IN THE LABOUR COURT OF LESOTHO **LC/REV/91/08**

HELD AT MASERU

IN THE MATTER BETWEEN

FORMOSA TEXTILES (PTY) LTD **APPLICANT**

AND

TSELISO LECHOBA **1ST RESPONDENT**
DDPR **2ND RESPONDENT**

JUDGMENT

Date: 17/03/2010
Review of DDPR award – Arbitrator erred in failing to give due consideration to uncontroverted evidence led on behalf of the employer – Arbitrator failing to apply her mind to the facts and relying instead on her own opinion – Sanction – Employer has right to set standard of conduct and to determine sanction with which a transgression will be visited - Arbitrator must not readily interfere with sanction imposed by employer unless it shocks one's sense of fairness – award reviewed corrected and set aside.

1. This is an application for the review and setting aside of the award of the learned arbitrator Malebanye in which she found the dismissal of the 1st respondent substantively unfair. She then proceeded to award that he be compensated by payment of ten (10) months salary amounting to M8,300-00.

2. The facts are largely common cause. The 1st respondent was employed in dye department of the applicant company. On or around 20th April 2008, 1st applicant used the dye of the factory to dye his own jacket. He then hanged it for drying within the factory premises. When Mr. Gong Chong Hua, the supervisor of the dying department saw it, he took it to the office and told

the Mosotho supervisor who was around that he needed to know the owner of the jacket and if the owner did not come forward he would destroy the jacket.

3. When the 1st respondent heard this he presented himself to the office and reported that the jacket belonged to him. He was then charged with misappropriation of company property. The charge was based on Clause 3.2.4.4 of the disciplinary code which provides that; an employee will be subject to dismissal if he is found guilty of "incorrect application of company funds, assets or property for reasons of personal gain or other such purposes." The management accused 1st respondent of using company property for his benefit without permission.

4. At the hearing which was held in due course, 1st respondent pleaded guilty. When he was asked to explain he pointed out that the dye he used was a used dye which is being disposed of through a hose into a drainage. There was a drum put at a point where there was a leak. He dipped his jacket into that drum that was collecting a leaking dye. After sometime he took it out and dried it.

5. Evidence led on behalf of the company at the disciplinary hearing was that everything on the premises of the company belongs to the company, even if one may think that it is useless or of little value. Evidence went further that even used dye may still be used again. It went further that employees are not allowed to take for own use company property even if it has been disposed of.

6. 1st respondent contended that he was not aware that it was wrong to use the dye as he thought it was already disposed of. The company responded that copies of the codes are put up on all notice boards for employees to read them and familiarize themselves with them. The disciplinary hearing found him guilty as charged and he was dismissed.

7. The applicant filed a referral at the DDPR wherein he

complained that the reason for his dismissal was neither fair nor valid. Evidence on behalf of the company was adduced by the Human Resources Manager Mr. Lu hsin Michael and the supervisor of Dying Department Mr. Gong Chong hua.

8. The evidence of DW1 Mr. Michael, reiterated what was said at the disciplinary hearing namely, that 1st respondent was dismissed for using company dye to dye his jacket, without permission. He stated further that the act of the 1st respondent amounted to misappropriation in terms of the company code and that the penalty for that type of offence is dismissal.

9. DW2 was Gong Chong hua who testified that 1st respondent dyed his jacket with the firm's property. He testified further that company rules prohibit employees from dying their clothes with the company dye. He stated that this prohibition had even been made in writing. He stated further that the 1st respondent dyed his jacket without even seeking his permission.

10. Asked if employees are aware that they are not to use the company dye at work, he said that that is commonly known as they are told when they first arrive. He was further asked if anything is done to remind them of the prohibition, he said "there are notice boards with regulations of this nature but they are normally removed after 2 months and are replaced by others…" He averred that 1st respondent ought to know the regulation well as he had been with the company for a while.

11. DW2 testified further that Mr. Lechoba knew that using the company dye as he did was breaking the law. Asked if the dye used by 1st respondent was still to be used by the employer, he responded that in the dying department all things are important whether they are used or are to be used. The court put it to him that the 1st respondent said the dye he used was about to be thrown away? He responded that:

> *"Actually these dyes are materials that are normally not thrown away. It can be reused. If it is declared that it is of*

no use, only superiors can declare that the dye is useless. We have no power to declare this."

12. The court further put it to him that 1st respondent says that other employees routinely dye their clothes at work, but measures such as those taken against him have never been taken. He responded that he was not aware that employees had been using the dye as alleged. He concluded his evidence by denying that he was aware that 1st respondent was dying his jacket. He said he thought he was doing his work. The cross-examination did not discredit the evidence of either of these two witnesses in the slightest. It thus remained intact.

13. The evidence of the 1st respondent was that he had used a leaking dye to dye his jacket. He stated that his jacket was found by DW2 and he was disciplinarily charged. He testified further that he admitted guilt. He conceded that the rules are posted on the notice boards, but said he had always abided by them. He testified in conclusion that he was not aware that it was against the rules to dye his clothes with company property.

14. Under cross-examination he conceded that the dripping dye which he used belonged to the company. He further admitted that the rule against taking the employer's property for own use was one of those rules put up on the notice board. It was put to him that taking the employer's dye as he did was a mistake? He agreed and said he noticed that what he did was a mistake even though he only noticed after he did it.

15. The last witness was one Vincent Katiso Matlali who worked with 1st respondent in dying department at the time of his dismissal. His evidence was that he was not aware of the rule that says an employee who takes an employer's property without permission is liable to dismissal. He infact denied that any such rule existed. In this connection he was clearly contradicting the 1st respondent who conceded that such a rule existed.

16. He testified further that 1st respondent was dismissed for violating a rule he did not know. He testified further that

employees often dye their own clothes at work. He stated that their supervisors know this and they do the same. He testified that employees do not seek permission to dye clothes as such it would be absurd for the 1st respondent to have sought permission. He testified further that even as he spoke employees still dyed their clothes and that for his part he does not consider that to be wrong.

17. Regarding whether 1st respondent knew the rule, DW2 made it clear that everybody knew that dying of employees' clothes at work is not allowed. He said they are informed of this on arrival and are reminded of it through notices posted on the notice boards. Not only was he not challenged, but 1st respondent too conceded that rules, among them the rule against misappropriation were always posted on the notice boards.

18. With regard to employees routinely dying their clothes DW2 said he was not aware of it. Indeed when he became aware of it he took immediate action. DW2 is the senior supervisor in the dye department. It was not put to him that his supervisors were party to the misuse of the company property. Neither were any of those supervisors who allegedly condoned the practice called to tell the court under what rule they permitted that practice. Common sense however dictate that no employer would allow that kind of free for all practice as is alleged by PW2 to have prevailed at the applicant company. The prohibition against dying of personal items as testified by DW1 and DW2 is not only reasonable, but is also what one would expect in companies in similar situation to that of the applicant.

20. Against the backdrop of this evidence the learned arbitrator came to the conclusion that the dismissal of the 1st respondent was substantively unfair. Her reasons for coming to that conclusion were first that the dye 1st respondent used was a waste, which was leaking away, which was not going to be used again. She stated that the use of such a dye cannot constitute an offence of such gravity as to warrant dismissal.

21. She conceded that 1st respondent ought to have first obtained permission to use the dye. She went on to state that in any

event failure to secure such permission cannot on its own constitute sufficient ground to terminate the employee's employment. She averred that failure to get permission on the part of the 1st respondent did not render employment relationship intolerable and that only acts of gross dishonesty have the effect of undermining the trust relationship upon which an employment relationship is built.

22. 1st respondent was employed on a one year fixed term contract. That contract was coming to an end the same month that the 1st respondent was dismissed. He testified, without producing a copy of the contract that he had already signed another contract which was to commence in May 2008. He did not wish to serve that contract, but asked that he be awarded wages for the contract period as compensation. Learned arbitrator agreed with him and awarded him compensation of ten months salary. The two months having been taken off in recognition of the fact that he had committed a wrong for which the arbitrator said the appropriate penalty should have been a warning.

23. The applicant applied for and obtained stay of execution pending the review of the award of the learned arbitrator. The grounds on which the review was sought were that:

    i) The learned arbitrator erred and misdirected herself by finding that the reason for dismissal was too minor to warrant a dismissal. In so finding the learned arbitrator acted irregularly in that she sought to interfere in the administration of the applicant.
    ii) Learned arbitrator misdirected herself and erred by totally disregarding applicant's written submissions.
    iii) Learned arbitrator relied on uncorroborated evidence of 1st respondent.
    iv) Learned arbitrator misdirected herself by finding dismissal of 1st respondent unfair in total disregard of applicant's code and the fact that a valid reason existed for the dismissal and instead relying on the nature of the offence committed.
    v) The learned arbitrator failed to fully apply her mind

to the facts and the evidence.

24. The last ground of review is sufficiently broad to encompass all those that come before it. In advance of dealing with the merits of the review, it is apposite to put on record an important principle which has a bearing in this case. It has been held that an arbitrator should not readily interfere with the employer's sanction of dismissal, unless the decision in question is indefensible in terms of the norms of industrial relations practice and values and it induces a sense of shock. (See Impala Platinum Ltd. .v. Tshoma (2003) ILJ 2233). To do otherwise is often interpreted as usurping the administrative function of the employer and making a court of law appear as if it is a super employer which it is not.

25. In the case of Consani Engineering (Pty) Ltd .v. CCMA & Others (2004) 25 ILJ 1707 at 1714 H-J, the learned Murphy AJ had this to say about an award of a Commissioner which was almost similar to the one under review herein:

> *"The employer sets the standard and has the right to determine the sanction with which non-compliance with the standard will be visited. As has been stated in various cases a commissioner should appreciate that the question of sanction for misconduct is one on which reasonable people can differ. There is a range of possible sanctions on which one person might take a view different from another without either of them being castigated as unreasonable. If the sanction falls within a range of reasonable options a commissioner should generally uphold the sanction, even if the sanction is not the one the Commissioner herself would have imposed. Only if there is striking disparity between the employer's sanction and the one the Commissioner would have imposed should the Commissioner interfere. As Ngcobo AJP (as he was) put it in County Fair Foods (Pty) Ltd .v. CCMA & Others (1999) 20 ILJ 1701 (LAC), a commissioner is only justified in interfering in a sanction where the sanction is so excessive as to shock one's sense of fairness.*

It seems to me that the Commissioner in this instance, impelled perhaps by understandable philanthropic motives, has indeed erred in seeking to correct the employer's sanction. Clearly she opted for a sanction which she considered more individually just in the circumstances. In so doing she failed to give due and proper consideration to the employer's zero-tolerance policy."

26. Coming to the merits of the review, the findings of the learned arbitrator go against the weight of evidence. The finding that the dye that 1st respondent used was a waste is in stark contrast with evidence adduced on behalf of the applicant which was not challenged, to the effect that in dying department all things are important whether they are used or they are to be used and that dyes are material that are normally not thrown away as it can be reused. The learned arbitrator failed to give due consideration to this material evidence which was never controverted. In this connection she clearly acted irregularly and that calls for the setting aside of her finding on that score.

27. As rightly pointed out by applicants she decided to rely on uncorroborated evidence which she herself extracted from the 1st respondent through questions from the chair, which was that the dye he used was leaking between the pipes and he put an empty bin to collect it. The 1st respondent had never said that in his evidence in chief. In chief he said "I took the dye that was dripping in some machine. I used that dye." This is consistent with what he said at the disciplinary hearing when he said the used dye is transferred through a drainage and there is a drum which has been placed at a point where there is a leakage to contain the dripping dye. That is the dye that he used.

28. If it was useless, the applicant would not have put a container at a leakage point to collect it. All of a sudden 1st respondent manufactures a story when he responds to the arbitrator's

question, that he is the one who put the container to collect the leaking dye. Even assuming he did, evidence which he failed to rebut is that he is not permitted to use the dye and that he should have first sought permission.

29. In a further classical act of failure to apply her mind to the facts the learned arbitrator went on to ask whether the 1st respondent could be said to have committed a dismissable offence by taking a dye that was of no economic value as it was leaking away. First, there is no evidence that the dye was leaking away, and as such of no economic value. If it was leaking away it would have caused an environmental hazard of unimaginable proportions. Accordingly, not only was there no such evidence, the leaking dye was according to 1st respondent's own evidence being collected in a drum, placed there by the employer.

30. The second irregular act committed by the learned arbitrator was to ignore that the applicant company had a rule which 1st respondent knew, against misappropriation of company property. It was not for the learned arbitrator to use her opinion to answer the question whether the 1st respondent committed a misconduct. The employer's code provided a clear answer that it was an offence punishable by dismissal.

31. The learned arbitrator for her part decided to style it a minor transgression for which a warning would suffice. That could well be a valid contention but it does not make the employer's decision to classify it as a serious offence for which dismissal is a fitting penalty unreasonable. It behoves every employer to adopt stern policies against misuse and misappropriation of its property. There was no unreasonableness in the rule and therefore there was no reason for the arbitrator not to give effect to it.

32. At one point the arbitrator agreed that a transgression had occurred in as much as 1st respondent ought to have sought permission before dying his jacket. Now this was correct as the unchallenged evidence of DW1 and DW2 said so in clear

words. She then misdirected herself and stated that failure to seek the permission is not reason enough to have resulted in dismissal. As it has been said, the employer has the right to set the standard and to determine the sanction with which transgression of the standard should be visited. (See Consani Engineering case supra at p.1714G).

33. The arbitrator should not willy willy interfere with the employer's sanction of dismissal just because she herself would have imposed a different sanction in the circumstances. (See TZICC .v. DDPR & Another LC/REV/125/06 (unreported)). The 1st respondent himself admitted he used the employer's property without permission. He however said he believed a warning should have been an appropriate punishment and not dismissal. The learned arbitrator went along with this wish; I dare suggest, for understandable philanthropic reasons against loss of employment by the employee.

34 But now that is not what the code says. It provides for dismissal in such cases. There being no suggestion or finding that the code is unreasonable in providing for such a penalty there is no justification for the arbitrator to substitute what she deems an appropriate sanction. She ought to have given effect to the code. Failure to do so was not only arbitrary but also rendered her guilty of failure to apply her mind to the facts. Accordingly, the award is reviewed corrected and it is set aside.

THUS DONE AT MASERU THIS 16st DAY OF APRIL, 2009.

L. A. LETHOBANE
PRESIDENT

J. M. TAU **I CONCUR**
MEMBER

M. MAKHETHA **I CONCUR**
MEMBER

FOR APPLICANT: **MR. MACHELI**
FOR RESPONDENT: **MR. MOTSOARI**