held in the Hoescht (Pty) Ltd case supra a complete rehearing of the matter takes place before the industrial court and it is enjoined to consider the fairness or otherwise of the dismissal on all the facts presented to it."*

28. This is precisely what ought to have happened in casu namely, considering the fairness of the dismissal on all the facts presented before the arbitrator. However since she misconceived her role as being to reopen the enquiry she failed to do what she was called upon to do which was to decide whether the dismissal of the 2nd respondent was fair, regard being had to the evidence presented before her. If she had had regard to that evidence, she would have found that substantively the employer had acted fairly in as much as he had a reason which was never disputed. The reason was conceded by the 2nd respondent herself as she said she even apologized to Anna.

29. Finally it was contended that the award is reviewable on the ground that in making the award the Arbitrator failed to consider nor were she ever addressed on the efforts made by 2nd respondent to mitigate her damages. Whilst this is a legitimate ground for review it however will only be an academic exercise to deal with it in the light of the findings we have made that the award is irregular to the extent that it is was made without consideration of the evidence presented by the side of the applicant. If such evidence was considered and due weight given to it the learned arbitrator would not have arrived at the conclusion reached that the employer failed to advance the reason

for dismissal of 2nd respondent. For these reasons the award in arbitration proceedings A0974/03 is reviewed, corrected and set aside. There is no order as to costs.

THUS DONE AT MASERU THIS 3RD DAY OF APRIL 2008

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA **MEMBER**	**I CONCUR**
M. MOSEHLE **MEMBER**	**I CONCUR**
FOR APPLICANT:	**MR. MOHALEROE**
FOR RESPONDENT:	**MR. MOLATI**