

**IN THE LABOUR COURT OF LESOTHO**

**LC/REV/75/09**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**PERFECT CAR RENTAL (PTY) LTD**

**APPLICANT**

**AND**

**DIRECTORATE OF DISPUTE  
PREVENTION & RESOLUTION  
M. MOCHOCHOKO (ARBITRATOR)  
LABOUR COMMISSIONER  
obo MAMOKETE LEMPHANE**

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

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

**3<sup>RD</sup> RESPONDENT**

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## **JUDGMENT**

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*Date: 09/03/2011*

*Section 79(2) of the Code empowers employer to withhold severance pay if employee is fairly dismissed for misconduct – Employer withholding employee’s severance pay and accrued leave – Arbitrator enjoined to assess if evidence establishes that employees was fairly dismissed for misconduct – Arbitrator failing to discharge that obligation – Hearing – Arbitrator holding that employee was not given fair hearing despite evidence to the contrary – Award reviewed, corrected and set aside on issue of severance pay – The order on payment of accrued leave.*

1. This is an application for the review and setting aside of the award of the learned arbitrator Mochochoko, in which he found the dismissal of a former employee (the complainant) of the applicant, procedurally unfair and consequently adjudged her qualified to be paid severance pay, which the employer had denied her because he considered her to be guilty of a misconduct. The complainant had filed a referral in which she

claimed payment of severance pay and accrued leave of eight days which she had not taken.

2. The applicant is a transport company which had seven employees and 8 sub-contractors who leased their cars to them for a fee. One of the seven employees was a transport controller who worked at night. During the day time there were six employees made up of four drivers, a transport controller and an office clerk/cash attendant who was the complainant herein.
3. The complainant was dismissed from the employ of the applicant on the 1<sup>st</sup> October 2008 for negligence in that she had kept cash without banking it for three days contrary to standard procedure, which money finally got stolen. She was further found negligent in that she had disclosed to a stranger i.e. a non-employee, the details of when subcontractors would be paid and how the payment was going to be effected i.e. whether by cash or cheque.
4. In her own evidence before the DDPR the complainant avoided to testify on what her duties entailed. She instead concentrated her effort on simply denying that she was responsible for the disappearance of the money. In a rare moment of truth, however, she conceded that she was responsible for the money that disappeared, but averred she did not know how it disappeared. She however, admitted that on the morning that the money was found missing, a former sub-contractor had asked her when they were paying sub-contractors and she had cooperated with him and divulged when and how the payment would be made.
5. The complainant testified further that the keys to the cash box safe were kept by her and the Managing Director one Frank. Asked if the office had been broken into she said it had not. She stated that a case of negligence was opened against her but she was never called to a hearing. She averred that nothing further was said to her at work but the Managing Director later called her to his house where he told her that she must repay the money.

6. Under cross-examination she admitted for the first time that she collected money from customers and paid it over to the sub-contractors whose vehicle would have been hired. If the owner of the vehicle is not present to collect the rental fee for his car, she would keep the money in the cash box safe until the owner arrived she testified. (see p.22 & 23 of the record). In answer to a question, in what circumstances she took the money to the bank, she said she only banked money she received from Frank for that purpose. It was put to her that the policy was to bank money daily and that no money was to be kept in the cash box. She denied knowledge of the policy and said all she knew was that she would take the money to the bank when instructed to do so by Frank.
7. She was asked if she ever took any money to the bank without prior authorization. She said she only banked cheques without authorization. She said she did not take the money to the bank because Frank used to take the money home to his wife. She said even the one that disappeared Frank was going to take it. (see p.26 of the record). Complainant's evidence is clearly contradictory and unreliable. At page 20 of the record the complainant said she gave Frank money that had been generated by his cars. At page 21 she said the stolen money had to be kept in the safe because it was not Frank's money. She sought to paint a picture that money could be kept in the safe box for days if the owner did not come to collect it (see p.23). this of course sounds strange by any business accounting standards.
8. Frank's evidence was that complainant was employed as office clerk and transport controller. As office clerk she was responsible for company income which she had to bank daily. She was also responsible for paying sub-contractors as well as for office running costs. He testified that she alone was responsible for the key to the safe. Asked to comment about complainant's evidence that the keys to the safe were kept by him and her, he said when he gave the key to the complainant, he kept a duplicate which he did not take around with him. He

kept it at home and for this reason he could not touch the cash box except in the presence of the complainant.

9. He testified that on Wednesday 6<sup>th</sup> August 2008, at around 5.00pm complainant gave him M700-00 which she said was for sub-contractors and told him that she had left the same amount in the cash box and it was for sub-contractors as well. DW1 said he asked her to bring that money as well. Accordingly, he got a total of one thousand four hundred Maluti from the complainant.
10. The following day whilst still at home, he received a call from one of the staff members at the office one Mathai who told him that Police had fired shots at Lancers Inn where their cars are usually parked. He told him further that they had impounded one of his cars and taken four employees as well. Two of the employees were from the sub-contractor while the other two were applicant company's employees. The complainant was one of the two company employees who had been taken in.
11. DW2 testified that he followed them (the employees) to Police headquarters where they had been taken. He found that they were being questioned on issues which had no bearing to his business. They were later released together with the car they were taken in with. The witness testified that after they were released the employees did not go back to work. He said he even gave the complainant a ride home. She only reported back to work on Friday 8<sup>th</sup> August 2008.
12. He averred that when he arrived at work on Friday at around 10.30am, complainant came to enquire from him if he took the cash box. He denied doing so and she told him that the box was missing, but there had not been a break in. Later Mathai came to ask him if complainant told him that the cash box had money in it. He averred that he was not expecting that the box could have money because the money is not kept in that box. He said company policy is that money is kept in the bank, or it is kept by those to whom it belongs i.e. people whose cars would have been rented. If the owner is not there to take it, the complainant ought to tell him "so that I could remove it from a

dangerous zone and take it home and come back the next day.” (see p.69 of the record).

13. Frank testified further that for there to be money in the cash box it would have been received prior to the 7<sup>th</sup> August because on the 7<sup>th</sup> complainant returned home after the brief detention at the Police headquarters. He testified that the last time complainant was at work was Wednesday 6<sup>th</sup> August when she gave him M1,400-00 at close of business. He went further to say that the complainant did not tell him that there was more money still remaining in the cash box. Asked when he knew that there was M9,300-00 which disappeared with the cash box, he said it was only upon being told by Mathai. (p.71 of the record). He was asked if he ever asked complainant about the money lost in the cash box? He answered that:

*“I confronted her about that issue of money in the safe and asked what was that big money for, that has been kept in the safe and she told me that it was for students.”* (p.71 of record).

He went on to clarify that the money actually belonged to owners of two taxis who transported students to Ladybrand and it turned out that the money had been paid by the students. He testified that he asked her why she did not bank the money or give it to the owners, she said she was accumulating it. He said he then told her that she must repay the money because she failed to do her work of banking the money or giving it to its owners.

15. Asked what her reaction was he said she remained silent and looked frightened. He was asked if the complainant appeared puzzled by his accusation that she failed to bank the money he said she did not “because she knew that she did not do her work, because she knew what she was supposed to do with the money.” (see p.73 of the record). He stated that he told her that she was his suspect number one and asked her who her suspect was. That was when she mentioned Latolang Bereng who she said had asked her that morning when they were going to pay sub-contractors.

16. He was asked yet again if he asked the complainant about the missing money and the negligence of releasing sensitive information about company finances to outsiders. He said he and his wife as co- director had several sessions with Mamokete giving her the opportunity to explain the circumstances about the disappearance of the money. He said he gave her a month to repay the money but she failed to do so. It is common cause that on the 1<sup>st</sup> October 2008 which was a month and some three weeks since the disappearance of the safe and the money, the complainant was dismissed without being paid her terminal benefits.
17. The applicant lodged a complaint with the office of the Labour Commissioner which referred her claim for severance pay and accrued leave to the DDPR. Section 79(1) of the Code provides that an;
  - (1) “An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive upon termination of his or her services, a severance payment equivalent to two weeks’ wages for each completed year of continuous service with the employer.
  - (2) An employee who has been fairly dismissed for misconduct shall not be entitled to a severance payment.”

As said the employer withheld the severance pay because he was of the view that the complainant was guilty of misconduct in that she had been negligent in her work resulting in the loss of the M9,300-00.

18. The learned arbitrator was thus obliged to assess whether on the evidence before him the complainant had been fairly dismissed for his misconduct. The learned arbitrator dismally failed to discharge that obligation. He instead concentrated his effort on procedure and held that the complainant was not given a fair hearing in that she was not given adequate time to prepare because the hearing was held the same day the charge

was given. Furthermore he held the hearing to have been unfair because the complainant was not represented and she was not allowed to call witnesses.

19. The applicant lodged a review against that finding contending that the arbitrator committed a reviewable irregularity in that he ignored his evidence to the effect that the complainant was given a hearing although not formal. Indeed the Managing Director testified that he confronted the complainant several times about the missing money and her failure to discharge her duties of either giving the money to the owners or banking it, or tell him the Managing Director about it so that he could remove it. What further hearing did the complainant need? She had been confronted not once, but several times. She was even given the whole month to come up with ways in which she could repay the money.
20. The learned arbitrator seem to have totally ignored evidence of the hearing and instead placed emphasis on the type of a hearing that complainant was given. He had in mind a specific type of a hearing which the employer had not used. However, the employer had a reason why he had not followed a formal hearing procedure, which reason does not seem to have been considered by the learned arbitrator either. At page 87-88 of the record the following exchange happened between Frank and the representative of the complainant:

**AR** "I would like you to repeat your answer. You said on the 9<sup>th</sup> you charged Mamokete verbally and you even held a hearing verbally on the same day. Am I wrong or correct?"

**DW1** Indeed that is so sir.

**AR** Do you see to have dealt with that matter transparently?

**DW1** Due to the small size of my company I considered to have dealt with the matter correctly just as any Managing Director would do.

**AR** About the small size of the company I don't understand?

**DW1** About the small size of the company I mean I am the one who does everything. I am the human resource, managing Director, I am also seeing to it that people are doing their work on the other hand."

21. This evidence clearly explains why the employer did not follow the formalistic approach to the handling of the hearing. Unfortunately the learned arbitrator has totally ignored it and insisted on formal charges being laid. This was clearly irregular as the arbitrator failed to apply his mind to the evidence presented. He went on to hold that the complainant was not represented at the hearing as such the hearing was unprocedural. First there is no invariable rule that an employee must be represented at a hearing even where she or he has not sought representation. There is no evidence that the complainant sought representation and that it was denied. Accordingly, that finding was arbitrary and unreasonable as it was not based on evidence.
22. The learned arbitrator further acted unreasonably in finding that the complainant was not allowed to call witnesses. Nowhere in the proceedings before the DDPR did the complainant testify about being refused to call her witnesses. She was charged of negligence in that she released sensitive information to a stranger. Other than say that she did not know that she could not release such information, she could not deny that she did so, in as much as she was the first person to disclose that she released such sensitive information. As a person dealing with company's finances she ought to know which information concerning company finances she could release to outsiders and which one she could not. Her evidence that she did not know that she could not share the information with strangers is clear proof of carelessness and negligence.
23. The complainant was further charged of negligence in that she kept the money in the safe for more than three days without banking it, giving it to its owners or giving it to the Managing Director for safe keeping. She could not deny these charges save that she did not know that she had to bank the money without Frank's instruction to do so. Complainant was three years into that job. She could not after that length of service in that job be heard to say she did not know that the cash box was not a safe place to keep the money for a longtime in an office which not only her had access. Anyone of the employees could



enter the office and clearly that made the cash box not a safe place to keep the money. She was therefore clearly negligent. If complainant needed witnesses to come and help her wade through the troubled waters of these two charges she was free to tell her employer so. But there is no evidence that she ever did so, on the contrary, evidence is that she pleaded guilty to the charges. (see p.86 of record). Clearly therefore, the learned arbitrator's finding is irregular, unreasonable and irrational as such it calls for the interference of this court.

24. Applicants have rightly taken the finding of the learned arbitrator on the alleged procedural irregularity on review. The finding was completely irrational, unreasonable and as such irregular. As we said in paragraph 18 of this judgment the learned arbitrator failed to do the key function of determining whether the complainant was fairly dismissed for misconduct. This was necessary to enable the learned arbitrator to assess whether the employer correctly withheld payment of severance pay pursuant to section 79(2) of the code. In the absence of that determination the learned arbitrator was not in a position to pronounce on the complainant's entitlement or non-entitlement to severance pay. His determination that complainant was entitled to be paid severance pay in the absence of prior determination of her guilt or innocence on the charges she faced was once again irrational and unreasonable and therefore calls for the interference of this court.
25. Clearly therefore, there is no basis on which the learned arbitrator could come to a conclusion that the complainant was wrongly denied severance pay in terms of section 79(2) of the code. Accordingly, the learned arbitrator's finding on this point i.e. complainant's entitlement to severance pay is reviewed corrected and it is set aside.
26. There is another leg of his finding that the complainant should be paid 8 days accrued leave which she had not taken. The review application did not challenge this aspect of the finding. Indeed even at the arbitration the applicant had not challenged complainant's entitlement to the payment of the 8 days leave days. Mr. Ntaote had rather lackadaisically sought to suggest

that the amounts due to complainant could be set off from the M9,300-00 which disappeared. (see p.79 of the record). Mr. Ntaote did not however pursue that point and we can safely consider it as rightly abandoned because no evidence had been led to substantiate the need for a set off. Accordingly, this part of the award is not disturbed and as such the applicant company is still to pay the complainant the M480-00 ordered by the arbitrator for the 8 days leave due but not taken. Each party to bear its own costs.

THUS DONE AT MASERU THIS 22<sup>nd</sup> DAY OF JUNE, 2011

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

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

**I CONCUR**

**D. TWALA**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR 3<sup>RD</sup> RESPONDENT:**

**MR. NTAOTE**  
**MR. LEROTHOLI**