

HELD AT MASERU

In the matter between:

`MANTHABISENG KELEPA	1 ST APPLICANT
`MANEO SHALE	2 ND APPLICANT
`MAMPOLOKENG MATSITSI	3 RD APPLICANT
`MAMABELA LEUTA	4 TH APPLICANT
`MANNUKU SEKETE	5 TH APPLICANT
`MATS`ABANG SEHLABAKA	6 TH APPLICANT
`MATEISI MOKUENA	7 TH APPLICANT
`MATHABO MATS`OELE	8 TH APPLICANT
`MATOKELO MOTSAMAI	9 TH APPLICANT
MATS`ELISO RAMOTHEBA	10 TH APPLICANT
`MAKELEBELETSOE MOHAPI	11 TH APPLICANT
`MANTHO KOTOANE	12 TH APPLICANT
LITHLARE NTAOANA	13 TH APPLICANT

and

LESOTHO PRECIOUS GARMENTS (PTY) LTD	1 ST RESPONDENT
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION	2 ND RESPONDENT

JUDGMENT

06/08/15

Hours of work - Review of an arbitral award on two grounds that the Arbitrator:- (i) misconstrued the law by dismissing 7th and 8th applicants' referral for failure to attend conciliation proceedings despite them having been represented; (ii) failed to apply her mind to the case that was before her by failing to appreciate that the applicants were made to work on a Saturday which they contended was a rest day for them - Court found that in the circumstances of applicants' case the Saturday in issue neither constituted overtime nor was it a rest day - Application dismissed.

1. This application arises out of applicants' dismissal for insubordination on account of failure to obey 1st respondent's instruction to come to work on Saturday, 27th October, 2012. Applicants argued that Saturday was normally not a working day for them. Disciplinary hearings were held for them and they were all found guilty and dismissed. Aggrieved by this decision, they referred an unfair dismissal claim to the Directorate of Dispute Prevention and Resolution (DDPR) in **A 0168/12**.

2. The matter proceeded by way of conciliation on 22nd January, 2012 whereat 7th and 8th applicants (Mateisi Mokuena and Mathabo Mats`oele) failed to attend. Conciliation failed and the matter was set down for arbitration on 21st March, 2012. These applicants attended the arbitration proceedings but were ordered to leave by the learned Arbitrator because their referrals had been dismissed following their failure to attend the conciliation proceedings. Be that as it may, the arbitration proceedings proceeded in respect of the rest of the applicants, but they lost. They are before this Court to have this award of the DDPR reviewed, corrected and set aside.

GROUNDS OF REVIEW

3. Applicants' Counsel contended that the learned Arbitrator misdirected herself by:-

- i) dismissing 7th and 8th applicants' referrals for failing to attend the conciliation proceedings when they had been represented by a union official; and
- ii) improperly applying the law to the facts by failing to draw a line between overtime and rest days.

4. He therefore prayed:-

- i) that the ruling to dismiss 7th and 8th applicants' referrals be set aside;
- ii) that applicants' dismissal be declared unfair;
- iii) that 1st respondent pay costs of this application; and lastly
- iv) for further or alternative relief.

THE ISSUE FOR DETERMINATION

5. The key issues for determination in this matter concerns the validity of the learned Arbitrator's decision to dismiss 7th and 8th applicants' referrals on the basis that they had failed to attend conciliation proceedings despite them having been represented by a trade union official and secondly, whether it was proper for her to have dismissed the rest of the applicants' claim that they had not come to work on Saturday, 27th October, 2012 because it was not a working day.

FAILURE BY THE 7TH AND 8TH APPLICANTS TO ATTEND CONCILIATION PROCEEDINGS

6. It was 7th and 8th applicants' case that despite their non-attendance of conciliation proceedings, their union representative was present and had full authority to represent them. Hence, they maintained that it was not proper for the learned Arbitrator to have dismissed their claim. Applicants' Counsel argued that conciliation was just an administrative process and as such the learned Arbitrator had no right to dismiss 7th and 8th applicants' referrals at that stage particularly when their union representative was in attendance. It is common cause that the applicants were represented at the DDPR by Mr Mokhele from the Factory Workers' Union (FAWU). The issue here would then be whether parties have to physically attend conciliation proceedings irrespective of whether they are represented or not.

7. In terms of **Section 227 (8) of the Labour Code (Amendment) Act, 2000**

If a party to a dispute contemplated in subsection (4) fails to attend the conciliation or hearing of an arbitration, the [A]rbitrator may:

(a) postpone the hearing;

(b) dismiss the referral; or

(c) grant an award by default.

This Section is reinforced by **Regulation 19 (1) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001** which is couched in the same terms.

8. As far as we are concerned, the critical issue is to establish whether applicants' representative had obtained a mandate to represent them before the DDPR. According to the English decision of **Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and Another**,¹ (a case that was followed in **Glofinco v Absa Bank Ltd t/a as United Bank**)² by permitting the agent to act in the conduct of the principal's business with other persons, **"the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons."** There are instances where a litigant has to be present, for instance, if he or she has to tender evidence, otherwise there is no need. If the

¹ 1964 (2) QB 480 (CA)

² Glofinco v Absa Bank Ltd v United Bank (135/2001) [2002] ZASCA 91

lawmaker were to insist on the presence of litigants whenever their cases are heard representation, would not serve much purpose.

9. In my view, as long as a representative has a mandate, his attendance suffices, and he could make representations on behalf of all the applicants including those who had failed to attend the hearing. Legal reference to failure to attend conciliation or arbitration hearing envisages a situation where neither the litigant nor their representatives are in attendance. Legal or union representation may be likened to an agency situation. The agent has authority to enter into contracts on behalf of the principal. Thus, as long as it is established that an officer of an employers' organisation, a trade union official or a legal practitioner has authority to represent its members or clients, as the case may be, they have a right to make representations on their behalf just like agents in a commercial setting. There was no dispute that Mr Mokhele, the union official had authority to represent the 7th and 8th applicants.

10. In the absence of any challenge to the union's official's mandate to represent 7th and 8th applicants, we come to the conclusion that he had authority to represent them even in their absence. They are therefore affected by the ruling in **A 0168/12** and are therefore properly before this Court as parties to this review application.

HOURS OF WORK

OVERTIME AS DISTINCT FROM REST DAYS

11. "***Overtime***" and "***rest days***" are two distinct concepts. The Court felt the need to draw attention to this distinction because parties seemed to use the words interchangeably in both their pleadings and in the course of the proceedings, thereby blurring the distinction between the two concepts.

12. The normal hours of work, subject to certain exceptions, such as Security Officers (referred to as watchmen in the Regulations)³ shall not exceed forty-five hours in any given week calculated as follows:-

- (a) ***for an employee who ordinarily works a five-day week, nine hours of work on any day;***

³ Labour Code (Exemption) Regulations, 1995

- (b) *for an employee who ordinarily works a six-day week, eight hours of work on five days and five hours of work on one day.*⁴

13. In essence, subject of course to the exceptions, no employer may require or permit an employee to work longer than forty-five hours a week comprising nine hours a day if the employee works five days or fewer per week, and eight hours per day if the employee works more than five days a week. These are referred to as “***normal hours of work***.” All work beyond this is overtime, and can only be done by arrangement with concerned employees. To this end, ***Section 118 (3) of the Labour Code Order, 1992*** provides that “***where the continuous nature of the work so requires, an employer may request or permit an employee to work overtime...***” An employer may, however, dismiss an employee who unreasonably refuses to work overtime - see ***Steel Engineering & Allied Workers Union of SA & Others v Trident Steel (Pty) Ltd (1986) 7 ILJ, 86 (IC)***.

14. Rest days are regulated by ***Section 117 of the Labour Code Order, 1992*** which provides that:-

- (1) *... 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 or her 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.*
- (2) *Whenever an employee is required to work on his or her day of weekly rest or on a public holiday, the employer shall pay him or her for such work at double the employee's wage rate for an ordinary work day. This shall be without prejudice to an employee's entitlement to payment at a higher rate for work performed on that day of rest or public holiday under the terms of a collective agreement applicable to the employee.*

A day of rest is clearly distinct from overtime. It can be any other day of the week but the law recommends that as far as possible it should fall on a Sunday. The issue of whether applicants had defied the 1st respondent's instruction by refusing to render their services on Saturday, 27th October, 2012 is a question of evidence.

⁴ Section 118 (1) (a) and (b) of the Labour Code Order, 1992

EVIDENCE TENDERED AT THE DDPR

APPLICANTS' VERSION

15. Mats`eliso Ramotheba was the main witness on behalf of all the applicants. She conceded that they refused to work on the Saturday in question because it was not a working day for them, but a rest day. She averred that the instruction to work on Saturday violated their contracts of employment because according to them they were supposed to work from Monday to Friday. This evidence was corroborated by `Matokelo Motsamai, `Mannuku Sekete, `Mats`abang Sehlabaka, `Maneo Shale, `Mampolokeng Matsitsi, `Mantho Kotoane, Litlhare Ntaoana, and `Makelebeletsoe Mohapi.

FOR THE 1ST RESPONDENT

16. Evidence tendered on behalf of the 1st respondent was to the effect that applicants generally worked a five-day week from Monday to Friday, but changes were effected to the work schedule through which applicants would work from Tuesday to Saturday. According to Tankiso Mofumali, the Floor Manager, the affected employees had been informed of the new arrangement on Friday, 19th October, 2012 and that it would take effect on the following week. He testified that employees had been divided into smaller groups to work at different intervals instead of working at the same time with one group starting work on Monday and ending its week on Friday and the other starting on Tuesday and ending its week on Saturday. Applicants fell in the latter group. His explanation for the new arrangement was that work had dwindled so management had decided that employees work in shifts to avoid retrenchments or short time.

17. He testified further that applicants started the new work schedule on Tuesday, 23rd October, 2012 with a time off. They came to work on Wednesday, Thursday and Friday and were supposed to end their week on Saturday. They, however, did not come to work on Saturday, 27th October, 2012. Their explanation was that Saturday was not usually their working day. Following their failure to come to work on the said day, disciplinary hearings were held against them and they were dismissed. He pointed out that applicants did not raise any objection when they were informed of the new arrangement. As far as he was concerned, the instruction was reasonable as it was due to the

introduction of the shift system and did not affect employees' wages. He confirmed that the applicants were charged with insubordination and dismissed.

18. Sechaba Maphathe, a Packer corroborated Mofumali's evidence in its entirety. He testified that they were informed of the new arrangement by their supervisors on the morning of 19th October, 2012 that they would be given a day off on Tuesday and as such Saturday would constitute a normal working day. He intimated that he initially did not understand the arrangement and did not go to work on the said Saturday, only to be subjected to a disciplinary hearing and dismissed. He said he, however, subsequently asked for forgiveness and was re-employed.

THE COURT'S ANALYSIS

19. The evidence that management issued an instruction on 19th October, 2012 introducing a new schedule which would cause the applicants to work on Saturday was not disputed. Applicants agreed that they worked a five hour week which implied that they worked a nine hour day. They also admitted that they had not come to work on Tuesday, 23rd October, 2012.

20. Clearly, work carried out on Saturday was meant to compensate the Tuesday applicants had not been at work. There were no extra days or hours worked in the particular week. In the circumstances, the day neither constituted overtime nor a rest day. An employer has a right to give lawful and reasonable instructions to his or her employees from time to time and in return employees have a duty to obey such instructions. An instruction is lawful and reasonable if it can be justified by the needs and circumstances of the business. This 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.⁵ This principle has been cited with approval in a number of this Court's decisions including *Mookho Nkaota v J & S Fashions (Pty) Ltd and Another*.⁶

21. A person who fails to report for duty after being so instructed renders himself or herself liable to be charged with misconduct. This principle was followed by this Court in *Simon Mohlapiso v Frasers Lesotho Ltd*.⁷ In this case the applicant worked at a central warehouse which supplied goods to all Fraser's

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Le Roux, Andre`Van Niekerk : The South African Law of Unfair Dismissal, Juta & Co., 1994 at p. 109

⁶ LC/REV/78/10

⁷ LC 18/97

branches throughout the country. He refused an instruction to work on a Saturday and was subsequently charged and found guilty of gross insubordination. There was a standing instruction that should the warehouse run behind on deliveries to branches, employees would have to work on Saturdays which was not a normal working day at the warehouse and was therefore treated as overtime. The Court found that he had indeed refused a lawful instruction and was liable to dismissal.

22. In *casu*, Mofumali's evidence as corroborated by Sechaba Maphathe reflected that applicants worked a nine hour week, which meant that they worked for five days. In the circumstances, Saturday became a normal working day as they had not come to work on Tuesday. Overtime would be hours in excess of the normal five days. In the circumstances of this case the issue of overtime or that of a rest day did not arise.

23. The Court finds nothing amiss in the learned Arbitrator's award that the applicants refused to obey a lawful instruction by refusing to work on Saturday which was a normal working day in the circumstances. It therefore finds no reason to interfere with the award.

DETERMINATION

- i) Applicants' review application is dismissed;
- ii) The DDPR award in *A 0168/12* is allowed to stand;
- iii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 06th DAY OF AUGUST, 2015.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

L. MATELA
ASSESSOR

I CONCUR

M. MOSEHLE
ASSESSOR

I CONCUR

FOR THE APPLICANTS : ADV., M.J RAMPAI - PHOOFOLO CHAMBERS
FOR THE 1ST RESPONDENT : ADV., K.P LETSIE - LESOTHO PRIVATE SECTOR
EMPLOYERS' ORGANISATION

ANNOTATIONS

CITED CASES

1. Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and Another 1964 (2) QB 480 (CA)
2. Glofinco v Absa Bank Ltd t/a as United Bank (135/2001) [2002] ZASCA 91
3. Steel Engineering & Allied Workers Union of SA & Others v Trident Steel (Pty) Ltd (1986) 7 ILJ, 86 (IC)
4. Mookho Nkaota v J & S Fashions (Pty) Ltd and Another LC/REV/78/10
5. Simon Mohlapiso v Frasers Lesotho Ltd LC 18/97

STATUTES

1. Section 117 of the Labour Code Order, 1992
2. Section 118 (3) of the Labour Code Order, 1992
3. Section 227 (8) of the Labour Code (Amendment) Act, 2000
4. Regulation 19 (1) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001

BOOKS

Le Roux, Andre` Van Niekerk: The South African Law of Unfair Dismissal, Juta & Co., 1994 at p. 109