

HELD AT MASERU

In the matter between:

**EMMA 'MALISEMA SEHLABAKA
NTŠEBO ELIZABETH MASITHELA
TANKISO 'MAKO**

**1st APPLICANT
2nd APPLICANT
3RD APPLICANT**

And

**CITY EXPRESS STORE (PTY) LTD
THE LEARNED ARBITRATOR
L. L. SHALE - DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 19th March 2013

Application for review of the DDPR arbitral award. One ground of review raised – that the learned Arbitrator did not pronounce himself on the procedural fairness or unfairness of Applicants dismissals. Court finding that the learned Arbitrator did not pronounce himself on procedural aspect of Applicants' dismissals. Applicants failing to justify that the irregularity warrants interference with the arbitral award. Review application being dismissed. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the DDPR arbitral award in referral A0352/2009. It was heard on the 19th March 2013 and judgment was reserved for a later date. Facts surrounding this matter are basically that Applicant referred claims for unfair dismissal and unpaid monies with the DDPR. An award was entered against Applicant leading to the current review application. Only one ground of review has been raised in terms of which Applicant seeks to have the DDPR arbitral award reviewed, corrected and set aside. Both parties made

their presentations and Our judgment on the matter is thus follows.

SUBMISSIONS AND FINDINGS

2. Advocate Matooane for Applicant submitted that the learned Arbitrator erred in law in that, He did not make a finding on the procedural aspects of the Applicants' dismissals. He submitted that Applicants had challenged both the procedural and substantive aspects of their dismissals. He stated that the learned Arbitrator acknowledged the procedural challenge but did not pronounce himself on same. Reference was drawn to paragraph 9 of the arbitral award.
3. It was further submitted that Applicants hearing was conducted contrary to the employers disciplinary code in that all Applicants were grouped and charged together for the same offence. It was added that in terms of the disciplinary code, the lowest levels of employees upwards, should be charged by the next level of authority. In that case, employees were of different levels but were charged by one person contrary to the disciplinary code. Reference was made to the employers disciplinary code which had been tendered as evidence in the DDPR proceedings, and formed part of the record.
4. It was argued that had the learned Arbitrator considered the procedural aspects of the Applicants' dismissals, he would have realised that the employer did not consider who was responsible for the offence and the level of their fault. Advocate Matooane further argued that had the procedure been followed, the outcome might have different as offences differ by departments. He stated that each supervisor knows what is an offence and what is not an offence in their individual departments.
5. In reply, Advocate 'Nono for 1st Respondent submitted that it is incorrect that the learned Arbitrator did not pronounce himself on the issue of procedure. He stated that the learned Arbitrator stated that Applicants were jointly responsible and were therefore properly charged. He made reference to paragraph 10 of the arbitral award. He stated that this paragraph was addressing the issues raised under paragraph 9 of same in relation to procedure.

6. Advocate 'Nono further submitted that he conceded that Applicants were not charged by their individual senior officers. He stated that they were all charged for a similar offence and that they all appeared before the same chairperson. He admitted that this was contrary to the 1st Respondent disciplinary codes. He explained that if the codes had been followed in the strict sense, only one of the Applicants would have been charged. He went further to state that the three Applicants were at different levels of authority within the 1st Respondent employ, which would have meant that they would have had to charge each other for the misconduct that they orchestrated together. Advocate 'Nono further submitted that even if the procedure had been followed, the outcome would still be same.
7. It was further submitted that the fact that Applicants were not charged by their individual senior officers does not warrant the setting aside of the arbitral award. Advocate 'Nono argued that it is now an established principle of law that a mere breach of the employers disciplinary codes does not warrant interference with the arbitral award. He made reference to the case of *Central Bank of Lesotho vs. DDPR & others LC/REV/216/2006*, where the Court quoted an extract from the judgment in *Landman P. in National Education Health and Allied Workers' Union & Others .v. Director General of Agriculture & Another (1993) 14 ILJ 1488 at 1500*, had the following to say,
“... a move should be made away from strict legality to the equitable, fair and reasonable exercise of rights. We believe that our jurisprudence has strayed too far away from this path and that the time has come when we should turn our backs on a legalistic interpretation and insistence on uncompromising compliance with a code and ask a general question: Was what the employer did substantially fair, reasonable and equitable? If the answer is positive that will ordinarily be the end of the matter”.
8. Advocate 'Nono further argued that the issue about Applicants being grouped together is new altogether. He stated that this issue was never the issue before the DDPR but only coming up for the first time on review. He stated that claim before the DDPR was that the procedure was flawed as Applicants were

not charged by their individual senior officers. Reference was made to page 56 of the record.

9. Paragraph 9 of the arbitral award relates to a summary of the evidence before the DDPR proceedings. In this paragraph, Applicants raised their complaint about the procedural unfairness of their dismissals. Applicants argument is that they were charged by the wrong person contrary to the employers disciplinary codes. We have gone through paragraph 10, which 1st Respondent has attempted to argue that it addresses the issue of procedure. In Our view, paragraph 10 does not address the issue of the procedural fairness or unfairness of the dismissal of Applicants.
10. In fact, nothing is said in that paragraph about whether or not it was procedurally correct that Applicants were not charged according to the employer's disciplinary codes. In fact there is nowhere in the arbitral award where the learned Arbitrator has pronounced himself on the issue of the procedural aspect of the dismissal of Applicants. At paragraph 10, the learned Arbitrator merely alluded to the issue of the collective responsibility of all Applicants in relation to the misconduct they were all charged for. In essence, the learned Arbitrator has not pronounced himself on the procedural aspect of the dismissals of Applicants and has thus erred in law.
11. In view of Our finding above, the next issue is whether this procedural irregularity warrants interference with the arbitral award. The answer to this question lies into whether the outcome would have been different had the learned Arbitrator considered and pronounced himself on the issue of procedural fairness or unfairness of the Applicant dismissals. Advocate Matooanes's augment that offences differ by departments does not sustain. Applicants were charged by 1st Respondent for an offence emanating from their departments. We do not see how being charged by their supervisors per the code, would alter the attitude of 1st Respondent as the employer against the conduct of Applicants.
12. Further, We acknowledge and accept 1st Respondent's argument that if the learned Arbitrator had considered the

procedural aspect of the dismissals of Applicants, his conclusion would not have changed. He would indeed have been bound by the principle enunciated in the *Central Bank of Lesotho vs. DDPR & others (supra)* that 1st Respondent has rightly stated. That judgment is the decision of this Court and is binding upon the 2nd Respondent. This authority is both applicable and relevant to the case *in casu* in that both cases relate to the situation in which the people who were supposed to chair the disciplinary hearings were compromised and someone had to stand in for them.

13. It is Our opinion that Applicants, in accordance with their differing levels authority, could not have been expected to charge each other. We say this because, it was the opinion of the 1st Respondent that they were jointly or collectively responsible for the loss suffered and thus needed to be dealt with together. That being the case, there was no other way that 1st Respondent could have dealt with them. Consequently, We find that the procedural irregularity on the part of the learned Arbitrator does not warrant interference with the arbitral award.

AWARD

Having heard the submissions of parties, We hereby make an award in the following terms:

- a) That the application for review is refused;
- b) That the award in referral A0352/2009 remains in force; and
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 24th DAY OF
JUNE 2013.**

**T. C. RAMOSEME
DEPUTY PRESIDENT (AI)
THE LABOUR COURT OF LESOTHO**

**Mr. S. KAO
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT: ADV. MATOOANE
FOR RESPONDENT: ADV. 'NONO**