



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter Between:

Case No. 1608/10

WATSON NJABULO MTHEMBU

Applicant

And

THE CMAC ARBITRATOR LORRAIN ZWANE

1st Respondent

LEWIS STORES (PTY) LTD

2nd Respondent

Neutral citation : *Watson Njabulo Mthembu v The CMAC Arbitrator Lorraine Zwane & Another (1608/10) [2019] SZHC 13 (13th February 2019)*

Coram : **M. Dlamini J**

Heard : **4th December, 2018**

Delivered : **13th February, 2019**

Summary: The applicant prays for review and setting aside of the arbitration award which led to his dismissal at his place of employment. The application is strenuously opposed.

The Parties

[1] The main parties in this application are the applicant and the 2nd respondent. The applicant is an adult male of Matsetsa area, Lubombo Region and was employed by 2nd respondent as the Branch Manager, Siteki. The 2nd respondent is a company duly incorporated and registered in terms of the company laws of the Kingdom.

Grounds for Review

[2] The applicant deposed as ground for review:

“42. I am advised and do assert that grounds of review at Common Law including:

4.2.1. The fact that the decision was arrived at arbitrarily, capriciously, or mala fide, or as a result of an unwarranted adherence to fix a principle, or in order to further an ulterior or improper purpose, or that the court (or Arbitrator), misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that their decision was grossly unreasonable as to the inference that the Court or Arbitrator failed to apply its/her mind to the matter, it has further been held that error of law may give rise to a good ground for review.”

[3] I must hasten to point out that it is totally undesirable to draft pleadings in this fashion. For applicant to mention all the common law grounds of review in this manner creates the impression that applicant is not certain of the exact ground he is relying on for his application. It further gives the impression that applicant is merely clutching at straws. I must however point out that this is not the court finding of fact but only an impression created by applicant in so deposing.

Synopsis

[4] The applicant was charged by 2nd respondent with three main counts, namely:

“1. **“Gross Negligence”**”

a) *In that you failed to adhere to stock counts procedures as a result the branch suffered stock losses in excess of E40 000.00. Refer to stock take done with you on the 21st July 2005 and 4th August 2005.*

b) *In that you exchanged a defy fridge on Account 3362221 without an Authority from the Regional Controller or at least supplier.*

c) *In that you exchanged 2 JVC’s home theatres to two different customers without the approval of the Regional Controller, or at least the supplier.*

2. **“Gross Dishonesty”**

a) *In that you informed Divisional General Manager (**Mr Kekana**) in your letter dated 2nd August 2005 that you*

have discovered the goods that were found missing during the stock count of 21st July 2005, yet that was not true.

- b) *In that you gave away an AIWA hifi-set worth E1999.00 in the pretence that you were authorised by the Regional Controller **Mr. D. Shongwe**.*

- c) *In that you wrote a letter to the Divisional General Manager, **Mr. Kekana**, undertaking that you will invoice 2 OREO wall units to your name that were found to be mysteriously missing and you did not invoice these to your name as per your letter.*

Bringing the Company's Name into Disrepute

- a) *In that you falsely informed the Divisional General Manager that a I[sic] sit sofa, which was borrowed by the Lubombo Regional Administrator, was taken by the King, yet you had given the sit to the Regional Administrator as a gift. The company management was blaming the King's Office. Thus the King's name was wrongly dragged into this matter."*

[5] At the end of his prosecution, he was convicted on two counts and discharged on the third count (*bringing the name of the company into disrepute*)¹. The arbitrator analysed the evidence adduced before him. He then concluded:

¹ See page 56 at paragraph 5.29 & 5.30 of record

“Consequently, I find that applicant’s dismissal on the grounds of gross dishonesty and gross misconduct was fair and justified in the circumstances.”²

[6] He then dismissed the application serving before him as lodged by applicant. The applicant filed the present application challenging the findings and award of the arbitrator. The grounds for review are based on common law.

Determination

[7] The applicant was the first to take the witness stand. He adduced his side of the story. I shall consider the applicant’s evidence later herein. I think the procedure ought to have been that the respondent’s witnesses ought to have first adduced evidence in support of the charges levelled against applicant and thereafter call the applicant to the witness stand in the event there was *prima facie* evidence supporting his charges. To call the applicant first to the witness box was akin to saying applicant should prove the negative.

[8] However, I make no issue of the procedure adopted before the arbitrator as applicant did not raise it as such, I further see no prejudice to applicant by such a procedure. Respondent’s main witness in justifying its conviction and dismissal of the applicant was **David Lugebane Shongwe**. He identified himself as the Regional Controller of 2nd respondent. He explained that there were two procedures for taking stock at Lewis, namely periodical and full stock take.

[9] Similarly, a notice for stock take may be issued to the relevant branch store by the Regional Controller or a surprise stock take may take place. A surprise

² See page 56A paragraph 5.31

stock take was conducted upon Siteki branch where applicant was the branch manager. He was part of the team. They discovered that a wall unit, Hi-fi, part of a launch suit were missing. The applicant was asked for an explanation on the unaccounted stock. Applicant explained that the Hi-fi was given to a customer.

[10] The stock at Lewis was the sole responsibility of the branch manager. The stock clerk assisted him. For the exchange of stock with a customer, the first step was to have the item repaired. If it could not be repaired, then a debt note was made and it was forwarded to head office. Head office returned it to the supplier. No item was exchanged directly with a customer. Should it happen that an exchange was necessary, the Regional Controller's approval had to be obtained? Applicant did not request any approval for exchange of any of the items missing. He justified that it was a criminal offence for the manager to exchange items with customers without the Regional Controller's consent.

[11] In relation to the JVC's, applicant did not seek his approval before exchanging them with the customer. The missing stock identified under charges (b) and (c) were never recovered by the Stock Clerk upon his return from leave. However, applicant surrendered second hand fridges which he was not aware of their origin. The items missing were never retrieved. Applicant did not do stock take upon his return from leave.

[12] On charge 2, the respondent's witness denied that applicant requested him to delete the AIWA from their computer system. He testified that he did not give applicant the authority to dispose of the AIWA. He further testified that on return of applicant from leave, he ought to have conducted a stock take. However, applicant did not. It was gross negligence of him to conduct business as usual without conducting stock take.

[13] On charge 2c he confirmed that the wall units were not recovered. As a result, applicant requested that an invoice be issued in his name. It is only the coffee tables that were later recovered and not the wall units.

Applicant's version

[14] The applicant testified that there were two types of stock counting at Lewis. A sectional stock take and a full stock take. A sectional stock take entailed the Stock Clerk counting stock on weekly basis. Full stock take was conducted by Regional Controller, Divisional Manager or any senior officer from head office. A full stock take was preceded by a three to four weeks' notice to the branch manager advising him that the team from head office would arrive for stock counting. The purpose of the notice was to allow time for the stock clerk to reconcile his stock.

[15] This is because some of the stock was taken for repairs while others exchanged by customers due to factory defects. Applicant disputed any unceremonious stock taking by the head office and challenged same as unprocedural. He further denied that stock of the total value of E4000 went missing from his branch as reflected under count 1. He testified further that on 21st July, 2005 a team from head office arrived for a stock take. The Stock Clerk was on leave. He was surprised at their arrival because no notice was served on him. He then requested that full stock count should not be done for the reason that his Stock Clerk was on leave. This fell on deaf ears.

[16] He then testified:

“Yes the Regional Controller and his company proceeded in stock taking on 21st July 2005. The outcome of the stock take

was that some stock was found missing and the present stock had no tickets”³ (tickets were to be placed on return goods) my explanation.

[17] He testified further:

“On the 4th August, 2005 the stock take happened when the stock clerk had come back from leave and had identified the goods missing which were now in the shop. However, some were still not. The ones outside were at Nhlangano branch:

(a) Three coffee tables

(b) Fridge”⁴

[18] On 13th June, 2005 he was to proceed on leave. He conducted a full stock take following a notice by **MR. Shongwe** (RW1) before proceeding on leave. Upon return from leave, applicant expatiated:

“When coming back telephonically discussed with Regional Controller that my sales were behind and collections and asked that I continue as it was about month end and never did stock take. I concede that I never did stock take and that my clerk was there and he was to come back and take my reliever, as he had brought her.”⁵

³ See exhibit B2 page 8 paragraph 3

⁴ See exhibit B2 page 6 paragraph 4

⁵ See exhibit B2 page 9 paragraph 3

[19] Applicant then produced a correspondence which was marked Exhibit 2. I shall refer to its contents later. The stock clerk then resigned from work upon the advice of Mr. Shongwe following the issue of the missing stock. In relation to the defy fridge, the customer complained that it had “*a breakdown*”. He referred the customer to the Stock Clerk. The Stock Clerk lent the customer another fridge and took the broken one for repairs following that authority from head office was verbal. He did obtain verbal authority from the Regional Controller.

[20] On the JVCs, he testified that they were sent for repairs and the Regional Controller was advised of the same. They could not be repaired as they had factory faults as evident by Exhibit AW5. He testified further on gross negligence that he did write a letter to the Regional Controller explaining to him that the goods which were missing on the date of stock take some were at Nhlanguano branch and others inside the shop. On the Hi-fi set he stated that the Regional Controller visited his branch. He found three Hi-fi kept in the storeroom with old stock. He removed them, saying he had written them off except for one. He together with the stock clerk requested him to write it off.

[21] On the charge of the two wall unit, he testified that they were not missing. He however wrote a letter advising the Regional Controller that they should be invoiced in his account. He then wrote another one saying he would not be invoicing them as they were found behind wardrobes. He pointed out though that he did not have the second letter retracting his undertaking to invoice his account. He was cross-examined at length.

Adjudication

[22] The main question for address is whether the Regional Manager did find stock missing which resulted to the 2nd respondent's loss of E4000. Did the applicant flaut stock take procedures?

Analysis of evidence

[23] In his evidence in chief, applicant was adamant that the duty to control and account for stock was the responsibility of the stock clerk and not his. However, under cross-examination when faced with 2nd respondent's manual, he stated:

*"I agree that second paragraph made it clear that the branch manager is responsible for security of stock."*⁶

[24] He immediately pointed out:

*"I agree that the security of the stock was the responsibility of the Branch Manager. I confirm that the purpose of stock checking is to ensure that stock is not missing."*⁷

[25] Applicant also divulged:

*"When the DGM **Thekwana** came, I did not know that same stock was in Nhlanguano and others had gone for repairs."*⁸

[26] Now, if it was his responsibility as the Manger to ensure that stock is under his watchful eye, why then did he need the advice of the Stock Clerk that the missing stock was at Nhlanguano branch and others taken for

⁶ See exhibit B2 page 15 paragraph 1

⁷ See exhibit B2 page 15 paragraph 2

⁸ See exhibit B2 page 16 paragraph 1

repairs? The answer is obvious, he failed in his responsibility to account for stock. He was in the eye of the law negligent. This conclusion is further fortified by applicant's answer in cross-examination as follows:

*"I don't deny that stock was taken and there were missing items."*⁹

[27] He immediately conceded:

*"I agree that on the first charge of gross negligence I failed to take stock. The letter at page 79 was written by me. I agree that I was admitting being wrong – count (a)."*¹⁰

[28] Applicant complained of the unceremonious coming in of the team from head office to do stock taking. It is not clear why applicant was complaining of stock count being conducted at any time. Stock is 2nd respondent's business. Without stock, there is no business. On count 2 (a), under cross-examination, he was shown a letter authored by him to the effect that all items had been found. He pointed out that he wrote the said letter upon the return of the Stock Clerk. He then conceded:

"The items on page 55 are the ones which were later recovered. Items listed are the ones found but there were three television sets still missing (Panasonic). Yes also the LS Hi-Fi set was missing."

[29] He also testified:

⁹ See exhibit B2 page 17 paragraph 3

¹⁰ See exhibit B2 page 17 paragraph 3

“I agree that when I wrote the letter not all the items had been returned.”

[30] Now the question is, why did applicant write to his superiors that all items had been found when they were still missing? The answer in law, lies in applicant’s conduct described as dishonest. This means the charge of dishonesty must sustain. For him to later say he wrote the letter under pressure without evidence of same does not detract from the pointer that he was dishonest at his work place.

[31] On the question of invoicing the wall units in his name, he testified that he never did. It was however, after he left 2nd respondent that someone else invoiced it to his name. Again the question is, why write to your superior and undertake to pay for the missing items but fail to do so? He attempted to dodge his act of dishonest in this regard by testifying that he wrote a second letter saying he would no longer invoice his account. However, he conceded that he did not have such letter. Correctly so as there was never such letter. This is evidence of further dishonesty.

[32] From the total analysis of the evidence by applicant alone, both in chief and under cross-examination, it is clear that upon the delegation from head office conducting stock at applicant’s branch, some stock could not be accounted for. Even upon the return of the Stock Clerk, stock was still missing as conceded by applicant. It is for this reason that applicant undertook to pay for the missing stock by having his account with 2nd respondent invoiced. Despite his undertaking to invoice his account, he failed to do so.

[33] It is also evident from applicant’s testimony that applicant failed in discharging his duties of stock control. He could not account for missing stock in the presence of his superiors. He could not account for it even upon

the return of the Clerk from leave. In the result, the findings and dismissal of his application by the arbitrator cannot be assailed.

[34] Turning to the listed grounds for review, applicant deposed:

“5.5 During the hearing, there is no evidence that was led by the initiator in my disciplinary hearing and the witnesses that were stated to be the key witnesses did not testify.”

[35] The records reflects otherwise. During submission the applicant insisted on this point and insinuated that the arbitrator had doctored the record. Without any affidavit to this effect, the court stands to disregard such contemptuous submission presented from the bar. The court is bound by the record. This record was filed by the applicant. If it did not reflect what actually transpired during the arbitration, the applicant ought to have deposed in his affidavit to that effect clearly and concisely and further prayed that the arbitrator files a record reflecting the events as they unfolded before him. A general averment and submission of the nature serving before me stands to be rejected root and branch.

[36] In the final analysis, on the admission of dereliction of duty (*failed to do stock take before and after returning from leave*) and an undischarged undertaking (*that he shall invoice the missing stock into his account*) on the part of applicant and the evidence adduced on behalf of 2nd respondent, it is abundantly clear that applicant was dishonest as the manager of 2nd respondent. The arbitrator’s verdict and award must stand.

Costs

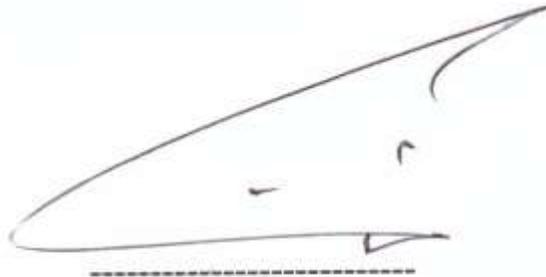
[37] I note that the applicant remained unemployed during the hearing of this matter. He was present in court and now appears to be of age. I therefore do not deem it just that costs be mulcted against him.

Orders

[38] The following orders are entered:

38.1 Applicant's application is hereby dismissed;

38.2 Each party to bear its own costs.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left and a smaller, more intricate flourish on the right. The signature is positioned above a horizontal dashed line.

**M. DLAMINI
JUDGE**

For the Applicant : **L.R. Simelane for Khumalo Ngcamphalala Attorneys**

For the Respondent : **K.S. Simelane of Henwood & Company**

