IN THE LABOUR COURT OF LESOTHO **LC/REV/57/2010**
A0753/2009

HELD AT MASERU

In the matter between:

MAKHALE ELLIOT LEOATLE **APPLICANT**

And

G4S CASH SOLUTIONS
LESOTHO (PTY) LTD **1st RESPONDENT**
THE DDPR **2nd RESPONDENT**

JUDGMENT

Date: 13th March 2013
Application for review of the DDPR arbitral award. Several grounds being raised and only one succeeding. Ground found to be sufficient to justify interference with the DDPR award. Court finding that the leaned Arbitrator relied on a ground different from that on which Applicant relied upon to dismiss 1st Respondent. Applicant having dismissed for misconduct, the learned Arbitrator confirming dismissal on the ground of poor work performance. Court finding this conduct to amount to a gross irregularity and granting the review application. 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 A0753/2009. It was heard on the 13th March 2013 and judgment was reserved for a later date. Facts surrounding this matter are basically that Applicant referred a claim for unfair dismissal with the DDPR. An award was entered against Applicant leading to the current review application. Several grounds of review have been raised by the Applicant in terms of which he seeks to have the arbitral award reviewed, corrected and set aside.

2. Within this review application, is an application to have the matter dismissed for want of prosecution. However, at the commencement of the proceedings, parties informed the Court of their agreement to abandon the application for dismissal for want of prosecution and to proceed into merits of the matter. This agreement was accepted by the Court and the matter proceeded into the merits. Our judgment on the matter is thus follows.

SUBMISSIONS AND FINDINGS

3. Applicant's first ground of review is that the learned Arbitrator erred in law and misdirected himself by ruling that Applicant admitted that he did not sign for the money that he collected from Metro Cash & Cash in Mohale's hoek. The Court was referred to paragraph 4 of the arbitral award for this conclusion. It was submitted that Applicant had testified that he signed for the money collected and that this evidence was ignored, hence the conclusion that he did not sign. Reference was made to pages 43 to 44 and 75 to 76 of the DDPR record of proceedings.

4. It was further submitted on behalf of Applicant, that no one testified to the effect that Applicant did not sign. In reply, 1st Respondent submitted that there is nowhere in the arbitral award where a conclusion was made that Applicant did not sign. It was submitted that in fact, it is not denied and has never been denied that Applicant signed. As a result, there was no misdirection on the part of the learned Arbitrator as suggested by Applicant.

5. We have examined both the record of proceedings and the arbitral award. We have confirmed that indeed, Applicant eventually signed for the money collected after a lengthy struggle with one 'Mamoji. This is reflected in pages 43 – 44. However, pages 75 – 76 of the record bear no relation at all, to the issue of whether or not Applicant singed. These pages relate to whether Applicant was aware about the procedures of handling a receipt book and if anyone has been charged in the past, for not signing for money collected. They are thus irrelevant as they do not address the real issue.

6. We have also inspected the arbitral award, specifically at page 2 on paragraph 4. We have noted a few points worthy of mention from the arbitral award. We have noted that the arbitral award is divided into sections. There is a section on Introduction at paragraph 1; Preliminary issues at paragraph 2, Facts and evidence from paragraphs 3 to 9, Finding from paragraphs 10 to 14; and the award at paragraph 15. The portion that Applicant seeks to rely on for his argument is paragraph 4. This portion falls under the summary of facts and evidence. It therefore cannot be accurate to rely on this portion of the award to argue that the learned Arbitrator made a factual conclusion that Applicant did not sign for the money collected. This paragraph merely summaries the claims and/or defences of parties and does not contain any factual conclusions. Consequently, this ground fails.

7. The second ground of review was that the learned Arbitrator misdirected himself by admitting that Applicant was given a internal transfer and trained for the job of a crew member. In amplification of this ground, Applicant submitted that there was no evidence to this effect during the hearing. In reply, 1st Respondent submitted this was not the issue for determination before the 1st Respondent. It was added that the issue was whether Applicant breached the rules of the employer or not. It was further added that even the decision of the learned Arbitrator to dismiss Applicant's referral was not based on the issue of whether Applicant was transferred or trained for the job of a crew member. 1st Respondent concluded that in view of his submission, there is no way that the learned Arbitrator can be accused of any misdirection.

8. Having read the arbitral award, We have not found anywhere in the award where the learned Arbitrator admitted that Applicant was given an internal transfer and trained for the job of a crew member. This is perhaps the reason why Applicant could not direct this Court to a specific portion of the award where this is alleged to have taken place, or even in the DDPR record of proceedings. As rightly pointed out by 2nd Respondent, the issue for determination before the DDPR, was whether Applicant breached the rules of the 2nd Respondent.

9. Consequent to the issue for determination, the leaned Arbitrator come to the conclusion that Applicant had indeed breached the 2nd Respondent rules and confirmed the dismissal. In essence, the issue of whether Applicant was trained or not, or whether he was transferred or not, did not pay a role in the finding of the learned Arbitrator, at least as paragraph 10 to 14 indicate. On these bases, Applicant's argument cannot succeed.

10. The third ground of review is that the learned Arbitrator confirmed Applicant's dismissal without considering that 1st respondent confirmed Applicant's dismissal before the appeal hearing had finalised. In motivation, Applicant submitted that the learned Arbitrator did not consider their procedural argument that Applicant's appeal did not complete. Reference was made to page 132 at the third paragraph under the evidence of one Matomaneng and under the Applicant's opening statements on page 2. In reply, 1st Respondent submitted that this was not part of the Applicant's case before the DDPR. It was added that this argument is only coming up for the first time on review.

11. Upon perusal of the record of proceedings, We have noted that page 132 of the record does not indicate that the appeal hearing was never finalised. What the evidence contained in therein shows, is that the matter was adjourned so that the presiding office could consult about his conflict of interest in the same matter. Similarly, page 2 of the record does not paint the picture suggested by Applicant. In that page, Applicant had merely stated in his opening statement that he was unhappy with both the substantive and procedural fairness of his dismissal.

12. In view of this said, the argument that the learned Arbitrator failed to consider that the appeal hearing did not finalise cannot hold. Applicant has simply failed to prove that he testified to that effect as well as how the learned Arbitrator could have failed to consider his evidence that the appeal hearing did not finalise. This leads us to conclude that 1st Respondent's evidence is more probable that this argument was never part of the Applicant's case before the DDPR and that it is only coming up for first time on review. Our superior

Courts have expressed their discounted towards issues being raised for first time on review. It has been held that this is contrary to the rules of natural justice, as the practice denies the inferior Courts the opportunity to address these issues (see *Puleng Mathibeli .v. Sun International CIV/APN/411/1996).* We accordingly dismiss this ground.

13. The fourth ground of review is that the learned Arbitrator issued an award after 120 instead of the 30 days, as required by the law and the rules of the 2nd Respondent. It was argued that in releasing the award late, no extension had been sought and the learned Arbitrator became biased as he was under the pressure of his supervisors when he issued the award. In reaction, 1st Respondent submitted that the above averments do not illustrate biasness on the part of the learned Arbitrator. It was added that the averments made do not meet any of the legal requirements for a claim of bias.

14. Whenever an allegation of judicial biasness is made, there is a presumption that in one way of another, that the judicial officer will or is likely to be partial in adjudication of a matter. The test to be applied is an objective one and its elements were laid out in the case of *S vs Roberts 1999 (4) SA 915 (SCA)* at 924E – 925D where the Court had the following to say,
"... (2)The suspicion [of bias] must be that of a reasonable person in the position of the accused or litigant.
(3)The suspicion must be based on reasonable grounds.
(4)The suspicion is one which the reasonable person referred to would, not might, have."
This authority has been cited with approval in the Labour Appeal Court decision of *Makhalane vs. Letšeng Diamonds & others LAC/CIV/APN/04/2011*.

15. Based on the reasoning proposed by Applicant for his fear of or actual apprehension of bias, his argument falls short of the standard set in the above case. We do not find how a late issuance of an award could reasonable cause the learned Arbitrator to exercise his judicial discretion with partiality. There are no reasonable grounds within the averments of Applicant that connect the lateness of the award with the likelihood of partiality on the part of the learned Arbitrator. Applicant merely argues that there was no application for

extension and that the learned Arbitrator was under pressure. It is not clear how the absence of an application for extension and that barely alleged pressure could possibly result in bias. These arguments do address the issue or establish the link required to establish bias. Consequently, this point cannot succeed.

16. The fifth ground of review was that the learned Arbitrator failed to consider Applicant's evidence of his job description and contract of employment as evidence that he was dismissed for the job that he was not hired for. In support, Applicant submitted that he was a vehicle guard and not a crew member, in terms of his contract. He stated he was dismissed for the duties of a crew member. He argued that had the learned Arbitrator considered both his evidence at page 69 of the record and his contract, he would have realised that he was dismissed for the job hat he was not hired for.

17. Respondent submitted that prior to Applicant's dismissal, he had since been promoted into the position of a crew member. He stated that Applicant was dismissed for misconduct relating to his position as a crew member. He submitted that that there is evidence at page 43 – 44 of the record that shows why Applicant was charged and dismissed. It was said that this evidence will show that Applicant had been doing the job of a crew member for a long time prior to his dismissal. It was further submitted that the argument that he was dismissed for the job that he was not hired for, is only coming up for the first time on review as it was never contested by Applicant before the DDPR.

18. The evidence of Applicant at page 69 of the record merely shows that he was an employee of 1st Respondent. This is the context within which his contract of employment was tendered and accepted as part of the evidence. This evidence does not even allude to the position of Applicant, even at the time of his employment. Whereas, the contract might state the position of Applicant, but in terms of the evidence on page 69, that was not the issue when the contract was tendered.

19. In essence, this confirms 1st Respondent argument that this issue is only coming up for the first time on review. We have

already expressed our attitude towards issues that are raised for the first time on review and we see no reason to deliberate on the issue any further. Consequently, We find that there is no irregularity on the part of a the learned Arbitrator as he could not consider an issue not raised by the parties. We reserve Our comment on the rest of the issues.

20. The last ground of review is that the leaned Arbitrator did not consider the fact that 1st Respondent had not tendered its disciplinary rules, to prove the existence of the rule that Applicant was charged with and dismissed for. In motivation of this ground, Applicant submitted that 1st Respondent had stated that it had dismissed Applicant for contravention of section 4.7 of its disciplinary code but that the said rules were never tendered as evidence.

21. Applicant submitted that he had denied the existence of the rule for which he was charged and dismissed. He stated that if the learned Arbitrator had considered this, He would have realised that there was no rule that Applicant is alleged to have breached. Applicant further submitted that rather than to require the production of the rules of the employer, the learned Arbitrator relied on Clause 12 of the *Codes of Good Practice* to find the dismissal of Applicant to be fair and that this is a gross irregularity.

22. In reply, 1st Respondent submitted that failing to produce a copy of their disciplinary codes in the proceedings, does not and cannot invalidate the entire proceedings. It was further submitted on behalf of 1st Respondent, that there was no problem in the learned Arbitrator's reliance on the provisions of the *Codes of Good Practice* to justify his decision. It was argued that the 1st Respondent disciplinary codes are merely illustrative and cannot cater for each and every misconduct.

23. It is Applicant's case that he was dismissed for contravention of the employers disciplinary code and that this was the 1st Respondent's case before the 2nd Respondent. Although no specific reference has been made by Applicant to the record of proceedings where this was said, the averment has not been denied by 1st Respondent. It is also not denied that the disciplinary code was not tendered as part of the 1st

Respondent evidence, before the DDPR. It is trite law that what has not been denied ought to be taken as true and accurate and We accordingly uphold the averments as such (see *Theko vs. Commissioner of Police & another 1991 – 1992 LLR – LB 239* at 242).

24. This leads Us to Applicant's compliant that the Arbitrator ignored the fact that disciplinary rules, which form the basis of his dismissal, were not tendered yet their very existence was highly contested. Further that rather, the learned Arbitrator relied on the *Codes of Good Practice* to confirm his dismissal. In Our opinion, the learned Arbitrator clearly relied on an authority that was not the basis of the dismissal of Applicant when he premised his decision on the *Codes of Good Practice*. In effect, the conduct of the learned Arbitrator is tantamount to a substitution of the charge that Applicant faced at the plant level, with a new one for which the learned Arbitrator found him guilty.

25. Essentially, the learned Arbitrator ignored the fact that there was no evidence of the existence of the rule and relied on the *Codes of Good Practice* to convict Applicant. It was particularly important that this be considered as the very existence o the rule was challenged by Applicant. This is a gross irregularity that warrants interference with the arbitral award. What makes this irregularity so gross as to justify interference with the award, is the fact that the clause relied upon, which is clause 12 of the *Labour Code (Codes of Good Practice) of 2003*, relates to a dismissal based on poor performance whereas Applicant was dismissed for misconduct. Consequently, this ground succeeds.

AWARD

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

a) That the application for review is granted;
b) That the mater in referral A0753/2009 be heard *de novo* before a different Arbitrator; 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. L. MATELA **I CONCUR**
MEMBER

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **MR. MASOEBE**
FOR RESPONDENT: **ADV. MABULA**