

**IN THE LABOUR COURT OF LESOTHO      LC/REV/62/2010**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**SEPOLO ALEX NKOJANE**

**APPLICANT**

**AND**

**FIRST NATIONAL BANK  
LESOTHO LTD  
DDPR**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

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## **JUDGMENT**

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*Date: 03/03/2011*

*Review – Evidence of applicant’s wrongdoing so overwhelming that it cannot just be explained away by applicant’s bare denial – Independent contractor is an employee of the principal and is entitled to be protected under the principal employer’s personnel regulations – Insubordination – Applicant flatly refusing to comply with instruction of manager – Such conduct is so reprehensible that employer is entitled to take disciplinary measures even if there is no specific rule prohibiting such conduct under the employer’s regulations – Common labour law does not permit such conduct – Review dismissed with costs as measure of displeasure for pursuing a clearly frivolous review.*

1. The applicant, a former employee of the 2<sup>nd</sup> respondent has applied for the review and setting aside of the award of the 2<sup>nd</sup> respondent, which had found his dismissal procedurally and substantively fair. The facts are largely common cause. On the 14<sup>th</sup> June 2009, the applicant arrived at FNBL Maputsoe Branch at around 18.30 hours. He was looking for one of G4S Security Guards, who guard the Maputsoe branch of the 1<sup>st</sup> respondent by the name of Moleli.
2. He found two security guards on duty, security guards Lesefa and Monaleli. He enquired from them where Moleli was. They told him that he had gone to the shop to buy food. Applicant followed the direction in which Moleli was said to have gone in search of food. He did not find him. He came back to the guard house and verbally abused the two guards. He accused them of telling him a lie about the whereabouts of Moleli.
3. He threatened to come back with his feared and dangerous gangsters of Maputsoe to attack them saying none of them could do anything because he knows that they do not even have firearms on them. He grabbed their guard room keys from where they were hanging and went away with them saying to them that no one can do anything to him. It was on a Sunday evening when all these were happening. Applicant went away with the keys and only brought them back on Monday at between 10.00 and 11.00 am.
4. The security guards reported the incident to their supervisor a Mr. Rabele who in turn reported it to the Branch Manager of the 1<sup>st</sup> respondent Mr. Moabi. The latter called the applicant to his office in the presence of Security Supervisor Mr. Rabele and the Branch Administrator Ms. Palesa Mothibeli. He asked him about the incident that had been reported to him and asked him to make a written report. The applicant told the Branch Manager that he would not make the report since the keys he took belonged to G4S and not FNBL and that what transpired on Sunday was none of his business.
5. The Branch Manager said he sought to persuade him gently showing him the danger of the words he was uttering namely that he took the keys of G4S and not the Bank. He repeated the threats he made to the security guards and said he knows the Manager hates him. He went on to say should he try to do anything to him he would sent his

dangerous acquaintances of Maputsoe to sort him out. He made this threat in the presence of Rabele and Mothibeli.

6. The Branch Manager testified that he thereafter asked applicant several times to furnish a report but he still refused. He resorted to communicating with him through emails still beseeching him to furnish Management with a report of what happened on Sunday. He still refused. In the end the Branch Manager slapped applicant with a suspension letter pending investigation which the applicant refused to sign saying Moabi was not his Manager. He said his Managers are in Maseru and he decided to come to Maseru.
7. Mr. Moabi testified that applicant's unbecoming conduct happened soon after the 1<sup>st</sup> respondent lost M4.5 million through theft where one of the 1<sup>st</sup> respondent's employees was a major suspect. He was charged with three counts as follows:
  - (a) On or about the 14<sup>th</sup> June 2009 the accused contravened section 4.2.1 of FNBL disciplinary code in that he took without authority and refused to return the G4S security keys guarding FNBL Maputsoe branch.
  - (b) On or about the 15<sup>th</sup> June 2009 the accused contravened section 4.2.3 of the disciplinary code in that he refused to write a report when instructed to do so by his Branch Manager to explain an alleged misconduct by himself.
  - (c) On or about 14<sup>th</sup> June and 15<sup>th</sup> June 2009 the accused contravened section 4.2.7 of the code by threatening violence against G4S security guards and Mr. Tokelo Moabi an employee of FNBL Maputsoe branch respectively.
8. It is common cause that applicant pleaded not guilty to all the three charges. He however, did not deny that he made the remarks he is alleged to have made to the security guards and that he took away their guard room keys. He infact confirmed same, but said it was all a joke. He also admitted that he refused to write a report when so ordered by the Branch Manager. He justified his refusal by saying the issue of the keys and the altercation with the security guards had nothing to do with FNBL, they were issues that concerned G4S. As for the threats he denied that he ever threatened either the security guards or Mr. Moabi.

9. Applicant's loose tongue has undoubtedly got him into such deep trouble that he can hardly wade through it. Evidence of him threatening violence against Mr. Moabi and the security guards is so strong that he cannot just explain it away with a bare denial that he ever threatened someone. The evidence of the threats against security guards is corroborated in a material way by the repetition of the same threat against Mr. Moabi. This shows what type of a person he is, who threatens colleagues with mobilization of township gangsters to terrorize them.
10. As if the repetition of the threat was not enough confirmation of his modus operandi against those who do not succumb to his threats, he repeated the threats in the presence of two other independent witnesses namely Rabele and Mothibeli. These two witnesses confirmed at the disciplinary hearing that he had indeed threatened Mr. Moabi and he failed to discredit their testimony. His denial of the threats is downright untruths and the learned arbitrator rightly and justifiably found that the charge of threats was sufficiently proven against the applicant.
11. This charge alone was sufficiently weighty to justify applicant's dismissal. In other words going through the other two charges was largely academic because the Manager cannot be expected to retain a person who threatens the security of the bank and when the bank Manager seeks to get justification for his actions he threatens the Manager himself. Dismissal on this ground alone was justified.
12. The applicant had further been charged of dispossessing the G4S security guards of their guard room keys. The applicant had rather preposterously argued that the keys were none of the business of the bank and that only G4S security had the right to complain. Indeed the two security guards lodged a complaint with their supervisor who in turn complained to the Branch Manager. When the applicant was called into the Manager's office to give account of what happened on Sunday evening, Mr. Rabele of G4S security was there as the complainant.

13. It is significant that G4S are the employees of the 1<sup>st</sup> respondent albeit employed as independent contractors. G4S has entered into a contract for services with the bank as opposed to a contract of service. When they are interfered with in the conduct of their work for the bank on the bank's premises they are entitled to protection under the regulations of the bank like any other employee of the bank. Mr. Rabele rightly sought protection from the management of the bank because the applicant was the employee of the bank. If he was not, in other words if he was a stranger the bank in conjunction with G4S would have reported the incident to the Police.
14. In review application counsel for the applicant argued that the learned arbitrator disregarded the laws governing employment relationship by failing to recognize that there was no violation of company rule regulating the misconduct the applicant is alleged to have committed. The basis for this argument is that the cause of the dispute is the property of G4S and not the bank. We have already shown that for the mere reason that the misconduct happened on the bank's premises against persons working for the bank makes the bank directly responsible and its rules ought to apply to regulate the conduct. Clearly, therefore, applicant contravened the bank's rules against unauthorized removal of any material from the bank, or from any person or bank premises where such material is kept. Vide regulation 4.2.1.
15. It is common cause that applicant refused to write a report to explain the incident of 14<sup>th</sup> June 2009. At the disciplinary hearing the applicant confirmed that "I did not agree to write the report as the issues were G4S issues not FNBL and I told him that ". We have already shown that the G4S security are providing security services to the bank and like the applicant who is entitled to the protection of the bank while carrying out his duties as an employee of the bank on the bank's premises they deserve the full protection by the management of the bank. Mr. Moabi was discharging his responsibility towards them when he called the applicant to account for his conduct towards them.

16. However, even assuming applicant was correct that the issues he was required to report on were G4S security and not FNBL as he alleged; that did not justify him to refuse to implement the order to make a report. He still had the obligation to comply with the instruction even if it meant repeating his perception in the report that his feeling is that the issue he is called to report on had nothing to do with the bank. He would however, be very wrong. Not only is the respondent's disciplinary code not countenancing insubordination, the misconduct itself is so serious that even if there was nothing in black and white, the employer would in terms of common labour law be entitled to take harsh disciplinary action for the applicant's act of insubordination. Accordingly, the learned arbitrator correctly upheld applicant's conviction on this ground as well.
17. In his review application the applicant is literally clutching at the straws. He sought to challenge the Board Resolution authorizing the Chief Executive Officer of the bank so nominated, constituted and appointed by the Board of Directors for the time being of the bank to be the true and lawful attorney and agent of the bank for being perpetual. He could not show a single authority that prohibits the board resolution to be drawn in perpetual terms as has been done in the case of the 1<sup>st</sup> respondent. Apart from doing the obvious namely; appointing the Chief Executive, the resolution is drawn in conveniently flexible terms that allows any person for the time being appointed as Chief Executive to have power to sue and to defend proceedings against the bank. There is nothing wrong in law and in practice with this kind of arrangement.
18. Mr. Mosuo for the applicant contended that on the last day of the arbitration proceedings (21/05/10) the arbitrator resolved to proceed with arbitration in the absence of the 1<sup>st</sup> respondent. He averred that because the 1<sup>st</sup> respondent was not represented, the arbitrator "was tempted to take cross-examiner's task of interrogating the witness/applicant." He submitted that this amounted to grave procedural irregularity.

19. Clause 25(3) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004 provides that:

*“unless there are good reasons for doing otherwise, the arbitration proceedings are inquisitorial in nature. This means that it is the arbitrator’s task to find out the truth by questions requiring the parties to produce documentary and other forms of the evidence that may lead to a just and expedited determination of the dispute.”*

Clause 26(9) of the guidelines provide that while the arbitrator is empowered to lead witnesses he or she *“must avoid cross-examining the witness. The object of the questioning (should be) to elicit the evidence of the version in support of which the witness is giving evidence.”*

20. The arbitrator is clearly entitled to ask questions but not to cross-examine witnesses. The evidence of the applicant herein runs from pages 36-38 of the record. The arbitrator seem to have intervened only five times. The first time she required a clarification on how applicant knew G4S because he had been asked if he knew it and he had answered in the affirmative. The second intervention was when she asked applicant what he had been dismissed for.
21. The 3<sup>rd</sup> question sought applicant’s response to the three charges he had testified that he was charged with. He admitted taking the keys and said the other charges are lies. The arbitrator followed the question seeking to know why he took the keys. He responded that he was joking. The last intervention was when the arbitrator sought to get from applicant why he says his dismissal was unfair. None of these five occasions when the arbitrator intervened showed her to be cross-examining the applicant. She is clearly seeking clarification as she is entitled to do in terms of the guidelines. It follows that applicant’s complaint of irregularity is without merit.

22. Finally, Mr. Mosuoe submitted in his heads of argument that the arbitrator relied on unsubstantiated evidence of Mr. Moabi, the Branch Manager. From the disciplinary hearing, the record of which was presented at the arbitration, Mr. Moabi's evidence was supported by the two security guards who applicant dispossessed of the keys and even threatened them. He was further supported by Mr. Rabele the security supervisor and the Branch Administrator Ms. Mothibeli in the presence of whom applicant defied the Manager as well as to threaten him. Accordingly, we find no merit in this complaint as well. Similarly, the application for review is without merit and it is accordingly dismissed with costs as a measure of displeasure at applicant for pursuing what this court considers to be a totally frivolous review application.

THUS DONE AT MASERU THIS 17TH DAY OF MAY 2011

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

**J. M. TAU**  
**MEMBER**

**I CONCUR**

**M. MOSEHLE**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR. MOSUOE**  
**MR. LOUBSER**