

**IN THE LABOUR COURT OF LESOTHO**

**LC/REV/77/2010**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**MANTEBOHELENG NKUATSANA**

**APPLICANT**

**AND**

**J & S FASHIONS (PTY) LTD  
DDPR**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

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## **JUDGMENT**

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***Date: 28/06/11***

***Review – insubordination – Arbitrator finding that applicant was fairly dismissed for insubordination – Alleged grounds of review are an appeal as they show dissatisfaction with arbitrator’s findings on the facts – Application dismissed with costs as the court’s mark of displeasure with applicant’s blatant lies.***

1. This is a case of alleged insubordination in that the applicant refused to obey the instruction of her Chinese supervisors to remove completed articles of clothing from one spot to another. The Chinese supervisor Mrs. Wang Tong Mei testified both at the disciplinary hearing and at the arbitration. Her testimony was short and it was that on the 7<sup>th</sup> August 2009, she instructed applicant and her co-worker Mrs. Matlhoriso Tlele to remove the previous day’s completed articles from their table to another place in order to make way for that day’s work.

2. Mrs. Wang testified that Matlhoriso obliged, while the applicant did not. She testified that she called applicant at least three times trying to repeat the instruction that she must remove the clothing where it was to another place. Applicant just starred at her and did not move to oblige the instruction. She testified that she reported applicant's behaviour to the Team leader Mrs. Mamokete Leboela.
3. Mrs. Leboela testified that she was near Wang and the two employees, when the former gave instruction that completed work be removed from applicant's table to another spot. She testified that they were just behind her as her table is in front of theirs. She therefore heard when the instruction was given and witnessed when the applicant refused to comply, while her colleague complied. She testified that she approached the two and enquired what the problem was.
4. Leboela testified that Wang reported to her that applicant was refusing to do work. She testified that she turned to applicant and asked her why she was not obeying her supervisor's instruction? She too did not get any response from the applicant. She averred that it was infact not the first time that applicant refused to obey a supervisor's instructions.
5. The witness testified further that she proceeded to lay a complaint against the applicant with the Personnel Office. That complaint gave rise to a disciplinary hearing in which Mrs. Leboela was the complainant. At the said hearing both Wang and Leboela testified as herein before narrated. Her cross examination of Leboela at that hearing leaves much to be desired. In short she did not attempt to discredit the evidence against her. On the contrary she asked questions which went to show that she did what she was charged of intentionally.
6. The first question she asked was whether she did not finally do as instructed, which goes to admit that she initially failed to carry out the instruction. The answer was that in the end she did as instructed, but only after the Team Leader herself intervened. She did not deny that, but went further to ask whether the regulations of the company only apply to her and

- not to Wang, against whom she said she had laid several complaints of assault. The witness responded that she took action, but Wang denied that she assaulted her. As to Wang, the applicant failed to put even a single question to her in cross-examination, which means her evidence went unchallenged as well.
7. Applicant's own testimony was to deny that Wang instructed her to do work which she refused to do. She said the instruction had been given to her co-worker Matlhoriso who complied. After a while Wang came to her and asked her if she was refusing to do the work. Even before she could answer her, she (Wang) said she did not want to talk to her. She asked her why she asked her the question if she did not want to talk to her. At that point Mamokete the Team leader intervened and asked what was happening.
  8. She testified further that Wang called Mamokete to give her an explanation of what she considered to be the problem. After that Mamokete came to ask her why she was refusing to obey the instruction. She said she answered that she was not refusing, but she was handling thick bundles which were slipping and falling to the ground. At that time there were still few pieces of cloth remaining from what they were asked to remove and she proceeded to pick them and put them away as instructed.
  9. Applicant's coworker Matlhoriso also testified in support of her that infact the instruction was given to her. She averred that at that time applicant was fitting a button and Wang came to her and accused her of refusing to obey her instruction. Wang proceeded to call Mamokete and told her that applicant was refusing to carry out her instruction. She stated further that Wang instructed Mamokete to give applicant a warning. Mamokete asked applicant why she was refusing to carry out instructions of Wang and applicant answered that she had not refused. She went further to say she was still going to do the work but she was finishing what she was doing.

10. This was the evidence of the applicant and her witness at the disciplinary hearing. It was clearly contradictory and left no doubt that it was a fabrication. Initially the two of them said the instruction was not given to applicant but to Mrs. Tlele. However, under cross-examination it emerges that the correct version is that the instruction was given to both of them. The example is applicant's alleged response to a question from Mrs. Leboela where she says she told Mrs. Leboela that she was not refusing to carry out the instruction but she was preoccupied with huge slippery bundles, which were falling down if she was living them unattended.
11. The second example emerges from Matlhoriso's testimony. She too says when Mrs. Leboela asked applicant why he was not doing as instructed by Wang she said she was not refusing she was finishing doing something. If indeed the instruction was not directed to her, applicant would not answer Mamokete as she is alleged to have done. Infact throughout her cross-examination Matlhoriso makes it clear that the instruction had been given to both of them.
12. The lies of these two witnesses do not end here. Applicant's evidence was that even before she could answer Wang regarding why she was not complying with her instruction Wang had said she did not want to speak to her. That is however, not gainsaid by her witness Matlhoriso. She in her testimony says a totally different story to the effect that applicant answered Wang and gave her reasons why she had not been able to comply with her instruction.
13. Yet another lie told by these witnesses was why applicant did not comply with Wang's instruction. To Mamokete applicant says she said she was holding slippery articles which were falling to the ground. Matlhoriso said applicant was fitting a button. Clearly the chairperson of the disciplinary hearing was faced with unchallenged evidence of Mamokete and Wang in respect of applicant's insubordination. He was further faced with complete lies told by applicant and her witness Matlhoriso. There was therefore no way he could find for applicant in the face of the untruths she told the hearing.

14. After applicant was found guilty and dismissed she referred a dispute of unfair dismissal to the DDPR. The evidence she gave at the DDPR materially differed from what she told the disciplinary enquiry. The story she gave this time was that Wang accused her of not complying with her instruction when the instruction had only been given to her co-worker Matlhoriso. Unlike what she said at the hearing that even before she answered Wang had already told her she did not want to speak to her, this time she said she was able to answer and told Wang that she had not given her any instruction.
15. Applicant testified further that it was only thereafter that Wang said she did not want her anymore. Not that she did not want to speak to her as she initially said at the disciplinary hearing. She averred further that Mamokete approached her and asked what was happening. This again is inconsistent with her evidence at the enquiry which said when Mamokete approached them Wang called her aside and gave her what she considered a distorted report of what was taking place.
16. Ms Tlele too testified totally differently to the way she testified at the disciplinary hearing. She said Wang gave instruction to her alone even though they were together with applicant. She averred that she obliged but because of her hand (whatever that means) she was not able to take the articles she had to move all at the sametime. Wang accused applicant of not doing as she instructed her. She averred that applicant answered that even though she was with Matlhoriso when she was given the instruction she was not herself given any instruction.
17. She was asked if applicant proceeded to do the work after Miss Wang's complaint. She said she did not move. She was asked if she explained anything to Ms Wang and the witness said she did not hear anything, all she heard was Wang's accusation that applicant was refusing to do as she instructed her. Once again this was miles apart from what she said at the disciplinary hearing. She made no mention of her hand incapacitating her to do the work properly during the disciplinary hearing. We have no doubt that her evidence to this effect at the arbitration was a fabrication.

18. Whilst she sought to protect applicant during the hearing by saying applicant was busy fitting a button she did not manage to find space for this lie at the arbitration. Whilst she is explicit at the arbitration that applicant said the instruction was not directed to her, at the disciplinary hearing she euphemistically said applicant gave Wang reasons why she could not comply with her instruction. She also made no mention of the allegation that Wang instructed Mamokete to give applicant a warning.
19. Once again the arbitrator handling the referral was pampered with heavy lies by the applicant and her supposed witness. Having heard the evidence of Mamokete and Wang which was very consistent with what they said at the disciplinary hearing, the arbitrator concluded correctly that the applicant was indeed insubordinate and as such her dismissal was substantively fair. The award confirming applicant's dismissal was handed down on the 4<sup>th</sup> April 2010.
20. On the 9<sup>th</sup> September 2010, some five months after the handing down of the award, the applicant filed an application for the review of the award learned arbitrator that confirmed her dismissal. No application for the condonation of the late filing of review was made. At the hearing hereof counsel for the 1<sup>st</sup> respondent did not pursue the issue of the lateness of the review. If he had that would have been the end of this review application, precisely because ex facie the application there are no prospects of success on the merits.
21. The grounds on which the applicant seeks the review of the award of the learned arbitrator are as follows:
  - (a) The learned arbitrator erred and/or misdirected himself by holding that applicant deliberately refused to obey lawful instructions of her supervisor whereas there was ample evidence that the instruction was given to her co-worker.
  - (b) The learned arbitrator erred and/or misdirected himself by holding that applicant failed to suggest why the 1<sup>st</sup> respondent's 1<sup>st</sup> witness can make up a story, though I

suggested that the said witness assaulted me and learned arbitrator failed to consider it in reaching his decision.

(c) The 1<sup>st</sup> respondent's 1<sup>st</sup> witness said I did not do the work at all whereas the 2<sup>nd</sup> witness's evidence was that I later joined my co-worker. Learned arbitrator failed to consider this glaring inconsistency.

22. In response the 1<sup>st</sup> respondent argued in limine that the so-called grounds of review are an appeal in disguise. Mr. Tsabeha for the applicant contended on the contrary that the three grounds of review raised, can be summarised in a single line that the learned arbitrator did not consider the evidence before him. If that were indeed the case that would make this case a proper case for review.
23. Regrettably however that is not the case. Our reading of the record vis-a-vis the award of the learned arbitrator lead us to the conclusion that the evidence was duly considered and adverse findings made thereon. Applicant's so-called grounds of review are dissatisfaction with the learned arbitrator's findings on the facts which do not favour her. That immediately qualifies the complaints as an appeal and not a review.
24. This court has gone out of its way to review the evidence tendered which the applicant would have wished the arbitrator to make favourable findings towards him on it. Unfortunately, applicant's entire case is based on blatant lies which the arbitrator had no option but to reject them. Even the suggestion that Wang assaulted her cannot explain why Mamokete as the Team leader would make up the story that she was insubordinate towards Wang. This is apart from the fact that the so-called assault on her by Wang would appear to be a lame excuse which is not supported by Matlhoriso her co-worker or Mamokete, who works so near them that she was immediately able to hear when Wang was giving her instructions, which she refused to obey.

25. The last ground of review is no more than a case of a sinking man who hopes to save himself by clutching at the straws. What Wang testified to is that applicant refused to comply with her instruction. This much is clearly true. There is never any time that she was ever asked if the applicant eventually complied with her instruction. But even if she was asked such a question she would have said she did not because she never did. Evidence that in the end applicant did what Wang asked her to do came from Mamokete. She was however explicit that applicant did that work when she (Mamokete) instructed her to do it. There is therefore no inconsistency that calls for the intervention of this court. In the premises we find that there is no merit in this review application.
26. Applicant's conduct towards her supervisors was clearly abhorrible. Her conduct throughout these proceedings of telling irritating lies about her conduct is not one that should be countenanced. Her pursuit of this case with the assistance of her union was frivolous. We feel we have to make a costs order as a mark of our displeasure with this type of conduct. Accordingly, the review application is dismissed with costs.



THUS DONE AT MASERU THIS 17TH DAY OF OCTOBER 2011

**L. A. LETHOBANE**  
**PRESIDENT**

**M. MOSEHLE**  
**MEMBER**

**I CONCUR**

**L. MOFELEHETSI**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR 1<sup>ST</sup> RESPONDENT:**

**ADV. TSABEHA**  
**ADV. MOHAPI**