

IN THE LABOUR COURT OF LESOTHO

**LC/REV/450/06
LAC/REV/168/05
A0868/05**

HELD AT MASERU

IN THE MATTER BETWEEN

SECURITY LESOTHO (PTY) LTD

APPLICANT

AND

**DDPR
PHEELLO RAMAKOLOI**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 12/05/09

Review – Arbitrator failed to apply his mind to the totality of the evidence which pointed to the fact that 2nd respondent was indeed insubordinate as alleged by the employer – Arbitrator irregularly relied on his own opinion which was not justified by evidence that 2nd respondent could not hear the call of his supervisor – Award reviewed corrected and set aside and in its place substituted the order that the referral of the applicant is dismissed.

No order as to costs.

1. This is a review arising out of the award of the learned Arbitrator Shale dated 21st November 2005. The award was a sequel to arbitration proceedings that arose as a result of alleged unfair dismissal of the 2nd respondent on the 1st June 2005, for alleged insubordination.
2. At the arbitration the learned arbitrator was presented with *viva voce* evidence as well as the record of the internal appeal

- hearing which more or less took the form of a rehearing, because witnesses were examined and allowed to be cross-examined. At the disciplinary hearing the 2nd respondent was charged with ignoring the call of his supervisor when he called him to come and assign him work, as well as leaving the work station without permission.
3. Evidence led on behalf of the applicant which is confirmed by the 2nd respondent is that on the 7th March 2005, the 2nd respondent arrived late for a parade which starts at 5.30 am. He stood aside as had been a practice in the recent past not to involve him in a parade because he had had an injury in the leg whilst at work. The parade was being conducted by Mr. Kali Makhetha.
 4. Mr. Makhetha testified that at the end of the parade he assigned his men duties, but the 2nd respondent was asked to stay where he was as he would be assigned work later. After he had finished his work at the parade, Mr. Makhetha said he walked to the gate of the factory where they worked. He was followed by other guards as well as the 2nd respondent and one Mahloko.
 5. He stated that when they arrived at the gate, 2nd respondent put his bag down and went to another factory called Global. He testified that when he (2nd respondent) returned he called him inside the sentry box where he was, in order to assign him work. He stated that 2nd respondent ignored him and took his bag and left. He averred that he tried to shout to him but 2nd respondent did not respond. This evidence of Makhetha is more clearly captured in the record of the internal disciplinary appeal hearing, which the learned Arbitrator was availed a copy of by the 2nd respondent himself.
 6. Mr. Makhetha stated that he was with one Mahloko when he called 2nd respondent. Mahloko even tried to help and also call 2nd respondent, but he still did not respond. Another security guard by the name of Portman who was outside the gate also tried to call him, but 2nd respondent ignored him and went home. Mr. Mahloko corroborated the story of Mr. Makhetha. It was as a result of this behaviour that 2nd respondent was subjected to a

disciplinary hearing for insubordination and found guilty and dismissed.

7. 2nd respondent denied that Makhetha called him. His version was that people who came late for the parade were punished by being ordered to run around the factories. He was also subjected to the same punishment because he had arrived late with one Ranyali. His story was that upon their arrival with Ranyali one Mahlongoloane called Ranyali out of the gate and asked him and others to run. He had left 2nd respondent out of the punishment.
8. He averred that when Sgt. Makhetha realized that he had remained behind he asked why he was left. He told him of his injury and Mahlongoloane confirmed that he had an injury. He stated that Mr. Makhetha said he must run otherwise he would not post him. He testified further that at the end of the parade Mr. Makhetha posted everybody else but left him.
9. He testified further that after approximately 20 minutes he went to the gate, where Makhetha and Mahloko were. He averred that he asked for permission to go and fetch his jacket, presumably from Global Factory. He stated that Mr. Makhetha did not respond, but he proceeded to go and fetch his jacket after which he came back to the gate and waited with both Makhetha and Mahloko. He testified further that he decided to leave and go home, because he knew he had a problem being together with Mahloko.
10. He testified that Makhetha does not relate well with him. He was asked if he reported to his supervisors that he was leaving. He said he reported to Makhetha and Mahlongoloane. (See p.9 of the record). He was asked after how long he left, he said it was after an hour. Under cross-examination he was asked if he had permission to leave he said he did not. He was asked if he reported to his supervisor Mr. Makhetha. He said he did not because he could not reach the office. This testimony clearly contradicts 2nd respondent's earlier testimony that they were together with Makhetha at the gate and that he reported to Makhetha and Mahlongoloane that he was leaving.

11. Except for the alleged instruction to run for coming late, the evidence of the 2nd respondent at the arbitration is not consistent with what he told the disciplinary hearing. The issue of Mahlongoloane and Ranyali emerged for the first time at the arbitration. Equally new was the evidence that Mahlongoloane allowed him to stand aside from the parade, while instructing others to run. At the disciplinary hearing he asked Mr. Makhetha why he told him to stand aside? That question cum statement clearly contradicts his latest version that it was Mahlongoloane who permitted him to stand aside.
12. At the disciplinary hearing 2nd respondent said he left for home after approximately 20 minutes. At the arbitration he said he left after an hour. Clearly the discrepancy between the two is too big and it can only be described as an attempt at concealing the truth of what exactly happened on the day in question. We have already shown that 2nd respondent told a plain falsehood by saying that he reported to Makhetha and Mahlongoloane that he was going home, and later admitted under cross-examination that he did not tell anybody.
13. He stated that he left because he knew he had a problem with Mahloko. Elsewhere he said Mahloko was his enemy. However, at the disciplinary hearing he said he left because Makhetha had said he would not post him. Whatever the true reason for his departure, what is clear is that 2nd respondent left the work place defiantly and without permission of anybody in authority. In his testimony Mahloko came no where near making even a single statement that could even remotely be interpreted as evincing enmity towards the 2nd respondent.
14. It appears from the award of the learned arbitrator that he too was not convinced by the story of the 2nd respondent that he was instructed to run. Right from the disciplinary hearing stage Makhetha denied ever ordering 2nd respondent to run. 2nd respondent's own question to Makhetha as to why he (Makhetha) told him to stand aside confirm that Makhetha did not ask him to run. Neither Mahlongoloane nor Ranyali were called by the 2nd respondent to come and confirm the

statements and actions attributed to them by him regarding what transpired when they arrived at work. He gave no reason for failing to call them.

15. For his part Mr. Makhetha confirmed in his answer to 2nd respondent's question that he did not require 2nd respondent to take part in the parade, because he knew that he had an injury. It is therefore, far fetched for a person who makes the acknowledgement of 2nd respondent incapacitation, that he could in turn punish him with an order to run especially when the injury was admittedly in the leg. Mahloko too confirmed that on the day in issue, 2nd respondent was standing aside from the parade like had always been the case that he did not take part in the parade. In the circumstances the learned arbitrator rightly did not accept 2nd respondent's story that his problems started when he was ordered to run around despite his known incapacity as a result of a work related injury.
16. The learned arbitrator correctly found that the enquiry must be directed at the alleged insubordination of the 2nd respondent. The learned arbitrator found proven the fact that Makhetha called the 2nd respondent. He was satisfied that Makhetha was gainsaid by Mr. Mahloko who said he also called the 2nd respondent and that though the latter was a bit far he could hear him. (See P.3 of the award - the last paragraph).
17. Despite making the factual findings as stated in the above paragraph, the learned arbitrator went on to state as follows:

"To my mind, it is very important to know if applicant heard these alleged calls. Mr. Mahloko's evidence that applicant was far when he called him suggest to me that he is not sure if applicant heard his call. Even with Mr. Makhetha, no evidence shows that applicant heard him such that it could be said that he ignored him." (pp. 3-4 of the award).

The learned arbitrator then concluded that 2nd respondent was not insubordinate because there was no proof that he heard the calls and defiantly ignored them. He then ordered that 2nd respondent be reinstated.

18. It is this award which the applicant seeks to have reviewed on the ground that the learned arbitrator failed to apply his mind to the totality of the evidence presented which evidence showed that the 2nd respondent was insubordinate. This is a very valid attack on the award of the learned arbitrator. Evidence shows that Makhetha called 2nd respondent who was just outside the guard room but he did not respond. The 2nd respondent says as much at p.13 of the record that he was outside the room while Mahloko and Makhetha were inside. In the circumstances it cannot reasonably be concluded that the 2nd respondent could not hear two people calling him given his admitted proximity to them.
19. Furthermore, the fact that Mahloko was able to approximate the distance of the 2nd respondent when he called him, can only lead to the conclusion that Mahloko was now outside the sentry box when he called as such, 2nd respondent ought to have heard him. Mr. Makhetha went further to say that Portman who was outside the gate at the time, heard that they were calling 2nd respondent and added his voice in calling him. He also ignored him. It is significant that 2nd respondent made a bare denial that he did not hear the calls and yet Portman who was out side the gate was able to hear. It is also significant that 2nd respondent did not dispute Makhetha's evidence that Portman was outside the gate and that he too tried to call him but he still ignored him.
20. According to learned arbitrator's own summary of the evidence, Mahloko said 2nd respondent could hear him when he called him. Notwithstanding that evidence which is clearly confirmed by the surrounding circumstances, the learned arbitrator relied on his own opinion that Mahloko is not sure if 2nd respondent heard him. He based his opinion on inaccurate summary of the evidence of Mahloko that he (Mahloko) said 2nd respondent was far. This summary is inaccurate, because in his words Mahloko said 2nd respondent was "a bit far." (See p.6 of the record). That is not the samething as saying someone is far. The opinion of the learned arbitrator was therefore not based on evidence.

21. There can be no doubt that the totality of the evidence shows that the 2nd respondent heard the calls of his supervisor as well as those of the other two people who helped him, but chose to ignore them. Clearly the learned arbitrator failed to apply his mind to the evidence as a whole and chose to rely on 2nd respondent's bare denial which was a convenient thing for him (2nd respondent) to do in the circumstances. This is a serious irregularity which materially affects the award of the learned arbitrator and therefore calls for the interference of this court.
22. Even assuming the 2nd respondent did not hear the calls, which evidence clearly shows to the contrary, the 2nd respondent had been insubordinate by leaving work without saying a word to his supervisor who was admittedly with him when he chose to take his bag and leave.
23. The employer showed at the appeal hearing that they considered the manner in which he left work without asking for permission to be an act of defiance. A lot of questions were directed at this aspect of misconduct at the appeal hearing and yet the learned arbitrator failed to apply his mind to it, despite being in possession of the record of the appeal hearing. Quite clearly the applicant established the necessary facts to show that the 2nd respondent was indeed insubordinate. In the premises the award of the learned arbitrator is reviewed, corrected and set aside and in its place substituted the order that the referral of the applicant is dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 22ND DAY OF JUNE 2009

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. PAKALITHA PHATSOANE (HRO)
IN PERSON