

IN THE LABOUR COURT OF LESOTHO

LC/REV/587/08  
A0679/06

HELD AT MASERU

IN THE MATTER BETWEEN

MOSA MASILO

APPLICANT

AND

NATIONAL UNIVERSITY OF LESOTHO  
DIRECTORATE OF DISPUTE  
PREVENTION AND RESOLUTION  
L. NTENE

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT

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## JUDGMENT

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*Date: 01/04/09*

*Review - Award of costs by arbitrator - There is nothing wrong with arbitrator fixing amount of costs as parties at arbitration are usually lay persons. However the arbitrator must allow the person against whom he/she intends to award costs to address him/her on the issue. The amounts imposed must not be arbitrary - Evidence arbitrator reached conclusions not justified by evidence - Arbitrator found applicant guilty of misappropriating University money when evidence shows that the money received by applicant belonged to a private sporting organization and that he received it as Treasurer of that organization - Award reviewed and set aside.*

1. The applicant herein was dismissed from the employ of the 1<sup>st</sup> respondent on the 13<sup>th</sup> September 2006. The dismissal followed a disciplinary hearing on the 6<sup>th</sup> and 13<sup>th</sup> July 2006. In that hearing applicant faced three charges that can be summarised as follows:

**Count 1:** Misappropriation of university funds in that you used M7,999-00 for your personal benefit without authorization.

**Count 2:** Dishonesty in that on the 30<sup>th</sup> September 2005, you produced a fictitious receipt No.151311 which purported you paid M7,999-00 in the miscellaneous accounts, which receipt you subsequently gave to Dr. Tsikoane in his capacity as President of NULSSA as evidence that you deposited funds collected from renting university residences during SAUSSA games in December 2004.

**Count 3:** Failure to follow NUL finance regulations in that you failed upon receipt of University Money to the tune of M7999-00 to issue an official receipt which money was collected for accommodation in the university residences during SAUSSA games in December 2004.

2. The facts are largely common cause. The applicant was employed by the respondent as Senior Finance Officer. As a member of staff he was also a member of the National University of Lesotho Staff Sports Association; the NUL Chapter of the Southern African Universities Staff Sports Association (SAUSSA). Applicant was the treasurer of NULSSA, while Dr. Tumelo Tsikoane was its president.
  
3. According to the evidence of DW3 Mr. Mosiuoa Koto NULSSA is a separate entity from the NUL. This is also the evidence of Dr. Tsikoane although he added that the association is not registered. Dr. Tsikoane was asked in Chief if the Association has property. He responded that it has property and money is one of them. Asked to elaborate about the management of the finances of the Association he stated that the Association has three sources of income. These are subscription received from members, money that accrues from fund raising activities and subvention from the University Administration. He went on to state:
 

*“now these three sources are fairly consistent. They happen every year. But I figure I should mention that, in the context of 2004 there was yet another source of money, which was not our money but which we had to*

*manage and that was money accruing from renting university's halls of residences to the visitors."*

4. Dr. Tsikoane testified both at the internal disciplinary hearing and at the DDPR. His testimony is consistent in both occasions. He stated that SAUSSA sporting activities is an annual event. The event is held by members of SAUSSA on a rotational basis. In December 2004 NULSSA was hosting the games at NUL and approximately nine universities were hosted by NULSSA.
5. Evidence of Dr. Tsikoane went on to show that NULSSA has meager financial resources consequently they always ask for assistance from the Administration whenever they have to host an event. The expenditure has to be accounted for afterwards. During the games, members of NULSSA were responsible for allocating rooms to the visitors and collecting rental paid for the accommodation. Dr. Tsikoane could not recall who was responsible for the allocation and collecting of accommodation rentals. It was however, not the applicant.
6. It would appear that as part of fund raising, the association collected money that was raised from sale of beverages. There were also other accountable monies that were being kept and disbursed as need arose by other members of the committee like Mr. Aaron Liphoto who had M10,000-00 with him.
7. Dr. Tsikoane went on to testify that:
 

*"Now when the money has been collected, some of the moneys were paid directly to the cashier in the Bursary by people who were collecting the moneys from different areas. That was the case with Mrs. Mothopi for instance. There was also money which after being collected was given to Mr. Aaron Liphoto in the presence of Mr. Molefi Majalle, and that money was given to me afterwards and I later gave that money to Mr. Masilo."* (At p.150 of the record).

Asked how much that was he said "in the region of M7,000-00; slightly in excess of M7,000-00 plus receipts." Asked what the purpose of giving the money to Mr. Masilo was he stated:

*“well the purpose of giving them to him was that Mr. Masilo was our treasurer and the purpose was that he would deposit the money where it was supposed to go.”*

8. According to his own evidence Dr. Tsikoane was given the money in December 2004. He stated that at that time the University was closing for Christmas and New Year holidays. As a result he only passed the money to Mr. Masilo in February 2005. He averred that he understood that in December people who had to deposit moneys they collected would not be able to get services in the Bursary unit as the University was going on recess. He however expected payments to be made soon after the University opened. This is why starting January 2005, through February, March and April they pressured that people who had to account for moneys in their possession do so. This is the time that he also accounted for what was in his possession by giving the money to the applicant who had been complaining that people who collected monies had not yet paid them over to him. (see p.368 of the record).
9. Dr. Tsikoane went on to state that in pursuing the accounting, he did ultimately manage to get receipts of payments made by one Mrs. Mothopi. “And in the case of Mr. Masilo we also received the accounting for the money that had been requested from the University and was written in his name. We got the accounting on that. That was for purchasing drinks and other things... But there was a problem with regard to this money... that I had given to him.” (see pp154-155 of the record).
10. It is common cause that the applicant failed to account for the money which Dr. Tsikoane gave to him despite the latter’s persistent demand. Dr. Tsikoane testified that after his “persistent request and pressure at some point applicant gave him some receipts. (see p.155 of the record). One of the receipts for the amount of M7,999-00 was questionable for two reasons. Firstly, it was a duplicate receipt and not an original. Secondly, it showed that payment had been made in September 2005 when he expected payments to have been made between January and March 2005. Both at the disciplinary hearing and at the arbitration, Dr. Tsikoane gave

- evidence that he raised the issue of the receipt in a memo to the Vice Chancellor asking that it be verified. (see p.155 and p.370 of the record).
11. At page 371 of the record however, Dr. Tsikoane put the record straight that he wrote the Memo to the Vice Chancellor as an answer to the University's own Memo in which they had stated that "they would not assist us in future if these financial matters are not clarified." Dr. Tsikoane's Memo which is pp406-408 of the record confirms his latter piece of evidence. It is dated 5<sup>th</sup> December 2005 and its heading is:  
 REQUEST FOR ASSISTANCE RELATIVE TO THE  
 FORTHCOMING 7<sup>TH</sup> SAUSSA ANNUAL GAMES,  
 UNIVERSITY OF ZAMBIA, LUSAKA FROM 11<sup>TH</sup> - 17<sup>TH</sup>  
 DECEMBER 2005.
  12. As already pointed out, Dr. Tsikoane proposed that the authenticity of receipt no. 151311 for the payment of M7,999-00 be established. The proposal was made in his Memo to the Vice-Chancellor. The latter tasked DW3 Mr. Koto to investigate the matter in particular, "moneys which were allegedly in the custody of Mr. Mosa Masilo.... to find out what became of those moneys and advise the Vice Chancellor accordingly." (P.95 of the record). DW3 testified that in his investigation he interacted with Dr. Tsikoane who is the President of NULSSA. He gave him information and documents.
  13. With the information obtained from Dr. Tsikoane he (DW3) wrote applicant a letter dated 12<sup>th</sup> May 2006, to explain what became of M7,999-00 which was collected during the SAUSSA games from renting of University residences. The letter's heading read: "Missing funds:SAUSSA Games." The applicant responded, inter alia, that he had not deposited the money and that in the interim, he had pressing family commitments and he used the money on them. He added that the Bursar had already asked him about the money and he had requested his office to recover it from his salary by monthly installments.
  14. On the 13<sup>th</sup> June 2006, DW3 wrote yet another letter in which he asked applicant to provide explanation about receipt No.

- 151311 which purported he paid M7,999-00 into the miscellaneous vote in September 2005. The applicant's response was that the receipt was generated as a test sample receipt when he was testing the new IT's system. He averred further that the receipt "was erroneously included in the receipts that (he) copied Dr. Tsikoane."
15. DW3 testified that after he got applicant's responses he concluded that a misconduct had been committed and that disciplinary measures had to be undertaken. The witness was asked under cross-examination if NULSSA is part of the NUL structures. He stated that NULSSA is a staff sporting club and that it is a separate entity from the NUL. (see p.106 of the record). It was suggested to him that applicant says he was entitled to keep the money and not deposit it with the Bursary unit because it was given to him as the treasurer of NULSSA. His response was that he had no comment because he does not know the regulations of NULSSA (see p.105 of the record).
  16. The next witness DW4 was Mr. Sebehela Selepe who is the Chief Internal Auditor of the 1st respondent. He was assigned to investigate how receipt No. 151311 came into being. His evidence was brief and it was that he joined NUL on 10/04/06. Around May 2006, he was told about Mr. Masilo's case. He was required to investigate receipt No. 151311 which was said to have disappeared in the system.
  17. The witness stated that in his investigations he found that the amount of M7,999-00 was never paid to the University as Mr. Masilo had stated in his letter to Mr. Koto. He went on to aver that he found that receipt No. 151311 was generated by Mr. Masilo on the 30<sup>th</sup> September 2005 and reversed by him on the same day. Asked what was the financial implications of the two transactions, he said it was zero. He went on to state:
 

*"It shows that this money or whatever transaction was being generated didn't have any financial implications. What I mean is that there is no addition or subtraction in the moneys of the University in simple terms. It was just transactional process as far as the normal generation of this generation is concerned."* (see p.119 of the record).

18. Under cross examination it was put to Mr. Selepe that receipt No. 151311 does not show who the debtor who was making payment was. He agreed that it did not show. It was again put to him that Mr. Masilo said he generated the receipt because he was testing the alignment of the computer. He answered that he understood that and that if that was the case a test can be printed as many times as one likes it still remains one transaction.
19. It was further put to him that contrary to what he suggested in his Memo of 30<sup>th</sup> May 2006 , Mr. Masilo says he never misrepresented that he paid money that was in his possession to the University. His response is important; he said:  
*“As you can see, there were some initial collection of data. It was at the beginning of finding out exactly what happened. If you can read my statement well, I haven’t said Mr. Masilo has ... I haven’t said he has committed that misrepresentation. But as I said to you initially ... when this information was given to me ... even when I was in Pretoria, there was an allegation of misrepresentation which I am even quoting here...., I was told that, that receipt was given to one Dr. Tsikoane.”*  
*(see p. 126 of the record).*
20. It was further put to him that whenever one conducts a system test he can use any amount. He agreed that was so. It was suggested to him that applicant says he used M7,999-00 in his own discretion just to conduct a test. He said he does not know, but he would not deny his statement to that effect. He was asked if NULSSA and the University are one and the same thing. He said he did not know. It was put to him that they were separate entities. He would not agree or disagree, but added that he is aware of membership fees being paid in the name of the organization. He was asked where the association keeps its monies. He said he did not know (p.139 of the record).
21. It was put to him further that the money which Mr. Masilo is charged with embezzling is money that belongs to NULSSA. He said the President of the Association should have told him

- so. Counsel for the applicant further put it to him that the President of NULSSA Dr. Tsikoane gave applicant the money in his capacity as treasurer of NULSSA. He said he would not deny. It was also put to him that when Dr. Tsikoane gave applicant the money he did not say who the payer was. He again said he did not know and would not deny it either.
22. In our view it is the evidence of these three witnesses which is most relevant to the determination of the review task ahead of us. The evidence of DW1 and DW2, Messrs Mokoma and Shale respectively related to procedural matters. For his part the applicant restated what he had already put to witnesses for the 1<sup>st</sup> respondent. In a nutshell he said he had been a member of the executive committee of NULSSA since 2002. At the time he was a member of the committee without portfolio. In 2003 he was elected Vice President and in 2004 he became Treasurer. He retained that portfolio until April 2005 when he was suspended from the committee by the President Dr. Tsikoane. The latter said as much in his evidence that as a result of misunderstandings arising from lack of accounting for the December 2004 SAUSSA games he suspended applicant and one Mr. Aaron Liphoto from the committee.
23. The applicant testified that NULSSA is not part of the 1<sup>st</sup> respondent. He stated that it is an association of staff members who participate in sporting activities. He testified that he never received money as an employee of the University which he failed to account for. He received money as the treasurer of NULSSA. (P185 of the record).
24. It is common cause that at the disciplinary hearing applicant requested that the hearing start with charge 3 which read:  
*“Gross misconduct - Failure to follow NUL finance regulations in that you failed upon receipt of University money to the tune of M7,999-00 to issue an official receipt or voucher, the money collected as payment for accommodation in the University residences during the SAUSSA games in December 2004.”*  
 The representative of the 1<sup>st</sup> respondent Mr. Tlhoeli objected on the ground that the counts were interrelated. Applicant raised a



- concern about the amount of M7,999-00. He said the amount he knew of was M7,000-00 and that if they agreed to amend the amount in the charge to read M7,000-00 he would plead guilty to count 1. He stated that he is pleading not guilty to counts 2 and 3. He went further to point out that on count three he could not issue any receipt because he never received any (University) money.
25. Mr. Tlhoeli remarked that “what Mr. Masilo says in relation to charge three makes me think otherwise.” He asked for five minutes break to consult. After the break Mr. Tlhoeli reported that he was withdrawing charge 3 and that he would only lead evidence on charge 2 since applicant had already pleaded guilty to count 1.
  26. At the close of hearing applicant was found guilty on his own plea in count 1 and in count 2 as well. The chairman recommended that he be dismissed. At the arbitration applicant testified that he pleaded guilty to utilizing NULSSA money and not that of the University. He testified further that if he had misappropriated funds of the University “the bursar who is the accountant for the University would be the one pressing the charges or providing evidence.” (See p.197 of the record).
  27. He testified further that he withheld the funds because there were outstanding issues which they needed to sort out as the committee. He was waiting for the committee to meet so that he could get the rest of the money that was still in the hands of other committee members like Mr. Aaron Liphoto. He stated that his holding onto the money was authorized by NULSSA (see p199 of the record).
  28. In his award the learned arbitrator found that the applicant was guilty of misappropriating NUL funds as such NUL had the right to discipline him. He further found him guilty of dishonesty in that he purported to account for the money given to him by Dr. Tsikoane by presenting a fictitious receipt which he had generated in order to deceive Dr. Tsikoane. He concluded by imposing M1,000-00 costs on either the applicant or his representative because in her view applicant had been frivolous

since he pleaded guilty to the charge and later came with a lame excuse that he did not know he was pleading guilty to misappropriating NUL funds.

29. Against these findings applicant has launched this review application. The grounds of review are many but the most relevant are the following:
- (i) The award of costs against applicant or his representative was irregular and unjustified.
  - (ii) The award of the arbitrator is grossly unreasonable in the light of the evidence in as much as applicant was never involved in the collection of money during the games and the money given to him by Dr. Tsikoane was received by him as treasurer of NULSSA and not as a finance officer of the University.
30. In support of the first ground of review, Mr. Letsika for the applicant argued that the learned arbitrator wrongly predicated her decision to impose costs on the fact that the applicant had pleaded guilty at the disciplinary hearing. He contended that a person who pleaded guilty at a disciplinary hearing may still refer a complaint to the DDPR on the ground for instance that the penalty imposed was harsh. This is true, but to be fair to the learned arbitrator his attitude was that given the facts as found by him at the arbitration there was no reasonable justification for the applicant to have pursued the matter further after he was found guilty on his own plea. It is a totally different issue whether the learned arbitrator's finding on the facts which led to the imposition of costs was itself justified by the evidence tendered.
31. Mr. Letsika further complained that there is no precedent for the learned arbitrator to fix the amount of costs that must be paid. He argued further that the normal practice is to dismiss a claim with costs and a party who is awarded costs would normally draw the bill of costs and tax the same. This again is true when this argument is related to legal practitioners who know how to draw the bill of costs and tax it. It is to be recalled that the DDPR is not a court of law and practitioners do not normally appear in proceedings before it except with leave of the

- arbitrator. Parties at arbitration are lay people who would appreciate it when costs are fixed for them like the learned arbitrator did in casu. I would therefore not find fault with the practice of fixing the amount of costs as such.
32. The last leg of Mr. Letsika's argument on this issue of costs makes a lot of sense and it correctly found support from Mr. Moiloa for the 1<sup>st</sup> respondent. The argument was that the learned arbitrator did not afford the applicant a hearing before she decided to impose punitive costs on him. Furthermore, he contended that even the amount of M1.000-00 is arbitrary. He relied on the case of *Sekonyela and Others .v. Sekonyela LAC* (2000-2004) 271 at 272-3.
  33. While we fully agree with the argument that the principle of *audi alteram partem* applied in the circumstances, we cannot agree with the inference being sought to be drawn by Mr. Letsika that failure by the arbitrator to observe the principle was indicative of bias. This is a simple mistake of law which of course in terms of sec. 228F (3) of the Labour Code (Amendment) Act 2000 makes the award of the learned arbitrator reviewable.
  34. It was necessary that the learned arbitrator alerted applicant to the view that she held that costs was necessary in the circumstances so as to enable the applicant to address her on the issue. Furthermore, some indication of how the amount of costs to be imposed was arrived at was necessary. In the absence of factors that were taken into account to determine the amount, the figure remains an arbitrary one and it also falls to be reviewed, corrected and set aside just like the decision to impose costs which was taken without affording applicant a hearing.
  35. In support of the second ground of review, Mr. Letsika contended that the award was unreasonable in as much as the findings of the learned arbitrator are not rationally connected to the evidence before her. (P.6 of the heads of argument). He contended that "there were mainly two issues to be resolved by the DDPR. First whether the money belonged to the employer or the sporting organization known as NULSSA. Second, the

DDPR had to resolve whether or not the duplicate receipt constituted a misrepresentation by the applicant that the moneys given to him by Dr. Tsikoane were paid to the bursary.” This, we agree is a succinct summary of the issues that were to be determined by the DDPR.

36. With regard to the first issue, the applicant was charged with misappropriating University funds. Applicant pleaded guilty even though he says he was pleading guilty to using NULSSA money and not University money. The learned arbitrator totally rejected his evidence and said applicant knew that the money belonged to NUL. Looking at the record however, there is no evidence on record that supports the learned arbitrator’s conclusion that applicant knew that the money belonged to NUL. Even Dr. Tsikoane who is the one who gave him the money never said he told him he was giving him NUL money.
37. At the disciplinary hearing Dr. Tsikoane said he gave applicant in excess of M7,000-00 which he said he “thought it would be deposited with the bursary” (see p.369 of the record). At the same hearing applicant, while pleading guilty to charge one, pleaded not guilty to charge 3 which accused him of failing to issue receipt upon receiving University money. His reason for not pleading guilty to this charge was “I never received any money and as a result, I could not issue any receipt.” (See p362 of the record). It is common cause that on hearing this the representative of the 1<sup>st</sup> respondent withdrew the charge. In other words he was acknowledging that applicant did not receive any University money in the amount alleged in the charge. However, this was the same amount charge 1 alleged applicant had misappropriated. If he did not receive University money which was conceded by representative of the 1<sup>st</sup> respondent, how could he misappropriate University funds which never came into his possession?
38. At the arbitration hearing, Dr. Tsikoane is recorded at page 151 of the record as saying that he gave Mr. Masilo the money as Treasurer of NULSSA and that the purpose of giving it to him “was that he would deposit the money where it was supposed to go.” As it can be seen at the disciplinary hearing he said he

- “thought” he would deposit it with the bursary. At the arbitration he said the purpose was that he would deposit it where it was supposed to go. No shred of evidence was tendered that the applicant was told by the person who gave him money or any one in the committee for that matter that the money he was given belonged to the University. His own evidence that he did not receive University money was confirmed by the representative of the University when he decided to withdraw the charge relating to receipt and issuance of official receipt. It follows from what we have said that the statement of the learned arbitrator that “applicant knew that the money belonged to NUL when he used it.” (p14 of the record) is not supported by evidence led before her.
39. The learned arbitrator made further statements of fact which are totally her own creation as there is no evidence to support such remarks. This is what she said at page 13 of the record.
- “NUL rented its halls of residence to the participants of the games and entrusted NULSA for the collection of the rent on its behalf. Certain members of NULSSA were entrusted with responsibility of the collection of the rent. Rent was collected and given to the President of NULSSA. The President of NULSSA in turn handed over the money to the applicant as the Treasurer of NULSSA to deposit it with the NUL Bursar. Applicant instead of depositing the money with the Bursar used the money for his personal matters.”*
40. There is no evidence that the NUL itself rented halls of residence and entrusted NULSSA to collect rent on its behalf. Not a single one of the witnesses who testified for the 1<sup>st</sup> respondent gave such a testimony. Equally unsupported by evidence is the statement that the President of NULSSA gave applicant the money “to deposit it with the NUL Bursar.” On the contrary the applicant said he was given the money to keep it as the Treasurer of NULSSA. The President conceded this point in his evidence under cross examination. At pp.167-168 of the record Mr. Letsika asked him questions which he answered as follows:

- Mr. Letsika:** “And he finally says that as Treasurer of the organization NULSSA he was entitled to keep the money that is the money you gave him around February 2005?”
- Dr. Tsikoane:** “Keeping it as what?”
- Mr. Letsika:** No he was entitled to keep the money and to take it further to give it back to you as and when you requested it as the President of the organization?”
- Dr. Tsikoane:** Well in the context of the responsibilities and duties of the Treasurer of an organization including this one that is correct. But I want to go further to say that keeping this kind of money follows the known University procedures established. And that also applies to our own money because we keep our money in the University coffers, where we have requested the University to open a vote.
- Mr. Letsika:** Keeping in this context Dr. Tsikoane to be fair with you means keeping as you kept the money, literally physically keeping the money as you kept the money from December up to February when you gave it to Mr. Masilo that is what keeping means in this context.
- Dr. Tsikoane:** Thanks for that clarification.”

41. The concession of Dr. Tsikoane that applicant was given the money to keep as the Treasurer of NULSSA leads us to the next question whether the money belonged to the University. In her award the learned arbitrator said it did. She based her finding on the false statement that the NUL had rented its halls of residence to the participants. We have already shown that there is no evidence to support that statement.
42. The correct statement of facts in this regard is to be found in the evidence of Dr. Tsikoane both at the disciplinary hearing and at the arbitration. At the disciplinary hearing he said that their organization has meagre resources. As a result;  
*“each time there is an activity even if it is not SAUSSA, we normally ask for assistance from NUL. We have been*

*getting that assistance in various forms i.e. vehicles, finances etc. In 2004 we hosted nine universities. In order to shoulder that responsibility we asked for assistance from the University and that was part of the Treasurer's responsibility." (See p367 of the record).*

Even though he did not single out accommodation, it is a fair assumption that provision of accommodation at University residences was one of the ways in which the University assisted NULSSA. This is confirmed by Dr. Tsikoane's further testimony that their visitors were accommodated in students' residences and that there was a team from NULSSA, not NUL, responsible for allocating rooms and collecting the rentals.

43. Dr. Tsikoane outlined the sources of income of the organization which he said are fairly consistent as they happen each year. These were money from members' subscription, money from fund raising activities and money received from the University. He went on to say:

*"But I figure I should also mention that in the context of 2004, there was yet another source of money, which was not our money but which we had to manage. And that was money accruing from renting University's halls of residence to the visitors." (See p.148 of the record).*

Now it is clear from this evidence that NULSSA itself was responsible for renting the residences. It also had to collect and manage the funds collected. Indeed at the disciplinary hearing Dr. Tsikoane said common sense dictated that they should account for the assistance given to them and this included, it would appear, money collected for rentals.

44. It cannot reasonably be concluded from the above evidence that the money belonged to the NUL at the time that it was collected and given to the applicant. Evidence has established that NULSSA is independent from NUL. The learned arbitrator found as much at page 4 of her award. Evidence further shows that NULSSA was assisted by NUL in hosting the games. Some of the assistance had to be accounted for. Provision of housing was one of them. NULSSA collected and had to manage the funds collected from renting residences. However, at point of collection and management the money was NULSSA

money. It could only become NUL money once NULSSA had paid it into the University account. Before then it was NULSSA money even if the intention would have been to account to the NUL with it in the end. This is clear from the evidence of Dr. Tsikoane.

45. Not a single one of the other witnesses who testified on behalf of the 1<sup>st</sup> respondent was able to say that the money allegedly misappropriated by the applicant belonged to the University. Mr. Koto who was the investigator was in no doubt about the propriety of the money he was tasked to investigate. The heading of his letter to applicant is: "Re.: Missing Funds SAUSSA Games," The first line of the letter reads:  
*"I have been appointed by the acting Vice-Chancellor to investigate missing funds for the SAUSSA games."*  
 He was clear that the funds he was investigating were not NUL funds but SAUSSA games funds. Under cross-examination he would not deny that the funds were given by the President of the Association to a Treasurer of the Association which is separate from the University. (See pp103-106 of the record). DW4 Mr. Selepe was asked if he is aware that the money that applicant is accused of misappropriating belonged to NULSSA. He said he was aware (see pp137-138 of the record).
46. The bulk of evidence point to one thing that the money was collected by NULSSA. It further shows that it was paid to applicant as Treasurer of NULSSA who had to keep it in his capacity as Treasurer. Only Dr. Tsikoane sought to say that the money belonged to NUL when it was collected. (See p.149 of the record). That testimony is inconsistent with the evidence that says NULSSA is a separate entity from NUL and from his own evidence that NULSSA had to collect and manage the rental collected.
47. Mr. Moiloa for the 1<sup>st</sup> respondent argued that everybody appreciated that the funds belonged to NUL and that NULSSA merely collected them on behalf of NUL. That was probably the understanding of the person who prepared the charges. It was not the understanding of Mr. Koto who investigated the disappearance of the funds. Neither was it the understanding of



- Mr. Selepe who clearly conceded that the funds belonged to NULSSA. Indeed as we showed even Dr. Tsikoane's evidence is clear that the funds were collected by NULSSA and that it had to manage such funds. However, NULSSA had to account to the University for the assistance the latter rendered to it.
48. Quite clearly the funds belonged to NULSSA. That it intended to account for the use of University residences with it does not make it University money before it is actually paid over to the University. Accordingly, the contention on behalf of the applicant that the finding that the money belonged to the NUL is not rationally connected to the evidence tendered thus rendering it reviewable must be upheld. Quite clearly the University was a bit over zealous in taking up what was clearly an internal private matter of NULSSA and turned it into its own.
  49. It is besides the question whether this was a case of misconduct committed outside the workplace for which the employer was entitled to discipline the employee. The learned arbitrator misdirected herself by taking the enquiry to that level at page 5 of her award because that was not the issue before her to determine. The issue was whether the University was entitled to allege that funds misappropriated under a private organization like NULSSA were its funds and therefore take over the role which should be of a wronged organization and itself discipline the person concerned.
  50. The finding that the money did not belong to the University automatically leads to the finding that even the misrepresentation if there was one was not made to the University but to NULSSA. Applicant did not send a receipt purporting payment to the Bursar of the University. He sent it to Dr. Tsikoane in his capacity as the President of NULSSA. The University is therefore not justified to claim that the applicant has been dishonest to it. The finding of the learned arbitrator that applicant deceived the University is therefore not justifiable in the light of the evidence. It accordingly calls for this Court to interference with the award.

51. A lot can be said about the evidence tendered and the extent to which the learned arbitrator has failed to pay due regard to it, thereby arriving at conclusions not justified by the facts. For example, Dr. Tsikoane testified and the same was confirmed by applicant that he suspended him from the committee when he failed to account for the money he gave him. This was in order, because the association ought to have the power to discipline its members. This was in April 2005. Thereafter all was, it would seem quiet.
52. The problem of the missing funds resurfaced towards the end of that year when the association was asking for assistance for the 2005 games to be held in Lusaka Zambia. The University asked correctly that there be full accounting for past assistance. The Memo of Dr. Tsikoane of 5th December 2005, to the acting Vice Chancellor says as much that it is a request for assistance which was coupled with an attempt to account for past assistance.
53. It was at this point that the President of the Association defended his Association's failure to account by pointing accusing finger at some of the Association's members applicant included. Instead of leaving NULSSA to deal with its members and insist to hold it to account as it was the one being called to account, the acting Vice Chancellor got derailed. He loosened his grip on NULSSA and pounced on the individual NULSSA was seeking shelter in the shadow of. That was irregular.
54. In his testimony applicant pointed out that if he had misappropriated NUL money the Bursar would be the complainant. This evidence was apparently not considered and yet it was a very crucial piece of evidence that showed the propriety of the funds misappropriated. From the evidence tendered both at the disciplinary hearing and at the arbitration it is clear that Dr. Tsikoane was the complainant as even key evidence came from him.
55. This was a clear indication that the funds involved here had not yet become NUL funds. They were at the point of their misappropriation still NULSSA funds. Evidence clearly point to

this and yet it was totally ignored and conclusions which were not justified by evidence were reached which purported that applicant misappropriated NUL funds, well knowing them to be NUL funds and that he later deceived the University that he paid the funds into the Bursary.

56. The irregularities committed are of a very gross nature in as much as all the findings are against the weight of evidence. The award of the learned arbitrator is therefore reviewed and set aside in its entirety. Proper assessment of the evidence would have led to the conclusion that applicant was improperly and unfairly charged with stealing NULSSA funds under the guise that they were NUL funds. In the circumstances the learned arbitrator would inevitably have ordered reinstatement but for her misdirection on the evidence. In the premises the award of the DDPR is reviewed, corrected and set aside and in its place substituted by the following order:
- (a) The dismissal of the applicant by the 1<sup>st</sup> respondent on the 13th September 2006 was substantively unfair.
  - (b) The 1<sup>st</sup> respondent is ordered to reinstate the applicant in his job without loss of seniority or benefits he would have enjoyed but for the dismissal; with immediate effect.
  - (c) The 1<sup>st</sup> respondent is ordered to pay applicant arrears of salary lost as a result of the unfair dismissal from the date of dismissal to the date of reinstatement.

THUS DONE AT MASERU THIS 24TH DAY OF APRIL 2009

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

**M. THAKALEKOALA**  
**MEMBER**

**I CONCUR**

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

**I CONCUR**

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

**MR. LETSIKA**  
**MR. MOILOA assisted by Ms Kantoro**