IN THE LABOUR COURT OF LESOTHO **LC/REV/ 78 /15**

HELD AT MASERU

In the matter between:

NEDBANK LESOTHO LIMITED **APPLICANT**

and

LINTLE MARELETSE **1st RESPONDENT**
DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

16/03/2020

- ***Banking - Gross negligence and negligence - Bank employee engaged as a Cash Custodian dismissed for gross negligence for allegedly leaving cash outside ATM canisters for two days - Further, for negligence for allegedly failing to observe principles of dual custodianship with a fellow co - custodian Teller 1 in replenishing cash in the ATM and failing to execute her custodianship duties of daily balancing of ATM and compilation of daily records for two days - Bank purporting these acts/ omissions culminated in it incurring a loss of M20 000.00 - Employee only acceding to breaching the bank's regulations by failing to reconcile books for two days but insisting that she couldn't be held liable for the loss incurred by the bank because it could be traced to Teller 1, her co - custodian on the day - She successfully challenged the dismissal at arbitration - Dissatisfied, the Bank sought to have the arbitral finding reviewed and set aside;***

- ***Review - Gross Negligence and Negligence - Arbitrator misconstruing the issue that she was called upon to decide by considering factors aimed at identifying the culprit in the missing cash - Court considered the said factors irrelevant in light of the fact that the charge preferred against the employee was gross negligence and negligence, not theft - She treated the case as if it was a theft case - With theft the identity of who possessed the money is critical because 'possession' is a main element, but with negligence 'possession' or 'intention' are not an issue - This led the Arbitrator to an unreasonable decision that lost sight of the issue that was before her - The arbitration award is therefore reviewed and set aside.***

INTRODUCTION

[1] The applicant herein, Nedbank Lesotho Limited, dismissed the 1st respondent on 05th September, 2013 following a disciplinary hearing in which she was charged with two counts, namely, gross negligence and negligence. At the time of her dismissal, the 1st respondent was employed by the applicant as an ATM (Automatic Teller Machine) Custodian. She successfully challenged the

said dismissal at the Directorate of Disputes Prevention and Resolution (DDPR) on 10th May, 2015. In her award, the learned Arbitrator found 1st respondent's dismissal to have been both substantively and procedurally unfair and ordered that she be reinstated to her former position and be paid her arrears from the date of her dismissal. Dissatisfied with this award, the applicant approached this Court to have it be reviewed, corrected and set aside.

BACKGROUND TO THE DISPUTE

[2] The dismissal emanates from the events of 27th to 29th December, 2012. As aforementioned, the 1st respondent was an ATM Custodian and on 27th December, 2012, she was co - custodian with Mr Taole, who was Teller 1 on the said day. It is common cause that the ATM needed to be replenished on the day, and in terms of the bank's co - custodianship principles the exercise had to be undertaken jointly by both the 1st respondent and her co - custodian. They apparently requested a total sum of ***M470 000.00*** of which Teller 1 could only raise ***M376 080.00*** in his account and needed ***M70 000.00***[1] to supplement it. The two, therefore, proceeded to the vault to request the extra cash to meet the total credit of ***M470 000.00***[2] to the ATM account that they needed.

[3] It, however, later emerged that the total amount that was actually loaded into the ATM was ***M420 000.00*** instead of ***M470 000.00***[3] that was requested, representing a shortfall of ***M50 000.00***. Upon balancing his books on 27th December, 2012, Teller 1 declared a ***M30 000.00*** surplus,[4] still leaving a shortage of ***M20 000.00*** unaccounted for. The beginning of problems! Subsequent to these occurrences, the bank launched an investigation which led to it preferring a disciplinary charge against the 1st respondent and a dismissal that culminated in the current dispute.

THE CHARGE

[4] The 1st respondent was served with a notice on 30th May, 2013 to attend a disciplinary hearing to answer three charges, namely (quoted ***verbatim***):-[5]

1. Gross negligence in that:

On the 27th December, 2012 while you were Cash Custodian at Pioneer Mall branch, you left M20 000.00 outside ATM canister for two days from 27th to 28th December,

[1] "R1" to the papers filed of record before the DDPR
[2] "R2" Supra
[3] Applicant's testimony at p. 78 of the DDPR record
[4] "R4" to the documents filed with the DDPR
[5] "R5" Supra

2012 and that money disappeared in your custody causing the bank a loss of M20 000.00.

2. Negligence in that:

(i) On or about 28th December, 2012 you did not observe the dual custodianship process when replenishing cash on the ATM thus resulting in the bank suffering a financial loss;

(ii) On 27th December, 28th December, and 29th December, 2012 you failed to execute your custodianship duties of daily balancing of ATM and compilation of daily reports thus resulting in the Bank not being able to pick up a loss of M20 000.00 on time.

In essence, the charge impinged on gross negligence and negligence and comprised of the following elements, namely:-

- Leaving money outside ATM canisters for two days and such money disappearing in 1st respondent's custody;
- Failing to observe dual custodianship in replenishing cash in the ATM;
- Failing to execute her custodianship duties of daily balancing of ATM and compilation of daily reports; and lastly
- All the above, allegedly, resulting in the bank incurring a financial loss of M20 000.00.

A disciplinary hearing[6] was held and chaired by one Mr Tsépo Ntaopane.

APPLICANT'S CASE

[5] The bank's case is essentially that the 1st respondent left a sum of M20 000. 00 outside cash canisters leading to its disappearance. Secondly, that both 1st respondent and Teller 1 failed to observe principles of dual custodianship, and that the 1st respondent failed in her custodianship role by failing to do daily balancing for two days culminating in a charge of gross negligence and negligence. The bank contended that the two failed to follow the dual custodianship process when replenishing the cash in the ATM in that Mr Taole, merely appended his signature to the papers presented to him by the 1st respondent without checking the cash.[7] According to the bank, had Teller 1 and the 1st respondent checked the cash jointly, they could have both picked the extra

[6] "R6"to the documents filed with the DDPR

[7] DDPR record of proceedings, p. 174 of the paginated record

M20 000.00. Further, that had the 1st respondent done her daily balancing she could have picked the M20 000, 00 shortage on the day it occurred or rendered it easier for the bank to have traced it on time. The 1st respondent testified[8] that the discrepancy of the missing M20 000.00 and unbalanced books was only discovered by Mrs Khojane, her supervisor on 29th December, 2012 when she came back from leave. The bank insisted that the money that went missing was the one that the 1st respondent had left outside the canisters.

1ST RESPONDENT'S CASE

[6] The 1st respondent contended that when she loaded the ATM on the 27th December, 2012, there was an extra M20 000.00 that could not fit in the canisters and she put it safely somewhere in the ATM, a practice she stated was normal in the bank as long as the extra cash did not exceed the bank's prescribed limit of M500 000.00.[9] She indicated that she later loaded this M20 000.00 that had exceeded the capacity of the canisters, and according to her, it never disappeared. As far as she was concerned, the bank was charging her for a different M20 000. 00 which she knew nothing about. She averred that the lost cash could be traced back to Teller 1. She contended further that the missing M20 000.00 consisted of M50.00 denominations when the one she had temporarily put outside the canisters was of M100.00 denominations. All in all, she insisted that no money disappeared at the ATM, and that the lost M20 000.00 could be traced to Teller 1, a fact corroborated by one of applicant's witnesses Mr Koatja (RW1), a fellow ATM Custodian. She argued that she had been dismissed for something which was otherwise a normal banking practice, namely, placing money outside canisters. For her, this M20 000.00 can be distinguished from the one that was said to be missing.

[7] She, however, conceded that she did not reconcile the ATM records for two days, a thing she acknowledged infringed the bank's control procedures. She pleaded guilty to this count that she failed to do her daily balancing as expected, but denied that the bank incurred any monetary loss as a result thereof, thereby rendering her dismissal from the bank unfair. She successfully instituted unfair dismissal proceedings against the bank before the DDPR.

THE ARBITRAL AWARD

[8] The learned Arbitrator accepted 1st respondent's version that the M20 000.00 that went missing was in M50.00 denominations when the money that was left outside the canisters was in M100.00 denominations; Secondly, that

[8] Supra at p. 78
[9] 1st respondent's testimony p. 87 supra

the 1st respondent was denied an opportunity to present documentary evidence at the disciplinary proceedings; Thirdly, that the chairperson failed to guide her when to hand in the document she wished to tender as evidence; lastly, that she was refused an opportunity to view the CCTV footage of the ATM area. She indicated that she requested to view the footage during the investigations, but it was not clear and her plea to have it zoomed was refused. When she later asked to view it again, just prior to the disciplinary proceedings, she was told it had been deleted. The learned Arbitrator ruled that the deleting of the footage before the completion of the case denied the 1st respondent an opportunity to prepare her defence. It was 1st respondent's case that had she been afforded an opportunity to view the CCTV footage properly, it would show that the missing cash did not disappear at the ATM but could be traced back to the Teller. The learned Arbitrator found 1st respondent's dismissal to have been both procedurally and substantively unfair. The bank felt aggrieved by the ruling and approached this Court to have it reviewed and set aside.

GROUNDS OF REVIEW

[9] The applicant seeks to have the learned Arbitrator's award set aside on the following grounds, that she:

i. Conducted the proceedings irregularly, by allowing the applicant to begin leading evidence, whereas the 1st respondent ought to have stated her case first to enable the applicant to address the case put before it;

ii. Erred and misdirected herself by ignoring applicant's clear evidence that the 1st respondent had been negligent in the conduct of her duties on 27th and 28th December, 2012 resulting in the bank incurring a Twenty Thousand (M20 000.00) loss, thereby taking into account materially irrelevant facts;

iii. Erred and misdirected herself by ignoring applicant's case put against the 1st respondent at the disciplinary hearing as well as at the DDPR and without reason, coming to a conclusion that a fresh case was brought against the 1st respondent at the DDPR, thus, misconceiving her mandate in conducting the enquiry and came to a wrong conclusion;

iv. Erred in concluding that the 1st respondent was charged for M20 000.00 which was in denominations of M100.00 whereas it has always been clear from the disciplinary hearing that she was charged for the missing M20 000.00 in M50.00 denominations;

v. Ignored the fact that the M20 000.00 which was recorded missing, resulting in a loss to the bank was never put in the canisters on the 27th to 28th December, 2012, as the 1st respondent claimed in her documents, until Mrs Khojane came and discovered the discrepancy;

vi. Misconceived the nature of the enquiry leading her to come to an erroneous conclusion and ignored the fact that the 1st respondent does not dispute that there is M20 000.00 in denominations of fifty Maloti (M50.00) that negligently went missing in 1st respondent's custody as she had failed to adhere to dual custodianship, and failed to do her daily balancing on the two days 27th to 28th December, 2012 thus failing to trace where the M20 000.00 got lost;

vii. Misdirected herself by concluding that that the 1st respondent was denied an opportunity to present her documents in the disciplinary hearing without putting the necessary weight on the evidence presented by both parties;

viii. Erred in her reasoning in that she failed to have regard to the material evidence adduced to the effect that the 1st respondent did not have any documents which she was barred from presenting in the disciplinary hearing, as she did not even produce them at the DDPR, she even failed to state which purpose those documents were intended to serve, as a result her reasoning is unfounded;

ix. Had regard to irrelevant evidence - CCTV footage was irrelevant to the issue that the money which the 1st respondent was charged with was not the M20 000.00 in M100.00 notes which the CCTV footage showed;

x. She committed a gross error of law in treating the hearing at the DDPR as if it was an appeal of the disciplinary hearing and failing to appreciate that the proceedings at the DDPR are ***de novo***.

Despite having raised a number of grounds for review, applicant's Counsel consolidated most of them during proceedings.

[10] In reaction to applicant's case, the 1st respondent contended that the learned Arbitrator considered all the relevant evidence before arriving at her decision. She argued that she was dismissed for leaving money in the ATM but outside canisters when there was no proof that it was the money that disappeared. As far

as she was concerned, the learned Arbitrator had correctly found her dismissal to have been unfair. Her Counsel submitted, ***inter alia***, that the applicant is erroneously attacking the conclusion and not the reasoning in the award which is a ground of appeal and not review. It is trite that DDPR awards are not subject to appeal.

THE RELEVANT TEST FOR REVIEW

[11] The matter has come before this Court for review, hence the need to identify the relevant test for review in light of its surrounding circumstances. The basis of applicant's case is in essence that the learned Arbitrator considered irrelevant factors in arriving at her decision. We therefore, have to ascertain what the enquiry before her was, and whether she could be faulted in any manner.

THE NATURE OF THE ENQUIRY

[12] 1st respondent's dismissal impinged on gross negligence and negligence, respectively. The learned Arbitrator, therefore, had to determine whether the dismissal was fair in light of the charges levelled against the 1st respondent. Disciplinary action may be taken against employees for negligence because they owe a duty of care to their employers and colleagues as one of their implied terms of the contract of employment. A glance at what constitutes negligence - ***Negligence is the failure to comply with a standard of care which would be exercised in the circumstances by a reasonable person***.***[10]*** In the employment context, there is an obvious overlap between negligence and poor performance to the extent that work negligently performed is poor. Negligence can manifest itself in either acts or omissions that cause or could cause loss to the employer. The test is whether a reasonable employee in the position of the accused employee would have foreseen the possibility of harm and taken steps to avoid that harm.[11] It implies a failure on the part of an employee to exercise the standard of care and skill that can reasonably be expected of an employee with his or her degree of skill and experience.

[13] According to the distinguished Professor P.A.K Le Roux[12] in order to determine negligence, Courts employ the classic three - part test as formulated in ***Kruger v Coetzee***.[13] Liability for negligence arises if a person:

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[10] John Grogan - Dismissal 3rd ed., Juta, 2018 at p. 294, SACCAWU and Another v Checkers Shoprite 1996 (5) BLLR 678 (IC) at p. 648 para G

[11] John Grogan - Workplace Law 11th ed., 2014 at p. 262

[12] "Negligence - The Grounds for Disciplinary Action" - Contemporary Labour law Vol. 5, No 1, August 1995, 1406

[13] 1966 (2) SA 428 (AD) per Holmes JA ., at 430 E-H

(i) Would foresee the reasonable possibility of his [or her]***conduct injuring another in his*** [her] ***person or property and causing him*** [or her] ***patrimonial loss;***

(ii) Would take reasonable steps to guarding against such occurrence; and

(iii) Failed to take such steps.

If the answer to all the above questions is in the affirmative, then the employee would have been negligent.

[14] An explanation of what 1st respondent's job as an ATM Custodian entailed will make one better appreciate the bone of contention in this case. This can be discerned from the evidence of RW1, Mr Koatja, in explaining the process of loading cash in an ATM. He testified[14] that ATM Custodians are:-

> ***taught that a slip is printed from the ATM to ascertain how much the ATM has. The money will be taken out of the ATM and read against the slip that the ATM has. If additional money has to be loaded in the ATM, they will go to the vault and fill in the GL credit and request the required amount. They will count the money and from there they will <u>both</u>*** (emphasis added) ***go to the ATM and load the money. The same figure or amount they took from the vault is transferred to the ATM account.***

The GL credit is a document that records money from the vault.[15]

DUAL CUSTODIANSHIP

[15] The concept of ***'dual - custodianship'*** or ***'co - custodianship'*** generally connotes dual control, which is a security procedure requiring actions to be approved by two people each being held accountable.[16] In the circumstances of this case, it meant that the two custodians assumed **<u>joint responsibility</u>** for the safety of the cash that was in their custody. They were jointly accountable. It follows that the 1st respondent was equally accountable for the money just as her co - custodian, Mr Taole, was. The two had failed to verify the cash together, as the 1st respondent loaded it in the ATM alone.

[16] Whether the cash could be traced to Teller 1 or not was neither here nor there. Indeed, evidence pointed to the probability that the money could be traced to Teller 1. RW 1, Mr Koatja, applicant's own witness, testified before the DDPR that:[17]

> ***If he was doing both the custodian and teller's duties with money going to the ATM through his account, the 20 000.00 could be lost through several transactions***

[14] Page 5 of the record of the DDPR proceedings
[15] Evidence of RW 1, Mr Koatja, applicant's witness p. 5 of the DDPR record of proceedings
[16] Dictionary of Banking Terms
[17] P. 30 of the DDPR record of proceedings

including the 50 000.00 transaction. He might have been shortchanged of the M50 000 by overpaying a person if he was cashing a cheque.

[17] It emerged during investigations that Mr Taole just appended his signature to the documents without checking whether the cash was in order. Both could not explain what happened to the M20 000.00 when they ought to have done all the transactions jointly. This violation of controls could have caused the bank the loss. One or other or both of them were negligent in the execution of their duties. They both failed to exercise the requisite dual control on the 27th December, 2012 resulting in the bank incurring a loss of M20 000. 00. The failure by both to observe dual custodianship amounted to negligence which exposed the bank to potential loss.

[18] We are fortified in our finding in this regard by the decision of the Labour Appeal Court in ***Lesotho Bank 1999 Ltd v `Matsotelo Mapetla***[18] per S.N. Peete J., in which the respondent and one Mrs Moshabesha whilst engaged as ATM Custodians at the Cathedral Branch of the then Lesotho Bank 1999 Ltd and exercising dual control of the ATM, it emerged that a customer's deposit of M400.00 was not credited to his account. The customer had been assisted by Mrs Moshabesha and the respondent wanted liability to be imputed on Mrs Moshabesha and not herself. She was dismissed following a disciplinary hearing which she refused to attend. This Court's decision[19] holding her dismissal to have been procedurally unfair was reviewed by the Labour Appeal Court. It held that sticking out like a sore thumb was the fact that both the respondent and Mrs Moshabesha violated the bank's regulations regarding the customer's deposit. It held further that one or other of them were negligent in the handling of the deposit, and blame could not be placed on one person. The Court went further to point out that ***"strictly speaking violation of this nature caused a loss to the bank through disregard of its rules and procedures and merited a dismissal."***[20]

MISCONSTRUING THE NATURE OF THE ENQUIRY

[19] In our view, the learned Arbitrator approached this case as if it revolved on theft when it in fact related to negligence. The preoccupation seemed to have been with identifying who could have taken the cash, hence arguments around the CCTV footage that the 1st respondent was denied an opportunity to view the footage; tracing of the money, which led her to a finding that the money could be traced to Teller 1. This came out clear from the learned Arbitrator's enquiry at page 29 of the record of proceedings that ***"Don't you understand where the***

[18] LAC/A/6/03

[19] Per Lethobane P., in `Matsotelo Mapetla v Lesotho Bank 1999 LTD., LC 110/01 (unreported)

[20] Lesotho Bank 1999 Ltd v `Matsotelo Mapetla LAC/A/6/03 at para 26

M20 000.00 is said to be?" Theft envisages an unlawful and intentional appropriation or possession of what belongs to another.

[20] With negligence, the location of the cash is irrelevant. What was in issue was that the bank incurred a loss which could have **probably** been averted if sufficient diligence and care had been exercised. As it is, even if the bank recovered the money, it could still be entitled to proceed with the charge of negligence. Employees may be guilty of negligence even if no harm results from their acts or omissions: what matters is if they ***might*** have caused harm.[21] In order to be found to have been negligent, it is not necessary for an employee to have intentionally or wilfully deviated from the standard of conduct that the notional reasonable person would have adopted. It is sufficient that the deviation took place. The learned Arbitrator, as the trier of fact, ought to have considered whether the bank proved 1st respondent's alleged gross negligence and negligence. Often in these kind of cases, besides the employer having to prove whether or not there was negligence, one would even challenge whether dismissal was an appropriate sanction in the circumstances. For us, the next question would be whether the learned Arbitrator committed such a material irregularity that would render her decision unreasonable or one which a reasonable decision - maker could not reach.

REASONNABLENESS

[21] This Court held in ***Ben Heqoa v Browns Cash and Carry and Another***[22] that a decision based on irrelevant considerations is grossly unreasonable and constitutes a reviewable irregularity. This was a case in which the employer refused to pay an employee severance pay on the basis that it had been granted an exemption from the payment of severance pay in terms of ***Section 79 (7) of the Labour Code (Amendment) Act, 1997*** which provides that:-

> ***Where an employer operates some other separation benefit scheme which provides more advantageous benefits for an employee than those that are contained in subsection (1)*** (i.e relating to severance pay) ***he may submit a written application to the Labour Commissioner for exemption from the effect of that subsection.***

[22] It was common cause that the employer had applied and been granted the said exemption subsequent to applicant's resignation. The applicant argued that the exemption could not apply to him as it could not have a retrospective effect. According to the Court, the issue that was before the learned Arbitrator was whether the exemption applied to claims that arose before it was granted or only those that arose after it was granted? The learned Arbitrator considered the date

[21] John Grogan Workplace Law supra at p. 262
[22] LC/REV/331/06

on which the application was made and ruled in favour of the employer, when what was relevant was the effective date of the exemption, not when it was sought. This Court found the learned Arbitrator to have misconstrued the issue he had been called upon to decide. It held that this was grossly unreasonable. Gross unreasonableness has been held to constitute a ground for interference by the Court where there is proof that the person on whom the discretion was conferred did not apply his or her mind to the matter.[23]

[23] The Court held in ***Minister of Health and Another v New Clicks, South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)***[24] that:-

> ***There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision - maker is bound to take into account is essential to a reasonable decision. If a decision - maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision - maker.***

Can the learned Arbitrator's decision ***in casu*** be said to be so unreasonable as to warrant a review? The test is whether the decision of the learned Arbitrator under review ***"is one that a reasonable decision - maker could not reach"*** in light of the material placed before him or her.[25] The test as explained in ***Herholdt v Nedbank Ltd (COSATU as amicus curiae)***[26]

> … ***involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before*** [her]**.**

[24] She clearly did not properly apply her mind to the case that was before her. The nature of the enquiry was not where the M20 000.00 was, hence the applicant treaded carefully not to charge her with theft because they could not trace the cash. The issue of the footage was irrelevant. The 1st respondent was never accused of having taken the money but for omissions which led to the bank incurring a financial loss. 1st respondent was a senior staff member at Pioneer Mall supervising the cash area. All Tellers reported to her. We note that she acceded to having failed to balance the ATM for two days. Given the fact that the applicant is a financial institution, and the position the first respondent held, we find the misconduct serious. Had the 1st respondent done her job diligently, and

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[23] Herbstein & Van Winsen - The Civil Practice of the Supreme Court of South Africa, 4th ed., 1997, Juta & Co., Ltd at p. 939

[24] 2006 (2) SA 311 (CC) at para 511

[25] Sidumo v Rustenburg Platinum Mines Ltd and Another [2007] 12 BLLR 1097 (CC) at para [110]

[26] [2013] 11 BLLR 1074 (SCA) at para 12 - 13

followed the bank's checks and balances, she would have been exonerated from the misconduct. She contributed to the loss. Arguably, had the 1st respondent performed her duties diligently by observing principles of dual custodianship and did her daily balancing which are standards of care expected by the bank, the discrepancy of the missing M20 000. 00 is likely to have been detected and perhaps traced timeously. The test was whether she exercised sufficient care.

[25] The learned Arbitrator attached too much weight on irrelevant issues such as the denominations of the missing M20 000.00 when the charge did not even specify them. In our view, denominations were not significant in the circumstances of this case, what was critical was the loss suffered by the bank. It appeared that at this juncture the bank was no longer interested in how the loss occurred and denominations thereof. The learned Arbitrator's duty was to ascertain whether the bank proved a case of negligence on a balance of probabilities against the 1st respondent as to warrant a dismissal or not. It is also worth noting that the discrepancy of the missing M20 000.00 was only discovered after two days when Mrs Khojane returned from leave on 29th December, and only then was proper ATM balancing done.[27]

[26] On ruling that the Chairperson of the disciplinary enquiry had a duty to guide the 1st respondent on when to tender her documentary evidence, one pauses to ponder: what purpose did the documents serve? According to the 1st respondent:[28]

> ***The documents were ATM balancing of 27th December, GL debit of 27th December the figures under reimbursement from teller should be the same as figures in the GL debit. If the two had been compared that would prove that the money that did not go into the ATM is 50 000.00.***

The GL debit is a document that reflects transfer of money from Teller account to the ATM account.[29] Clearly, the 1st respondent sought to trace the M20 000.00 back to the Teller, which was not in issue. We wish to reiterate that the documents would not serve much purpose even if tendered because the charge impinged on disappearance of money that was left outside the canisters; on failure to observe dual custodianship controls and on failure to balance books leading to a loss or its timeous detection. 1st respondent's focus seemed to be on locating the missing cash, which was irrelevant in the face of the charge of negligence levelled against her. Even if the 1st respondent duly loaded the M20 000.00 that she had left outside the canisters as she alleged, the issue was that there was a missing M20 000.00 that could not be located. The approach by the learned Arbitrator

[27] P. 3 of the record of the DDPR record of proceedings - facts that were common cause
[28] P. 127 supra
[29] Evidence of RW 1, Mr Koatja, applicant's witness at p. 5 of the DDPR record of proceedings

seem to have been that because the money was not with the 1st respondent, she was not negligent. She erred in this regard.

CONCLUSION

[27] Having made the above analysis we come to the conclusion that the learned Arbitrator seem to have misconstrued the nature of the enquiry, placing too much emphasis on irrelevant issues which led her to an unreasonable decision.

ORDER

We therefore make the following order:

(i) The review application is upheld;

(ii) The DDPR award in ***A08126/14*** is reviewed and set aside; and

(iii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 16th DAY OF MARCH, 2020.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

S. KAO I CONCUR
ASSESSOR

L. RAMASHAMOLE I CONCUR
ASSESSOR

APPEARANCES

FOR THE APPLICANT : ADV., H. TS'OLO - ASSOCIATION OF LESOTHO EMPLOYERS AND BUSINESS
FOR THE 1st RESPONDENT : ADV., P.A. `NONO - ASTUTE CHAMBERS

ANNOTATIONS

STATUTES CITED

The Labour Code (Amendment) Act, 1997

CITED CASES

`Matsotelo Mapetla v Lesotho Bank 1999 LTD., LC 110/01 (unreported)
Ben Heqoa v Browns Cash and Carry and Another LC/REV/331/06
Herholdt v Nedbank Ltd (COSATU as amicus curiae) [2013] 11 BLLR 1074 (SCA)
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Sidumo v Rustenburg Platinum Mines Ltd and Another [2007] 12 BLLR 1097 (CC)

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