

IN THE LABOUR COURT OF LESOTHO

LC/REV/77/07

HELD AT MASERU

IN THE MATTER BETWEEN

STANDARD LESOTHO BANK

APPLICANT

AND

TSIETSI POLANE
DDPR

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Date : 02/09/09

Review of DDPR award - One sided legal representation of a party to arbitration - Section 228A(2)(a) permits legal representation where parties agree - Respondent alleged in defence that there was agreement between the parties and the applicant failed to rebut or challenge respondent's averrements to that effect - Respondent's evidence accepted as unchallenged - Evidence - Arbitrator's refusal to accept the evidence of a witness does not constitute reviewable irregularity as long as the Arbitrator applied his mind to the evidence - Application dismissed with costs.

1. This is an application for the review of the award of Arbitrator Molapo-Mphofe dated 20th June 2007. The facts in brief are that, the respondent was an employee of the applicant at the Leribe branch. He was at the time of the events leading to this case holding the position of Area and Service Centre Manager.
2. The 1st respondent was dismissed on the 15th November 2006, for alleged gross negligence alternatively none compliance with established practice and procedure. The charges arose out of a

- decision taken by the 1st respondent to authorize a special clearance of a cheque to the value of M398,850-00 which later turned out to be fraudulent. The cheque was drawn on ABSA bank in Chiawelo South Africa.
3. Evidence showed that it takes 21 days to clear a foreign cheque. However, there is a special clearance procedure which enables a customer to access funds right away. The particular customer who brought the fraudulent cheque sought and was afforded a special clearance in terms of the rules governing that type of service.
 4. The record of the arbitration proceedings does not show the evidence of the 1st applicant on how he went about clearance of the cheque as the tapes are said to be inaudible on that part. What is clear however, is that, the 1st respondent sought and obtained a written confirmation from ABSA that the cheque was genuine. A fax purportedly from ABSA bank was sent confirming that the cheque was genuine. That such a fax was received and filed accordingly, is confirmed by DW4 Maneo Nkofu who wanted to verify confirmation of yet another cheque of M280,000-00 brought by the same customer a few days later. (See p.111 of the record). She testified that she found fax confirmation of the M398,850-00 instead.
 5. Satisfied that the cheque had been confirmed 1st respondent directed DW2 Jeremia Nku to fill in a deposit slip on behalf of the customer. 1st respondent says the reason he directed an officer of the bank to help the customer was to make sure that all the necessary details of the cheque are filled in the deposit slip. Applicants wanted to impute some ulterior motive in the apparent kindness this particular customer was dealt with by the bank. However, no evidence was advanced to support this imputation. In any event, 1st respondent advanced a reasonable explanation why he asked an officer of the bank to fill the form for the customer.
 6. According to DW3 Moretlo Tsiu, 1st respondent brought the filled deposit slip and the cheque to her to deposit it as a teller. The witness testified that the usual procedure would be for her to

refer the cheque to port and the officer at port would hold the cheque for 21 days while it is being verified. In this instance the cheque was not referred to port, but the deposit was processed by her right away.

7. As a further security measure, DW3 says she put the cheque under UV light to verify its authenticity. The 1st respondent was still standing next to her. When put under the UV light, the cheque responded in the way a genuine cheque would react under such light. (See p.100 of the record). The witness testified that she looked at 1st respondent to ascertain whether she should proceed. The 1st respondent instructed her to clear the cheque immediately. She was asked under cross-examination whether the cheque was presented to her for deposit or for payment. Her answer was that it was presented for deposit. (P.103 of record).
8. It later turned out that the facsimile confirmation of the cheque was not a genuine ABSA confirmation. It also turned out that the cheque itself was not a genuine cheque. Accordingly, the bank was defrauded of the amount of the value of the cheque. 1st respondent was subjected to a disciplinary hearing, found guilty and was dismissed. He referred a dispute of unfair dismissal to the DDPR. In defence of its decision to dismiss 1st respondent the applicant led the testimony of five witnesses.
9. At the close of the case, the learned arbitrator made an award in which she found that the dismissal of the 1st respondent was substantively unfair. She rejected outright the testimony of DW1 as irrelevant and amounting to similar fact evidence. That witness had testified about a cheque of M450,000-00 which the same customer had attempted to encash allegedly with the complicity of the 1st respondent. The learned arbitrator dismissed this evidence as irrelevant to the issue she had to decide. She cannot be faulted for doing so.
10. DW2's testimony was simply to show that 1st respondent asked him to fill the deposit slip for the fraudster. The arbitrator found nothing untoward with that assistance because the 1st respondent provided a reasonable explanation for helping the

- customer even though he was literate. DW3's testimony effectively build 1st respondent's case that he followed all the procedures for special clearance and the cheque reacted like a normal cheque. That evidence immediately dispels any notion of negligence on the part of the 1st respondent. DW4 further strengthened the 1st respondent's case that he only authorized the processing of the cheque after obtaining a confirmation even though it later turned out to be fraudulent.
11. Evidence of DW5 Mr. Ralintsi Tlai-Tlai was the one on which the charge of negligence was founded. The arbitrator found that the 1st respondent acted in accordance with the rules which permit that to verify a cheque it should be faxed to the drawee bank. She concluded that the 1st respondent acted within his authority in authorizing the payment of the cheque. She found that the dismissal was unfair and awarded 12 months salary as compensation.
 12. The bank issued a Notice of Motion calling for the review and setting aside of the decision and the proceedings that led to the award. The grounds of review are found in paragraph 5 of the Founding Affidavit of Lehlohonolo Manamolela. They are the following:
 - (a) 2nd respondent allowed the representative of the 1st respondent to lead unsworn evidence regarding the criminal case of the customer who defrauded the bank.
 - (b) 2nd respondent failed to consider the evidence of the applicant indicating that the 1st respondent failed to follow set procedures.
 - (c) 2nd respondent placed the onus of proving that Monica, Vincent and Derek existed on the applicant whereas such burden should have been borne by the 1st respondent.
 - (d) Generally 2nd respondent placed a criminal standard of proof on the applicant.
 - (e) 2nd respondent contradicts herself by finding that the customer could not fill in a deposit form in the absence of evidence, but then also finds that the customer was a regular customer of the bank who used the bank frequently.

13. The 1st respondent filed the notice of intention to oppose but did not file any opposing affidavit. The matter was set down for hearing on the 28th May 2009. On the date of hearing, the applicant appeared represented by Mr. Loubser who had since been appointed attorneys of record for the applicant after the Association of Lesotho Employers withdrew as applicant's representatives. Mr. Loubser filed written heads of argument in which he raised for the first time an additional ground of representation of parties at the arbitration hearing. It then became necessary that the matter be postponed to enable Mr. Loubser to file supplementary affidavit raising the point of representation to enable Mr. Teele for the 1st respondent to answer and the court to deal with the issue in proper manner.
14. A supplementary affidavit of Mr. Lehlohonolo Manamolela was duly filed. Mr. Manamolela deposed that he objected to Mr. Teele's representation at the conclusion of the conciliation, when 1st respondent indicated that Mr. Teele would be representing him at the arbitration. He averred that in response the arbitrator ruled that the 1st respondent would need a lawyer so he would be allowed to obtain the services of a lawyer. (See paragraph 7 of the supplementary affidavit).
15. Mr. Manamolela averred further that he again objected to the presence of Advocate Teele at the commencement of the arbitration proceedings when he realized his presence. This time he said he was uncomfortable that Mr. Teele has acted as a judge of the High Court. He deposed that:

“the arbitrator then simply said that she does not see any reason why adv. Teele could not continue representing 1st respondent and she ruled that the proceedings should proceed.” (See para 12 of the supplementary affidavit).

Counsel for the applicant contended that the representation of 1st respondent by Mr. Teele was in violation of section 228(2) of the Labour Code (Amendment) Act 2000, (the Act) which limits legal representation at arbitration proceedings to instances where, parties agree, or the arbitrator concludes that it would be

unreasonable to expect a party to deal with the dispute without legal representation. He contended that the one sided legal representation constituted an irregularity that stands to be reviewed and set aside by this court.

16. The 1st respondent filed an opposing affidavit in which he deposed that his lawyer had a telephonic communication with the bank's legal officer Mrs. Mohapelo on the 9th January 2007, enquiring whether the bank would be legally represented at the arbitration as he would be representing 1st respondent. Mrs. Mohapelo replied that "*...Mr. Manamolela would be representing the bank and he said he would have no objection if I was legally represented.*" (See para 4(b) of Answering Affidavit).
17. Mr. Polane deposed further that at the commencement of the arbitration proceedings Mr. Manamolela indicated that he would have no objection to my being represented by Mr. Teele but he enquired whether Mr. Teele could represent me since he had heard he was a judge. Deponent categorically denied that Mr. Manamolela objected to Mr. Teele's appearance and stated instead that he approved his participation in the proceedings. He thus denied that any reviewable irregularity was committed as a result of Mr. Teele's participation in the arbitration proceedings.
18. Faced with this denial, Mr. Loubser for the applicant contended that this means the two affidavits do not take the matter any further. He submitted that the court should rely on the fact that there is nothing in the record that shows that the arbitrator considered the issue whether this was a proper case to allow the participation of a legal practitioner. If Mr. Manamolela is to be believed, he cites two instances where the arbitrator ruled in favour of 1st respondent being legally represented. This was after conclusion of conciliation and at the commencement of the arbitration proceedings. It cannot be correct therefore, that there is no evidence that the arbitrator considered the issue.
19. Mr. Teele for the 1st respondent quashed the argument that the court is faced with a situation of the word of one deponent

against another by referring to the case of *Theko .v. Commissioner of Police and Another 1991 - 1992 LLR - LB 239* at 242, where the court held that where respondent had not replied to or challenged the correctness of the averrements contained in the affidavit of the appellant's attorney, the issue must be "*resolved on the basis of the acceptance of the unchallenged evidence of an officer of this court.*"

20. In casu the 1st respondent has deposed that the applicants agreed to 1st respondent's representation by a legal practitioner. Firstly, the legal officer of the bank allegedly said there would be no objection if 1st respondent is represented by Counsel. Mrs. Mohapeloa to whom the agreement is ascribed has filed no affidavit to deny the remarks attributed to her by Mr. Polane.
21. Secondly, Mr. Manamolela himself has been told to the face that he did not object and that he infact agreed to the representation in line with Mrs. Mohapeloa's earlier undertaking that there would be no objection to 1st respondent's representation by an attorney. Mr. Manamolela has made no attempt to reply or deny the allegations pertaining to his attitude to 1st respondent's representation by a lawyer. We must therefore resolve the issue on the basis of 1st respondent's unchallenged averrements that Mr. Teele's representation was agreed by the parties, pursuant to section 228A(2)(a) of the Act. There was therefore, no reviewable irregularity committed by the learned arbitrator.
22. The second leg of Mr. Loubser's contention was with regard to what he referred to as the real issue that faced the arbitrator. He contended that the arbitrator failed to apply her mind properly to the real issue which was the immediate payment of a cheque in the amount of M398,850-000 and the role played by the 1st respondent in making the funds available to the client. He contended that the arbitrator failed to attach sufficient weight to the evidence of Tlai-Tlai who testified that the client already had a letter of confirmation from the payee bank ABSA bank of Chiawelo when he walked into the office of the 1st respondent.

23. Counsel went on to give graphic details of the criticism leveled by Tlai-Tali to the way the 1st respondent handled the cheque which in his view went to show that 1st respondent was negligent. Mr. Tlai-Tlai's criticism may well be valid. However, failure to buy into it by the arbitrator or disagreement with it, does not constitute a reviewable irregularity. The arbitrator has not failed to apply her mind to the issue as alleged or at all.
24. On the contrary, that is precisely what she did. She specifically found that 1st respondent has not been guilty of negligence as Mr. Tlai-Tlai suggested in his testimony. On the issue of the cheque, evidence adduced by the teller Moretlo Tsiu is that the cheque was presented for deposit and not payment. It is therefore factually incorrect that the 1st respondent was involved in an immediate payment of a foreign cheque. That was not the evidence before the arbitrator. (See p.103 of the paginated record). For these reasons this ground of review falls to be dismissed as well.
25. Counsel for the applicant did not pursue the other grounds of review which appear under paragraph 12 of this judgment. Mr. Teele too did not bother to address them as they had clearly been abandoned. It follows that this review application stands and fall on the two grounds canvassed by counsel before us. Those grounds having failed the application ought not to succeed. It is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 20TH DAY OF OCTOBER 2009

L. A. LETHOBANE
PRESIDENT

D. TWALA
MEMBER

I CONCUR

L. MATELA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

ADVOCATE LOUBSER
ADVOCATE TEELE KC