

**IN THE LABOUR COURT OF LESOTHO**

**LC/REV/12/10**

**HELD AT MASERU**

**In the matter between:**

**MOCHELA MATSEPE**

**APPLICANT**

**and**

**LESOTHO FLOUR MILLS  
DIRECTORATE OF DISPUTE PREVENTION  
AND RESOLUTION**

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

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## ***JUDGMENT***

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***Date: 20/11/13***

***Review of an arbitral award - On the ground that the Arbitrator's decision was not sufficiently supported by the evidence that was tendered before him as he had ignored critical evidence - The Court finds the alleged irregularity to have been without substance - DDPR award upheld.***

### ***BACKGROUND TO THE DISPUTE***

1. Applicant started working for the 1<sup>st</sup> respondent in 1989, and served as a Shift Miller from 2000 until 15<sup>th</sup> September, 2008 when he was dismissed. The said dismissal followed a disciplinary hearing in which the applicant was charged with two counts of violating the Company's code of conduct. Firstly, in that he allegedly committed a gross misconduct by leaving the maize mill unattended. The mill is said to have stopped during his absence. The 1<sup>st</sup> respondent contended that the applicant acted in an irresponsible and dangerous manner and generally neglected his duty. Secondly, that he left 1<sup>st</sup> respondent's premises without permission during working hours. The disciplinary enquiry was instigated by the events of 17<sup>th</sup> August, 2008. The applicant was found guilty as charged and a sanction of a dismissal was

preferred. He lodged an appeal with the 1<sup>st</sup> respondent's Managing Director, but he was unsuccessful.

2. Aggrieved by the outcome, he approached the Directorate of Dispute Prevention and Resolution (DDPR) challenging both the substantive and procedural fairness of his dismissal. The applicant had denied the charge on the basis that he could not be said to have left the mill unattended when he was not there. He indicated that he had arrived late to work on the said day, and Mr. Moloji who was in the preceding shift was the one who ought to have been charged because he left the mill when there had not been a proper handover between them. The learned Arbitrator ruled that there was overwhelming evidence against the applicant. He concluded that the 1<sup>st</sup> respondent's case was proved on a balance of probabilities that the applicant had earlier arrived at his workplace and later left without having reached an agreement with Mr. Moloji that he would stand in for him.

3. The applicant has lodged a review application with this Court seeking to have the learned Arbitrator's award reviewed and set aside. The gist of the application is that the learned Arbitrator failed to consider relevant evidence that pointed out that it was Mr. Moloji who left the machine unattended and not the applicant. He contended that the record clearly reflects that when Mr. Moloji left, the applicant was not present. The person who was present was Masokola *aka* Soko. He submitted that if there was anything that the applicant could have been charged with was arriving late. 1<sup>st</sup> respondent's Counsel argued that the learned Arbitrator duly addressed himself to the two issues that were put before him. The other issue of the usurp of power by the Human Resources Manager was not pursued on review. He again submitted that the applicant requested Mr. Moloji to stand in for him, but the latter made it clear that he was leaving. According to him, applicant's decision to leave subsequent to this exchange amounted to misconduct. When he left he knew there was nobody standing in for him.

4. In order to put the review application into its proper perspective, it would be prudent to consider and analyse the evidence that was tendered before the learned Arbitrator and ascertain whether he could have ignored some critical evidence as argued by applicant's Counsel. The 1<sup>st</sup> respondent had commenced with his defence in the proceedings before the DDPR.

## ***1<sup>ST</sup> RESPONDENT'S WITNESSES***

### ***(i) MOEKETSI MABALEHA'S EVIDENCE***

Mr. Mabaleha was Head Miller at 1<sup>st</sup> respondent's company. He testified that on 17<sup>th</sup> August, 2008, a Sunday, he was called by one Soko Marake, a labourer, around half past four informing him that maize had run out in the mill and they were also having a problem putting the water in it. He said his first reaction was to enquire where his superiors were, referring to the applicant, the Shift Miller, and one Mr. Seliane, a Miller. Mr. Marake said he had not seen them, but they were supposed to have started work at three o'clock. Mr. Mabaleha indicated that he called applicant's house to enquire what could be the problem but was answered initially by a younger person who he suspected was the daughter who passed on the telephone to her mother who said her husband had left home around one o'clock.

Upon failure to locate the applicant, he said he headed to work and as he approached the workplace, he saw applicant's car parked outside a bar called "*lechaeneng*" apparently not very far from Lesotho Flour Mills. He testified that he tried to locate him and upon finding him he enquired from him why he was there when the mill had a problem but applicant pointed out that he was late and he knew nothing about the mill having a problem. According to Mr. Mabaleha it was then between half past four and five o'clock. The witness testified that he left the place very angry, and he also did not want to discuss work related issues at a bar. The witness contended that the applicant had committed a stage 4 offence which warranted a dismissal. He said shortly upon arrival at the workplace the applicant also arrived in his vehicle. According to him, it was then around five o'clock. He said he recalled this because he had had to fill in a register. He pointed out that the applicant attempted to put in unconditioned maize (that was not ready for milling) in the mill, and he became suspicious that the applicant was under the influence of alcohol, and getting closer to him, he could actually smell it. He explained that procedurally the applicant ought to have checked if there was maize before starting the machine. Mabaleha concluded that Moloji could not have left the workstation if the applicant had not arrived given the nature of their work in terms of which if a person who is to relieve another has not arrived the one present carries on with the work.

### ***(ii) THORISO MATSOSO'S EVIDENCE***

He testified that he was at work on the 17<sup>th</sup> August, 2008 around 1500 Hours and he saw Moloji and the applicant talking. He said he heard Moloji say that since the

applicant had arrived; he was going to change and leave. He averred that he changed and around 1545 Hours saw the applicant seated at a table at “*lechaeneng*” bar.

***(iii) MOTS`ELISI MOLOI'S EVIDENCE***

Mr. Moloi was a Miller. He testified that on the day in question he had started his shift at seven o' clock in the morning, to end at three o' clock. His testimony was that he took readings from the scale around half past four, and when he finished around five to three, he went to check if the applicant had arrived. He indicated that he saw him go out of the gate, and he called him back. He said the applicant informed him that he had found a person lying by the side of the road, injured and he wanted to take him to hospital. He further testified that the applicant then told him that he was going to change and go home. Mr. Moloi denied that the applicant asked him to cover his shift.

***(iv) THULO - FOR GAS SECURITY COMPANY***

He testified that on the day in question at around 1515 Hours, as he was recording the names of people who were knocking off, he noticed the applicant who also went out. He then asked him where he was going to as he knew he was supposed to be on duty, and he replied that the shift before him had gone and he was escorting his madam, and he got into his car and left. The witness then tendered a copy of the log - book relating to the 17<sup>th</sup> August, 2008.

***(v) TS`EPO NTAOPANE FOR NEDBANK***

This witness testified that he was the Head of Business Banking at Nedbank, and that on the 17<sup>th</sup> August, 2008 there was no longer any NEDBANK ATM next to LCS and there is therefore no question of any money having been withdrawn from there on that date. This evidence had been adduced because it was alleged that the applicant had told a fellow employee that he was around “*lechaeneng*” because he had gone to withdraw some money from the ATM there.

***APPLICANT'S CASE***

5. Applicant's version was that he was late for work on the day in issue could not be said to have left the machine unattended because he was not there. In a nutshell, his argument is that since he had not resumed his duties, he could at best be charged with coming late to work, and not leaving the machine unattended.

6. Relating the events of the 17<sup>th</sup> August, 2008, the applicant averred that on his way to work he had seen his cousin on the side of the road and he seemed unconscious. He had then taken him to hospital. He testified that he subsequently went to work and upon arrival he found the gate attended by one Monoto, and he asked for a telephone to call the mill, but there was no answer. He said when he exited the sentry he found Moloji seated outside, and informed him that he had a patient at Queen 11 hospital. He requested him that if he happens not to be back by three o' clock, Moloji should tell Seliane, who was to be together with the applicant on the shift that he will be late. Applicant said he then left 1<sup>st</sup> respondent's premises around half past prior to the commencement of his shift. He indicated that he left for the hospital and left around quarter to five when his patient was discharged. He said Mabaleha saw him on the street and not at "*lechaeneng*" as he alleged, and he tried to explain to him why he was late, but he did not give him an opportunity to explain himself.

7. Applicant's Counsel submitted that it was a reviewable irregularity for the learned Arbitrator to have ignored applicant's critical evidence that Mr. Moloji left despite his absence. Apparently, only Soko, the labourer remained. He relied on this submission on the case of *Standard Bank of Bophuthatswana Ltd v Reynolds NO & Others 1995 (3) SA 74* in which the Court held that in order for a decision to be justifiable, it must be sufficiently supported by evidence. According to applicant's Counsel, the evidence tendered on behalf of the 1<sup>st</sup> respondent did not support the charge that was preferred against the applicant that of leaving the mill unattended. As far as he was concerned, the mill was left by Mr. Moloji and not the applicant as alleged. As far as he was concerned Mr. Moloji could not leave the workstation before making a proper handover to him. Applicant's Counsel insisted that failure by the learned Arbitrator to take into account this important piece of evidence into account rendered his award reviewable.

8. Applicant's Counsel reminded this Court that the ambit of the grounds of judicial review has been widened. He quoted Justice Friedman J.P., when he remarked at p. 89 of the *Standard Bank case (supra)* on the extended grounds of review that:-

*Our Courts have held that where a decision maker takes a decision unsupported by any evidence, or by some evidence which is insufficient to reasonably justify the decision arrived at, or where the decision maker ignores uncontroverted evidence which he was obliged to reflect, the decisions arrived at will be null and void.*

9. We could not agree more with the Honourable judge on the expanded scope of the grounds of judicial review. Traditionally, review deals with the regularity of the proceedings and the legality of the process. Courts have extended their scope of review powers to include tests such as the “*justifiability*” test. In *Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ, 1425 at 1426* (para.9) the Court pointed out that:

*In determining whether administrative action is justifiable in terms of the reasons given for it, almost inevitably, involve the consideration of the ‘merits’ in some way or another. As long as the judge in determining [the] issue is aware that he or she enters into the merits not in order to substitute its opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.*

10. Another such test is the “*failure to apply one’s mind.*” The Court held in *Coetzee v Lebea NO & Another (1999) 20 ILJ, 129 (LC)* that the best demonstration in applying one’s mind is whether the outcome can be sustained by the facts found and the law applied. One must confess that these tests seem to draw a very thin line between appeals and reviews.

11. Applying the test in the *Standard Bank case*, the question would then be whether the decision of the learned Arbitrator in A0947/08 was sufficiently supported by the evidence tendered to justify applicant’s dismissal. Reiterating applicant’s case, he contended that if there was anything that he could be faulted for is arriving late for work, and not leaving the mill unattended. As far as he was concerned it was Mr. Moloji who breached a workplace rule by leaving without proper hand over.

#### **THE COURT’S EVALUATION**

12. I wish to point out that applicant’s founding affidavit was so long (16 pages and 41 paragraphs) and difficult to comprehend, but I did my best in the circumstances to ascertain the cause of action. It is very critical that papers filed of record comply with **Rule 3 (f) of the Labour Court Rules, 1994**. The Rule provides that the originating application must “*contain a clear and concise (emphasis added) statement of the material facts upon which the applicant relies, with sufficient particularity to enable the respondent to reply thereto.*” The Court also has to be able to grasp the case it has to determine and deliver justice accordingly. Applicant’s Counsel went all out to present his case during the review proceedings but in all fairness to the Court and 1<sup>st</sup> respondent’s Counsel, the originating application ought to have been

streamlined and issues narrowed down properly. The problem could have been brought up by the fact that the matter was prosecuted by a different from the one who instituted the review proceedings. This point is raised because it can be very frustrating and delays the dispensation of justice.

13. Be that as it may, at the heart of this dispute is an alleged failure by the applicant to attend to a mill at Lesotho Flour Mills on the afternoon of Sunday the 17<sup>th</sup> August, 2008. The question whether or not the applicant can be said to have left the mill unattended seem to lie in the enquiry whether the applicant was present to start his shift at three o' clock on the day. Evidence tendered revealed that the applicant was at his workplace shortly before the commencement of his shift.

14. It also emerged from the record of the disciplinary proceedings that Mr. Moloi and the applicant did not come to an agreement on the former standing in for him. This comes out clear at p. 10 of the said record. Quoted *verbatim* it reads:-

**Mr. Sefali** (applicant's co-employee) asked Mr. Moloi: ***"Who did you handover to when you left?"***

**Mr. Moloi:** ***"When I went out of the mill, the person who was supposed to relieve me was not there. I was going to look for him."***

**Mr. Matsepe:** ***"Ntate Moloi, when I went out of the security office, you were sitting on the wall of the weighbridge."***

**Mr. Moloi:** ***"I was not sitting down."***

**Mr. Matsepe:** ***"When you told me you were knocking off did you inform me as to how you were milling."***

**Mr. Moloi:** ***"No I did not tell you."***

**Mr. Matsepe:** ***"Why did you knock off when you had not handed over to me."***

**Mr. Moloi:** ***"As I came to the gate Mr. Matsepe wanted to go out of the gate. I called him. We then went with him."***

**Mr. Matsepe:** ***"When you concluded to fetch me from the gate, did you know whether or not I was there?"***

***Mr. Moloji: "I had come to look for you and luckily I did find you."***

15. It is clear from this excerpt from the disciplinary record that the parties were not in agreement. We think the story would have been different if the applicant had not come to work earlier and left when Moloji told him in no uncertain terms that he was knocking off. He could have at least sought the intervention of a senior officer, and not just leave.

16. That Mr. Moloji and the applicant were not in agreement is further demonstrated at p.87 of the record. In cross-examination by applicant's representative (AR), Mr. Mabaleha (RW 2) responded:

***AR: Thank you. So you confirm and certify that he (MR. Moloji) was on that particular day acting senior miller? Is that correct?***

***RW2: E ea ntate.***

***AR: Wasn't he the one that Mr. Matsepe was supposed to report his problems to in that capacity of senior man? Wasn't Mr. Moloji the one to whom Mr. Matsepe was supposed to report his problems, if any?***

***RW2: O ne a tlamehile ho joetsa. Ba lumellane. A b'a ntjoetse tumellano e Lipakeng tsa bona.***

***AR: Thank you. Now you are being fair. You are being too fair. Didn't Mr. Moloji tell you that they talked with Mr. Matsepe about his problems?***

***RW2: O la mpolella. Ba hanana.***

***AR: Did you go into an extra mile to confirm that indeed they disagreed?***

***RW2: E ea ntate ke fumana reporting ea ntate Matsepe hosena ma a reng ba ile ba lumellana le ntate Moloji. Le hore ha kea joetsoa.***

It is clear from this cross - examination that Moloji and the applicant never struck any agreement on the issue of standing in for one another.



17. There is no question that the applicant was at 1<sup>st</sup> respondent's premises just before three o' clock when he was supposed to resume duty. The evidence of Messrs Moloi, Thoriso Masupha and Thulo, the security personnel bears testimony to this. Thulo's evidence was corroborated by the log-book. The ATM story was denied by the applicant, perhaps conveniently so because a NEDBANK official had already testified to the absence of an automatic teller machine at LCS. The fact remains that the mill was not manned on the said date when it was the applicant's responsibility and duty to have attended it. The reason behind applicant's absence at his workstation is inconsequential to the enquiry to the issue at hand. What is critical is that he was not at the mill when he was supposed to have been there.

18. Indeed as the learned Arbitrator pointed out if he had indeed dropped the patient at the hospital, why did he go back to him when he was supposed to have been at work? In our view, if there is any wrongdoing that Mr. Moloi committed, it is an issue that can be separately pursued by the employer. Courts of law have been warned to be wary of usurping administrative/managerial powers. The renowned Labour Law author Grogan J., in *Workplace Law*, 8<sup>th</sup> ed., at p. 91 observed that:

***The power to prescribe standards of conduct for the workplace and to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of managers everywhere, forming as it does an integral part of the broader right to manage...***

19. Over and over the consideration of the evidence tendered, the real question on review is not whether the record of proceedings real factors which would justify the outcome contended by the applicant, but rather whether the decision maker in all circumstances of the matter can be said to have been properly exercised the powers entrusted to him- See ***Sidumo & Another v Rustenburg Platinum Mines & Others 2008 (4) SA 24 (CC) at p. 44 B.***

20. It is our considered opinion that the learned Arbitrator considered all the evidence tendered before him, and reached a decision that any reasonable person sitting on the case could have reached. The Court therefore finds no reason to disturb his award. His award in A 0947/08 is allowed to stand undisturbed. The review application fails.

There is no order as to costs.

*THUS DONE AND DATED AT MASERU THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2013.*

**F. M. KHABO**  
**PRESIDENT OF THE LABOUR COURT (a.i)**

**P. LEBITSA**  
**MEMBER**

**I CONCUR**

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

**I CONCUR**

**FOR THE APPLICANT : ADV., MOLATI**  
**FOR THE 1<sup>ST</sup> RESPONDENT : ADV., MABULA**