

IN THE LABOUR COURT OF LESOTHO LC/REV/20/2010

HELD AT MASERU

IN THE MATTER BETWEEN

LIFE'S COMFORT SOLUTIONS (PTY) LTD APPLICANT

AND

**THE DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION
(M. MOCHOCHOKO)
MATEBOHO PELESA**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 29/09/10

Review – Evidence – Arbitrator accepting fabricated evidence and excluding credible evidence of wrongdoing on the part of the employee – Award unreasonable as arbitrator failed to apply his mind to the evidence adduced – Award given goes against the weight of evidence – Award reviewed, corrected and set aside.

1. This is an application for the review and setting aside of the award of the DDPR dated 29th October 2009, that found that the dismissal of the 2nd respondent was unjustified and therefore unfair. The learned arbitrator hearing the referral ordered that 2nd respondent be compensated by payment of 12 months' salary amounting to M81,600-06. He further ordered the applicant company to pay M3,905-64 for allegedly failing to furnish written statement of reasons for dismissal. The total amount ordered to be paid to 2nd respondent was M85,505-70.
2. The 2nd respondent was employed as the Branch Manager of

- applicant company's Maputsoe based shop. Or around 3rd July 2008, a customer by the name of Manathane Mokebisa bought two cellular phones on credit at the cost of M8,439-00. The customer made a down payment of M2,000-00. She was to pay M1,000-00 monthly installment until the full amount was paid.
3. On or around that sametime the customer was transferred to Maseru. She arranged with 2nd respondent that to avoid travelling to Maputsoe to make payment, she must pay at applicant's Town Shop situated opposite Lesotho High School along the Main North 1 Road. The 2nd respondent would collect the installment and effect payment at the Maputsoe Shop. 2nd respondent was however, also later transferred to Maseru with effect from 1st October 2008. One Thabang Nthako took over as new Manager for Maputsoe.
 4. In November, Mr. Nthako checked the accounts of his customers in preparation for the close of the year. He noticed that Manathane's account was behind in payments. Mr. Nthako testified that he took the customer's details and sought to contact her. He however, did not find her. He contacted 2nd respondent who furnished him with the customer's contact details. On finding her the customer disputed the balance of her account that he (Mr. Nthako) gave her. The record showed that she had last paid in September. She disputed that and said she had paid M1,000-00 in October and November and it was only December that she did not pay, but even then she had informed 2nd respondent.
 5. All the payments had been made at the Town Shop where by arrangement with 2nd respondent the installments had to be deposited. According to Mr. Nthako, Mrs. Mokebisa undertook to follow up the payments and asked him to leave the issue in her hands. Mrs. Mokebisa later called and said she was confronting problems and promised to come to Maputsoe to attend to the problem.
 6. Mr. Nthako testified that he told his boss Ms. Agnes Pakela about the problem of Mrs. Mokebisa's account. She (Ms

Pakela) asked him to enquire from 2nd respondent what happened. The latter said she did not know about the installment, which was not paid. On the 12th March 2009, Mr. Nthako met with Mrs. Mokebisa at her place of work and she again confirmed making payments in September and October 2008 at the Town Shop which she directed to be given to 2nd respondent.

7. The evidence of Manathane was that she made two payments at the Town Shop which were to be forwarded to Maputsoe. This was according to arrangement with 2nd respondent. She testified that she called the 2nd respondent each time she went to pay. When she was told that one of the payments she allegedly made had not been received, she called 2nd respondent who was the one who collected the payments. She testified that 2nd respondent said she had only received one payment and that she was in the process of tracing another payment.
8. The next witness was Mamoabi Tjela the Branch Manager of the Town Shop where the two payments were deposited. She testified that Manathane left money to the tune of M1,000-00 twice and this money was to be given to 2nd respondent for transmission to Maputsoe shop. She testified that she was able to pass the September payment to the 2nd respondent after two weeks. With regard to the October installment she remembered that she passed it to the 2nd respondent on the 22nd October 2009. She recalled this date because it was the day that the applicant company was celebrating a birthday promotion.
9. It is common cause between the parties that the 2nd payment was not paid in until the 12th march 2010, even then after investigations ensued. The 2nd respondent was charged with enriching herself with customer's money. In her defence 2nd respondent said the money was given to her in December towards Christmas. She testified that at that time she was very busy as such she forgot to pass the money to the Maputsoe shop. She testified that sometime in January the child of Mamoeletsi Kolonyane, a blood relation of hers, who works at the Maputsoe Shop, came to her home and that she gave the

money to the child to give it to her mother so that she could pay it in.

10. Mamoeletsi did testify in support of allegations attributed to her by 2nd respondent and said in January her child gave her M1,000-00 which was from the 2nd respondent. Asked whether it was explained what the money was for she said it was said the money was for her (2nd respondent) account at work. When asked what account that was she said she did not know. Asked why she did not pay the money she said she forgot.
11. The witness was asked if it is correct that she made a written statement seeking to explain the money she allegedly got from 2nd respondent. She agreed that that was so. She was asked to explain what she had said and she answered that “the money was from my child and since she sometimes gave me money to keep, I thought these monies were for safe-keeping. The monies I kept I had forgotten about the monies.” (p.10 of the typed record). Clearly, this witness was not truthful. In one breath she was told the money was for Mateboho’s account at work, but failed to effect payment because of forgetfulness. In another breath she made a statement in which she said she thought the money was given to her for safe keeping. The two versions are diametrically opposed which shows clearly that the witness is a liar.
12. As if she had not contradicted herself enough; this witness was asked at p.10 of the record if she remembered Manathane Mokebisa. Her response was “I don’t know her but it was said the account was hers.” Now this is the 3rd version that this witness gives about the money she allegedly received and what it was intended for. She clearly spoiled her evidence by telling downright untruths and such evidence could not be of any help to the court.
13. 2nd respondent’s evidence that she gave the money to Mamoeletsi’s child because she was herself too busy to go to Maputsoe was contradicted by the evidence of Agnes Pakela

Operations Executive and 2nd respondent's immediate supervisor. She testified that on being transferred to Maseru, 2nd respondent was given a position of Merchandiser and the person in that position "visits our shops at least once a week to see that stock is available and well packaged and to see to the cleanliness of the shop to prepare for promotions." (p.11 of typed record). Asked if a month can pass without a Merchandiser's visit she said it cannot happen because such an employee must visit at least once a week. This evidence was not discredited by cross-examination or challenged by evidence to the contrary.

14. In his award the learned arbitrator was of the view that the evidence of 2nd respondent regarding when she received the October payment and that of Mamoabi Tjela regarding when she gave the money to 2nd respondent was evenly balanced. Given that situation he opted to believe the version of the 2nd respondent that she received the money in December.
15. The learned arbitrator also accepted 2nd respondent's version that she forgot about the money because she was busy as a Merchandiser at the time. He further accepted the version that the money was later passed to Mamoeletsi through her child who also forgot it and only paid it on 12th March 2010. He went on to say there was no workplace rule providing for the time period within which the money should be delivered. He accordingly found that the dismissal of 2nd respondent was unjustified and therefore unfair.
16. Against that award the applicant filed the present review application. The applicant sought the award to be reviewed and set aside on the following grounds:
 - (a) Learned arbitrator entertained and awarded a claim of M3,905-64 for failing to provide written reasons despite the fact that the parties had agreed at the start of the arbitration that the said claim was abandoned.
 - (b) Learned arbitrator disallowed submission of documents during cross-examination thereby curtailing the latitude of cross-examination.

- (c) Learned arbitrator found dismissal of 2nd respondent unfair and yet all the evidence showed that disciplinary proceedings were fair.
 - (d) Even in the proceedings before him the findings of the learned arbitrator are against the weight of the evidence adduced against 2nd respondent. The conclusion reached is not justified by the evidence.
17. During submissions Mr. Ntaote for the 2nd respondent conceded that at the arbitration parties had agreed to abandon the claim for alleged failure to furnish 2nd respondent with written reasons of dismissals. He submitted that they accepted that the award be reviewed and set aside only on this score. For his part Mr. Mpaka for the applicant argued strongly that the award was not justified by the evidence tendered at the arbitration.
 18. Even though the record does not reflect the objection to the production of a statement made by Mamoeletsi, the representative of the 2nd respondent does not deny that such an objection was made and was rightly rejected according to him because it was sought to be handed in after applicant closed their case. It seems to this court that the handing in of the statement at that stage was wrongly disallowed because it was handed in to confirm the witness's own testimony that she had indeed made a statement the contents of which conflicted with what she was now telling the tribunal. (see p.10 of the transcribed record).
 19. The witness was questioned on the statement and she admitted that what she wrote in that statement differed from what she stated before the tribunal. Indeed as we earlier said her evidence at the arbitration was contradictory of itself and later turned out that it also contradicted the statement she earlier made concerning her alleged receipt of the money. It was clearly irregular for the learned arbitrator to have refused to admit the said statement which would confirm beyond any shadow of doubt that witness Mamoeletsi was an untruthful witness. It follows from what we have said that the learned arbitrator ought not to have accepted the evidence of this witness and the findings based thereon call for interference with

the award.

20. The contention that the award of the learned arbitrator is against the weight of evidence adduced before him is correct. The evidence of 2nd respondent like that of her sister Mamoeletsi is a clear fabrication. It cannot by any stretch of imagination be said to balance with that of Mamoabi for the following reasons:
 - i) Mrs. Mokebisa and Mr. Theko had occasion to ask 2nd respondent about the money. She never suggested to either of them that she had forgotten about the money and that she in any event finally gave it to her sister's child to give to her mother to pay the account.
 - ii) Mrs. Mamoeletsi's own account of receipt of the money and what it was said to be for is full of contradictions.
 - iii) 2nd respondent's alleged busy schedule which made it difficult for her to go to Maputsoe to effect payment was totally discredited by her immediate supervisor who said she had to visit the Maputsoe shop at least once a week.
 - iv) When asked what can remind her that she received the money in December and not October as alleged by applicant she (2nd respondent) said it is her own evidence. In other words her say so which we say is a fabrication.
 - v) On the contrary Mamoabi is reminded by the fact that the date she gave her the money was the day of a birthday promotion.
21. By all accounts the evidence of Mamoabi as to when she gave 2nd respondent the money is reliable and that of 2nd respondent is not. It is more likely to be sought to be supported by Mamoeletsi her relative in a veiled attempt to cover the act of 2nd respondent under the cloak of forgetfulness and busy schedule. The evidence of Agnes Pakela showed that however busy she was, 2nd respondent had to be at Maputsoe shop at least once a week. All indications are, regard being had to the evidence, the 2nd respondent received the money timeously after it was paid, but kept it to herself. The learned arbitrator ought to have so found if he applied his mind correctly to the evidence.

22. The learned arbitrator sought to justify his award on the ground that the time within which the money was to be paid was not an issue and that in any event, there was no rule providing for the time period within which to deliver the money. This was totally unreasonable to say the least. If the time frame was not of essence, Manathane would not have been chased after by the new management accusing her of allowing her account to fall into arrears. Infact, the terms of the sale was that the balance would be settled in monthly installments of M1,000-00. The award was clearly unreasonable and the learned arbitrator failed to apply his mind to the evidence adduced and instead allowed himself to be carried away by transparent falsehoods advanced by the 2nd respondent. For these reasons the award in A0241/09 falls to be reviewed, corrected and set aside and in its place substituted the following order “the referral in A0241/09 is dismissed.”

THUS DONE AT MASERU THIS 18TH DAY OF NOVEMBER, 2010.

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR 2ND RESPONDENT:

MR. MPAKA
MR. NTAOTE