

IN THE LABOUR COURT OF LESOTHO

LC/REV/525/06

HELD AT MASERU

IN THE MATTER BETWEEN

MANTSOAKI MALAKANE

APPLICANT

AND

STANDARD BANK LESOTHO (PTY) LTD

1<sup>ST</sup> RESPONDENT

THE ARBITRATOR (C.T. THAMAE)

2<sup>ND</sup> RESPONDENT

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## JUDGMENT

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*Date: 22/09/2010*

*Authority to defend proceedings on behalf of a juristic person must be back by a resolution of the Board of Directors or there must at least be an averments in the opposing affidavit that deponent is authorised - Evidence - Applicant dismissed on a suspicion not supported by hard evidence - Hearsay - Arbitrator accepting hearsay evidence to support the suspicions of a shortage - Dismissal ought to have been found unfair - Award reviewed, corrected and set aside.*

1. The applicant was employed by the 1<sup>st</sup> respondent and she had risen through the ranks to the position of supervisor in charge of tellers at the time of her dismissal. Events leading to her dismissal are brief and simple. On the 19<sup>th</sup> January 2006, a member of the bank's internal audit department Mr. Tlai-Tlai got a tip off from one member of staff that applicant had taken M15,800-00 from her cash till for her personal use.
2. Mr. Tlai-Tlai immediately caused someone to be sent to go and

carry out a snap check on the applicant. The snap check was conducted by Mr. Lekhooa Pitso the Assistant Manager Client Services. His testimony was that he found applicant's cash holdings balancing with her computer record. He then allowed applicant to continue with her telling duties.

3. A further tip off suggested that applicant could be balancing because she had electronically transferred cash to teller Tjabaka. Mr. Pitso went to check applicant's treasury and found that cash specification balance on the applicant's last day of telling duties was M17,130-32. When that cash specification balance was related to the cash balance at the time of the snap check there was a shortfall of M15,800-00.
4. Mr. Pitso had found that at the time he checked applicant the same amount had been electronically transferred by applicant to teller Tjabaka. After the 2<sup>nd</sup> tip off he was instructed to go and check Tjabaka. He found that the transfer from applicant to Tjabaka had been reversed, as such the latter balanced as well. He too was allowed to proceed with his duties, because nothing untoward had been found. Nothing further was done that day to confront either applicant or Tjabaka about the transfers.
5. The following day applicant was suspended. She was later charged of dishonesty and tempering with bank's records in that "a day or days preceding the 19<sup>th</sup> January 2006, until around 10.30am you had had an imbalance of M15,8000-00 in your cash holdings which you did not reflect in your cash specification as per procedure." She was further accused of seeking to hide this by unprocedurally floating transfers of the same amount from one teller to another without accompanying it with physical cash.
6. She was found guilty and dismissed. She referred a dispute of unfair dismissal to the DDPR. Mr. Pitso who was PW1 testified as hereinbefore narrated. The thrust of his evidence being that applicant had a shortage in her cash holdings. Under cross-examination the applicant impressed on witness Pitso that she balanced, hence why he allowed her to proceed with her telling duties. He agreed, but said the report he submitted showed the discrepancies brought about by the back and forth transfer of cash

between her and Tjabaka.

7. The applicant sought to know whether either her or Tjabaka failed to balance. The response was that they both balanced. She asked a direct question why in the circumstances Management had this strong feeling that one of them had a shortage. PW2 answered that "what is so suspicious about that transaction is that there were no supporting vouchers."
8. He averred in answer to a further question what he meant by supporting vouchers, that there ought to have been inter-teller vouchers evidencing the transfer. Applicant asked him if he asked for such vouchers from her at the time. His answer was that they were asked for by her supervisor i.e. applicant's immediate supervisor. However, this supervisor was not called to testify. The long and short of his answer is therefore that he did not ask for them i.e. the supporting vouchers. He is not in a position therefore to say that they were not there.
9. PW2 was Mr. Ralintsi Tlailai, the internal auditor. His testimony was that he was tipped off by a whistle blower that applicant's physical cash balance is not what it purports to be and that infact applicant is short by M15,800-00. He then instructed one Mateboho Nkeane to get someone to check the applicant. He stated that while the checking was going on or at about its conclusion, he got another tip off that applicant will be found to balance because they were manipulating the system with another teller named Tjabaka. He averred that he then instructed that Mr. Tjabaka's physical cash holdings be also checked.
10. He averred further that when cash is transferred between two tellers there has to be an inter-teller slip showing the cash transferred with denominations of such cash specified. He averred that the absence of such a slip is evidence of "total dishonesty," because that slip would be able to confirm the amount transferred to the other teller.
11. He stated that he later met with the Branch Management over the issue. He asked the Management to retrieve the two tellers' reports (teller boxes) so that he could check what had been

happening. He found that at 10.30am when applicant was checked she had not yet done telling duties. She had up till then been out supervising tellers. The challenge was to link what her teller log report showed with the allegation made against her. (see p.39 of the transcribed record).

12. PW2 continued to narrate that applicant's closing balance on Tuesday 17<sup>th</sup> January had been M17,130-52. This had admittedly been her last telling day prior to the 19<sup>th</sup> January, when she was checked. Upon checking, the physical cash was then less by the M15,800-00 in issue. He was asked at p.42 of the record if that meant there was anything wrong. His response was "that is why we want to know what happened." He went on to state that the report discovered that the same amount had been transferred from applicant's machine to Tjabaka.
13. Mr. Tlailai went on to testify that the situation was that applicant was checked first and found to balance, because the amount in issue appeared transferred to Tjabaka. When the second teller was checked, the check on the applicant had been completed. He stated that to establish the shortage or excess the two tellers ought to have been checked simultaneously (see p.43 of transcribed record). He is correct. Now when the checker got to Tjabaka he also balanced because the amount in issue had been transferred back to applicant.
14. PW2 was asked if he spoke to Tjabaka about what happened and what his response had been. He said he did, but what Tjabaka related to him concerning the happenings of the day is all hearsay as such no reliance can be made on it. Asked as to what finally happened at the end of the day, he said applicant balanced. Asked how he eventually balanced in the light of allegations made against her, he said applicant could have found cash elsewhere to cover the shortfall. Now this is dangerous speculation that Mr. Tlailai was led into and even Mr. Manamolela who led him into it, was aware he did something wrong, because he asked him "Is that your speculation?" In the absence of evidence to support it, such speculation cannot be accepted and it ought to have been rejected by the learned arbitrator.

15. The representative Mr. Manamolela asked PW2 to be specific and tell the tribunal what wrong applicant was accused of doing. (see p.48 of transcribed record). He could not be specific and sought to play around with the figure of M15,800-00 that was apparently transferred between applicant and Tjabaka. Mr. Manamolela asked him further "But I have learned that upon snap checking she balanced?" The response was "in quotes."
16. Under cross-examination it was put to PW2 that on her last day of telling applicant's cash specification was checked and locked away by applicant's supervisor, Lisemelo Makara. He could not deny, but confirmed that when applicant was checked she had not been doing telling since the time she was checked by Lisemelo who also locked her cash away. Applicant sought to know when he could have taken the cash for her use. He said he did not know, but said applicant had access to the cash even on the 18<sup>th</sup>, even though she did not do telling.
19. Applicant put it to the witness that her cash holdings balanced right through, up to closing time on the 19<sup>th</sup> January and asked if the witness thinks she could have connived with the supervisors so that they balanced her cash balances when she did not balance? The witness could only say that he has already answered the question. The truth, however is that he had not, and that question required an answer. Asked what caused him and the bank to suspect applicant of dishonesty, he said it is because applicant transferred money to Tjabaka without accompanying the transfer with physical cash. Now this is either hearsay or speculation because no such evidence was tendered at the arbitration.
20. It is possibly hearsay because, time and again Mr. Tlailai said Tjabaka told him that applicant did not accompany the electronic transfer with physical cash. He and Mr. Manamolela finally sought to justify this by handing an unsworn statement allegedly made by Tjabaka confirming the statements that Mr. Tlailai attributed to him. The said Mr. Tjabaka was never called to testify and stand the test of cross-examination on the alleged statements attributed to him. Such evidence could not be admissible let alone support a serious charge of dishonesty against applicant in the absence of its

author.

21. Despite these evidential shortcomings that we have traversed, the learned arbitrator came to the conclusion that applicant's dismissal was fair basing himself on the hearsay evidence presented by Mr. Tlaitlai. In particular he accepted the alleged statements of Tjabaka that the transfer was made to him by applicant without any cash accompanying it. He further committed a grave irregularity of basing his adverse finding against applicant on PW2's wild speculation that applicant may have balanced on the day because she might have obtained cash from elsewhere.
22. The learned arbitrator went further to rely on hearsay evidence that Tjabaka had allegedly said he had sufficient funds to do his work and that he never asked for cash transfer from applicant. He concluded incorrectly that the transfer had not been recorded in accordance with practice concerning inter-teller transfer. We say incorrectly because there is no evidence that any of the witnesses asked applicant for the slips at the time of the check.
23. In answer to applicant's question Mr. Pitso said the slip was asked for by applicant's immediate supervisor. However, that supervisor was never called to confirm that he/she asked for the slip and that applicant failed to produce it. Mr. Tlaitlai could not have asked for it because, he testified that after ordering the snap checks he went out and only came back in the afternoon when he was presented with reports. There is therefore no evidential basis for the conclusion that the transfer was not backed by necessary inter-teller transfer slips.
24. The learned arbitrator opined that the transfers may have been done with the intention to conceal something sinister. On the basis of the aforesaid hearsay evidence the learned arbitrator concluded that he was "satisfied.....that applicant had an imbalance of M15,800-00 in her cash holdings on 19<sup>th</sup> January 2006, which she attempted to conceal by floating fraudulent transfers between herself and teller Tjabaka." He then pronounced the dismissal of the applicant as substantively and procedurally fair.
25. Applicant applied for the review of the award of the learned

arbitrator contending that:

- (a) There was no iota of evidence to support the charges against her.
  - (b) The learned arbitrator upheld her dismissal despite clear evidence that contrary to the charge she had no imbalance and the witnesses of the 2<sup>nd</sup> respondent could not explain why her books balanced.
  - (c) In arriving at his finding the learned arbitrator relied on inadmissible hearsay evidence such as documents purportedly emanating from witnesses who did not testify which documents applicant directly challenged their admissibility.
  - (d) Applicant is not guilty of fraud or dishonesty in as much as there is no evidence to prove applicant's guilt.
26. In its answering affidavit the 1<sup>st</sup> respondent denied all applicant's contentions and contended in limine that the applicant has not set out grounds of review and that the application is an appeal disguised as a review. In her replying affidavit the applicant also raised a point in limine challenging the authority of Mr. Manamolela to defend the present proceedings and to purport to represent 1<sup>st</sup> respondent in these proceedings.
27. At the start of the hearing counsel for both sides agreed that in order to save time and costs they will adopt a holistic approach and argue both the points raised in limine together with the merits. Starting with the point raised on behalf of the 1<sup>st</sup> respondent, Mr. Matooane rightly did not pursue it. The applicant's application directly challenges the findings of the learned arbitrator that they are either not justified by evidence presented or that they are based on inadmissible hearsay evidence. Whether applicant is right in so saying is something different, but the grounds constitute justifiable grounds for review.
28. With regard to the authority of Mr. Manamolela, Mr. Shale for the applicant contended that there is no resolution of the board of 1<sup>st</sup> respondent evidencing that 1<sup>st</sup> respondent resolved to oppose this

application. He contended further that *ex facie* the opposing affidavit Mr. Manamolela has not been authorised to depose to the affidavit.

29. In response Mr. Matooane referred us to the cases of Mall (Cape) (Pty) Ltd .v. Meron Ko-operasie Bpk 1957 (2) SA 347. Mr. Shale for the applicant had relied on the same case in support of the proposition that:

*“even though an artificial person is not enjoined to invariably annex or attach a resolution evidencing that it has resolved to sue or defend, at least there must be evidence before court to warrant the conclusion that it is the 1<sup>st</sup> respondent which is litigating not some unauthorised person on its behalf.”* Vide para 3.4 of applicants’ heads of argument.

Mr. Shale contended that Mr. Manamolela had no authority because there is neither a resolution authorising him to defend the application nor an averrement in the affidavit that he is so authorised.

30. Mr. Manamolela’s affidavit is without doubt suffering from the shortcomings pointed out by Mr. Shale. Other than state that he is a Human Resources Manager, Mr. Manamolela does not state what authority he has to oppose the review application. The position of Human Resources Manager does not bestow him the powers and authority to be the ears or eyes of the company as would a director.
31. Mr. Matooane for the 1<sup>st</sup> respondent argued to the contrary that Mall’s case is authority for the proposition that where there is minimal evidence of authority it behoves the person challenging the existence of the authority to bring evidence. He contended that the authority of Mr. Manamolela having not been challenged at the DDPR cannot be challenged before this court as well.
32. We agree with Mr. Matooane that Mr. Manamolela’s representation was not challenged before the DDPR. It is not challenged before this court either. What is being challenged is his authority to defend the proceedings on behalf of the 1<sup>st</sup> respondent or authority to file opposing affidavit in the absence of a company resolution or



even an averments under oath that he is duly authorised. Such would constitute the best evidence that the defence to the proceedings has been properly authorised (see Mall's case p.352 A). The learned Watermeyer J then proceeds to state that:

*“where as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court then I consider that a minimum of evidence will be required from the applicant.”*

We do not have any such minimum evidence in casu and as such agree with Mr. Shale that Mr. Manamolela has failed to provide the minimum evidence to show that he is authorised to oppose the review application or to file the opposing affidavit on behalf of the respondent.

33. Mr. Matooane for the 1<sup>st</sup> respondent contended that whether the review is opposed or not this court cannot rubber stamp applicant's application. It still has the duty to determine the application justly and fairly. He was in our view correct. Applicant contended that there was no evidence to support the charges against her and that it was irregular to uphold her dismissal when evidence established that her cash holdings balanced.
34. There is no doubt that the conviction at the disciplinary hearing and the upholding of the dismissal all went against the weight of evidence adduced. There was no iota of evidence as applicant contended that she had a shortage. What the 1<sup>st</sup> respondent had was a suspicion which was never able to be confirmed that applicant had a shortage. PW2 correctly stated, that if may be applicant was checked simultaneously with Tjabaka something could have possibly been found. He conceded that no shortage was established because they were checked at different times. It follows that applicant was charged and found guilty of a suspicion which was not confirmed by evidence.
35. What made the case even more difficult to prove was the fact that the whistle blower was kept secret throughout. This is the person who could have shed light on the shortage if indeed there was any. The 1<sup>st</sup> respondent further made its case difficult by getting rid of

Tjabaka who could have been utilized as a witness to substantiate the claims of floating of transfers against the applicant. In the absence of Tjabaka no one was available to prove that any such thing as alleged was indeed done by the applicant. Clearly therefore, the finding that the dismissal was fair failed to consider that there was no evidence to sustain the charges. Available evidence which was improperly rejected favoured the applicant and that was that she balanced from the time she was checked right up to the closing time.

36. Finally, applicant contended that apart from the fact that there was no evidence to support the charges, evidence which was presented and which the learned arbitrator relied upon was hearsay. I entirely agree. Having got rid of their star witness Tjabaka, the witnesses of the 1<sup>st</sup> respondent could not testify on what he told them. This they did however, and the learned arbitrator relied on such evidence to find the dismissal fair. That was irregular and as such it calls for this court's interference with the award.
37. The award is outrightly unreasonable in the light of evidence, which failed to link applicant with the wrong she was suspected of committing. Even when PW2 was asked what evidence he had to connect applicant with the allegations made against her, he could not voice it, other than to continue to repeat their suspicions which were raised by the whistle blower who never came to the fore. For these reasons the award in A0239/06 stands to be reviewed corrected and set aside and in its place substituted the finding that the dismissal of the applicant was substantively unfair.
38. The applicant referred the dispute of unfair dismissal seeking reinstatement or compensation in the form of salary for 26 months. It follows that the primary relief sought by the applicant which the DDPR would have had to grant in terms of section 73 of the Code, had it acted reasonably, would have been reinstatement, unless the DDPR found that it was not practicable to order reinstatement (see Lerotholi Polytechnic .v. Blandina Lisene LAC/CIV/05/08 and Judith Refiloe Motaung .v. National University of Lesotho LC/REV/50/08 (Both unreported)).

39. I have checked the record and I have failed to find where evidence was led by the 1<sup>st</sup> respondent disputing practicability of reinstatement. It follows therefore that the appropriate remedy that the arbitrator would have awarded in the circumstances of this case, had he applied his mind to the evidence would have been reinstatement. In the premises this court orders reinstatement of the applicant without loss of remuneration, seniority or other benefits from the date of purported dismissal. There is no order as to costs.

THUS DONE AT MASERU THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2010.

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

**D. TWALA**

**I CONCUR**

**MEMBER**

**J. M. TAU**

**I CONCUR**

**MEMBER**

**FOR APPLICANT:**

**ADV. SHALE**

**FOR 1<sup>ST</sup> RESPONDENT:**

**MR. MATOOANE**