IN THE LABOUR COURT OF LESOTHO **LC/REV/94/09**

HELD AT MASERU

IN THE MATTER BETWEEN

SEKAKE PHAKISI **APPLICANT**

AND

LETSENG DIAMOND (PTY) LTD **1ST RESPONDENT**
DDPR **2ND RESPONDENT**

JUDGMENT

Date: 26/04/2011
Review of DDPR award – An off duty misconduct – An employer may discipline employee for off duty misconduct if employer can show nexus between employee's misconduct and employer's business – Respondent failed to establish connection between its business and the alleged misconduct committed by the applicant – Furthermore, respondent failed to establish that applicant's conduct amounted to a misconduct – Award reviewed and set aside.

1. This is an application for the review of the award of the learned arbitrator Mochochoko wherein he upheld the dismissal of the applicant from the employment of the 1st respondent on alleged misconduct of dishonesty. The applicant was employed as Assistant Security Manager of the 1st respondent. He was answerable to a Mr. Norman who was the Security Manager of the 1st respondent.

2. On the 9th April 2005, at around 4.00pm the applicant went out of the main gate of the mine in a vehicle driven by his friend a Mr. Tsepo Motaung. Applicant was admittedly not on duty and the vehicle he was in, belonged to Barlow World a subcontractor of the 1st respondent. The person driving it was Barlow World's Site Manager and he frequently drove this vehicle. At the time they went out of the gate the gate was being manned by a member of G4S Security by the name of Mahooana Khakhane.

3. Applicant and Tsepo went to Mapholaneng where they admittedly had alcoholic drinks. On their way back to the mine, the vehicle overturned. According to PW1, Tsepo was afraid that he was going to land in trouble because this was not the first accident he was having with company vehicle. He plotted to fabricate a story to the effect that the vehicle was stolen from the mine and that it overturned in the hands of the alleged car thiefs. PW1 who was the applicant, said he warned him against that and even reminded him i.e. Tsepo that he must remember that he (the applicant) was a security officer.

4. PW1 testified further that Tsepo disclosed to him that he was going to use Khakhane to support his story that he had come back with the vehicle intact and that it was subsequently stolen from the mine, leading to its overturning. Applicant said he told him i.e. Tsepo that Khakhane too was under his command and he would not approve of him being used in such a scheme. The two of them returned to the mine in the damaged vehicle. When they got to the gate Khakhane had already knocked off.

5. He testified that he found Khakhane at the canteen where it turned out to be too noisy for them to talk. He averred that they could not stand outside either, because it was too cold. He then called Khakhane to his room with the aim of making him aware of Tsepo's plans. After he started to talk to Khakhane and after he told him that they had an accident with the Barlow World car they went out in,Tsepo walked in.

6. Applicant testified that Tsepo who was drunk started negotiating Khakhane to assist him device a story about the vehicle having come back with no damage and being subsequently stolen by someone, who later overturned it. Applicant testified that both he and Tsepo were drunk. He nonetheless appreciated the ongoing discussion. He testified that he got fed up with Tsepo's persistence in pursuing the plot he had advised him against. He chased both Tsepo and Khakhane out of his room and ordered Khakhane to see him the following day.

7. He testified that Khakhane did come to his room in accordance with his instruction the following day, in the morning. He testified that he told Khakhane not to associate himself with Tsepo's proposal, because he would be in trouble if the Police investigated the case and found that their story was a lie. He averred that Khakhane then told him that he was going to report what had happened to the Security Manager Mr. Norman. He answered that that was the right thing to do as a security officer.

8. The witness testified that he did not consider it part of his duties to report to Mr. Norman what had happened as he was not on duty. However, on Saturday evening Mr. Norman sent two people one Marupelo and one Qhuu to come and find out about the accident that he had learned he had been involved in. He said he did not give them any details. He just told them that they were both safe and had not been hurt. He promised to give Mr. Norman a full report later.

9. On Sunday he met Tsepo who told him he had made a report to the Police and that he had portrayed the vehicle as stolen as he had planned. He averred that he told him to go back to the Police to change the false statement and give a true one. He testified that Tsepo said he was afraid to go alone. PW1 said he requested DW1 Tau Tlebere to accompany him to the Police Station. He asked Tlebere to assist because he was one of their friends and he had already informed him about the accident and Tsepo's nefarious plot. Tlebere had undertaken to go to Tsepo to advise him to change his plans. Asked if Tlebere did accompany Tsepo to go and change the statement. He said

he did not know, however the false statement was eventually changed.

10. Evidence led on behalf of the 1st respondent was adduced by Tau Tlebere one of applicant's circle of friends in whom he had confided the details of the accident. Tlebere was the chairperson of the disciplinary enquiry which found applicant guilty of dishonesty and recommended his dismissal. He testified that he found applicant guilty of dishonesty because he considered him a high risk in the position he held because he was present when the plot to give false statement to the police was hatched and yet he failed to report that plot to his supervisor Mr. Norman.

11. It was put to the witness that his own testimony had been that although applicant was present in the room when Tsepo sought to persuade Khakhane to help him create a lie, he was himself silent. He conceded that was the case. He was asked if applicant's silence was a sign of dishonesty. (see p.71). DW1 stated in answer that he did not only rely on the silence but other evidence tendered as well. Asked what that evidence was he said the statement made by the applicant. He was asked if the statement he talks about was written or verbal. He immediately changed and said he was talking about the statement made by Tsepo to the police. (see p.71).

12. Asked if he was referring to the false statement that Tsepo made to the police, he agreed. He was asked how he connected applicant with that statement. He said during the hearing applicant was asked if he knew about that statement and he said he knew about it. They then told him that he should have informed the employer about it. The representative of the applicant sought to know who tendered the statement and DW1 said it was already in the case file.

13. Asked if the statement said anything about the applicant he said it did not, but they were concerned that despite knowing about the false statement applicant's attitude was that he was not going to report on it. It was put to him that applicant did report Tsepo's fabrication to him. He denied and said if that was the

case he would not have chaired the disciplinary enquiry. Pressured further that applicant told him about the accident and that he was one of the seniors to whom applicant reported, he conceded, but said they talked about it lightly by which I assume he means informally, because he said applicant never said he was reporting. (see p.91).

14. It was put to him that he actually accompanied Tsepo to the police to change the false statement. He denied physically accompanying Tsepo to the police station, but conceded he would have advised him as a friend to go and change the statement. When he was put to task to confirm that he persuaded Tsepo to change the statement he changed and said as far as he was concerned that was the first statement Tsepo was going to make. It was put to him that he was not being truthful when he earlier said he had had no previous knowledge of the accident, otherwise he would not have chaired the disciplinary enquiry. He agreed he had heard about the incident but not in a formal manner.

15. It was put to him that no evidence of applicant's alleged dishonesty was placed before him. He responded thus:

> *"As I have said before, because of the gravity of Mr. Phikisi's position which he holds in the company and access to our product being diamond, it would have been expected that the meeting between Mr. Motaung would have not been entertained either being in his presence, we are in vocal (sic) or silent, implied that he understood and agreed with Mr. Motaung's request to Mr. Khakhane."*

It was put to him that Mr. Khakhane's own statement showed that it was infact applicant who dissuaded Khakhane from accepting Tsepo's proposition. His position was that PW1 only cooperated with Khakhane after the latter told him he was going to report.

16. It was put to him that there was no urgency on the part of the applicant to report the accident they had had with Tsepo. He agreed there was no urgency to report the accident. He was asked further if he was aware that the accident the applicant and Tsepo had had nothing to do with the safety and security of diamonds. He agreed that was so.

17. DW2 was security officer Khakhane who confirmed the common cause evidence that he was manning the gate at around 4.00pm on the 19th April 2005, and that applicant went out in a Barlow World vehicle driven by Tsepo Motaung. He knocked off at 6.30pm and later that evening Phakisi called him to his room where he told him that he and Tsepo had an accident in the vehicle they went out in. While they were talking Tsepo walked in and started seeking his support in fabricating a falsehood that the vehicle they had an accident in was stolen, from the mine after he and Phakisi returned it safely after they drove out in it earlier that day.

18. He was asked what Phakisi did? He said Phakisi ordered the two of them to leave his room and told him that they would talk the following day. He testified that he reported to PW1 the following morning that he was going to report the previous day's incident to Mr. Norman. DW2 testified that applicant said he must remember his job as security officer and said if Mr. Norman needed to talk to him he could call him.

19. DW3 was Mr. Kelvin Norman applicant's immediate supervisor. He was informed about the accident the same evening that it happened. He confirmed that the following Sunday DW2 security guard Khakhane, made a report to him that Tsepo and Phakisi wanted to hide the accident. (see p.118 of the record). He testified that PW1 failed to report the accident to him the evening it happened. After Khakhane gave him the report he asked him to call Phakisi for him, but the latter did not come. On Monday morning he met applicant and asked him to come and see him but applicant did not come immediately.

20. When they finally met he asked him to give him the statement regarding what happened on Saturday but he declined. He testified that he brought to applicant's attention that he was the second in command and that he must be open to him. He averred that applicant did not tell him everything, but decided to add his own statement. He stated that he was of the view that as a security person Mr. Phakisi should have reported the accident to him the same evening it occurred or at least on Sunday morning. He concluded that he was not happy with Mr. Phakisi's conduct and he found it "very hard to trust Mr. Phakisi and it would be difficult to trust him in any incident especially…being working in the diamond mine. I would find it very difficult." (P.123 of the paginated record).

21. The witness was asked to confirm that he said he obtained a statement from applicant. Contrary to what he said in Chief at p.121 of the record he changed and said he got Tsepo's statement. He was asked if he personally took the statement from Tsepo. It emerged that the statement he was referring to had been made to the police, but the witness was reluctant to admit this. When he was pressed to say exactly who took the statement, he said he was not sure if he took the statement or it was taken by the police. It is difficult to understand why the witness was at pains to accept a simple fact that he never took Tsepo's statement and that the statement he relied on was police statement. He is clearly not being truthful to the court.

22. It was put to him that there had been no evidence from either DW1 on DW2 that applicant was either involved in the fabrication or the planning thereof. The witness responded that Khakhane had said so to him. It was put to him that on the contrary Khakhane said applicant was silent throughout. He said he did not know safe that he learned the three were together in the room. Quite clearly this witness is again not being truthful about Khakhane's testimony for the latter never said PW1 took part in the plot to fabricate.

23. He was asked if Khakhane told him that he was making a report of the conversation with Tsepo in terms of an agreement he had with Phakisi that he must go and report. He responded that

Khakhane told him that Mr. Phakisi told him to go and report to him (security manager) in accordance with his duty as a security officer. In reexamination the witness stressed that Khakhane said applicant also took part in persuading him to fabricate something we have already said is far removed from the truthfulness of Khakhane's testimony.

24. DW4 was Mrs. Mochekoane-Ramakatane who had chaired the arbitration proceedings in J004/05. She was sworn in to hand in under oath the transcript of those proceedings. However, Mrs. Mochekoane-Ramakatane stated under oath that she was not the one who transcribed the record. She could not therefore, vouch for the authenticity of the record. Needless to say Counsel for the applicant did not even bother to cross-examine her.

25. It is common cause that having heard evidence on both sides the learned arbitrator made a ruling as follows:

    (i) Applicant was irritated and annoyed by Tsepo's proposal to lie about the accident as he was aware that would put him in trouble.
    (ii) Applicant actually warned Tsepo against pursuing his plan.
    (iii) Since applicant's evidence to this effect was not contradicted the learned arbitrator accepted it.
    (iv) Applicant made a written report to Mr. Norman which did not include Tsepo's lie that the vehicle had been stolen.
    (v) Contrary to what applicant said that when Tsepo interrupted them, he had not yet told Khakhane about Tsepo's plan to cover up the accident, the learned arbitrator found on the basis of the record in J004/05 that he had already warned Khakhane about Tsepo's plan when the latter walked in.
    (vi) Applicant warned Khakhane when they met Sunday morning to remember his job and agreed to him reporting the incident to Mr. Norman. (see pp6-7 para 19-21 of the award).

26. Despite his clear factual findings stipulated above, the learned arbitrator went on to say he was concerned "about what applicant said in relation to the fabrication and his conduct." He chastised applicant for not rebuking Tsepo the previous night when he persuaded Khakhane to help him to fabricate a story that the vehicle was stolen. Applicant's evidence which was not challenged was that he never supported Tsepo's attempt to tell a lie about the circumstances of the vehicle's overturning. He said he rebuked him on their way back to the mine even the following day when he learned he had already given the false statement to the police.

27. With regard to Khakhane the learned arbitrator's own finding is that applicant called him to his room to warn him about Tsepo's machinations. He found further that he did infact inform Khakhane. When Tsepo disrupted their conversation with his dirty plan, he (applicant) chased the two of them out of his room. That certainly cannot be called "complete silence" as the learned arbitrator found. Evidence which the learned arbitrator accepted is clear that not only did applicant disapprove of the plan, he went out of the way to warn both individuals albeit, separately, not to go ahead with the plan.

28. The learned arbitrator castigated applicant for not rebuking Tsepo when he spoke to Khakhane in his presence. It is however, not denied that he had previously reprimanded him. Furthermore, the learned arbitrator does not seem to have placed any weight to PW1's admitted act of expelling both persons out of his room. If it is accepted as the learned arbitrator did, that applicant was irritated by Tsepo's plans and even warned him against it and that he called in Khakhane to pre-warn him of the plot, his chasing them out of his room can only be correctly interpreted as a further sign of his disgust and non approval of the plot. He cannot in the circumstances be accused of complete silence. To find otherwise is clearly in conflict with evidence presented and duly accepted as such it amounts to an irrational finding which is inconsistent with the evidence presented.

29. In this review application the applicant further challenged the rationality of the award on the grounds that firstly it was irregular for the arbitrator to allow DW1 Tau Tlebere to testify while the said Tau Tlebere was the chairperson of the initial disciplinary hearing. The reason for the complaint was said to be that Mr. Tlebere was not a competent witness to testify to matters that came to his knowledge only by virtue of being the chairperson of the enquiry. At the hearing of this matter Mr. Sepiriti for the applicant wisely and correctly in our view abandoned this ground of review.

30. Mr. Sepiriti pinned his hopes on one ground albeit being repeated in different words in more than three paragraphs. This was that the arbitrator acted irregularly in finding that the applicant acted dishonestly by failing to report the accident:

    (i) While the accident and failure to report same was unrelated to applicant's job as a security officer.
    (ii) Because evidence demonstrated that the accident did not occur during the course and scope of employment with the 1st respondent moreso, when reporting of the accident was not necessary as far as applicant's duties as security officer were concerned.
    (iii) Because the accident and failure to report it have not been shown to have prejudiced the 1st respondent nor compromised applicant's position as security officer.

31. The thrust of the contention advanced on behalf of the applicant is that the accident involved a car other than that of the 1st respondent and that the applicant was off duty when he got involved in the accident, as such the whole episode had nothing to do with the 1st respondent as the employer of applicant or with the applicant as the employee of the 1st respondent. Mr. Loubser for the 1st respondent essentially narrated the background of the case and stated that applicant failed to mention in his report which he eventually made to Mr. Norman that Tsepo had wanted to falsify the report and that when he was taken to task about it he said he did not consider it his duty to report anyway. He agreed that this is the point that this court has to decide.

32. The issue whether an employer can discipline an employee for a conduct that occurred away from work and during off duty period has been answered in the affirmative in many South African cases. Key among them being NEHAWU obo Barns .v. Department of Foreign Affairs (2001) 22 ILJ 1292, where it was held that;

> *"despite the general rule that an employer can only discipline an employee for conduct perpetuated at the workplace during working hours an employer would indeed be entitled to take disciplinary action against an employee for certain acts of misconduct committed off its premises and outside working hours. This as long as the employer is able to show a nexus between the employee's conduct and their business."* (see Visser .v. Woolworths (2005) 26 ILJ 2250 at 2253).

33. In the case of Visser supra Commissioner Van Elk relying on the decision of the Labour Appeal Court in Hoescht (Pty) Ltd .v. CWIU & Another (1993) 14 ILJ 1449 postulated that the determination whether an employer can discipline an employee for a misconduct which does not fall within the express terms of the employer's code and that is perpetuated away from the employer's work place, depends on a multifaceted enquiry which includes amongst others:

(i) The nature of the misconduct.
(ii) The nature of the work performed by the employee.
(iii) The employer's size
(iv) The nature and size of the employer's workforce.
(v) The position which the employer holds in the market place and its profile.
(vi) The nature of the services rendered by the employer.
(vii) The impact of the misconduct on the workforce as a whole as well as on the relationship between the employer and employee and the capacity of the employee to perform his job.

"In the final analysis what would need to be determined is whether the employee's conduct had the effect of destroying or

of seriously damaging the relationship of employer and employee between the parties." At p.2254 B-D.

34. If regard is had to the foregoing guidelines, it is apparent from the evidence adduced that the employer based its decision on essentially three out of the total of seven factors that it had to consider. They took into account the nature of the misconduct, the position of the applicant and the nature of the services rendered by the employer. Not only did the employer not consider the other four factors, it did not consider whether the alleged misconduct harmed the relationship between Letseng Diamond as the employer and the applicant beyond redemption. We point to Letseng Diamond as opposed to the security manager Mr. Norman advisedly.

35. In our view it is important to observe that the authorities referred to speak of misconduct. Does the evidence presented establish applicant having committed misconduct against Letseng Diamond as the employer, which harmed or seriously destroyed the employer and employee relationship between the parties? Evidence is that the vehicle belonged to the sub-contractor and it was driven by a person of managerial rank who had full accountability for it. He overturned it away from Letseng Mine, where mine security had no security role to play. It was evidently a sole police prerogative to determine the circumstances of the accident.

36. According to evidence Mr. Norman, the security manager had interest hence he sent Marupelo and Qhuu to ask applicant about the accident. His response was, " tell him I am well and safe, no injuries but we will talk later." On the one hand Mr. Norman was hurt by this that applicant did not feel like reporting this to him. On the other hand he was hurt, according to him beyond rehabilitation, when applicant did not tell him in his report that infact Mr. Motaung attempted to hide the accident to appear as if the vehicle had been stolen from the mine. Assuming the legitimacy of Mr. Norman's concerns, did applicant's conduct amount to misconduct against Letseng Diamond Mine?

37. In the case of Saaiman & Another .v. De Beers Consolidated Mines (Finsch Mine) (1995) 16 ILJ 1551, the Industrial Court of South Africa as it then was, upheld the disciplinary action and subsequent dismissal of two white south African males who had been found guilty of stockpiling explosives under the instruction of the white supremacist organisation commonly known as AWB with the aim of waging war against the newly elected ANC Government after the 27th April 1994 first democratic elections in south Africa. Various factors were taken into account key among them being the racist agenda pursued by the applicants, in the face of the militant black majority workers employed by the respondent. Secondly, the fact that De Beers was a Diamond Mine which stockpiled explosives, the type of which was also found in the stockpiles hidden by the applicants. The possibility of their accessing the respondent's mine's own explosives was not ruled, especially as evidence was led which "established that the security of Finsch Mine is not of such a nature that it is 100% foolproof." At p.1567.

38. In NEHAWU .v. Department of Foreign Affairs supra the employee was a member of staff of the South African High commission in London. He was accused of sexually harassing two flight attendants, refusing to adhere to on board flight safety rules, and using foul, abusive and insulting language towards the cabin crew. It was found by the court that there was a nexus between his (the employee) conduct and the business of his employer. In Visser .v. Woolworths, the applicant had been arrested for allegedly stealing at Truworths store. The court found that there was a connection between the employee's conduct and the business of her employer.

39. In hoc casu, Barlow World who were the owners of the vehicle that overturned did not complain, perhaps understandably so because even the attempt to cover up as initially planned did not materialize. There is no evidence that it took any action against Tsepo its site manager for overturning the vehicle. However it is common cause that he still works for Barlow World. With all what we have said, we do not discern the connection between the accident and its not being reported with the business of Letseng Diamond as the employer. Applicant

may have hurt his supervisor when he did not disclose the details of the accident to him, but it is not proper in our view to elevate that hick up between the two individuals to employer and employee.

40. Mr. Norman was again displeased that the applicant did not tell him that Tsepo attempted to falsify the report of the accident. Assuming the dirty trick materialized who would it hurt between Letseng diamond Mine and Barlow World? Obviously the latter, but Letseng would get affected if the security at the gate had cooperated. According to evidence the security officer who was on duty did not give his cooperation at the instance of the applicant. The same security officer reported, with the approval of the applicant to Mr. Norman. This was the right person to report for he was the one on duty. Applicant was not, but he gave his support to the security officer on duty to do the right thing. What more do we need from him?

41. The complaint of Mr. Norman in this regard sounds very much on the subjective side, which he is entitled to as a person. But it seems to us that he ought to separate the subjective from the objective. The subjective considerations could well be addressed and resolved collegially through advise and counseling regarding what he (Mr. Norman) would expect from applicant in future as his second in command. After all he had the report he needed, safe that it did not come from the applicant as a person, but he had evidently supported efforts leading to his being informed.

42. It seems to this court that applicant's review of the award of the learned arbitrator in the circumstances was the right move. Applicant's alleged wrongdoing in the circumstances is farfetched regard being had to the evidence led in particular whether there was any nexus between the whole incident of the overturning of the vehicle off the mine premises, its reporting and the business of the employer. This is more so when regard is had to the fact that evidence failed to establish any wrongdoing on the part of applicant against the employer as opposed to Mr. Norman as a person.

43. Even assuming disciplinary proceedings could be instituted on the narrow complaint that the applicant neither rebuked Tsepo when he sought to influence Khakhane to buy his plan nor reported the attempt to do so to Mr. Norman, it would as evidence has shown, have been found that there is no merit in the complaint. The reason being, he had already previously advised Tsepo against the plan. Secondly, he had called Khakhane into his room to warn him against Tsepo's plan. Thirdly, when Tsepo in his drunken stupor persisted nonetheless, he chased both him and Khakhane, who was not resisting at the time out of his room. Fourthly, the following day he was a party to the reporting to Mr. Norman as he encouraged the security officer on duty when the vehicle went out to do his job. Fifthly and finally, he fervently followed Tsepo to change the false statement he had already made to the Police.

44. Clearly, it would be very difficult if not impossible to find applicant guilty of wrongdoing in the face of such evidence. Assuming without conceding that he was found guilty, certainly dismissal would not have been an appropriate penalty notwithstanding that 1st respondent is a diamond mine as has been the case on behalf of the 1st respondent throughout this case. In Saaiman's case supra Rossouw Am relying on the case of Heathcote .v. PG Auto glass (Pty) Ltd t/a PG Auto glass (1993) 4(9) SALLR42 stated that the fairness of a dismissal must be assessed by the court objectively. He stated further that:

> *"what the court must do is to consider whether the penalty of dismissal in the circumstances of the case was fair and appropriate, judged objectively in the light of prevailing industrial relations standards and norms of the employer."*

Later in the same judgment the learned Judge once again echoing the previous decision of Abrams .v. Pick n Pay Supermarkets OFS (1993) 14 ILJ 729 stated that "the court will hold that the dismissal was fair when the employee's misconduct resulted in the relationship of trust and confidence between employer and employee being broken irretrievably."

45. This court is not satisfied that the conduct that the applicant was charged of, if at all it amounted to misconduct amounted to an irretrievable breakdown of the trust relationship between him and the employer justifying dismissal. The learned arbitrator's finding to the contrary clearly constituted a mistake of law which has materially affected his decision. This is moreso, when regard is had to the fact that evidence presented came nowhere supporting such a finding. This is the evidence the same arbitrator summarised and accepted as the true version for he said it was not challenged. His finding to the contrary was clearly in clear contradiction of the evidence he had himself accepted. For these reason the award of the learned arbitrator is reviewed, corrected and it is set aside. In its place is substituted the order that the dismissal of the applicant by the 1st respondent is substantively unfair.

46. It is apparent from the award of the learned arbitrator that applicant had sought reinstatement to his position in terms of section 73(1) of the Labour Code Order 1992. If reinstatement is not practicable he prayed for compensation. From the record it is not apparent that the learned arbitrator heard evidence nor was he addressed on the practicability or otherwise of reinstatement, or the mitigating steps applicant took should compensation be ordered. For these reasons, this case is remitted to the DDPR for the arbitrator to hear evidence if necessary, on the need for and practicability of reinstatement in the light of the time lapse since the dismissal of the applicant. There is no order as to costs.

THUS DONE AT MASERU THIS 28TH DAY OF JULY 2011

L. A. LETHOBANE
PRESIDENT

L. MATELA **I CONCUR**
MEMBER

M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **MR. SEPIRITI**
FOR RESPONDENT: **ADV. LOUBSER**