

IN THE LABOUR COURT OF LESOTHO      LC/REV/115/07

HELD AT MASERU

IN THE MATTER BETWEEN

STANDARD LESOTHO BANK

APPLICANT

AND

MOSOBELLO MOSOEUNYANE  
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 : 24/02/09*

*Review – Applicant alleging that evidence which favoured its case was not considered – No evidence on record which supported charges against the 1<sup>st</sup> respondent – Infact 1<sup>st</sup> respondent's own evidence was not challenged – Application dismissed and award of DDPR confirmed.*

1. This is an application for the review of the award of learned arbitrator Keta in which he ordered the reinstatement of the 1<sup>st</sup> respondent in his former position with effect from 1<sup>st</sup> October 2007. The 1<sup>st</sup> respondent had been dismissed on the 3<sup>rd</sup> February 2007, following a disciplinary enquiry in which he had been charged with three offences.
2. The charges were as follows:
  - a) Continued misconduct of your staff current account in that you had unpaid items amounting to M508.14 dated 21/12/06 and M2,754.86 dated 22/01/07. This is despite the fact that you were put on second consolidation in November 2006 and issued with a final written warning

where you also made a commitment to sort out your finances.

- b) You are also in breach of the bank's lending procedure in that you contracted further debts inside your loans consolidation period, which was intended for your rehabilitation. This is also a serious breach in line with clause 4.0 of the staff handbook that clearly stipulates that you are expected to conduct your financial affairs in a reasonable manner.
  - c) Contravention of clause 3 of the Articles of Agreement in that you had failed to comply with the rules and regulations of the bank.
- 3. The hearing was held on the 6<sup>th</sup> February with 1<sup>st</sup> respondent's supervisor Mrs. Idah Phafane being the complainant and the key witness to all three charges. Apart from the supervisor and the 1<sup>st</sup> respondent, those present were the chairperson Ms. Ramoqopo and the person who recorded the proceedings Ms. Mpolokeng Mokhutsoane.
- 4. It is common cause that the 1<sup>st</sup> respondent denied both charges (a) and (b). With regard to the first charge he pointed out that the charge was false because he had not been put on second consolidation. It followed therefore that even the final written warning was wrong to the extent that it was informed by the misunderstanding that he had been placed on second consolidation.
- 5. With regard to the second charge, the 1<sup>st</sup> respondent denied that he had acquired further debts during the consolidation period. He submitted that he had ongoing credit at the time of consolidation and that he had last used his credit card in November 2006. It may just be mentioned for the sake of clarity that consolidation itself was on the 30<sup>th</sup> November 2006 and the 1<sup>st</sup> respondent signed for it on the 1<sup>st</sup> December 2006.
- 6. On the last charge the 1<sup>st</sup> respondent observed correctly that it was complementing the first two charges. In fact it was an

- unnecessary and inappropriate splitting of the first two charges because in their own, if proved they amounted to the breach of the rules. It was 1<sup>st</sup> respondent's view that in terms of evidence he had adduced in respect of the first two charges he was not guilty of breach of the rules as alleged.
7. At the conclusion of the hearing the chairperson found 1<sup>st</sup> respondent guilty. There is no record of the punishment that was recommended. It is however, common cause that as a result of those disciplinary proceedings he was dismissed. 1<sup>st</sup> respondent referred a dispute of unfair dismissal to the Directorate of Dispute Prevention and Resolution (DDPR) on the ground that, the charges he faced were invalid and that his dismissal was contrary to the rules of the applicant in particular section 6.1.5 of the Staff Handbook Manual and the "Penalty Guideline Chart."
  8. The referral was arbitrated on the 8<sup>th</sup> August 2007. Two witnesses were called by the employer to justify the fairness of the dismissal of the 1<sup>st</sup> respondent. None of the two witnesses were present at the disciplinary enquiry and therefore, none could testify as to the enquiry's compliance with the rules as the 1<sup>st</sup> respondent had challenged that the hearing failed to comply with the regulations and guidelines.
  9. Evidence led before the arbitrator was given by DW1 Lehlohonolo Masiane who said he was a Team Leader Retail and Credit Performance. In that position he supervises credit facilities given to both internal and external customers of the bank. He is furnished with daily reports of the staff accounts that are in default. If a staff member's name appears on the list he reports to the staff member's supervisor so that he/she can talk to the staff member concerned.
  10. DW1 testified that he had occasion to refer 1<sup>st</sup> respondent to his supervisor Mrs. Phafane because his account had unpaid items. To be honest this is as far as DW1's evidence goes because anything else that happened to the 1<sup>st</sup> respondent thereafter he had no personal knowledge of it. Thereafter DW1 was asked about the process of consolidation. He explained

that consolidation is done at the request of a staff member who has many debts which he wants to be consolidated into one debt. He testified that when granted, consolidation eases staff member's indebtedness by reducing his installment.

11. He testified further that after consolidation one is given a written warning. Thereafter the staff member is watched closely. If it is realized that the person still does not run his account reasonably he is given a final written warning which in some instances may lead to a dismissal. (See p.10 of the record). Asked what happened with regard to 1<sup>st</sup> respondent's consolidation, he had no personal knowledge. He could only say what he said he learned from other people. Under cross-examination 1<sup>st</sup> respondent put it to DW1 that he appeared on the list of defaulters because of a mortgage loan which he did not proceed with, because the owner of the property he intended to buy changed his mind. He (DW2) said he did not know, evaluation people would be ones who would know.
12. The second witness was Mohau Masia who is Head of Operations. He testified that around September 2006 Ms Phafane came to him to report 1<sup>st</sup> respondent's mismanagement of his account. He testified that he told her to speak to him. The problem continued and in November Ms. Phafane approached him to consider consolidation of 1<sup>st</sup> respondent's debts. He testified further that consolidation goes with conditions which are stipulated in section 6.1.5(4) of the Staff Manual. This is the same clause which 1<sup>st</sup> respondent says terms of his consolidation contravened.
13. Clause 6.1.5(4) provides that:
 

*“(4) Consolidation as a result of over indebtedness will be subject to a written warning letter being issued to a borrower. After consolidation should any evidence of continued financial distress/mismanagement become evident further disciplinary action will be undertaken leading to the issuing of a final written warning and subsequent dismissal.” (Emphasis added).*

14. It is common cause that on the 30<sup>th</sup> November 2006, 1<sup>st</sup> respondent was written a letter which consolidated his loans. The letter was written by DW2 Mr. Mohau Masia. In direct violation of clause 6.1.5(4) which says consolidation shall be subject to a written warning; DW2 issued 1<sup>st</sup> respondent with a final written warning. This is why 1<sup>st</sup> respondent repeatedly says that the rules were not followed. He sought to protest that this situation be rectified to no avail.
15. In February 2007, 1<sup>st</sup> respondent was disciplinarily charged because he was said to have been put on 2<sup>nd</sup> consolidation which attracted a final written warning. The 1<sup>st</sup> respondent vigorously disputed that he was never put on second consolidation as such the premise for the charge was wrong. He further disputed that he was inappropriately given a final written warning when he ought to have been given only a written warning. This, he argued led in him being prematurely subjected to a disciplinary hearing. Whilst the chairperson conceded that there was no second consolidation, she does not seem to have given any weight to that fact. As to the issuing of the premature final written warning she did nothing about it.
16. The learned arbitrator relied on these two factors in coming to the conclusion that the respondent's dismissal was substantively unfair. It seems to this court that he cannot be faulted for making that finding since both facts were not disputed by the employer. In his grounds of review counsel for the applicant does not dispute this finding or the basis for reaching it. He argues instead that:
 

*“the arbitrator failed to consider evidence that was before him i.e. that 1<sup>st</sup> respondent failed to conduct his financial affairs in a responsible manner.”*
17. This is essentially the only ground of review raised because the other two are a repetition of the first and the last one relating to failure to give parties the opportunity to argue the practicability or otherwise of reinstatement was withdrawn. All that was being said was that notwithstanding the two factors relied upon

by the arbitrator to find for the 1<sup>st</sup> respondent, there was evidence to support the other two charges which the learned arbitrator failed to consider.

18. The two charges which the arbitrator is accused of not considering evidence relating to them are that:
  - a) 1<sup>st</sup> respondent continued to misconduct his staff current account in that he had unpaid items dated 21/12/06 and 22/01/07.
  - b) 1<sup>st</sup> respondent contracted further debts inside his consolidation period thereby breaching the bank's lending procedures.
19. Two things need to be said about these charges. These are firstly, that the charges were founded on wrong premises namely that there was second consolidation, which evidence shows it never occurred. Secondly, both charges arose because 1<sup>st</sup> respondent was erroneously given a final written warning contrary to rule 6.1.5(4) of the staff handbook and the evidence tendered by DW1 which was to the effect that consolidation attracts a written warning only.
20. During the presentation of applicant's case the court invited Mr. Macheli for the applicant to identify items of evidence from the record which support any of the two charges which the learned arbitrator failed to consider. He correctly conceded and said he could not take the issue any further.
21. The fact of the matter is that no evidence was adduced by any of the two witnesses to support either of the two charges. On the contrary 1<sup>st</sup> respondent denied continuing to mismanage his account after consolidation. He actually said he last used his credit card in November 2006 and that he never entered into new loans after November 2006. This evidence was not disputed by the representatives of the applicant.
22. Mr. Macheli for the applicant sought to raise further grounds that the learned arbitrator sought to divorce issue of second consolidation from the rest of the material facts namely that the

1<sup>st</sup> respondent failed to conduct his account reasonably. We have already found there was no evidence of continued mismanagement of the account by the 1<sup>st</sup> respondent. Mr. Setlojoane for the 1<sup>st</sup> respondent contended that in any event this new ground is taking them by surprise in as much as it was not pleaded. He was correct.

23. Counsel for the applicant argued further that the learned arbitrator irregularly used a procedural flaw to find the dismissal substantively unfair. There are occasions when procedural impropriety may result in the dismissal being substantively unfair. Such is the case where no hearing is held altogether or even if it is held it is conducted contrary to the employer's laid down procedure. The learned arbitrator found the dismissal substantively unfair on account of failure to "follow laid down procedure in treating applicant's (1<sup>st</sup> respondent) case...." We cannot find fault with that approach. In the premises the review application cannot succeed. The award of the DDPR dated 22<sup>nd</sup> September 2007 is confirmed. Neither party asked for costs. Accordingly we make no order as to costs.

THUS DONE AT MASERU THIS 10th DAY OF MARCH 2009

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

**J. M. TAU**  
**MEMBER**

**I CONCUR**

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

**I CONCUR**

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

**ADVOCATE MACHELI**  
**ADVOCATE SETLOJOANE**