IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/CIV/A/10/09**

In the matter between:

PHEELLO RAMAKOLOI APPELLANT

AND

SECURITY LESOTHO (PTY) LTD RESPONDENT

CORAM: HONOURABLE JUSTICE K.E. MOSITO AJ

ASSESSORS: MR.S M. THAKALEKOALA

MR. D. TWALA

HEARD ON: 9TH JUNE 2011

DELIVERED ON: 30TH JUNE 2011

SUMMARY

Appeal from Labour Court – Whether Labour Court erred in relying on evidence given at the disciplinary inquiry – Court having considered such evidence on review – Insubordination- what constitutes – Appellant not insubordinate as there was no adequate evidence that he heard when he was called – As parties equally succeeded – No order as to costs.

JUDGEMENT

MOSITO AJ.

BACKGROUND

1. The Appellant is the former employee of the respondent. He came to this court appealing against the judgment of the Labour Court. The Labour Court had been seized with the matter consequent upon an application that had been lodged before it in which an attempt was being made to review an award of the DDPR. The said award was a sequel to arbitration proceedings that arose as a result of the alleged dismissal of the Appellant on the 1st day of June 2005. The Appellant had taken the matter to the Directorate of Dispute Prevention and Resolution (DDPR) for conciliation and arbitration.
2. At the arbitration, the learned Arbitrator was presented with viva voce evidence as well as the record of the internal disciplinary hearing. Witnesses were also called and examined before the DDPR.

PROCEEDINGS BEFORE THE DISCIPLINARY ENQUIRY

3. The case originated at the disciplinary enquiry whereat the Appellant was charged with ignoring a call by his superior when he called him to come back so that he could be assigned some work. The charge sheet read as follows:

> "U qosoa ka ho hana litaelo mane Formosa ka la 07/03/05. U tlotse Personnel Regulation 14.1.8. Tloho le lipaki tsa hao/mapaki-'moho le samane ena".

4. The above charge may be translated in the following words:

> "You are charged with refusing to obey instructions at Formosa on the 07/03/05. You breached Personnel Regulation 14.1.8. Bring your witness(s) –together with this summons"

5. It appears from the charge sheet that Appellant received the charge sheet on the 18th day of March 2005 at 1640hrs.

6. The facts that led to the preferring of the above charge were as appear from the record of the disciplinary enquiry are that on the 7th day of March 2005, the Appellant arrived late for a parade which starts at 5:30am. Because he was late, he stood aside as had been the practice in the recent past not to involve him in a parade because he had had an injury on the leg whilst at work. The parade was conducted by Mr. Kali Makhetha. According to Mr. Makhetha, at the end of the parade, he assigned his men duties but the Appellant was asked to stay where he was as he would be assigned work later. Mr. Makhetha testified that he walked to the gate after finishing his work at the parade at the factory where they worked. He says he was followed by the Appellant and other guards and one Mr. Mahloko. He testified that when they arrived at the gate, the Appellant put his bag down and went to another factory called Global. When Appellant returned Mr. Makhetha called him inside the sentry-box in order to assign him work. He testified that the Appellant ignored him and took his bag and

left. He further testified that he tried to shout in order to call him but Appellant did not respond. Mr. Makhetha also indicated that he was with one Mr. Mahloko when he called the Appellant. Mr. Mahloko even tried to help and called Appellant but Appellant still did not respond. Another guard by the name of Portman who was outside the gate also tried to call him, but Appellant ignored him and went home.

7. The evidence of Mr. Makhetha was corroborated to some extent by the evidence of Mr. Mahloko who testified that he tried to call the Appellant but the Appellant was a bit far from him. I may pause here to observe that to suggest that Mr. Mahloko tried to call the Appellant but he was a bit far from him seems to us to imply that the attempt by Mr. Mahloko to call the Appellant back at least on the version of Mr. Mahloko himself was not adequately satisfactory so as to ascertain whether it could be said that the Appellant could hear what Mr. Mahloko was saying or the calling by Mr. Mahloko because Mr. Mahloko himself says he tried to call Appellant but he was a bit far. We will come back to this issue.

8. The evidence of the Appellant was that he denied that Mr. Makhetha ever called him. His version was that people who came late for the parade were punished by being ordered to run around the factories. He was also subjected to the same punishment because he had arrived late with one Mr. Ranyali. His story was that upon arrival with Mr. Ranyali one Mr. Mahlongoloane called Mr. Ranyali out of the gate and asked him and others to run. The Appellant was left out of the punishment. He testified that when Mr. Makhetha realized that he had remained behind, he asked why he had been left out but Appellant told Mr. Makhetha that he had an

injury. Mr. Mahlongoloane also confirmed that Appellant had an injury. Appellant however testified that Mr. Makhetha told him that he must nevertheless run otherwise he would not post him. He testified that at the end of the parade Mr. Makhetha posted everybody else but left Appellant because the latter had refused to run.

9. Appellant testified further that after some twenty minutes he went to the gate where Mr. Makhetha and Mr. Mahloko were, he asked for permission to go and fetch his jacket (presumably from Global Factory). Mr. Makhetha did not respond but Appellant proceeded to fetch his jacket. He thereafter came back to the gate where he waited with Mr. Makhetha and Mr. Mahloko. He further indicated that he knew he had a problem with being with Mr. Mahloko and he decided to go home. He also testified that relations between him and Mr. Makhetha were not good; he testified that he reported to Mr. Makhetha and Mr. Mahlongoloane that he was going home and that he left for home after an hour. He however did not have permission to go home. It must be pointed out that there were a number of contradictions in the evidence of the Appellant as to the timing and the whereabout of Mr. Mahloko and Mr. Makhetha in relation to him before he went home.

10. Mr. Makhetha made it clear that he had not required Appellant to run because he knew that Appellant had an injury. Mr. Mahloko also confirmed that Appellant did not participate in the parade.

PROCEEDINGS BEFORE THE DDPR

11. The enquiry before the learned Arbitrator related to whether there was insubordination by Appellant. The learned Arbitrator found out as a fact that Mr. Makhetha had called out to Appellant and that this aspect was confirmed by Mr. Mahloko who said he also called the Appellant and that, that notwithstanding, the Appellant was a bit far and he could not hear him. The learned Arbitrator then proceeded to make the following remarks:

> "To my mind, it is very important to know if applicant heard these alleged calls. Mr. Mahloko's evidence that applicant was far when he called him suggest to me that he is not sure if applicant heard his call. Even with Mr. Makhetha, no evidence shows that applicant heard him such that it could be said that he ignored him"

12. The Arbitrator concluded that the Appellant was no insubordinate because there was no proof that he heard the calls and defiantly ignored them. He then ordered that the Appellant be reinstated.

PROCEEDINGS BEFORE THE LABOUR COURT

13. The respondent in this matter filed an application in the Labour Court for an order in the following terms:

    (a) Calling upon the respondents to show cause why the decision or proceedings in Arbitration Case No. A0868/05 should not be reviewed, corrected and set aside.

(b) Calling upon the respondents to show cause why the execution of the award in Arbitration Case No A0868/05 and any reasons that it wishes to give to the Registrar within 14 days.
(c) Calling upon the 1st Respondent to deliver the record of proceedings in Arbitration Case No. A0868/05 and any reasons that it wishes to give to the Registrar within 14 days.
(d) Calling upon the respondents to show cause why prayers (b) and (c) shall not operate with immediate effect as an interim orders.
(e) That the respondents should pay the costs hereto only in the event that they oppose this application.
(f) Granting applicant such further and/or alternative relief.

14. The grounds on which the company sought to review the arbitration case No. A0868/05 we as follows:

> *"4.1 The Arbitrator failed to apply his mind to the totality of the evidence presented in the case.*
> *4.2 The Arbitrator shifted the responsibility of an absconding and or insubordinate employee to the employer. The evidence was to the effect that the 2nd respondent left or had intended to leave without permission the consequences of his departure notwithstanding.*
> *4.3 The Arbitrator erred in holding that the applicant failed to prove insubordination in the light of the totaling of the evidence presented before him.*
> *4.4 The applicant reserved the right to furnish further reason of review."*

15. The Appellant reacted to the above statement of case by indicating that the Arbitrator had applied had applied his mind to the evidence presented

before him as clearly reflected in his reasoned decision annexed to the papers. He disputed that there is anything to indicate that there was a shift of *onus* to prove abscondment or insubordination. He also raised the issue which forms the hub of this case that the company had failed to give evidence to the effect that he had heard when he was called. He further averred that this did not amount to the shifting of the *onus* but that the applicant had failed to combat his evidence before the DDPR.

16. The Labour Court remarked in this regard that:

> "This is a very valid attack on the award of the learned Arbitrator. Evidence shows that Mr. Makhetha called 2nd respondent who was just outside the guard room but he did not respond. The 2nd respondent says as much as p.13 of the record that he was outside the room while Mahloko and Makhetha were inside. In the circumstances it cannot reasonably be concluded that the 2nd respondent could not hear two people calling him given his admitted proximity to them".

17. It must be mentioned that a reference to the "2nd respondent" in the above quotation is a reference to the Appellant. The Labour Court further held that the fact that Mr. Makhetha was able to approximate the distance of the Appellant when he called him, can only lead to the conclusion that Mr. Mahloko was outside the sentry-box when he called the Appellant. The Labour Court then held that the Appellant must have heard when he was called. The issue at the end of the day revolves on whether Appellant did

hear when he was called. The present Appellant was not satisfied with this judgment and he appealed to this court.

PROCEEDINGS BEFORE THE LABOUR APPEAL COURT

18. In the appeal before us, the Appellant presented his appeal cached in the following terms:

> "1. The Learned President of the Labour Court failed to apply his mind to the facts by concluding that the Appellant heard when he was called back to work yet that was not proved by the respondent in arbitration proceedings.
>
> 2. The Learned President of the Labour Court failed to deal with the facts presented to it *mero motu* bringing and relying solely, on the record of disciplinary hearing in reaching his judgment.

19. It is to these two grounds of appeal that we must now turn. However before turning to these grounds of appeal, it might be advisable to comment on the issue of insubordination which formed the basis of the charge in the lower tribunals as well as in the Labour Court. It might be necessary to begin by commenting on the characteristics of the concept of insubordination in employment law.

Insubordination

20. The big question is, "what is insubordination?" *The term i*nsubordination in employment law does not admit of a precise definition. A dictionary definition of insubordination is *"…not submissive to authority, disobedient or rebellious..."* This dictionary definition clearly implies that insubordination applies only upwards and can only be perpetrated by a junior employee towards a senior. Thus, an employee may be disrespectful without necessarily being insubordinate. It is imperative in employment law to draw a distinction between *insubordination* and *disrespect*. Both these concepts are categorized as misconduct in the workplace, and therefore are subjected to the internal disciplinary processes of the company.

21. As pointed out earlier, insubordination applies only upwards and can only be perpetrated by a junior employee towards a senior. Disrespect on the other hand, can apply both upwards and downwards. *Disrespect* is therefore not necessarily linked to a person's position of authority, but can be linked to one's human dignity. I*nsubordination* is typically a disciplinary offence whereby workers lower in the chain of command should do as they are told. This is because, every employee not only has the duty to come to work and be on time and so on, but also the duty to obey all reasonable and lawful instructions within the parameters of what is accepted as being a reasonable and lawful instruction. A violation of this duty constitutes the very core of "insubordination". A reasonable instruction is one that: the employee is capable of carrying out and, involves a task that is not substantially beneath the employee, and does not infringe the rules of the employer or the laws of the country, and involves a task that truly needs to be done .

22. The characteristics present in *insubordination* would be a willful, verbal refusal of instructions, willful disregard of management authority, disrespect, rudeness, rebelliousness or disobedient gestures, manner or attitude, dismissive gestures, walking away, abusive language, knocking the written instruction or notification of enquiry from the senior manager's hand, or taking it and discarding it, addressing the senior manager or director or supervisor in a disrespectful manner. In short therefore, *insubordination* is the willful failure to obey a senior's lawful and reasonable orders. Thus, the gravamen of insubordination is willfulness. As wilfulness is the highest degree of a guilty mind, an act is only wilful if it is deliberate and intentional and not occasioned by ignorance, inadvertence, accident, physical disability or like causes. Wilfulness' connotes a high degree of culpability. The wilful default in carrying out an order or the disobedience of such an order may be in regard to one of quite an unimportant character; it may, on the other hand, he a default or disobedience of an order fraught with the most serious consequences. An employer cannot provoke an employee into insubordination and use that as a ground of dismissal. (See **Denny v SA Loan, Mortgage and Mercantile Agency (3 E.D: C., p. 47)**. But the matter must nevertheless remain largely a question of fact depending on the inference which is drawn as to the mental attitude of the Appellant. In the present case, the Arbitrator, who had had the advantage of seeing and hearing the Appellant, may well have come to the conclusion that there was no willfulness in his conduct. In my opinion this is a case where the Arbitrator's reasons might have proved of great assistance to the Court. In this case, the explanation advanced by the Appellant does not amount to willfulness.

DID THE LABOUR COURT FAIL TO DEAL WITH THE FACTS PRESENTED TO IT BY *MERO MOTU* BRINGING AND RELYING SOLELY, ON THE RECORD OF DISCIPLINARY HEARING IN REACHING HIS JUDGMENT?

23. The Labour Court was entitled to have regard to what was said at the disciplinary hearing as well as at the DDPR. As was said by Zondo JP in **Kroukam v SA Airlink (Pty) Limited JA3/2003:**

> [23] Before I can consider what the respondent's witnesses said in their oral evidence which may reveal what the respondent meant when it said that the appellant was dismissed for gross insubordination and being a disruptive influence to the orderly operation of the organisation, it is necessary to consider what was said in the disciplinary inquiry and the internal appeal by representatives of the respondent and by the chairmen of the disciplinary inquiry and the internal appeal because what they said in those *fora* may throw light on what the respondent meant and, therefore, on the true reasons for the appellant's dismissal. It will also be necessary to have regard to what the appellant alleged in his statement of claim and what the respondent's response to that statement was in so far as these may throw light on what the respondent understood to constitute gross insubordination and being a disruptive influence.

24. There were no other facts placed before the Labour Court other than those outlined and presented at the disciplinary hearing and before the DDPR. All of those facts were traversed by the Labour Court. There is therefore no substance in the complaint that the Labour Court failed to deal with the facts presented before it by *mero motu* bringing and relying solely, on the record of disciplinary hearing in reaching his judgment. The Labour Court was perfectly entitled to consider the evidence presented at the disciplinary hearing and before the DDPR in the manner it did.

25. The last issue is whether the Learned President of the Labour Court failed to apply his mind to the facts by concluding that the Appellant heard when he was called back. As indicated above, the DDPR's Arbitrator held that the Appellant had not heard when he was called. The Labour Court was however not satisfied with this finding or fact by the DDPR. The Labour Court held that the DDPR's Arbitrator erred in finding that the Appellant had not heard when he was called.

26. As a general rule it is undesirable to rely on a credibility finding as the sole basis for assessing the probative value of evidence. *findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration* (***Santam Bpk v Biddulph*** **2004 (5) SA 586 (SCA)** at 589, par [5]). In ***Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*** **(2010) 31 *ILJ* 452**, Van Niekerk J also took an arbitrator to task for the arbitrator's one-dimensional approach to evaluating conflicting versions and remarked that, to resolve the factual controversy between the parties' witnesses, the arbitrator had to embark

upon a balanced assessment of the credibility, reliability and probabilities associated with their respective versions.

27. When the DDPR made a finding that the Appellant did not hear when he was called, it was making a credibility finding on a question of fact. When it came to testing the credibility finding in **Van der Riet v Leisurenet t/a Health and Racquet Club [1998] 5 BLLR 471 (LAC) at 474**, the South African Labour Appeal Court cited with approval the dictum in **Amalgamated Beverages Industries (Pty) Ltd v Jonker (1993) 14 ILJ 1232 (LAC) at 1209**, which stated that:

> "The present appeal is one in the ordinary strict sense, i.e. a rehearing on the merits, but limited to a consideration of the evidential material on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong. In that determination this Court is free, and indeed, bound to embark on a fresh assessment of the merits based on the evidential material before the court *a quo*, and to exercise its own discretion as to what is fair and reasonable in the circumstances, at the same time having proper regard to the findings of the court *a quo* as to the credibility of the witnesses who testified before it. *Food and General Workers Union & Others v Design Contract Cleaners (Pty) Ltd* (1996) 17 ILJ 1157 (LAC) at 1165 A-D and the other cases therein cited. It is therefore necessary for this Court to accord proper weight to the credibility findings made by Roth AM, without overstating the effect of same."

28. The question whether or not the Arbitrator was correct in finding as a fact that the Appellant did not hear when he was called necessarily involved the assessment of the probative value or otherwise of the evidence presented to the Arbitrator and his/her evaluation of the credibility or lack of it of certain witnesses who testified at the hearing. In the context of a review of a Commission for Conciliation Mediation and Arbitration (CCMA) arbitration award it was held, in the **City of Johannesburg (Midrand Administration) v Bean NO & Others [2002] 5 BLLR 416 (LC) at 421 C-E**, that:

> "With regard to her [the commissioner's] assessment of the probative value or otherwise of the evidence presented to her and her evaluation of the credibility or lack of it of certain witnesses who testified in the hearing, the challenge mounted by the applicant would appear to be more the stuff of appeal than review. The first respondent, as is always the case where issues of credibility arise, had the benefit of direct visual and aural evaluation of the witnesses in question – the manner of the presentation of their testimony, their demeanour in the witness chair, their reaction to cross-examination, and so forth. Her evaluation of the substance of their evidence was necessarily subjective and any differences of perception in that regard do not constitute grounds for review."

29. We agree with these remarks and we must point out that there is no reason why they would not apply to the review of the DDPR Arbitrator awards as well. Aside from the fact that the Arbitrator's reasons are

justified on the basis of the record, it must be accepted that the Arbitrator was in the best position to determine the credibility of the witnesses concerned. The Arbitrator would have been aware of aspects of the evidence such as the demeanour of the witnesses which will not appear from the record. Under the circumstances, the Arbitrator's further reasons for his credibility finding are not susceptible to review.

30. The importance of relying on the record of a witnesses' evidence as the primary basis for making credibility findings has been recognized. Authorities on this point are legion (See Van Zyl J, in the judgment in ***Foodworld Stores Distribution Centre (Pty) Ltd and Others v Allie*** **[2002] 3 B All SA 200 (C)** cited with approval by Navsa JA, in ***Allie v Foodworld Stores Distribution Centre (Pty) Ltd & others*** **2004 (2) SA 433 (SCA) 2004 (2) SA p433** at 442, par [38]). Credibility findings made by the DDPR were made after hearing, observing and watching the witnesses who testified. The Labour Court did not apparently observe the witnesses.

31. The essential question one should ask when deciding whether an arbitration award should be reviewed is whether the award is one that a reasonable decision-maker could not reach (See ***Sidumo & another v Rustenburg Platinum Mines Ltd & Others*** **[2007] 12 BLLR 1097 (CC)**). Accordingly, besides the review grounds enunciated in the **Labour Code (Amendment) Act 2000**, the Labour Court is bound to have regard to the aforementioned test. This court will not easily interfere with a decision of a DDPR Arbitrator. In ***Moodley v Illovo Gledhow & Others*** **[2004] 2 BLLR 150 (LC)** at paragraph 22 the South African Labour Court had occasion to observe that:

> "*It should be extremely reluctant to upset the findings of the arbitrator, unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilt with her functions as an arbitration that her findings can only be considered to be so grossly irregular as to warrant interference from this Court*."

32. We agree with these remarks and we wish to add that there is no reason why they would not apply to the review of the DDPR Arbitrator awards as well. The Labour Court will however interfere where it is clear that the factual findings are not supported by the evidence. As it was observed in ***Vita Foam SA v CCMA*** **[1999] 12 BLLR 1375 (LC)** at paragraph 22 – 24 by the South African Labour Court:

> "*It is clear that these factual findings of the commissioner, which was not supported by the evidence before her, must have influenced her reasoning when she decided on the seriousness of the misconduct of the five individuals concerned.*
>
> *In the result, this finding which was not justified on the basis of the evidence presented must have had a bearing on the outcome of the arbitration award.*
>
> *For this reason alone it appears that the arbitration award must be set aside as it contains this very serious defect.*"

33. We agree with these remarks. In considering the reasonableness of an award, the Labour Court should always bear in mind the distinction between a review and an appeal. What is therefore in essence the Labour Court's function is to consider whether or not the Arbitrator's decision falls

within the boundaries of reasonableness.(See in this regard ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*** **(2004) 4 SA 290 (CC)**).

CONCLUSION

34. In conclusion, we are unable to agree with the attack that the Labour Court erred in relying solely, on the record of disciplinary hearing in reaching his judgment. This issue had been addressed even on the papers before the Labour Court. The issue whether the Appellant did hear when called was addressed not only before the disciplinary enquiry, bet at the levels of the DDPR and the Labour Court as well. This ground of appeal must therefore fail.

35. With regard to the issue whether the Labour Court failed to apply its mind to the facts by concluding that the Appellant heard when he was called back to work, we agree that there was a misdirection on the point. Aside from the fact that the Arbitrator's reasons are justified on the basis of the record, it must be accepted that the Arbitrator was in the best position to determine the credibility of the witnesses concerned *vis-a-vis* whether the Appellant did in fact hear when he was called. The Arbitrator would have been aware of aspects of the evidence such as the demeanour of the witnesses which will not appear from the record. Under the circumstances, the Arbitrator's further reasons for his credibility finding are not susceptible to review. There was no legal basis for interfering with the award of the DDPR that Appellant did not hear when called. We accordingly uphold the appeal on this ground.

36. Since both parties have equally succeeded in this appeal, there will be no order as to costs

37. This is a unanimous decision of the Court.

K.E.MOSITO AJ

____

Judge of the Labour Appeal Court

For Appellants: Adv. L. Lefikanyana

For respondent: Adv. P.L Mohapi