IN THE LABOUR COURT OF LESOTHO

LC/REV/481/06

HELD AT MASERU

IN THE MATTER BETWEEN

PRESITEX ENTERPRISES (PTY) LTD **APPLICANT**

AND

LIMPHO RAPHUTHING **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

Application for review of DDPR award – Applicant failing to point out any irregularity calling for interference with the award of the DDPR – sec.73(1) of the Code – Reinstatement in terms of the section is a discretion which must be exercised judicially after considering all facts – It is not to be based on speculation – Representative of applicant failing to oppose prayed for reinstatement – Order of reinstatement on basis of unopposed prayer therefore cannot be interfered with – Application for review dismissal.

1. This is an application for the review of the award of Arbitrator Shale dated 3rd February 2006, in which he ordered that 1st respondent be reinstated to his job and

that he be paid M2,572.80 in lost wages. There was initially a confusion as to who between Arbitrator Shale and Arbitrator Ntaote actually arbitrated the dispute. The record of proceedings shows the name of Mr. Ntaote while the award itself is signed by Mr. Shale.

2. I asked Counsel for the parties to seek clarification from the DDPR. Whilst they promised to do so, they never came back with an answer until the time of the writing of this judgment. I personally had to enquire from the Director, who after perusing the relevant file reported that the arbitrator who dealt with this matter is Mr. Shale. It follows therefore that the name of Mr. Ntaote has appeared on the record by mistake. This is an error which we are able to correct with the clarification that we got from the Director since, the award itself has been made and signed by the right person. The record is accordingly corrected to read Arbitrator was Mr. Shale and not Mr. Ntaote.

3. The facts giving rise to the dispute that was referred to the DDPR are largely common cause; save where the applicants have claimed ignorance. It is common cause that 1st respondent was disciplinarily charged for a cloth measuring 1.5m x 2.7m that was found on the trolley he was pushing out of the factory to dump its contents at the rubbish pit. It is also common cause that he was dismissed for that infraction.

4. Evidence was led on behalf of the applicant that applicant worked at the general affairs department which is outside the factory. On the day in question he had been assigned to work at Fabrics Department where he would collect the garbage, load it on the trolley and then dispose of it at the rubbish dump. It was further testified that when 1st respondent got to the exit he was checked by a security officer who found the cloth. The 1st respondent was charged with unauthorized possession of company property. The witness Mr. Khoetha, testified in conclusion that it was 1st respondent's responsibility to ensure that

the trolley he was using did not contain anything that might put him in danger.

5. As we pointed out the disciplinary hearing that followed this incident led to the dismissal of 1st respondent. Under cross-examination Mr. Khoetha was asked why 1st respondent was charged with unauthorized possession when the cloth was found on the trolley he was pushing to go and dispose of its contents and not on his person. The answer was that it is because the contents of the trolley are his responsibility. Asked where 1st respondent normally works he said he worked outside the factory but on the day in question he had been assigned by Mr. Litau, his supervisor to work at Fabric Stores Department.

6. He was further asked what time he was assigned to go and work at Fabric Department. He said at 7.00am. When it was put to him that 1st respondent was given the assignment at 10.00am he disagreed. But that disagreement soon fell apart when he was asked if he was there when the 1st respondent was given the assignment. He conceded that he was not there. It follows that he was not in a position to deny that the assignment may have been given at a different time from the one he mentioned.

7. He was asked why 1st respondent had to be assigned to work at a department other than the one he worked in. He said he learned from 1st respondent's own statement that it was because the person who normally worked there was not there. He was informed that evidence would be adduced that 1st respondent was instructed to go to Fabric Department in the afternoon to finish the work left be a person who had been released due to a family problem. He said he would not deny. He infact later corrected his testimony to say that he agreed with 1st respondent's version because the incident actually happened at around 4.00pm. Asked if there was already work done at Fabric Department which 1st respondent had to complete, he said he did not know. (see p10-11 of the record).

8. 1st respondent's own testimony is that he was instructed by his supervisor at 10.00am to go and work at Fabrics Department after lunch because the person who worked there, a Mr. 'Mota had been released due to a family problem. He stated further that in the afternoon he did go to work at Fabrics Department and that his supervisor went with him. They found that work had been done, but not completed. The trolley was already half loaded, but there was another garbage that had been collected in one spot, but not yet loaded on the trolley.

9. Applicant testified that he completed the loading of the trolley by taking the garbage that was already collected and loaded it on the trolley. All this he did in the presence of his supervisor. After loading they parted with the supervisor as he pushed the trolley outside to go and empty it. A security officer at the exit checked the contents of the trolley using an iron rod. The cloth came out. He took it out but 1st respondent proceeded to go and empty the trolley. When he returned the security officer took him to the security office where he was required to make a report, which he did.

10. He was asked if one is allowed to inspect the job of a person he is replacing before he can start doing the job. He said that was not so. Asked why he considered his dismissal unfair he said it was because when he got there the trolley already contained material and that as he collected the other material which he loaded, there were people in the vicinity including his own supervisor, who ostensibly would have seen if he improperly loaded the cloth. He concluded that he did not know ho had put the cloth on the trolley. It must be put on record that the evidence of the 1st respondent was not tested or contradicted by the representative of the applicant by cross-examination, despite being given the opportunity to do so.

11. 1st respondent's testimony was corroborated by his then supervisor Mr. Tohlang Mohlakoana also known as Litau. He confirmed 1st respondent's evidence that on the day in question he released Mr. Mota who worked at Fabrics Department as he had a family problem. He stated that he instructed 1st respondent to go and work at Fabrics Department in the afternoon to "….complete work that was done by Mr. 'Mota who I had just released." (p.23 of the record).

12. He testified further that by lunch time there was already a lot of work to be done. The work had to be completed speedily. He thus personally went with 1st respondent to make sure that work was done expeditiously. He testified that 1st respondent found the trolley half loaded. He completed the job left by Mr. 'Mota by loading the garbage that Mr. 'Mota had already collected. He stated that they parted with first respondent when he was pushing the trolley out of the factory to go and empty it.

13. Asked if in his presence 1st respondent loaded anything that he was not supposed to load he said he did not. Asked if the contents of the trolley were 1st respondent's responsibility he said they were their joint responsibility. He disputed that the cloth on the trolley could be made 1st respondent's responsibility, because he was there when he (1st respondent) was loading the trolley. Furthermore, 1st respondent knew that he would be searched at the exit and that if the cloth was found it would lead to his dismissal. (see p.25 of the record).

14. Under cross-examination he was asked if he ever explained to the 1st respondent that the contents of the trolley were his responsibility. He said he did not caution him. He was asked if he ever explained to the authorities that the 1st respondent was only replacing someone who had been released and whether he ever disclosed that the trolley was already half filled when 1st respondent arrived. He, replied that he waited for the disciplinary hearing and that he attended the hearing, but he was never given the

opportunity to say anything. The questions of the cross-examiner point to a serious weakness in the manner that this matter was dealt with. This is that 1st respondent's supervisor was clearly not involved in the investigation and the laying of the charges against him.

15. After hearing evidence learned arbitrator concluded that the evidence of 1st respondent that he did not put the cloth on the trolley was not challenged. He found further that the applicant had not shown on the balance of probabilities that the applicant was the one who put the cloth on the trolley. He accordingly found that the dismissal was unfair and proceeded to award that 1st respondent be reinstated and that he be paid certain moneys in lost wages.

16. The applicant applied to this court to have the said award reviewed, corrected and set aside on the following grounds:
    (a) The Arbitrator failed to appreciate that the 1st respondent was charged with unauthorized possession of the employer's property and not theft.
    (b) There is no evidence to support the finding that "applicant had gone to replace an employee who had just left his trolley (partly) loaded."
    (c) Nor was there evidence to lead to the conclusion that it could be that other employee who placed the garbage on the trolley.
    (d) Onus was placed on the applicant herein in as much as it was made to begin and yet it was not the one alleging.
    (e) Learned arbitrator failed to consider evidence led on behalf of the applicant which was not hearsay, that it is standard procedure that before one drives the trolley it is his responsibility to check its contents.
    (f) The learned arbitrator failed to consider whether it was practicable to order reinstatement in accordance with section 73(1) of the Code.

17. We will deal with these grounds *seriatim*. The first ground of review is straight forward. It required no further elucidation even at the hearing of this matter. However, Ms. Sephomolo for the applicant failed to answer the question from the court which was: assuming the correctness of their statement that the learned arbitrator misconstrued the charge, what if any difference to the conclusions the learned arbitrator reached, would a different understanding of the charge bring? She sought to show that construing the charge as theft would have led in him requiring a stricter degree of proof. However, there is no where in his award where either the misconstruing of the facts as alleged or even the strict requirement of proof can be discerned. This ground is plainly without merit.

18. With regard to the second ground that there is no evidence to support finding that the 1st respondent was replacing someone who had left his trolley already partly filled. Such evidence was led by the 1st respondent himself. (see pp17 and 19 of the record). As we said earlier, 1st respondent's testimony in this regard went completely unchallenged as nothing was said in cross-examination to contradict it. First respondent was corroborated by his immediate supervisor who was present throughout the time he was loading the trolley. (see p.24 of the record). It follows therefore that even this ground lacks merit.

19. The third ground is that there was no evidence to conclude that it could be Mr. 'Mota who put the cloth on the trolley. Indeed there was no such evidence. However, 1st respondent in an attempt to persuade the arbitrator, argued that it could possible be Mr. 'Mota who put the cloth on the trolley. This was not hard evidence, it was an argument. Correctly, the learned arbitrator never relied on it in making his finding. His finding was based on the fact that there was no sufficient evidence to convince him on a balance of probabilities that 1st

respondent had taken possession of the cloth. (see p.2 paragraph 3 of the award).

20. Fourthly, applicant contended that they were made to give evidence first thereby putting onus on them yet it was not the applicant who was alleging. It is common practice which parties before the DDPR have for a long time agreed to follow, that once the employee has made out a *prima facie* case that he was dismissed, the evidentiary burden shifts to the employer to prove that it (the employer) dismissed fairly. This is what happened in casu.

21. Ms Sephomolo sought to establish prejudice by contending that the applicant testified without knowing what the alleged grounds of unfairness were and what evidence was going to be led against them. This may well be so, however it is evident from the record that the representative of the 1st respondent did put across to Mr. Khoetha, who represented the applicant what evidence was going to be led by the 1st respondent. By so doing he informed him of the case of the 1st respondent. In all such instances Mr. Khoetha who testified on behalf of the applicant either conceded the 1st respondent's version or claimed he did not know. (see pp11 and 12 of the record). In the premises we do not discern any prejudice caused to the applicant by the approach adopted.

22. Ms Sephomolo further argued that the evidence of the supervisor was a complete surprise to them in as much as it was never adduced at the hearing. This is precisely what is meant by the statement that the DDPR is not a review or appeal tribunal of decisions of employers' disciplinary proceedings. The proceedings before the DDPR are a hearing de novo in as much as the arbitrator is not bound by the record of the disciplinary proceedings (see TZICC Clothing Manufacturers .v. Nthati Mahlapha & Anor. LC/REV/125/06). To the extent that he (1st respondent's supervisor) may have said things that were new, applicant had all the right to request to be allowed to

call witnesses to rebut such allegations. There is no allegation that such a request was made and refused, Accordingly we find no merit in this ground as well.

23. It was further contended that the Arbitrator failed to consider evidence given by the witness for the applicant that it was standard procedure that before one drives a trolley away it is his responsibility to check its contents. The learned arbitrator focused his attention on who might have put the cloth on the trolley. Having concluded that 1st respondent's testimony that he did not place the cloth on the trolley was never challenged he dismissed applicant's witness's testimony. The learned arbitrator cannot be faulted in this approach because Mr. Khoetha's testimony was challenged and denied but he failed to challenge that of the 1st respondent. (see p.18 of the record). It follows that even this ground falls to be dismissed. It is accordingly dismissed.

24. Finally it was contended that the learned arbitrator failed to consider whether it was practicable to order reinstatement in terms of section 73(1) of the Code which provides:

> *"(1) If the Labour Court or arbitrator holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The court or arbitrator shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances."*

25. Counsel for the applicant contended that there were a number of factors which the learned arbitrator should have considered before ordering reinstatement. She gave as an example the length of service of the 1st respondent which was only four months. She further

pointed out that the 1st respondent only referred the dispute some three months after his dismissal and that the learned arbitrator was enjoined to enquire whether the job he was doing was still available.

26. Mr. Serabele for the 1st respondent conceded that the arbitrator had the discretion to determine whether reinstatement or compensation was the appropriate remedy after considering the relevant facts. He contended that after considering the facts the learned arbitrator concluded that reinstatement was an appropriate remedy. He went further to point out that a party that objects to reinstatement should have raised the objection during the proceedings.

27. Procedurally a party that would have a difficulty with the remedy of reinstatement is the one that should have brought it into issue. To this end Mr. Serabele's contention is correct. There is no evidence that the applicant ever raised any concern about the practicability of reinstatement. As it was held in the case of Pascalis Molapi .v. Metro Group Ltd & 3 Ors LAC/CIV/R/09/03 (unreported):

> *"The discretion that is required to be exercised in terms of section 73 (1) of the Labour Code Order 1992 has to be a judicial one taking all the facts (and not speculation) into account.*
> *In our view the discretion that we are required to exercise should be informed by the factual circumstances and logic as may be gleaned from the record before us. It is clear from both the facts and submissions advanced on behalf of applicant that he desires reinstatement. Respondents have not filed any opposing affidavits to show whether or not reinstatement may be impracticable in the circumstances of this."* (p.14 of the typed judgment).

28. In casu the 1st respondent specifically pleaded under paragraph 5 of DDPR Referral Form A that the outcome

desired is reinstatement. Form A is like a summons initiating action. It was served on the employer, the applicant herein. Accordingly, applicant came to the arbitration knowing that if the 1st respondent's claim of unfair dismissal succeeded, he wanted to be reinstated. Even during the closing arguments the representative of the 1st respondent concluded his submission with the emphasis of that prayer of reinstatement thus: "we further pray that applicant be reinstated and be paid all salary for the period that applicant has been out of work." The applicant through its representative said nothing to oppose this explicit prayer. It is trite law that what is not denied is assumed to be admitted. As Mr. Serabele correctly pointed out on the basis of the facts before him which were not denied the learned arbitrator concluded that reinstatement was an appropriate remedy.

29. It seems to this court that the approach of the learned arbitrator cannot be faulted. The factors that are being raised by Ms Sephomolo before this court were never raised by the applicants before the arbitrator. He could not deal with them without the risk of speculation and prejudicing the 1st respondent by indirectly acting as his opponent and making himself a devil's advocate. For these reasons this prayer also falls to be dismissed and it is so dismissed. It follows that this review application cannot succeed. It is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 17TH DAY OF APRIL 2008

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA **I CONCUR**
MEMBER

D. TWALA **I CONCUR**
MEMBER

FOR APPLICANT: **ADVOCATE SEPHOMOLO (MS)**
FOR RESPONDENT: **ADVOCATE SERABELE (MR)**