IN THE LABOUR COURT OF LESOTHO **LC/REV/78/10**

HELD AT MASERU

In the matter between:

MOOKHO NKAOTA **APPLICANT**

and

J & S FASHIONS (PTY) LTD **1ST RESPONDENT**

DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

DATE: 20/02/12

Review of arbitral proceedings - Employee having refused to work during lunch break contending that the instruction was unlawful and she was justified in refusing to obey it - The Arbitrator having found her to have been insubordinate and dismissed fairly, she is seeking a review on grounds that the Arbitrator failed to apply her mind to the circumstances surrounding the refusal to obey the instruction – Distinction between review and appeal considered - Court finds no fault with the DDPR award and dismisses the review application.

1. The applicant is a former employee of the 1st respondent. She served the 1st respondent from 28th February, 2008 until 24th February, 2010 when her services were terminated. Aggrieved by this dismissal, she approached the Directorate of Dispute Prevention and Resolution (DDPR) for a relief and lost. She is now before this Court to have the DDPR finding reviewed, corrected and set aside.

2. The dismissal followed the refusal by the applicant to carry out an

assignment during a lunch break. It is common cause that applicant's supervisor, one Mpolokeng Mokebisa requested workers in Line 4, which included the applicant, to attend to some repairs and to return early from lunch in order to finish off the work as there was a container waiting for the stock. The applicant apparently refused to do the task and did return from lunch early with the others but still refused to do the repairs as instructed and carried on with her normal duties. She insisted that she was entitled to refuse the instruction because it was unlawful basing herself on Section 118 (2) of the Labour Code Order 1992 which provides that;

> "***No employee shall be required to work continuously for more than five hours without being given a rest period from work of not less than one hour during which time he or she shall not be required or permitted to perform any work …"***

3. The learned Arbitrator found that by refusing to obey her supervisor's instructions when requested that there was pressure as a container was about to leave, the applicant was grossly insubordinate and deserved to be dismissed. The applicant has lodged a review application against this decision on the grounds that the learned Arbitrator failed to appreciate the circumstances under which she had refused to obey the said order. The gist of the review application is that the learned Arbitrator erred or misdirected herself by holding as she did that the applicant refused to obey lawful instructions given by the supervisor when it was common cause that the applicant was ordered to work during lunchtime. The applicant contended that she had every right to refuse to work because she was not offered any alternative time for lunch. She further stated that the supervisor could have still given the orders to one Ntsoaki who appeared not to be very busy at the time.

4. 1st respondent's reaction to this application was to raise a point ***in limine*** to the effect that the grounds of review raised by the applicant are in effect an appeal disguised as a review when this Court has no jurisdiction to entertain appeals. 1st respondent's Human Resource Manager pleaded on its behalf that the application be dismissed with costs on this ground. 1st respondent's Counsel argued that the grounds raised by the applicant are appeal grounds because she is complaining about the learned Arbitrator's finding and not about any procedural irregularity. He further argued that in the unlikely event of the point ***in limine*** not succeeding, they submit that the instructions issued out to the applicant were lawful. He pointed out that the

evidence of Mpolokeng Mokebisa, applicant's supervisor, was very critical. She testified that she issued out the instruction aforementioned to the applicant and her co-employees that there was a container already waiting for the stuff and soon after eating they should come back to do the repairs. She averred further that even upon return from lunch she persuaded her to execute the order, but she still refused.

GROUNDS FOR REVIEW

5. The grounds for review are that the learned Arbitrator erred or misdirected herself in holding as she did that the applicant had refused to obey lawful orders when she had in fact been instructed to work during lunch. Applicant's Counsel contended that this was a very salient point which the Arbitrator failed to take into consideration in arriving at her decision. He submitted that the applicant had not been given an alternative time for lunch and further that one Ntsoaki who the applicant alleged was not busy could have been ordered to carry out the instruction. Applicant's case is that the learned Arbitrator failed to apply her mind to these issues in determining the lawfulness or otherwise of the instruction.

THE COURT'S ANALYSIS

6. The main issue confronting the Court is whether the learned Arbitrator committed a reviewable error in concluding that the applicant was insubordinate in refusing to execute the instruction to work during lunch. It emerged from the DDPR record of proceedings that a Chinese supervisor, ***alias***, Kholumo, had requested Mpolokeng Mokebisa, applicant's supervisor, to see to it that the repairs were done speedily as the container was already waiting for the items to be shipped. In her testimony, Mpolokeng averred that she in turn told employees in Line 4 that all those doing repairs should return immediately after eating so as to attend to the repairs because the container was about to leave. She indicated that they all returned early from lunch but when she checked later she discovered that some repairs were not done. She immediately instructed the applicant to leave whatever she was doing to do the repairs as well. According to Mpolokeng she refused and asked the supervisor why she did not instruct Ntsoaki to do the repairs as well. She pointed out that she urged her to do as directed but she refused. The supervisor resorted to taking away from her whatever she was doing, but she folded her arms. She reported her to the Personnel Office where she did not deny refusing to execute the instruction.

7. The employment contract entails both express and implied terms comprising a set of rights and duties relating to both the employer and the employee. However, by its very nature the employment contract is a contract of subordination ***vis `a vis*** the employee. The employer has the power to regulate employee conduct ***albeit*** within the confines of fairness and legality. The regulation of the employee's conduct may take the form of specific rules and regulations and instructions issued from time to time. A rule or instruction will be legitimate or valid provided it is lawful and reasonable and can be justified by the needs and circumstances of the business. Whether a rule or an order complies with this requirement will depend on factors such as the nature of the employer's business, the circumstances in which it operates, the type of work an employee does and the circumstances in which the work is performed - see PAK Le Roux, Andr`e Van Niekerk in their work: The South African Law of Unfair Dismissal, Juta & Co., Ltd, 1994 p. 109.

8. The employee has a primary duty to perform the work he or she has undertaken to perform. Linked to this duty is the duty to respect, maintain and, in some respects promote the interests of the employer within the sphere of the employment. The employer has a right to give instructions to the employee from time to time as long as they are lawful and reasonable.

9. With this backdrop, we are now in a position to consider the reviewability or otherwise of the case before us; a point ***in limine*** raised on behalf of the 1st respondent. If we may remind ourselves, the basis for the review application is that the learned Arbitrator failed to apply her mind to the circumstances surrounding the refusal to obey instructions issued out by her supervisor. The test in the circumstances would be whether the outcome of the learned Arbitrator's finding can be sustained by the facts found and the law applied. In ***Coetzee v Lebea No and Another (1999) 20 ILJ, 129 (LC)*** the Court concluded that the seeds of the distinction between review and appeal lies in the phrase so commonly used to describe a process failure in the reasoning phase of a tribunal's proceedings - ***"the failure to apply one's mind."*** That test is different from the one that applies to an appeal, namely whether another Court could come to a different conclusion. Accordingly, once a reviewing Court is satisfied that the Tribunal has applied its mind to an issue before it, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law

applied.

10. A review concerns itself with the manner in which a tribunal comes to its conclusion rather than with its result. An appeal on the other hand is concerned with the correctness of the result - See ***Coetzee (supra)***. It has repeatedly been pointed out that a review does not re-open the merits of the decision of the trier of the facts. It only deals with the regularity of the proceedings and the legality of the process - see ***Global Garments v Mosemoli Morojele LC/REV/354/06*** at p.4. In reviews as long as the reviewing Court enters into the merits not in order to substitute its opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order - see ***Carephone (Pty) Ltd v Marcus NO & Ors (1998) 19 ILJ, 1425 (LAC) at 1426*** and ***County Fair Foods (Pty) Ltd., v Commissioner for Conciliation, Mediation and Arbitration and Others (1999) 20 ILJ 1701***.

11. Having considered the DDPR award and the record of proceedings, we conclude that the learned Arbitrator applied her mind to the case and reached an outcome she deemed appropriate in the circumstances. It was not disputed that a container was waiting for the goods that were to be repaired and that the applicant refused to carry out the instruction to do the repairs. Her defence was that she could not work during lunch at it was unlawful and that the supervisor ought to have instructed Ntsoaki who was not very busy. As aforementioned, a rule or instruction must be lawful and reasonable. The validity thereof will be determined, as aforesaid, by such factors as the nature of the employer's business; the circumstances in which it operates; the type of work an employee does; and the circumstances in which the work is performed. Clearly, there was an emergency and it is not like the applicant was not even given an opportunity to have lunch. She did have her lunch but was asked together with others to come back early to finish the repairs as the exigencies of their work required that the repairs be done expeditiously. Damning evidence was tendered to the effect that the applicant was asked both before and after lunch to do the repairs but she remained intransigent. Under normal circumstances a lunch break has to be fully enjoyed but clearly the instruction to return early from lunch was justified in the circumstances.

12. As it is, there are avenues to settle grievances. If the applicant felt it was unfair for her not to exhaust her lunch break she ought to have followed channels for lodging a grievance, and not to blatantly be defiant to her

employer. A rest period as envisaged by Section 118 (2) of the Labour Code Order, 1992 is a right but the applicant was requested that work pressures at the time demanded that the repairs be done as speedily as possible as the container was about to leave. The interruption of the lunch break was warranted by the particular circumstances at the time. The interests of the employer were at stake at this point in time, inducing on the employee the duty to respect, maintain and promote the employer's interests.

13. The learned Arbitrator stated in his award at p. 5 that the applicant was aware that the work required was urgent but because it appeared she had personal issues with her supervisor she chose not to do the work venting her animosity at the company's expense. There appears nothing untoward with the instruction that was issued by the applicant's supervisor. It was both legal in the circumstances and reasonable. The issue of why Ntsoaki was not instructed impinged on managerial prerogative. It was not for the applicant to dictate how the supervisor should do her job. As far as we are concerned, the instruction did not manifest an unfair exercise of managerial prerogative. We feel therefore inclined not to disturb the learned Arbitrator's award. The review application is therefore dismissed, but there is no order as to costs as the applicant has already been mulcted with costs by the DDPR.

THUS DONE AND DATED AT MASERU THIS 20TH DAY OF FEBRUARY, 2012.

F.M. KHABO
DEPUTY PRESIDENT OF THE LABOUR COURT

J. TAU **I CONCUR**
MEMBER

M .MAKHETHA **I CONCUR**
MEMBER

FOR THE APPLICANT: **S.S TS'ABEHA**
FOR THE 1ST RESPONDENT: **P.L MOHAPI**