

IN THE LABOUR COURT OF LESOTHO LC/REV/26/08

HELD AT MASERU

IN THE MATTER BETWEEN

KUENA MOLELEKI

APPLICANT

AND

**NIEN HSING INTERNATIONAL
(PTY) LTD
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION**

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date: 17/02/09

Review of DDP award – Applicant alleges that arbitrator failed to consider his own testimony which he says was uncontroverted – Court found that the evidence was controverted. Court further found that the evidence was considered by the arbitrator – Application dismissed.

1. This is an application for the reviewing, correcting and setting aside of the award of the learned arbitrator Monoko in which, he had dismissed the referral of the applicant where he was challenging the substantive fairness of his dismissal by the 1st respondent on the 29th March 2001. He was dismissed on the 20th August 2007. At the time of his dismissal he was working as a washing machine operator.
2. On or around the 14th August 2007, the applicant was on night shift work. Evidence led on behalf of the 1st respondent by DW1 Chen Gang is that at around 10.30 pm that night, he sent 4-5 employees to go and fetch pumice stones which is used to run the washing machine

- for bleaching the garments that are manufactured at the 1st respondent. He stated that he is the one who was responsible for the shift as such he had to make sure that work is done and done properly.
3. The group went and fetched the stones and returned safely. He stated under cross-examination that he had in fact gone out with that group. About half an hour later, the witness realized that more stones were needed to run the machines. He sent another group of 4-5 employees which included the applicant, to go and fetch more stones. This group refused to do as instructed, citing fear that there were dogs outside which might bite them. DW1 stated that he told them that there were no dogs outside and that another group had already been outside and they did not meet any danger.
 4. DW1 testified further that he thought there was communication breakdown due to language barrier. He then called a supervisor by the name of Khalema to explain to the group in the language they would understand, that there were no dogs to fear. The other employees complied and went to fetch the stones, but the applicant was adamant that he would not go. Two other supervisors namely David and Tsepo were called to persuade the applicant to do as he was instructed, he still refused.
 5. Under cross-examination DW1 repeated that he had followed the first group that he sent to fetch stones when they went outside. He further restated that the group that was instructed with applicant finally obeyed the instruction except the applicant. He was asked if Khalema told applicant that there were no dogs outside. He answered that Khalema who is the logo supervisor, told applicant that there were no dogs as well as the other two supervisors, Tsepo and David. Applicant's representative repeated the question and asked "was there guarantee that those dogs will not endanger his life?" The answer was:

"First we have informed our security outside to make sure there are no dogs outside. Second the first four to five people who were outside they came back with stones, thirdly we have line phones outside, that the security are the one who knows that dogs are tied or not, we phone them to ask to make sure that the dogs are tied enough."

6. It was put to the representative of the applicant that the employees are not permitted to walk outside the factory between 8.00 pm and 5.00 am. The witness denied this. He stated that when there are dogs outside employees are told “not to go outside from 8 to 5, but that day there no dogs and I myself went outside first together with those people taking stones and came back to work on that machine because if I did not fetch that stones the machine will stop and work will not progress and that will be my responsibility.” (see p.13 of the transcribed record).
7. The second witness was Khalema Khalema the logo supervisor. he confirmed that he was approached by Chen Gang to tell the applicant to go outside to fetch pumice stones. He did but applicant refused. He stated that Chen who was standing next to him repeated the instruction but applicant still refused. He averred that he told the other 3-4 machine operators to go outside to fetch the stones. They did as he told them and they were accompanied outside by a supervisor.
8. DW2 says he reported applicant’s behaviour to a co-supervisor one David. In the words of DW2 David literally begged the applicant to comply with the instruction in these words: “we do not have to work like this, I request you to go and fetch stones outside as you have been instructed. If you have the feeling that you are being ill-treated that we will solve tomorrow, but now you have to go outside and fetch the stones.” The witnesses testified that “Ntate Moleleki still refused. He did not accept that, he reiterated that he cannot go and collect the stones at that time.” (see pp18-19 of the transcribed record). DW2 said he approached the third supervisor Tsepo to help to get applicant to comply with the instruction, but he (applicant) still refused, saying he could not go outside at that time as he feared the dogs. “We told him that other people are from outside with Chen Gang who is our Chinese supervisor and they came with stones. They went again and came safe. There were no dogs outside,” the witness testified. He was adamant that he would not fetch stones at that time of the night.
9. Under cross-examination DW2 was asked if he was aware of the rule that applicant said the instruction contravened relating to the time that

employees were not to be outside at night? He said he did not know it. Asked if he ever sought to enquire about it he said:

“Yes what I know is that they were told not to go outside without permission because of the dogs that might bite them unless in the case they are instructed. The rule is that whenever you go outside you must inform the supervisors or management so that you can get any safety required.” (see p.21 of the transcribed record).

10. Asked if the rule stipulated the time that they were not to walk outside without permission, he said it did not mention times. Asked if he explained to applicant that it was safe outside, he said he did explain to him. He conceded that there were dogs but denied that they were untied all the time.
11. From the summary of the evidence it is clear that the evidence led on behalf of the 1st respondent remained intact even after cross-examination. In particular, the evidence regarding the instruction which was given and afterwards repeated by at least three other supervisors was not challenged. Secondly, the evidence that there was no danger of being attacked by the dogs and that it was safe outside as other employees had gone outside before, was also not challenged.
12. The applicant took the witness stand to testify on his own behalf. He testified that he did not agree to go outside at that time because he had been told by Chen Gang not to go outside at that time of the night. Asked if he was alone or with others, when he was told this he said he was alone. (see p.31 of the record).
13. He was asked if any other people went outside that night to fetch stones, he did not agree or deny. Instead he became euphemistic just like a person who avoids a direct answer because of fear of being caught, and said he did not see them. He stated that because of what he was told by Chen Gang he did not accept the instruction to go and fetch the stones at that time. Significantly however, Chen Gang who testified prior to the applicant was not confronted with this allegation that he is the one who gave applicant the rule not to go outside at night.

14. The applicant's testimony went further that when Chen Gang instructed him to fetch the stones at 11.00 pm he (applicant) spoke about the time. He did not speak about Chen's alleged 8.00 pm to 5.00 am rule; but he spoke about the time, whether it was safe to go outside at that time. He averred that the safety he was talking about related to the dogs which had in the past bitten people when they knocked off. He stated that even as he raised the concern about the dogs "no one came to me with the assurance of safety." This is in stark contrast with what Chen Gang and Khalema said namely, that they assured applicant that it was safe to go outside. The assurance was further repeated by two other supervisors David and Tsepo. This evidence was not challenged in the least during cross-examination.
15. In a lame attempt to strengthen his clearly weak defence applicant sought to deny that Khalema who he refers to as Tim, gave him an instruction after he failed to obey it, when it was first given to him by Chen Gang. However, applicant dismally failed to challenge Chen Gang when he said he sought the assistance of Khalema to relate the instruction to him in a language he would understand. He also failed to challenge Khalema who testified at length about his intervention in the saga. His testimony in this regard is a clear fabrication.
16. Applicant testified further in direct contradiction of what he said earlier that he was told not to walk at night by Chen Gang. This time he said he was told by one Mr. Wang, whom he said was the General Manager to whom everybody was answerable. (see p.31 of the record).
17. Applicant led the evidence of Mr. Mokaloba to support his version. The evidence of Mr. Mokaloba did little to advance applicant's case, because he was not there when applicant was given the instruction which he refused to obey. He himself stated that he got to know of the events of that night when he was told by the applicant during break.
18. Mr. Justice Ntlhabo who represented the 1st respondent asked the witness PW2 what testimony he had come to give, in the light of the fact that what he was telling the court was what he had been told. His response was like this:
"Ntlhabo: So what are you witnessing?

PW2: Ntate Moleleki asked me to come and witness that we were told not to go outside at that time.

Ntlhabo: You give evidence of what he told you?

PW2: What I've been told by Ntate Wang when I was employed.”
(see p.42 of the record).

19. This evidence is clearly devoid of truth. First the applicant has contradicted himself regarding the person who allegedly gave him the rule. Secondly, he said he was given the rule alone, accordingly PW2, cannot testify to that rule which was given to the applicant in his absence. Thirdly, Chen Gang was a witness at the DDPR and he was not confronted with this order which he gave and later sought to work against. Fourthly, no reason was advanced why Wang was not called to confirm the remarks attributed to him by PW2. These weaknesses render the evidence of applicant and his witness highly improbable and unreliable.
20. Against the backdrop of the evidence summarised above the learned arbitrator found that:
- (a) Applicant failed to refute that he did refuse to follow a lawful and reasonable instruction of his superior.
 - (b) Applicant has not challenged the evidence that a number of his co-workers went outside to fetch stones upon Chen Gang's assurance that it was safe to go outside.
 - (c) Applicant was grossly insubordinate by refusing to comply with his supervisor's instruction.
 - (d) Applicant was not subjected to any personal danger when he was sent to go and fetch the pumice stones outside.
- In the circumstances the learned arbitrator dismissed the referral of the applicant.
21. It is that award which dismissed the referral of the applicant which is being sought to be reviewed, corrected and set aside as irregular. Only one ground for the review of the award has been pleaded and it is to be found in paragraph 5 of the Founding Affidavit. It is couched in these words:

“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.”

22. That applicant’s evidence about the presence of the dogs was not controverted is a far cry from the truth. Evidence of Chen Gang stipulates clearly that there were no dogs outside at that time. He had himself gone out with the first group that went to fetch the stones. He was thus testifying to what he knew when he said it was safe outside. This evidence applicant failed to challenge.
23. Chen Gang repeated several times in his testimony that applicant would not be the first one to go outside. Those who had been outside had come back safely. His (applicant’s) own representative asked DW2, Mr. Khalema more than once if applicant was ever assured that it was safe to go outside. (see p.19 and p.23 of the record). DW2’s evidence both in chief and under cross-examination was that applicant was assured that there were no dogs. Clearly therefore, applicant’s assertion that his testimony about the presence of the dogs was uncontroverted goes against the weight of evidence which clearly points that there were no dogs outside at the time. Infact the dogs were safely tied in their kernels at the time.
24. Once it has been found as we have done that the evidence was infact controverted it follows that the ground of review falls away. Mr. Molise sought to add yet another piece of evidence which he said was not considered. This was the evidence of PW2 Mr. Mokaloba. PW2’s evidence which is worthy of mention is that he was told by Wang that he should not walk outside at night. Clearly that evidence was considered and rejected by the learned arbitrator. Evidence of this is found in the following statement of the learned arbitrator; “Having considered both parties evidence, I find that the applicant was dismissed for a fair and valid reason.”
25. The finding that the reason for dismissal is valid clearly rejects the defence that was being advanced that the refusal to comply with the

instruction was justified. In any event evidence of Chen Gang and the logo supervisor Mr. Khalema was that no rule existed which prevented employees to walk outside. They had only been warned against walking outside without authorization. In the premises this review application cannot succeed. It is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 19th DAY OF FEBRUARY 2009

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU
MEMBER

I CONCUR

L. MOFELEHETSI
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. MOLISE
MR. MACHELI