IN THE LABOUR COURT OF LESOTHO

CASE NO LC 18/97

HELD AT MASERU

IN THE MATTER OF:

SIMON MOHLAPISO APPLICANT

AND

FRASERS LESOTHO LTD RESPONDENT

JUDGMENT

This case arises out of the dismissal of the applicant on the 26th September 1996. The applicant had been charged and found guilty of gross insubordination by refusing an instruction to go to work on Saturday 14th September 1996 and failing to report his absence the following Monday. One witness each testified in support of applicant's and respondent's case respectively. These were the applicant himself and Mr. Subke for the respondent.

The applicant worked at the respondent's central warehouse, otherwise called Frasers Distribution Centre (FDC), which supplies goods to all Frasers branches throughout the country. He worked in the Receiving Department which fell under one Percy Tsenoli. One Frank Subke was in charge of the Dispatch Department. There was then the overall manager who was in charge of the whole warehouse.

Both witnesses confirmed that Saturdays are not normally working days at the warehouse. They also confirmed that there was a standing instruction of the Warehouse Manager that "should we run behind on deliveries to branches, it will be necessary to work on Saturdays." (See Annexure "A" to the Answer). The witnesses further agree that whenever it was necessary to work on Saturdays an announcement was made on the preceding Friday, on a loudhailer, informing workers that they would be coming to work the following day. The witnesses agree further that such work was treated and paid as overtime.

According to the respondent on Friday 13th September 1996, Mr. Subke was given an instruction by the Warehouse Manager to announce to the workers over the loudhailer that they would be coming to work on Saturday 14th September 1996. Mr. Subke says he did carry out this instruction; as a result all employees, with the exception of those who had officially recorded their excuses came to work. However, the applicant did not come to work. He had not given any excuse that he would not be able to come to work. The following Monday he proceeded with his work without telling anybody where he had been on Saturday. The applicant was thus charged with insubordination and found guilty and dismissed.

In his Originating Application, paragraph 3 thereof, the applicant confirms that "one Mr. Frank Subke made an announcement over a radio that the workers should be at work on the following day, Saturday the 14th September 1996, as that will be a working day." Applicant goes on in paragraphs 4 and 5 to aver that this was the way Mr. Subke used to instruct employees under his command if there was need to work on Saturdays and that since he (applicant) did not fall under Subke's section he did not "....regard the announcement as applicable to him."

In his testimony the applicant avers that he did not go to work on Saturday 14th September firstly because he had not been given 3 days prior notice in terms of section 117 of the Labour Code Order 1992 (the Code). This statement confirms his averment under paragraph 8 of the Originating Application. Secondly, he states that he did not go to work because he was not informed by anybody that he had to go to work on Saturday. He concludes by saying that because of this lack of information on his part, that Saturday he went to Ha Moitsupeli to attend to his daughter's accommodation problems at school.

> **In terms of Section 117 of the Code;**
>
> ***"(i) ....every employee shall be allowed a weekly rest period of at least 24 continuous hours which shall whenever practicable include Sunday as the day of rest. If the circumstances of a particular employment so require, however, the employer may, after consultation with the employee or his representative, at not less than three days' notice grant a different period of at least 24 continuous hours in that week as the period of weekly rest for the employee concerned."***
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> ***"(2) Whenever an employee is <u>required to work on his day of weekly rest</u> or on a public holiday, the employer shall pay him for such work at <u>double</u> the employee's wage rate for an ordinary work day....."*****(emphasis added).**

Clearly if Saturday was a rest day at the FDC it would by law be paid at double the applicant's wage rate for an ordinary work day. However, both the applicant and Mr. Subke in their testimony stated that, Saturday work was paid as overtime. This is confirmation that even though there may have been occasions when workers did not work on Saturdays, that did not mean that Saturday was a rest day, which could only be changed by giving three days prior notice. It remained an open day that

could be worked depending on the demands of the work. Indeed Annexure "A" to the Answer which the evidence of both the applicant and Mr. Subke confirmed its contents, says so in clear terms that Saturdays are working days if deliveries are behind. It was not necessary therefore, to give applicant three days prior notice that he would be required to work on Saturday.

There is clearly a conflict of versions regarding whether the applicant was informed on Friday 13th September 1996, that the following Saturday would be a working day, or whether an announcement was made after all to the workers that they should come to work that Saturday. Mr. Van Tonder sought to rely on the record of proceedings of the disciplinary enquiry to show that the applicant should not be believed because the account of the events he gave at the enquiry differs with that he has given in his testimony in court. Mr. Putsoane objected, correctly in our view, that the record being an unsworn document could not be relied upon to disprove applicant's evidence on oath. We are fortified in this position by the ruling of Labuschagne AM in Mshumi & Others .v. Roben Packaging (Pty) Ltd t/a Utrapak (1988) 9 ILJ 619 where the learned member stated at p.623 of the judgment that;

> ***"if a party to an application wants the court to take cognizance of statements in correspondence it attaches to its papers, it should depose to such statements."***

Mr. Van Tonder did not only fail to hand in this annexure under oath, but he did not even lead his witness Mr. Subke, on any of the averments of the document to establish their truthfulness under oath.

We are nevertheless still of the opinion that the applicant's version is devoid of the truth. Firstly, his oral testimony contradicts his statement of case as outlined in the Originating Application. Whilst he categorically denies in his testimony that he was ever informed that Saturday 14th September 1996 would be a working day or that any announcement to that effect was ever made; in his statement of case, in particular paragraph 3 of the Originating Application, he leaves no doubt in anybody's mind that an announcement was infact made by Mr. Subke and that he heard it.

In paragraph 4 applicant avers that this was the way Mr. Subke used to command employees who were under him "....whenever there was a need to go to work on a Saturday." He concludes by stating in paragraph 5 that,

> ***"the applicant was not under the section headed by Mr. Frank Subke and did not therefore regard the said announcement as applicable to him."***

It is trite law that a litigant must stand and fall by his pleadings. Even though it has been held that industrial court proceedings are not pleadings *strictu sensu* as understood in ordinary courts of law; (see Pilatus Manufacturing (Pty) Ltd .v. Mamabolo (1996) 17 ILJ 135) there are certain fundamental principles which the

Labour Court cannot depart from. This is the applicant's case; he proffered it and it is his onus to sustain it by coherent evidence and not to leave the court cropping in the dark as to which of the conflicting versions it should follow. Once a party fails to sustain its case it automatically falls away.

Under the pressure of cross-examination the applicant made significant concessions which showed that he was not telling the truth when he said no announcement was made that they should come to work the following Saturday. He admitted that the rest of the staff including those who were in his department had come to work. He said that those in his department told him that Mr. Tsenoli who was their departmental head, had informed them individually that Saturday would be a working day. No evidence was called to corroborate this allegation. Furthermore, if there was any grain of truth in it, the applicant would have specifically pleaded it, or brought it out in his evidence in chief. We are in no doubt that applicant was not telling the truth.

The applicant further conceded under cross-examination that whenever there was to be work on a Saturday, they were informed through a loudhailer, and that the announcements used to be made by Mr. Subke. This is in stark contrast with what he said in paragraph 8 of his Originating Application that his Manager Percy had not informed him to go to work on Saturday 14th September 1996. There was clearly no need for Percy to inform him personally, because the custom, which applicant was privy to, was that an announcement by Subke and possibly anybody else in management was sufficient notice to all staff to come to work.

Both in his Originating Application and in his testimony, applicant said on Saturday 14th September he had gone to Ha Moitsupeli to attend to his daughter's school problems. When he was asked where he had been the following Monday he advanced the same reason that his daughter had accommodation problem at school and that he had gone to attend to that problem. Mr. Van Tonder for the respondent asked the applicant why he gave the reason for his absence as being his daughter's problems instead of saying that he did not know that he had to come to work that Saturday. His answer was an unsatisfactory "it was a mistake." It was put to him that he answered that way because he knew quite well that he had been instructed to come to work on Saturday, but in his own wisdom decided to go to Moitsupeli. The applicant could not comment. On the basis of the evidence before us and in the light of applicant's own contradicting versions we are of the opinion that an announcement was indeed made, which the applicant heard, but failed to heed that workers should report to work on Saturday 14th September 1996.

Mr. Putsoane argued that the charge of insubordination which the applicant faced arose from his absence from work on Saturday 14th September. He submitted that in terms of the respondent's disciplinary manual an employee who absents himself for the first time is given a written warning. Another warning letter is given for the second absence and thereafter he is given final written warning. Mr. Van Tonder

contended on the contrary that this was not a case of absenteeism. It was on the other hand a case of working overtime which was necessary when work was behind.

We are in full agreement, that this was a case of a standing instruction that if work is behind, workers would have to work on Saturdays. Accordingly a person who fails to report for work after being so instructed as was the case in casu renders himself liable to be charged with insubordination.

Mr. Putosane argued further that failure to work overtime ought not to be punished like other offences because it already has an inbuilt sanction that an employee who fails to work overtime forfeits overtime pay. Section 118(3) of the Code provides that;

> ***"(3) Notwithstanding the provisions of this section, where the continuous nature of the work so requires, an employer may request or permit an employee to work overtime in addition to the normal hours provided for in this section...."***

What is clear is that overtime may be worked at the initiative of the employer or the employee. It is perhaps where it is at the initiative of the employee where it may be argued, albeit narrowly that an employee has denied himself overtime pay. The argument would be narrow and simplistic because what necessitates overtime is not financial gain. According to the wording of sub-section (3) above, overtime may be requested or permitted "....where the continuous nature of work so requires..." It is therefore the demands of the work that determines whether to work overtime or not.

The use of the word "request" must not be interpreted to mean that the employee has the latitude to turn down the request. In contractual terms such a request is infact an instruction based on the requirements of the work. In the case under consideration, a standing instruction; which in effect formed part of the employees' contracts of employment existed that Saturday's work is obligatory if work was behind. That instruction had to be obeyed, except in circumstances where an employee had asked for permission not to be present.

Mr. Putsoane's further contention was that respondent has not tendered evidence showing that the instruction was communicated to applicant to come to work on Saturday. He submitted that the applicant testified that that afternoon he was working outside and that there are some areas of the yard where the loudhailer does not reach. In the first place, Mr. Subke's evidence was categoric that he made the announcement to the staff after being so instructed by the warehouse manager. In the second place, nowhere in his testimony does the applicant say that that afternoon he was working outside. Lastly in his evidence Mr. Subke testified that the instrument used for the announcements is so loud that it can reach every corner

of the FDC complex. In any event it is significant that the applicant was merely expressing an opinion in response to a question from the member of the Court whether it was possible that one could miss an announcement if it is made when he is far. He said that it could happen if one has moved deeper inside the yard. He did not say that he infact at one time moved so deep inside as to have missed the announcement.

Mr. Putsoane's last argument was that insubordination entails willingly disobeying a lawful order. He stated that the respondent has failed to establish willingness on the part of the applicant. Even if the applicant had received the instruction to report to work, the circumstances which led to his going to Moitsupeli were beyond applicant's control and as such the element of willingness had been negated, Mr. Putsoane argued.

Willingness is exactly what the respondent have throughout these proceedings set out to establish. From their pleadings to their cross-examination of the applicant and finally through the testimony of their own witness, the respondents were out to establish precisely that point that the applicant got the instruction to be at work on Saturday 14th September 1996 but ignored it. Our finding on the facts is a clear vindication that this onus has been discharged.

As regards the applicant's family problem concerning his daughter; the onus was on the applicant himself to disclose to his employers the following Monday why he had not been able to report for duty the previous Saturday as expected. As Mr. Van Tonder argued, the practice of working Saturdays was a compassionate one because if an employee had pressing problems which he disclosed to his superiors, management allowed such an employee not to come to work. However, not only did applicant not say on Friday that he would have a problem, but even on Monday he did not say anything to anybody until when he was asked by one Mr. Staples. It was only then he disclosed that he had attended to his daughter's problems at School. In our view the applicant has failed to discharge the onus to disclose to his employer that circumstances beyond his control led to his inability to report for work as required.

Under paragraphs 12 and 13 of his Originating Application the applicant had complained further that warnings which had not been produced in evidence and which were not proved to be operative were taken into account. He averred further that the respondent had failed to treat him leniently in the light of his 18 years service in the company. Respondents' answer was that the warnings were referred to in the context of referring to applicant's record. Previous warnings do constitute a person's record and they can in future be disastrous, should applicant be found guilty of another misconduct. Such records need not be produced in evidence as they are normally a matter of record of what transpired previously. Prove of whether a warning is still operative would arise if there is a practice or rule stipulating how long a warning would remain valid. However, applicant tendered

no evidence to show that the respondent's rules or practice limited its warnings to a specified period.

As regards the severity of the punishment, the respondents averred that applicant would have been dismissed without benefits, because of the seriousness of the offence with which he had been charged and found guilty of. He was dismissed with benefits because his long service was taken into account. The applicant never controverted this averrement, in the premises it is presumed to be correct. This court finds no basis for it to interfere with the respondent's disciplinary action against the applicant. Accordingly this application is dismissed.

Costs shall be costs in the cause.

THUS DONE AT MASERU THIS 18TH DAY OF MARCH, 1999.

L.A LETHOBANE
PRESIDENT

P.K. LEROTHOLI
MEMBER **I AGREE**

A.T. KOLOBE
MEMBER **I AGREE**

FOR APPLICANT : **MR PUTSOANE**
FOR RESPONDENT: **MR VAN TONDER**