IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE	**CASE NO. 2/2007**
LIYABUYA GROCERY	**APPELLANT**
VERSUS	
THOBILE LOKOTFWAKO	**RESPONDENT**
CORAM	**ANNANDALE AJP** **MAPHALALA JA** **MAMBA JA**
FOR APPELLANT	**MR M.E. SIMELANE**
FOR RESPONDENT	**MR S. KUBHEKA**

JUDGEMENT
28TH FEBRUARY, 2008

MAMBA JA

[1] The Appellant is Liyabuya Grocery, a sole proprietorship owned and operated or run by Mr Nhlabatsi.

[2] The Respondent is Thobile Lokotfwako an adult female of P. O. Box 2524 Mbabane herein represented by the Swaziland Commercial and Allied Workers Union (SCAWU).

[3] The Respondent was employed by the Appellant as a cashier or shop assistant on the 1st day of June, 2001. The Grocery shop is situated in the Bhunya area. Her salary was fixed at E500-00 per month.

[4] At the time of her employment the business or shop was being run by Mr Sibusiso Motsa who transferred it to Mr Nhlabatsi on the 4th day of March 2004. Prior to and on this take-over date, nothing was discussed by either Mr Motsa or Mr Nhlabatsi with the respondent pertaining to her employment rights and benefits, Mr N Nhlabats, the new owner of the business, informed her (the Respondent) that she will continue to be paid at the rate of E500-00 per month, as had been the case under the management of Mr Motsa.

[5] In terms of the Wages Regulations for the Retail Wholesale and Distribution and Hairdressing Salon 2004, Bhunya, where the shop wherein the Respondent was employed is classified as an urban area under Category A

and the minimum monthly wage for a cashier employed in that area was a sum of E1097.93

[6] At the end of October 2004, the Respondent sought permission from the Appellant to go on maternity leave. She had never taken leave of any sort before this date. She was allowed to go on maternity leave by the Appellant, but it is clear that the parties were not at ad idem on the duration and terms and conditions of such leave.

[7] The Respondent returned to work on the 24th January, 2005 and was told by the appellant that her employment had since been terminated. The last wages to be paid to her had been in October 2004. She then filed a dispute with the Commissioner of labour wherein she claimed the following relief, namely payment for:

(a) Compensation for a period of 12 months for unfair dismissal.
(b) Underpayment.
(c) Wages for 3 months in respect of maternity leave and other ancillary relief.

[8] In its defence, the Appellant argued that it was a new employer altogether separate from the respondent original employer Mr Sibusiso Motsa and that therefore the

employment contract between the parties had been entered into in March 2004 and not in June, 2001. Consequently, the Appellant argued, the respondent had in October 2004 only been employed by the Appellant for a period of less than 12 months and was in terms of the employment Act, not entitled to maternity leave. Her 3 months absence from work on such leave was therefore unlawful and dismissible, summarily.

[9] The Appellant submitted further that all other benefits (employee) accruing to the Respondent during her term of employment under the management of Mr Motsa were claimable against Mr Motsa personally and not the Appellant. On the question of under payment, the Appellant countered the Respondent's contention by saying that the business was in a rural area with a turnover of just E2000.00 per month from which it could not afford to pay the statutory minimum wage of E1097.93 to the Respondent.

[10] The Appellant's submissions were unsuccessful. After conciliation the dispute remained unresolved and a certificate to this effect was issued. The parties agreed to go to arbitration in terms of section 85 (3) of the 2000 Industrial Relations Act (as amended and hereinafter

referred to as the IRA). An arbitrator was appointed on the 21st June 2005 to hear the dispute and he also found in favour of the respondent. The arbitration Award was on the 7th November 2005 made an order of the Industrial Court.

[11] The Appellant has appealed against this Award on essentially the same grounds that were presented before the Arbitrator.

[12] When the appeal first came before us, the court mero motu raised the issue of whether or not this matter was appealable in view of the provisions of section 19(1) of the IRA.

[13] Mr Simelane for the appellant in a very helpful argument, argued his case on the merits first and then on the issue of its appealability or otherwise. I shall deal first with the issue of whether this matter is appealable or not as I believe that if the answer is in the negative this shall dispose of the appeal without the necessity of going into its merits.

[14] Section 19 (1) of the IRA provides that;

> "There shall be a right of appeal against a decision of the Industrial Court, or of an arbitrator appointed by

the President of the Industrial Court under Section 8(8) on a question of law to the Industrial Court of Appeal."

The arbitrator who heard this matter was not appointed by the President of the Industrial Court. In fact, it would appear that there is no provision in the IRA empowering the President of the Industrial Court to appoint an arbitrator. Section 8(8) (as referred to in section 19(1) above) only empowers the President of the Industrial Court to direct that any dispute referred to the court "be determined by an arbitration under the auspices of the Commission."

[15] This is in line with the provisions of section 85 (2)(a) of the Act which also empowers the President of the Court "to decide whether such application should be heard by the court or an arbitrator appointed by the Commission."

[16] Clearly, in enacting Section 19 (1) of the Act, it was not the intention of the legislature to cloth the President of the Industrial Court with the power to appoint an arbitrator. That section in my view was enacted to make provision for the right of appeal on a point of law only against a decision of the Industrial Court or a decision of an arbitrator wherein the dispute or matter has been referred to arbitration by the President. The President is not empowered to refer the dispute to a particular arbitrator and therefore it would be

incorrect to suggest that the word appointed in section 19(1) should be substituted by the phrase "to whom the dispute has been referred."

[17] This issue was, in my respectful view, adequately dealt with by the court a quo in the case of **SYDNEY MKHABELA v MAXIPREST TYRES,** case number 29105 (ruling delivered on the 10th July, 2006), where the court stated that:

> "…reading the amended Act as a whole, it is clear that the intention of the Act is to make provision for a limited right of appeal on a question of law against a decision of an arbitrator where the President of the Industrial Court has directed that a dispute be determined by arbitration under the auspices of CMAC."

I respectfully agree with this interpretation of the law. Where the decision is that of the Industrial court or that of an arbitrator upon referral to arbitration by the President of the court, an appeal lies to this court as of right on a point of law only. It is not necessary for purposes of this judgement for me to examine or state what is meant by a question of law. **VIDE MEDIA WORKERS UNION OF SA v PRESS CORPORATION OF SA LTD, 1992 (4) SA 791 (A).**

[18] In casu, the dispute was not referred to arbitration by the President of the Court. The parties decided to go to arbitration. Where, however, the parties have voluntarily decided to refer the dispute to arbitration, the decision of the arbitrator is final on all issues and not appealable.

[19] In terms of section 85 (4)(b) of the IRA, once the parties to the dispute agree between themselves to refer the matter to arbitration, the arbitrator's decision is final. The Act does not specifically provide that the arbitrator's decision shall not be appealable, but I think it is trite law that the notion of non appealability is included or encompassed in the word "final," as used in the Act.

[20] The Industrial Relations Amendment Act 3 of 2005 came into effect on the 1st September, 2005. The arbitration award under consideration was made on the 23rd September, 2005. From these two facts, it would appear to me that the arbitrator's determination is governed by the Act, as amended, as it came into effect before the award was made.

[21] But even if I am wrong on this aspect of the matter, based on the premiss or argument that the parties agreed to take or refer their dispute to arbitration before the

Amendment came into operation, the repealed section 85(8) of the Act, like the present section 85(4) (b), provided that the determination of the arbitrator shall be final. So, the decision of the arbitrator is hit by finality and non appealability by both the old and the new provisions of the IRA.

[22] For the aforegoing reasons. I would hold that the decision of the arbitrator herein is final and non-appealable and this matter must be struck off the roll. The appellant is ordered to pay the costs hereof.

MAMBA JA

I AGREE.

J.P. ANNANDALE AJA

I ALSO AGREE.

S.B. MAPHALALA JA