

IN THE LABOUR COURT OF LESOTHO LC/REV/92/08

HELD AT MASERU

IN THE MATTER BETWEEN

CASHBUILD (PTY) LTD

APPLICANT

AND

DDPR

M. MASHEANE (ARBITRATOR)

TSEPISO POSHOLI

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

Date : 14/10/2010

Review of DDPR award – Arbitrator making an award that dismissal substantively unfair despite her earlier ruling that employee is guilty of the offence charged – Court found evidence of alleged inconsistency did not justify conclusion that dismissal was substantively unfair – Award reviewed and set aside and dismissal declared substantively fair.

1. This is an application for the review and setting aside of the Award of the learned arbitrator Masheane dated 20th November 2008. In the said Award the learned arbitrator found the dismissal of the 3rd respondent substantively unfair and ordered that he be reinstated in his position as Systems Supervisor with effect from 1st December 2008.
2. The facts are largely common cause. The 3rd respondent was employed by the applicant company as Systems Supervisor. He was in charge of the cash office and staff in that office. Events giving rise to this litigation took place on Sunday 21/04/08. Third respondent had gone to work and had been working as both the Systems Supervisor and Cashier.

3. As Systems Supervisor 3rd respondent was admittedly responsible for company cash. On Saturday 20th April 2008, the 3rd respondent had been at work with cashier Makarabo. At close of business 3rd respondent counted cash which was in the hands of cashier Makarabo. He found the change float to amount to M1,000-00 and the petty cash amounted to M600-00.
4. 3rd respondent testified that he put the cash in two separate bags, sealed them and left them in the office with Makarabo, while he went to the cash up machine in the Manager's office. Thereafter they closed the shop with Makarabo. The following day only 3rd respondent came to work. He worked as both cashier and Systems Supervisor. Applicant himself testified that that day the shop opened at 8.00am and closed at 13.00 hours. These were the standard hours for Sunday.
5. Applicant averred that at between 12.00 noon and 13.00 hrs he needed change for a customer. He went to the cash office to get the change. He took out the cash bags that were closed and sealed by him the previous day. He testified that he broke the seal to the change float bag which had contained M1,000-00 and found that it contained only M300-00. An amount of M700-00 was missing.
6. Surprisingly the 3rd respondent did not at that point call the Manager to make him aware of the shortage. He proceeded to open the second bag and found that it was also short of M300-00. In all M1,000-00 was missing. It was only then that he called the Manager and one Moeketsi to come and witness what he had discovered.
7. The Manager came and counted the money with the 3rd respondent and the shortage was confirmed. The Manager wanted to know why there was a shortage. 3rd respondent replied that he suspected Makarabo, because he had left her in the office when he had gone to the cash up office. He averred further that he was fortified in his suspicion by the fact that Makarabo had had queries relating to missing money before. Makarabo was charged of the disappearance of the money

found guilty and dismissed.

8. Subsequently the 3rd respondent was also charged of breach of company policy, alternatively negligence , alternatively fraud and again alternatively dishonesty. It appears he was found guilty of all the charges including the alternative charges. He was dismissed. He referred a dispute of unfair dismissal to the DDPR.
9. Evidence led on behalf of the applicant by the Manager Mr. Thabang Nkoale was that on the Sunday in question he was called by the 3rd respondent who showed him the two bags which he had already opened. He reported that upon opening each of the two bags he found that part of the money that was in the bags was missing. One bag had contained M1,000-00 and it was short of M700-00. The other bag had M600-00 and M300-00 was missing.
10. He testified that when 3rd respondent went to open the bags and discovered the shortage it was around closing time as it was between 12.00 noon and 13.00 hours. 3rd respondent told him that he had opened the bags because he was looking for change. He told him further that the previous day he had sealed the bags according to standard procedure. The Manager testified that he asked 3rd respondent to show him the seal which he had broken to open the bag. He could not produce it.
11. Mr. Nkoale testified further that since 12.00 -13.00 hrs is closing time it is not normal for the change bag to be opened at that time. Asked what the procedure for opening the bag is, he said, the cashiers require the presence of the systems supervisor to break the seal. If the cashiers are not there and the Systems Supervisor is alone like was the case in casu, the Manager has to be called to assist.
12. He testified further that when one seals a bag he has to record the seal number which the seals have on them. He went further to state that before one breaks the seal he has to ensure that it is the same seal he sealed the bag with by checking the seal

number. He stated that on the day in question none of these procedures were observed. He was asked why the 3rd respondent moved on to open the second bag after discovering the shortage in the first bag, without first informing the Manager. He answered that the 3rd respondent had said it was because he did not get the change he needed and he was shocked by what he found.

13. Under cross-examination no serious effort was made to discredit the evidence of DW1, especially in regard to the procedure for sealing the bags and breaking of the seal to open the bag. In his defence the 3rd respondent repeated that it was between 12 noon and 13.00 hours when he went to the cash office to get change. He stated that he broke the seal opened the bag and then discovered the shortage. He categorically stated that he does not need permission to open the bag. Indeed even the Manager did not say he needed authorization. He is instead the one who has to supervise cashiers when they need to open the bag. Similarly, he is to be assisted by the Manager to open the bag when the cashiers are not there. He proceeded to open the second bag and found that it too had shortage. It was only then that he called the Manager.
14. He testified that the Manager asked why there was a shortage. He answered that he was with Makarabo when he counted the money, he suspects that Makarabo might have opened the bag. The question is when Makarabo could have opened the bag because according to 3rd respondent's own evidence he closed the shop with Makarabo after they counted the money and put the bags away. On the day the shortage was discovered, Makarabo was admittedly not at work. Makarabo was nonetheless made a scapegoat and dismissed.
15. The 3rd respondent testified that he was the key witness in the disciplinary case of Makarabo. He testified under cross-examination that it was not proper that he was charged for the disappearance of the money because Makarabo had already been charged and found guilty. He was asked under cross-examination if he sealed the bags after closing them he said he

did. He was asked further if he recorded the seals and he said he did. He was asked to produce prove of the affirmative answers he had given. According to the record there was no response forthcoming from the 3rd respondent.

16. As we said 3rd respondent did not do much to challenge the evidence of DW1. For instance he did not challenge the evidence of DW1 when he said he asked him for the seal and that he failed to produce it. But under cross-examination he sought to deny that DW1 asked him for the seals. He was referred to the statement he made where he is quoted as saying "he asked me for the seals but I said I had lost them (thrown them away)" He tersely responded "that is not my statement."
17. Third respondent's testimony under cross-examination was nothing but lies. For instance when applicant is asked to confirm that he broke the seals on the two bags and that it was only thereafter that he called people to come and witness that there was a shortage he answered, "you are wrong to say that." But this is exactly what he told the court that he called the people after he opened the bags.
18. The person who cross- examined 3rd respondent went further to expose 3rd respondent's untruthfulness. He asked him if he indeed sealed the bags. He said he did. He asked him further:

Question: "Was the seal on the bag the same seal you had sealed with the previous day?"

Appl.: I broke it.

Question: Was it the similar seal you had sealed with the previous day?

Appl.: Yes they were similar.

Question: If they were similar, why do you not tell us that you took the money yourself?

Appl.: That is not true."
19. It was put to him (3rd respondent) that he had not sealed the bags as he alleges. He denied. He was asked to explain further what he meant. He said he had written them which I assume means that he had recorded them. He was asked how

he can show the court that he had recorded the seals. He said it is his say so. It will be recalled that this was the second time that this question was asked. The previous occasion the 3rd respondent had kept quite. If the seals had indeed been recorded the record book would show that, in order to confirm 3rd respondent's verbal statements.

20. It is common cause that after testifying on the shortage and the disciplinary case of Makarabo, 3rd respondent was asked about the disciplinary case against himself and its outcome. He had been happy that Makarabo was disciplined and dismissed for the disappearance of the money. This according to him ought to shield him from blameworthiness. A further shield according to his testimony ought to be that he should have been given a written warning and asked to repay the money because one Agnes Ramane who was charged of dishonesty was given a final written warning and asked to repay the money.
21. It is further common cause that the representative of the applicant did not challenge this aspect of 3rd respondent's testimony. In her award the learned arbitrator accepted this aspect of the evidence as unchallenged. With regard to the disappearance of the money she stated: "I find that the applicant has failed to convince the court that he did not commit the offence or (that) he was not an accomplice to this offence. I find on the balance of probabilities that respondent (applicant) had nobody to suspect but applicant in this incident and he had a valid and reasonable reason to lay charges against applicant." (at p.3 of the award).
22. Clearly the learned arbitrator made a finding that 3rd respondent committed the offence he was charged with. She nevertheless relied on the alleged punishment imposed on Agnes Ramane to find that there was inconsistency in the application of the sanction. She accordingly adjudged the dismissal to be substantively unfair and ordered that 3rd respondent be reinstated and ordered that the employer impose a similar sanction to that imposed in the case of Ramane.
23. Now this award is shocking when regard is had to the evidence,

but more of this later. For their part applicant sought to review the award on the ground that the learned arbitrator based her award on the alleged inconsistency and yet she had rejected 3rd respondent's attempt to lead such evidence. Consequently the applicant had considered itself relieved of the obligation to rebut the testimony concerning the penalty that was imposed on Agnes Ramane.

24. The 3rd respondent denied that any such ruling was made to exclude evidence in support of the alleged inconsistency. He went on to show that if there had been such a ruling the record of the proceedings would reflect it. He rightly rubbished the alleged ruling as an afterthought. If it was not because in a review the court scrutinizes the entire record which enables the court to *meru motto* pick up reviewable irregularities even if they are not raised by the parties in their affidavits, this would be the end of this review application.
25. Having read the record of the evidence as well as the finding of the learned arbitrator that 3rd respondent is to blame for the disappearance of the money, it is impossible to fathom how the learned arbitrator came to a totally contradictory finding that the dismissal was substantively unfair. I totally agree with her finding that given 3rd respondent's total disregard of the procedures, and his unmitigated lies under oath as well as unexplained serious contradictions in his evidence, there could be no other person to suspect about the disappearance of the money but himself. It follows that the dismissal was clearly substantively fair.
26. The alleged inconsistency could if it indeed existed at best result in procedural unfairness and be compensated with monetary award. However, it appears that even the finding that 3rd respondent was "dismissed for an offence that was similar to that committed by Ramane" is not justified by the evidence. The testimony of 3rd respondent was that Ramane was charged of "fraud and dishonesty." The evidence which the arbitrator captured in her summary of the evidence was further that 3rd respondent was charged and found guilty of gross breach of company policy, gross negligence, fraud and dishonesty.

Clearly, the 3rd respondent and Ramane did not face equivalent charges. The learned arbitrator failed to make a proper assessment of the evidence in this connection when she concluded that Ramane and 3rd respondent faced similar charges.

27. Finally, the learned arbitrator irregularly turned herself into a super employer which she is not by seeking to direct what penalty the employer should impose. That is not her field. She has no power to make such an order. Criticizing she can and make an appropriate compensatory order, but not to substitute the penalty imposed with her own. Accordingly, the award of the learned arbitrator stands to be reviewed, corrected and to be set aside for reason of unreasonableness in the light of evidence and her own finding that 3rd respondent was indeed guilty of the offences she was charged with. The orders of the learned arbitrator are accordingly set aside and replaced with the following; the referral in A0570/08 is dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 7TH DAY OF DECEMBER, 2010.

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR 3RD RESPONDENT:

ADV. NTAOTE
ADV. MOSUOE