IN THE COURT OF APPEAL OF LESOTHO

JUDGMENT

C OF A (CIV) 21/2015

In the matter between

LESOTHO FLOUR MILLS **APPELLANT**

And

MOCHELA MATSEPE **RESPONDENT**

IN RE: LAC/CIV/A29/2013 (A)

MOCHELA MATSEPE **APPLICANT**

And

LESOTHO FLOUR MILLS LTD **RESPONDENT**

CORAM: Musonda, Chinhengo, Chaka-Makhooane AJJA

HEARD: 21 OCTOBER, 2015

DELIVERED: 6 NOVEMBER, 2015

SUMMARY

Appeal against the judgment of the Labour Appeal Court – refusing leave to appeal on a factual ground – Respondent having been dismissed by the applicant pursuant to disciplinary proceedings against his being charged with leaving the mill unattended to when he never took over the operation of the mill instead of absenteeism, which carried a lesser penalty – The other employee not complying with Lesotho Flour Mills regulations on handover – An appeal for leave to appeal an additional ground dismissed.

ORDER

On appeal from: Labour Appeal Court (per Mosito A.J.)

Application for leave to appeal on the additional ground dismissed with costs.

Musonda AJA, (Chinhengo AJA and Chaka-Makhooane JA concurring)

MUSONDA AJA

[1] **BACKGROUND:**

This is an appeal against the refusal by the Court a quo for leave to appeal on a factual ground, whether the respondent was correctly charged of leaving the mill unattended to when he had

not taken over the mill. The court *a quo* rejected to grant the application. The appellant/applicant appealed against the refusal of that leave. The respondent was charged by the appellant/applicant with two counts, which were couched in the following terms:

> COUNT 1.
>
> Gross misconduct of a dangerous, irresponsible and unsafe behaviour and/or neglect of duty in that on or about the 17th Day of August 2008 at or near Lesotho Flour Mills Maize Mill, you left the maize mill unattended. This could have caused a fire and thus led to the mill stopping in your absence which constitutes gross misconduct as per the company's Disciplinary Code and/or procedure and/or your contract of employment with the company.
>
> COUNT 2.
>
> Leaving the Lesotho Flour Mills Ltd premises without permission, in that on the 17th day of August 2008 your came to work and/or were on the company's premises at a time your shift was to resume, around 3:00 pm, but left the company's premises during working hours for non-work related matters, which constitutes gross misconduct as per the Company's Disciplinary Code and/or procedure and/or your contract of employment with the Company.

[2] The Respondent exhausted the internal appellate process, after which he brought the matter before the DDPR, who validated the dismissal. The matter went before the Labour Court for

Review, which court dismissed the review. The respondent then appealed to the court *a quo*.

FACTS:

[3] The uncontroverted facts were that the applicant before the labour court had gone to his employer's premises, but never took over the operation of the mill. The star witness for the respondent in the labour court one Moloi, never handed over the operation of the milling machine to the respondent in this court and left without doing so, despite being aware that, the respondent had left the premises of his employer. Moloi was apparently senior to the applicant. As found by the labour court the two did not agree on the handover and takeover.

[4] Aggrieved by the labour court's dismissal of his review application Mr Matsepe, the respondent to this application launched an appeal in the Court a quo.

[5] His Heads of Arguments were couched in these terms:

> (a) The appellant did not leave the Mill unattended, but rather the mill was left unattended by another employee, Mr Moloi at the time the appellant was not within the work premises.

(b) The evidence proves that the appellant did not leave the mill unattended and was thus charged with what he did not commit, instead of being charged, at least, with absenteeism or late arrival at work;

(c) The Court *a quo* erred in dismissing appellant's application in the face of clear evidence that the person who left the mill unattended is Mr Moloi who confirmed the same fact; and

(d) It is clear that the Court *a quo* erred in ignoring evidence it ought to have dealt with, which is that the employer's or the 1st respondent's evidence against the appellant which is highly unreliable in that it differed at both the disciplinary hearing, Mr Moloi says he left the mill after 3:00 pm while at the DDPR he says he left before 3:00 pm.

[6] The Court *a quo* agreed with the appellant that, "being absent at work and leaving the mill unattended are two different offences with different sanctions, for which the other carries with it a different sanction short of dismissal". The Court *a quo* went on that:

> "it is now established that an employer is bound by his disciplinary code and for this no authority is required. It is clear in casu that on the facts and evidence, the Court a quo erred in dismissing the review. It was clearly established from the onset that there was no handover done to the appellant. He could therefore not have left the mill unattended."

[7] Aggrieved with the Labour Appeal Court decision to refuse leave to appeal on the additional ground of the Court's holding that:

> *"Respondent was not at the workplace when he ought to have been there"*

The appellant/applicant argues the decision was so manifestly wrong on the correct and credible evidence, that they constitute findings of fact and conclusions of law that no reasonable court could have arrived at.

[8] The grounds of appeal were couched in these terms:

(i) The Court erred in law as it did by failing to consider whether reinstatement were practicable in the circumstances. There was no sufficient evidence to make such a determination, the Labour Appeal Court was enjoined to remit the matter back to the Labour Court for a proper enquiry into the appropriate remedy in terms of section 73 of the Labour Code Order, as such the Labour Appeal Court, erred by ordering reinstatement.

(ii) The Court erred in law by awarding costs, where there was no or sufficient evidence that the appellant had acted in a wholly unreasonable manner. The Court further erred in granting costs where such were not even sought; and

(iii) The Labour Appeal Court erred in failing to consider and/or ignoring the decision of the Directorate of Dispute Prevention and Resolution which had the advantage of hearing the evidence presented by the parties when deciding that the labour court was wrong in the conclusion, that it reached, the court should have also looked at the decision of the DDPR which did not reach the same conclusion.

[9] It was strenuously argued by Mr Woker that the Court *a quo* did not exercise any discretion at all in regard to whether reinstatement was sought, was appropriate or not and so on, as contemplated by section 73. This, in this regard, the learned counsel contented that the legal question arises whether it should have done so and in particular given effect on section 73 in some other way before ordering reinstatement. Regard should have been hard to the delay between dismissal and the court's judgment (i.e six years).

[10] It was contended by Mr Molati that by the Labour Appeal Court nullifying the dismissal as unfair, in effect the court was saying that reinstatement should follow. I don't think that is the correct statement of the law, otherwise that would render section 73 redundant.

[11] It was argued for by Mr Woker that the labour court had no jurisdiction toward costs. The only power envisaged by the labour

Code (Amendment) Act 2000, under section 38, was to establish the constitution of the Court. Under 38A it to hear and determine all appeal against final judgments and final orders of the Labour Court.

[12] Mr Molati disagreed with that proposition and cited various provisions in the Rules of the Court to support his argument, that the Labour Appeal Court has powers to grant cost orders.

[13] The Court *a quo* granted the certificate to appeal on ground one in these terms:

> "When, in ordering Mr Matsepe's reinstatement, it failed to apply and/or give effect to section 73 of the code by not either itself applying section 73 alternatively nor referring the matter back to the DDPR for section 73 to be complied with."

[14] Mr Woker attacked the following findings of law and fact as they appeared in paragraphs 4.3, 4.4 and 4.5 of the Court *a quo's* judgment, as findings which no reasonable tribunal, would arrive at.

[15] It is the refusal to certify the above ground as a proper ground of appeal to this court, which generated this appeal. This is the only matter this court has to deal with. However it was logical to give a broad history of these proceedings in order to paint a picture with broad strokes.

[16] The kernel of Mr Woker's argument is that on Mr Matsepe's own version, he went to work on the day in question. Before the shift started he tried to persuade Mr Moloi to cover for him while he attended to a private, non-work related matter namely his cousin's admission in hospital. When Mr Moloi refused, he simply left and returned later at about 4:35 pm, which was one and half (1.5) hours after his shift had started. He did so without permission, without ensuring that someone would be in attendance to look after the mill in his absence, once his shift started.

[17] The gravamen of the respondent's case as canvassed by Mr Molati is that, there has been no consistency that the current respondent left the mill unattended to. In paragraph 5.1 (h) he pointed to clearly observable contradictions in Mr Moloi's evidence before the DDPR. He argued that Mr Moloi had said he left the mill before three O'clock (3:00 pm). The same Moloi at the disciplinary hearing said, "he left the mill after (3:00 pm)." The learned DDPR's failure to apply his mind to these contradiction rendered his decision reviewable.

[18] **THE LAW**

This Court has held as valiantly canvassed by Mr Woker that:

> *"If a court's findings of fact are so manifestly wrong that they are findings of fact that no*

> *reasonable court could have arrived at, then those findings of fact involve a question of law*[1]

In *Mantsoe v R*, the above propositions was formulated thus:

> *"The only conceivable basis upon which an attack on the factual conclusions of the court a quo could involve a question of law would be if these were conclusions which no reasonable court could have arrived at"*

I agree with that proposition of law as a reflection of the decision of this court.

[19] The issue as I see it, is whether the finding of fact by the court a quo on which the reversal of the decision of the Labour Court was based was perverse to the evidence. If so then such an irrational finding crystallises into a point of law in accordance with the decisions in *Mats'umunyane v R, Sehlooho v R, Mantsoe v R* supra.

[20] The suggestion put forward by Mr Woker, is that it was a fallacy to draw a distinction between absenteeism and leaving the mill unattended to. I respectfully disagree, it were so the applicant

[1] See Mats'umunyane V R LAC [1985-1989] 2001
Seholoholo V R LAC [1985-1989] 21
Mantsoe V R LAC [1990-1994] 193 at 195 B-E

would not have charged the respondent with two counts one of leaving the mill unattended to and absenteeism.

[21] The appellant/applicants were the architects and/or designers of the employment contract, which created two offences one dismissible, that of leaving the mill unattended and absenteeism which was not dismissible. Mr Woker's statement from the Bar is therefore inappropriate. In any event he is merely a legal representative, who should argue the law.

[22] Damning is a statement by the Lesotho Flour Mills representative Mr Moshoeshoe who testified in these terms before the DDPR at p181 of volume 2 of the record:

> *"Your worship, I want to mention that it is really turning me off, in fact it's tiring my witness. I want to put it on record your worship as the respondent's representative that the hand over that Moloi was supposed to do in terms of Lesotho Flour Mills regulation he did not do"*

This statement corresponds with the respondent's argument and supports the conclusion of the court *a quo* that, that the respondent had not left the mill unattended to, as he never took over. The first count was therefore misconceived and consequently the dismissal was substantively erroneous.

[23] There is no doubt about the intention of the architects and/or designers of the employment contract what leaving the mill unattended to means, there must be a handover which according to Mr Moshoeshoe never took place, which Mr Woker has endeavoured to contradict in this Court. This Court is clearly minded as to when the appellate court can interfere with the findings of fact.

[24] What has not been appreciated is the context and the philosophy which informed the designers of this employment contract when drawing a distinction between leaving a milling machine unattended to and absenteeism. The seriousness of the former conduct is that it can cause fire and result in huge economic loss, while the later conduct the employee sends an early warning of his/her unavailability, which could be remedied by redeployment. To paint a picture with broad strokes, it is like pilot, whose co-pilot is not in the cockpit and says it is time for the co-pilot to take-over and leaves the controls. The aircraft plunges into the sea, who is more irresponsible of the two. Of course it is the one that left the controls. In the instant case Moloi was more irresponsible. That is the philosophy underlying the characterisation of leaving the mill unattended to as dismissible offence, and the other as non-dismissible. As Mr Moshoeshoe pointed out Mr Moloi did not comply with Lesotho Flour Mills regulations on handover, (emphasis added).

CONCLUSION:

The attack against the Court *a quo* is fundamentally flawed as there was no evidence to support the finding proposed by the applicant's counsel. The proposition flies in the face of evidence. While it must be owned that the law is not a subject of mathematical precision and that different judges may vary in their assessment of evidence, I find that it was patently clear that Mr Moloi had 'a difficult relationship with the truth.' The contradictions starkly illustrates this witness's incredibility. He was a witness with an interest to serve, because his neck too was on the line. In the circumstances the only credible evidence which was damning to the appellant's case and before the DDPR was that of employer's representative, Mr Moshoeshoe quoted in paragraph 22 of this judgment. Had the learned DDPR and the Labour Court properly directed their minds, to that evidence, they would have inevitably reached the same decision as the court *a quo.* As demonstrated there was evidence to support the finding of the court *a quo* that the respondent never took over the operation of the mill and later left it unattended. The learned Judge in the Court *of quo* cannot be faulted and consequently this Court cannot disturb those findings. Legally there is no coherent alternative to the determination of the court *a quo.* There was the DDPR and Labour Court inattention to vital evidence of Mr Moshoeshoe.

The following order is made;

Application for leave to appeal on the third ground dismissed with costs.

The appellant can prosecute the appeal on the other ground they were granted leave by the court *a quo*.

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DR P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree

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M. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree

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L. CHAKA-MAKHOOANE
JUSTICE OF APPEAL

For the Applicant: Adv. H.H.T. Woker

For the Respondent: Adv. L. Molati