LAC/CIV/101/09

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

KUENA MOLELEKI APPELLANT

AND

NIEH HSING INTERNATIONAL (PTY) LTD 1ST RESPONDENT
PRESIDENT OF LABOUR COURT 2ND RESPONDENT

CORAM: HONOURABLE MR K.E.MOSITO A.J.
ASSESSORS: MRS. M. MOSEHLE
MR. J. TAU

Heard: 24TH July 2009
Delivered 28TH July 2009

SUMMARY:

Appeal from decision of the Labour Court – whether appellant guilty of disobedience to lawful orders. – Review, grounds of review different from

grounds of appeal. – Ground of appeal being based on what was not pleaded before Labour Court – Appeal dismissed with costs.

JUDGMENT

MOSITO AJ:

1. This is an appeal against the decision of the Labour Court. The facts that led to the institution of this appeal are that the appellant was an employee of the 1st respondent. He was employed as a Washing Machine Operator on 29th March 2001. He was later dismissed on 20 August 2007. The facts that led to his dismissal are largely not in dispute. They may be summarised in brief as appears herein below.

2. It is common cause that on the 14th day of August 2007 whilst on night duty appellant's supervisor, one Chen Gang instructed him to go outside of the washing room to get some pumice stones for his washing machine. Appellant refused citing the presence of vicious dogs outside. He also pointed out that there was a rule at the 1st respondent that employees should not go out of the washing room between 8:00pm and 5:00am as it was unsafe because there were dogs within the respondent's premises. The dogs were being kept on premises for security purposes.

3. It appears from the evidence tendered before the Directorate of Dispute Prevention and Resolution (DDPR) that there were two groups that were sent outside to go and collect the stones. The first group went outside in compliance with the instruction to collect the stones and came back. It then appeared to Mr Chen that the stones

were not enough. He then sent out the second group amongst whom was the present appellant to go and collect stones. The evidence reveals that the appellant refused to go outside citing the presence of the vicious dogs and the existence of a rule as pointed out above. Mr. Chen Gang pleaded with appellant all in vain and he spoke to three other Basotho supervisors to try and prevail over appellant to please go outside and collect the stones, these were Khalema, David and Ts'epo. The appellant refused to comply with this instruction and remained adamant that there were vicious dogs outside and that there was a rule that prohibited employees from going outside between 8:00pm and 5:00am on account of the presence of the alleged vicious dogs.

4. Mr. Chen Gang and the other Basotho supervisors tried their level best to explain to appellant that the dogs were not present at the premises and that, other employees had been outside with supervisors and they collected the stones and the dogs were not there. Appellant refused all this assurance notwithstanding.

5. It was in consequence of the above occurrences that appellant was subsequently dismissed for failing to comply with a lawful instruction.

6. Having been dismissed appellant approached the DDPR for relief. He claimed that he had been unfairly dismissed in as much as, so the contention goes, there was no valid reason for dismissal. The DDPR dismissed his claim. The appellant then approached the Labour Court on review. In his application for review, the appellant contended that "*the learned arbitrator ignored **my***

uncontroverted evidence that he was obliged to decide the issue of my dismissal upon which is that it was not safe for me to go out of the firm at night in view of the presence of the vicious dogs which would put my life in danger".

7. It will be realised from the above quotation from paragraph 5 of the founding affidavit of the appellant that, the alleged ground of review (if it can properly be called one) is written in an unintelligible fashion. However, if sense were to be made out of this paragraph, it is clear that appellant's contention was that the Learned Arbitrator ignored his uncontroverted evidence that he was not obliged to go outside notwithstanding the instruction given by his supervisors because there were vicious dogs outside.

8. The President of the Labour Court found, and correctly so in our view that the Arbitrator had indeed evaluated the evidence before him, and correctly found on the evidence that the appellant had been fairly dismissed on account of a valid reason for his dismissal. That reason was that he had refused to comply with a lawful instruction.

9. Whether or not the decision was correct, was a different issue from the issue whether the evidence had been considered. It might be that the decision of the Arbitrator was not correct on the facts, but it is clear that the evidence of the appellant before the arbitrator was fully considered by the arbitrator as clearly appears from the award of the DDPR.

10. The appellant then noted an appeal to this court against the decision of the Learned President of the Labour Court. His grounds of appeal were as follows:

> *"The learned judge (sic) a quo erred and/or misdirected himself in law by holding that the evidence of PW2 Mr Mokaloba was considered and rejected by the Learned arbitrator when this evidence was not considered, evaluated and weighed by the Learned Arbitrator.*
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> *-2-*
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> *The Learned Judge (sic) erred in dismissing the appellant's application for review as he did in as much as the weight [of] evidence on record did not justify a dismissal of the said review in that:*
>
> *2.1 The learned Judge (sic) a quo's factual finding that the group that was instructed with appellant herein refused instruction citing that there were dogs outside which might bite them is not supported by evidence from the record and as such a misdirection on his part.*
>
> *2.2 The learned judge (sic) a quo also erred and/or misdirected himself by making a factual finding that in fact the dogs were safely tied in their kernels at that time while there is no evidence from the record to that effect."*

11. In his able submissions before us, the learned counsel for the appellant advocate M. A. Molise argued quite strenuously in our view that in respect of the first ground above, the learned President of the Labour Court erred in holding as he did that the Arbitrator had considered the evidence of Mr. Mokaloba who testified for the appellant.

12. In our view this criticism of the learned President was quite unfair in as much as it had not been the appellant's case before the President, at least as pleaded in the papers that the Arbitrator had failed to consider the evidence of Mr Mokaloba and that was not the case pleaded in the Labour Court application. Before the President, the appellant's case was that the Arbitrator had failed to consider the uncontroverted evidence of the appellant himself. The issue whether the President had erred or misdirected himself by holding that the evidence of Mr Mokaloba was considered and rejected was not before the Learned President according to the founding affidavit. In any event even if it were before him, it is clear that the Arbitrator considered the evidence of both sides and consequently found in favour of the 1st respondent. This appears clearly from paragraph 10 of the Arbitrator's award.

13. Advocate Molise further submitted that regard being had to the decision of the Court of Appeal in **'MAMOTS'EOA SENYANE VS REX COURT OF APPEAL (CRI) NO. 8/08** and **MOSHEPHI & ANOTHER V REX LAC (1980-1984) 59** the Arbitrator did not consider the evidence in line with the guidelines indicated in those cases. In the latter case, the Court of Appeal held that:

> *The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the Appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the*

> *separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when it is evaluating evidence. Far from it, there is no substitute for detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done one may fail to see the wood for the trees.*

14. The learned Counsel contended further that the Arbitrator ought to have reflected in his award the aspects indicated in the above quotation. We do not agree with this submission. The above quotation contended for by the learned counsel was not made in the context of arbitration proceedings; it was made in the context of judicial criminal proceedings. The standard required of a criminal court can not certainly be equated to that required of an arbitral tribunal. It cannot be correct therefore to argue that the same approach should be imposed upon the Arbitrators of the DDPR.

15. In the circumstances therefore we are unable to find fault with the approach adopted by the Learned President of the Labour court, let alone that of the Arbitrator of the DDPR. We consequently come to the decision that there is no substance in this appeal. The appeal is accordingly dismissed with costs.

16. My assessors agree.

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K.E. MOSITO AJ

Judge of the Labour Appeal Court

For Appellant: Advocate Molise

For Respondent: Advocate Macheli