IN THE LABOUR COURT OF LESOTHO LC/REV/516/06

LAC/REV/57/06

IN THE MATTER BETWEEN

MASECHABA NTSIHLELE APPLICANT

AND

LESOTHO BANK 1999 LTD 1ST RESPONDENT

THE ARBITRATOR – DDPR 2ND RESPONDENT

JUDGMENT

Date : 07/05/10

Review – Arbitrator failed to consider critical evidence that showed that the alleged misconduct committed by applicant was not proven – Evidence of handwriting expert – Arbitrator failing to appreciate that the report does not support employer's suspicion of forgery – Held that in findings of the arbitrator is unreasonable as it is not supported by evidence tendered – Oath – Failure to swear only one witness not so gross as to taint the whole proceedings – Award reviewed and set aside and in its place substituted by the order that dismissal of applicant is substantively unfair.

1. This review application was initially filed with the Labour Appeal Court as the court empowered to deal with review of awards of the DDPR at the time. In terms of section 5 of the Labour Code (Amendment) Act No.5 of 2006, powers of review of awards of the DDPR were removed from the Labour Appeal Court and vested in the Labour Court. This court accordingly inherited this matter and registered it under case No.516/06.

2. The award being sought to be reviewed was delivered by arbitrator Thamae on the 21st March 2005. Section 228 F(1)(a) of the Labour Code (Amendment) Act No.3 of 2000 provides that a party that seeks to review an arbitration award must apply to the Labour Court for an order setting aside the award within 30 days of the date the award was served on him.

3. The applicant herein says she got served with the award being sought to be reviewed on the 24th March 2005. However the applicant only filed the application for the review of the award on the 1st July 2006, some one year and two months after she got to know of the award. The applicant prays for the condonation of her late filing. She proffered essentially three reasons for the delay.

4. The first reason is that as a lay person she was not aware that she had only one month to make an application for review. She averred that she had just been appraised of this fact, I assume by her attorneys of record. The second was the funds, which she said she was not able to brief counsel because her accounts were frozen which caused her to resort to borrowing. The third reason was the matrimonial squabbles between her and her husband. The applicant contended that she had prospects of success and accordingly prayed for condonation of her late filing.

5. The 1st respondent opposed the application for condonation and strenuously argued that it should not be granted. In their answer the 1st respondent contended that applicant's restraint on her accounts was caused by her failure to make alternative arrangements with her erstwhile employer on how she would repay her loan. They argued that her matrimonial squabbles ought not to affect her in taking steps to file the review.

6. The 1st respondent's response to the issue of applicant's matrimonial problems is clearly not subjective, which I think is the right test to apply in the circumstances. It is not the question of how I would deal with the situation. We should appreciate how individuals in their own way, have handled it and for applicant she says the squabbles affected her. We cannot fault her. Another of her explanations, which the respondent did not deal with is that as a lay person she did not know until when she was told by her

attorney that she ought to have applied for review within 30 days.

7. The applicant contended that she was only able to have funds to brief counsel around February 2006. Respondent contended that the fact that the review was only filed on the 1st June 2006, shows that applicant has failed to explain the period between February and June 2006. Applicant's contention that she did not know the requirements of the law until when she met her lawyer to brief him to take the review clearly takes care of that period.

8. It is common cause that the applicant sought to reply to the 1st respondent's opposing affidavit. In her reply she said that notwithstanding the one month stipulated by the law she has nonetheless filed the application within a reasonable time. (Ad para 7). At paragraph 18 of the replying affidavit, in answer to 1st respondent when they said the application for condonation would be heard first, deponent said no application for condonation is necessary and that she abandoned prayer relating thereto.

9. That was a careless statement to say the least. However, at the start of the hearing counsel for the applicant did exactly what the 1st respondent averred in paragraph 17 of their Answering Affidavit and started by motivating his application for condonation. Mr. Macheli on behalf of the 1st respondent did not object. It was only when he rose to answer applicant' case that he indicated that since applicant abandoned their condonation, applicant should not be allowed to pursue it.

10. Mr. Thoahlane for the applicant stated in response that if Mr. Macheli wanted to raise the point that condonation is abandoned he should have raised the point a long time ago and not wait for him to present his condonation application. He was correct. The position at this point is that the court has heard applicant's condonation application and the 1st respondent, having allowed it to proceed has to now deal with it accordingly.

11. The parties agreed on a holistic approach and said in the event that the condonation application succeeds the court should proceed to determine the merits of the review. We have considered the delay and do not agree with the applicants that they

have approached the court within a reasonable time. The explanation advanced is one of ignorance of the law and the matrimonial squabbles which overwhelmed applicant's household as well as financial constraint.

12. Whilst we are live to the maxim that says ignorance of the law is no excuse, we consider as well that the maxim does not suggest that everybody is presumed to know the law. Applicant has confessed her ignorance not as a defence which is what the maxim applies to, but as an explanation for her delay. Respondents have not challenged this explanation and we accordingly accept it. The importance of the case to the applicant cannot be over emphasized as she is admittedly now the sole bread winner following the death of her husband.

13. *Ex facie* the papers filed of record the applicant cannot be said to have filed a useless case with not the slightest prospects of success. We came to the conclusion that the explanation sufficiently compensates the long delay in filing this application. The case has the 50/50 chance of succeeding. Accordingly we afford the applicant a chance for her review to be considered on the merits and to this end the court condones the applicant's late filing as prayed in the notice motion.

14. This matter arises out of the dismissal of the applicant by the 1st respondent on the 10th December 2004. At the time of her dismissal applicant was holding the position of team leader (Tellers), a middle management position equivalent to Assistant Branch Manager. Her dismissal followed a disciplinary hearing in which she was charged, and found guilty of getting a loan fraudulently.

15. She referred a dispute of unfair dismissal to the DDPR. Even though 1st respondent led evidence of three witnesses, their key witness was the Internal Auditor Mr. Ralintsi Tlai Tlai. The facts which are common cause between the parties are that sometime in April 2004 applicant applied for a personal loan. The processing of the loan was delayed because the application was short of a consent from the husband of the applicant. It is a policy of the bank that spouses married in community of property must consent

to each other's request for a loan facility. Sometime in September applicant was finally able to bring the necessary consent and was granted a loan.

16. It is common cause that applicant's husband was a former employee of the 1st respondent. He was a manager. He had been dismissed from the bank. The relations between him and the wife were very strained. The evidence of DW1 Mr. Tlai-Tlai was that sometime after applicant got the loan, Mr. Ntsihlele came to the bank and said he suspected that his wife had been given a loan without his consent. DW1 testified that he asked Mr. Ntsihlele to reduce his complaint/suspicion to writing to enable the bank to investigate.

17. Mr. Ntsihlele did write a letter dated 9th November 2004. After receiving the letter DW1 said he called Mr. Ntsihlele to the bank. He showed him the signature appearing on the consent form and he denied that it was his. He stated that he confirmed his denial of the signature in a memo which he wrote before him and 3 other officials of the bank.

18. DW2 was the officer who works in loans department. His evidence was essentially to confirm that the applicant applied for a loan as aforesaid and that it was only approved in September as it did not have a consent form. Applicant asked Mr. Tlai-Tlai to produce evidence to show that she had known when she presented the consent form that the signature thereon was not that of Mr. Ntsihlele. Mr. Tlai-Tlai gave a long response, the effect of which boiled down to saying they felt that she knew (seep31 of the transcribed record).

19. Mr. Tlai-Tlai admittedly carried out investigations after receiving the complaint of Mr. Ntsihlele. Applicant told him and she repeated this at the DDPR that relations between her and her husband were still strained. As a result she had not taken the consent form to him

personally. She gave it to her son to give it to the father. For a long time the form was not signed, however in September 2004, she found it signed. She then took it to the bank and her loan application was processed.

20. Applicant disputed that she had forged her husband's signature. She explained her delay in bringing the consent as having been caused by her husband who took his own time before he could sign the form. She stated that the signature on the consent form was that of her husband and to prove this, Mr. Ntsihlele who had been called as a witness at the disciplinary hearing did not deny that the signature was his. She stated that the mere fact that a person's signature differs does not make the other signature a forgery.

21. The signature on the consent form was submitted for examination by a handwriting expert. It was compared with the signatures of Mr. Ntsihlele on the letter of 9th November and the memo of 17th November, which he wrote and signed in front of officials of the bank who witnessed his signing. The findings of the examiner were that:

    (i) The questioned signature indeed differed from the other two signatures compared with it as to make it a forgery, however,

    (ii) Of the three signatures the questioned signature looked most genuine smooth and clear and rapidly made while the signatures on the letter and the memo were crude and differed from each other.

    (iii) Even though the two signatures i.e. in the letter and memo were made before witnesses they may well be self-forgeries in which the signatory made deliberate errors in order to deny another signature later.

22. The learned arbitrator Thamae was presented with the foregoing evidence as well as minutes of the disciplinary hearing. He relied on the letter of 9th November and memo of 17th November to come to the conclusion that Mr. Ntsihlele never agreed to sign the consent form. He stated that if Mr. Ntsihlele had agreed to sign the

consent form he would not have turned round and written the letter and memo of 9th and 17th November 2004 respectively. He accepted Mr. Manamolela's submission that the applicant forged her husband's signature in order to get the loan by fraudulent means. He accordingly concluded that applicant's dismissal was substantively and procedurally fair.

23. Applicant applied for the review of the award arguing that the misconduct she was accused of was never proven during disciplinary hearing and during arbitration. To support this she referred to the fact that the finding of the arbitrator was based on the letter and memo of 9th and 17th November 2004 by Mr. Ntsihlele which were not handed in by their author, thereby rendering them hearsay. She contended that the letters were handed in by Mr. Manamolela which was irregular the argument went.

24. The second ground was that the arbitrator erred in accepting the report of the hand-writing expert who was not called to testify. Furthermore she stated that the same report was maliciously and intentionally distorted in order to deny her justice as the report was in her favour. Finally applicant argued that some of the witnesses were not sworn.

25. Mr. Macheli for the 1st respondent argued correctly in our view that the letters and the memo were handed in to show the evidence 1st respondent relied upon in arriving at the decision which was being challenged before the arbitrator. This much is correct only to the extent that they were not handed in to prove their contents, but to justify 1st respondent's decision. However, the learned arbitrator did not treat them that way. He treated them as prove of their contents which lends credibility to Mr. Thoahlane's criticism that once they were handed in as primary evidence, they required their author to have handed them in.

26. This is more so when regard is had to the fact that firstly Mr. Ntsihlele failed to deny at the hearing that the signature on the consent form was his. When he was asked this question at the disciplinary hearing, he said he was not a forensic expert. The learned arbitrator was referred to this part of Mr. Ntsihlele's testimony in the minutes of disciplinary hearing. (see p.46 of the

transcribed record). Mr. Ntsihlele's failure or refusal to confirm his denial of the signature on the consent form, must have rendered the letter and memo he wrote questionable. However, neither the chairperson of the disciplinary hearing nor the arbitrator picked this critical lack of confirmatory evidence.

27. The second glaring evidence which both the chairperson of the disciplinary hearing and the arbitrator failed to consider, is the report of the hand writing expert on the signatures on the letter of 9th November and the Memo of 17th November 2006. The examiner clearly and unambiguously rubbished the two signatures as possible self-forgery in order to deny another signature later.

28. This is precisely what the court is faced with in casu. The examiner says the questioned signature, is the one that appears more genuine, even though it was submitted with the understanding that the other two are the ones that are genuine. The findings show that the truth is the other way round, because even those two themselves differ from each other. The admitted strained relations between the spouses could have given rise to the writing of the letter of 9th and Memo of 17th November with falsified signature in order to justify denial of the otherwise genuine signature on the consent form. The report of the examiner clearly point to this, but neither the chairperson nor the arbitrator picked it.

29. It seems to this court that there is merit in the applicant's contention that both before the disciplinary hearing and at the arbitration the 1st respondent failed to prove that she had forged her husband's signature. Her conviction at the disciplinary hearing was based on suspicion that because she took five months to submit the consent she must have obtained the signature inappropriately. There was no evidence to support this suspicion. A decision based on it was therefore unreasonable and as such stands to be corrected and set aside.

30. At the arbitration Mr. Thamae relied on the letter and memo written by Mr. Ntsihlele. Both the letter and the memo must have lost any credibility the moment Mr. Ntsihlele failed to deny his signature on the consent form during disciplinary proceedings. To cap it the report of the examiner already doubted the genuiness of Mr.

Ntsihlele's signature on both those documents. The only thing that remained to support the conviction was 1st respondent's strong feeling as shown by Mr. Tlai-Tlai that applicant obtained her husband's signature fraudulently. Feelings are not the correct basis for a conviction. To this end the finding of the learned arbitrator that there was substantive fairness in the dismissal of applicant is unreasonable as it is not supported by evidence. It accordingly calls for the interference of this court by setting it aside.

31. It follows from what we have said about the report of the handwriting expert that applicant is correct when she says it has been distorted to deny her justice. The expert clearly made two glaring findings. The first was that yes the suspect signature differs from the exemplar signatures. The examiner did not stop there. He went on to say the exemplar signatures are the ones that appear to be forgeries intended to discredit the suspect signature which is the one that appears more genuine. All this evidence favours the applicant and discredits suspicions against her. Instead the report makes Mr. Ntsihlele's denial of his own signature suspicious.

32. This becomes even more credible when considered in the context of the then strained relations in the family. It follows from this that we are even further fortified in the view that we hold that there was no evidence to support applicant's alleged wrong doing. On the contrary evidence that was there and which was not considered exonerated her.

33. The last ground of review was that some of the witnesses were not sworn. We were referred to evidence of Mr. Manamolela, Mrs. Mokhutsoane and the applicant herself. Mr. Manamolela was not according to the record, a witness. He was the representative of the 1st respondent. He made opening remarks and closing remarks. Those are not evidence and they do not need to be made on oath. There is a part of Mrs. Mokhutsoane's evidence which is omitted from the record. That is a part that would show whether the witness was sworn or not. We are not therefore in a position to say she was not sworn because to do so would be speculative.

34. The witness who the record shows that she was not sworn is the applicant herself. All other witnesses were sworn except the applicant. We are of the view that the irregularity caused by that oversight is not so bad as to taint the entire proceedings. It only goes to affect applicant's testimony only. In the premises we find that the proceedings were valid except for the portion concerning applicant's testimony which was not taken on oath.

35. It follows from what we have said thus far that the award of the learned arbitrator that found applicant's dismissal to be fair both substantively and procedurally stands to be reviewed corrected and set aside and in its place substituted the order that the dismissal of the applicant on the 10th December 2004 was substantively unfair.

36. Applicant sought relief in the form of compensation and the release of withheld terminal benefits. If the arbitrator had not erred and misdirected himself as herein before outlined he would have granted the relief sought after considering mitigation, whether there is breach of contract by the Lesotho Bank, and whether the compensation ordered is fair and equitable in the circumstances. Vide sec.73(2). In the premises the matter is referred back to the DDPR for the arbitrator to assess compensation in terms of sec. 73(2).

THUS DONE AT MASERU THIS 25TH DAY OF JUNE 2010.

L. A. LETHOBANE

PRESIDENT

R. MOTHEPU — I AGREE

L. MATELA — I AGREE

FOR APPLICANT: MR. THOAHLANE

FOR RESPONDENT: MR. MACHELI