CIV/APN/414/92

IN THE HIGH COURT OF LESOTHO

In the Application of.

SECHABA MICAH MAPHIKE — Applicant

vs

LESOTHO OIL (Pty) Ltd — 1st Respondent
CHAIRMAN OF APPEAL HEARING OF S. MAPHIKE — 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice W.C.M Maqutu Acting Judge, on 11th day of March, 1994.

On the 27th November, 1992, Applicant instituted against Respondents what he termed an application for a review in terms of Rule 50 the Notice of Motion calls upon the Respondents to show cause, if any why.-

(a) The decision to dismiss Applicant dated 26th June, 1992 from the employ of First Respondent herein shall not be reviewed and corrected or set aside,

(b) Respondents shall not be ordered

to pay the costs hereof,

(c) Granting applicant such further and/or alternative relief as this Honourable Court may deem fit

The Court after checking the Rules noted that Applicant had made a mistake The was no Rule 507 in our Rules reviews in the High Court of Lesotho 1980 are government by Rule 50

When the application was ready for hearing the record had swelled to 208 pages Despite this endeavour by both sides to provide a full record, the crucial portion of the record of proceedings had not been provided This was the minutes of the disciplinary hearing of Friday 26th June, 1992 in which F Smit presided as chairman This was in fact the record of proceedings which was before the Second Respondent Water de Villiers Cleverley during the appeal

When the court discovered both parties had the record of proceedings of the 26th June 1992 when they appeared before the Second Respondent on appeal it insisted on its production so that the record of proceedings could be complete. The view the Court

took was that it was the responsibility of the aggrieved party to have provided whatever documents pertained to the matter under review which were in its possession In the Court's view it was immaterial that the Notice of Motion had directed that.

> "Second Respondent is called upon to despatch within fourteen (14) days of the receipt of this notice, to the Registrar of this Honourable Court the record of proceedings sought to be corrected or set-aside together with such reasons as he is required or desired to give;"

The Chairman (Second Respondent) had on the 14th November, 1992 at the beginning of the hearing of the appeal specifically asked Applicant if he had seen a copy of the minutes, applicant replied yes.

Both parties co-operated with the Court and the copy of the minutes of the disciplinary hearing was provided by Applicant within 20 minutes and the hearing of the application proceeded The Court had been prepared to postpone the matter for seven days so that this important portion of the record could be found The reason for the Court's desire to proceed with the matter was that the date of hearing had been given more than a year ago, parties had waited for over 12 months to be heard Consequently it was

necessary that the litigants be accommodated in order that finality could be reached.

Both parties had provided the Court with copies of Disciplinary and Grievance Procedures which included how disciplinary hearings should be handled It was agreed that for purposes of the hearing annexure "JM2" provided by Respondents should be used This booklet has 21 pages, it is substantially similar to Applicants annexure "SMM1" Both booklets were prepared by JJ Franken Office of General Counsel Cape Town

It is common cause that the Court does not have the jurisdiction to adjudicate upon, determine and dispose of the matter in terms of the above rules which are part and parcel of the Applicants contract of employment Only the adjudicator or the Chairman dealing with the disciplinary case has such power. An appeal is provided for in Discipline and grievance Procedures of First Respondent That appeal is to the higher level of First Respondent's management and not to a court of law Nevertheless the High Court as a Supreme Court has general Common Law powers of review

of associations, boards, officials or other persons exercising judicial and quasi-judicial powers

This Court's review jurisdiction is not meant to take away the powers of those quasi-judicial persons to deal with the merits and the discretion that goes with the exercise of those powers. The Court's general duty is to see to it that no failure of justice or unfairness of a serious nature has occurred Courts are not expected to set aside proceedings, on review by reason of what they perceive as irregularities or defects in the record of proceedings or conduct of proceedings unless these are grave and must have caused serious prejudice to one of the parties. The irregularity must be a gross one - Rex v Kalogerpoulos 1945 AD 38 at page 51

The Courts' have sometimes found themselves interfering with decisions of Boards where they have acted in a grossly unreasonable manner. See the majority decision in Loxton v. Kenhardt Liquor Licensing Board 1942 AD 275 It is worth noting that De Wet C J. in his dissenting judgment at page 281 dealing with a Licensing Board said·

> " the Board local men of standing who could apply local knowledge just in such cases as the present In my opinion the Court would be usurping the functions of the Board if it treated the matter virtually as an appeal a question of fact "

In this case being one governed by rules which form part of the contract the adjudicators could not use or apply local or personal knowledge because they are selected because they are expected to be impartial There can be no information or knowledge used that is not declared on the record De Wet C J emphasizes that a reviewing Court has not and should not act as if it is a court of appeal

The body or person adjudicating is nevertheless obliged to direct his mind to the question at issue - See S A Broadcasting Corp v Transvaal Township Board 1953 (4) S A 169 If the person or body involved fails to do so this might amount to denying such a party a hearing at all which must be a serious irregularity In all these matters, the onus of showing irregularities complained of is on Applicant Applicant did not only have the onus of proof He had to show that Respondents were in breach of the rules and that this led to prejudice. If we follow De Vos v Die Ringkommissie Van Die N G Kerk 1952(2) S A 83

it seems that voluntary bodies are bound to go by their rules, if they do not courts are obliged to interfere See also Elsworth v. Jockey Club of S A 1961(4) S A 142 There was no real dispute on the binding nature of the First Respondents rules as implied in the employment contract

The Court had a great deal of problem about these Disciplinary and Grievance Procedures which are to guide the Court in dealing with this matter They obviously deal with human relations, which always touch on delicate issues and the right live Matters of employment touch on the very survival of employees in this world where without money is life deciding becomes very difficult It seems the employer does what it can to retain and induce its employees to stay These inducement after long service become very lucrative in terms of money Therefore, it is only fair that long service employees should be treated with special consideration and sympathy and their problems should not be ignored Indeed on page 10 of the Disciplinary and Grievance Procedures booklet supervisors are enjoined look after employees with problems, find out their problems, hear both sides of those involved and even suggest where appropriate that

expert advice should be obtained. The instructions conclude by telling supervisors to.-

> "be supportive while reminding the employee that further complications will arise if personal problems begin to affect performance at work."

Courts are used to cases where rulings are made impartially and impersonally in civil proceedings. They are normally only obliged to be sensitive to the people involved in matrimonial proceedings where minor children are involved.

The problems of the Court were further complicated by the following passage about a hearing -

> "The most fundamental rule relating to any disciplinary procedure is that the employee must be accorded a hearing. The procedure adopted may be extremely informal and requirements will vary from case to case."

What is obvious is that a serious case cannot be treated with informality. The passage quoted above appears on page 12 of the Disciplinary and Grievance Procedures. This is preceded on page 3 by the following warning:

"3 Disciplinary hearing
In serious cases or where initial investigation or the disciplinary interview establishes either conflicting evidence or a disagreement between supervisor and employee, a hearing should take place This formal hearing should be chaired by a manager not directly involved in the making of the case against the employee The role of the chairman is to gather facts by hearing the evidence as submitted by the supervisor and the employee (and witnesses where appropriate).

The question the Court must ask itself is whether or not what was said Price J said in Garment Workers Union v De Vries & Another 1949(1) S A 1110 at page 1110 applies to this case Prince J said

> "In considering questions concerning the administration of a lay society governed by rules, it seems to me that a Court must look at the matter broadly and benevolently and not in a carping critical and narrow way A court should not lay down a standard of observance that would make it always unnecessarily difficult - and sometimes impossible to carry out the constitution I think I must approach such enquiries as the present in a reasonable common-sense way, and not in a fault finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every detail, however unimportant and unnecessary, of the constitution "

The Garment Workers Union case involved an election of a secretary while this involves bread and butter, a service of 8 years and future prospects of employment involving thousands in Maluti or Rands. The approach to be followed and the subject matter must because of dissimilarity differ from that of the Garment Workers Union Common sense is and must always be an ingredient in the decisions of the courts The Court cannot be broadly and benevolent and uncritical without hurting one of the parties Since money or economic interest are at stake here to say the court should not be penny pinching would be to be wide off mark

At the root of Applicant's complaint as more fully appears in his affidavit are

(a) "disciplinary hearing will not normally be taken against an employee without a disciplinary interview between an employee and his supervisor "

(b) "The employer, in this case Respondent, is obliged to inter alia give proper weight to factors which may have influenced or caused the employees default Paragraph 7.3

(c) "Places the onus or burden of proof of proving the employee's misconduct or poor performance on

the management." - Paragraph 7 3

(d) "On or about 10th December, 1991 Applicant was given a final written warning despite the fact that his staff were not giving him their support and co-operation." - Paragraph 8.3.

(e) With the final warning went the recommendation that Mr. Maile, Applicant's supervisor was to undertake frequent checks to ensure that controls were implemented and maintained as well as the quality of checks in order to minimise stock losses. mr. Maile did not comply with these recommendations at all - Paragraph 8 5

(f) On or about 26th June, 1992 at Mr. Maile's instance, Applicant was charged with breakdown in controls procedures and standing instructions which allegedly caused stock losses which were alleged to be evidenced by the audit report - Paragraph 9 1

(g) The hearing and letter of dismissal do not in any way address the issue of the recommendation that Mr Maile was expected to carry out frequent checks to ensure that controls are implemented and maintained - Paragraph 9 2

(h) At the hearing no proper weight was given to the factors which might have caused Applicant to default in as much as management had found out the Applicant's staff did not give him support and co-operation - Paragraph 9.2

(i) The reasons given in Applicant's

appeal deal with previous warnings and loss of stock and no weight was given to factors that influenced or caused Applicant to default in the light of lack of support and co-operation of the staff of Applicant. - Paragraph 9 3

(j) The spirit and the letter of the Disciplinary and Grievance Procedures was not followed - Paragraph 9 4

If indeed Applicant could be able to demonstrate that his dismissal by Respondents was "contrary to the letter and to the spirit of the Disciplinary and Grievance Procedures", the Court would have to accept, it had jurisdiction In order to succeed, however, Applicant would have not only to show these breaches of the letter and spirit He would further have to show that there were not only irregularities or defects in the proceedings but that they were or such a grave and prejudicial nature that a failure of justice resulted from them

Respondents in reply challenged reviewability and proceeded to deny some allegations and admit other

Respondents rely mainly on Mr Maile, the Applicant's supervisor and accuser to refute allegations made by Applicant What Respondents in

opposition through Mr Maile are saying about the appeal is that:

(a) "None of the procedures were wrong, and is furthermore submitted that the only hearing which is relevant for present purposes, is the final appeal hearing."

(b) "Proper weight was given to all the factors involved, and the applicant's misconduct was duly established to the satisfaction of the persons who were authorised to take decision " - Paragraph 10

(c) Applicant was given final warning After that Applicant's excuse that his staff were not giving him their support is not acceptable - Paragraph 13

(d) Mr Maile, the Applicant's supervisor annexes the proceedings of 13th November, 1991 marked annexure "JM3" where applicant was charged with FAILURE TO MEET PERFORMANCE STANDARDS which included failure to have adequate stock controls, failure to check and administer Tank Shift Reports and Tachograph Charts, and failure to implement instructions/recommendations As appears in Annexure "JM3" applicant admitted all charges against him In so far as Applicant blamed lack of co-operation and support from staff under him, Applicant was told he was responsible for the performance of staff under him and that it was his duty to take appropriate disciplinary action against them. - Paragraph 13.

(e) Mr Maile denies that the final warning contained a recommendation that Mr Maile should check and ensure that controls were implemented and in support of this annexes "JM4" a letter which does not contain such a recommendation Mr Maile adds that he has no operations background although he made some checks in an attempt to minimise stock losses but he could not identify the source of stock losses He noted failure on Applicant's part to follow compulsory procedures Despite his regular exhortations and instructions to Applicant, applicant failed dismally in this regard Paragraphs 15 1 and 15.2.

(f) Mr Maile points to a large scale conspiracy including Applicant and drivers to steal which has caused First Respondent (the employer) to lose approximately M750,000.00 in 18 months Evidence is, however, not enough to lay a criminal charge. Ever since Applicant's dismissal, these stock losses have suddenly come to an end - Paragraph 16.2.

(g) Mr Maile says eventually it transpired that more goods were taken out of the depot than was accounted for Physical inspection is a relatively easy matter through a process called "dipping" and the physical inspection is acceptably accurate Another system of checks was through tachographs, these were deliberately tempered with and were not properly working - Paragraph 16 3 and 16 4

(h) Mr Maile says applicant was given a full and fair hearing in which he was treated

with "kid gloves".

(i) Mr Maile feels Applicant is trying to blame him for not adequately policing him when Applicant as depot manager was the one solely responsible for seeing that procedure were followed He adds the hearing was "full, fair proper and complete " - Paragraph 17 1 and 17 2

(j) Mr Maile denied the hearing is quasi-judicial - Paragraph 19 1

If indeed, the hearing has indeed been "full fair, proper and complete" then Applicant application must fail even if the hearing is quasi-judicial The hearing was ex facie quasi-judicial and Counsel for Respondents could not press that argument

It remains for me to go carefully through the proceedings in order to determine the merits and demerits of this review application

I went through the record or minutes of proceedings of the disciplinary hearing in which Mr F Smit presided The records as already stated is the one that the parties had belatedly supplied me. It is dated 26th June, 1992 and is styled "Minutes of the Disciplinary and Grievance Procedure Booklet" annexure JM2 (which has been agreed by both to be

working document) on this matter of the record at page 19 provides.-

> "It is of importance to record everything that transpires at a disciplinary hearing Minutes of the hearing should be prepared as soon as possible and placed in the employee's file.
>
> "In the event of an appeal, the minutes of the original hearing should be handed to appointed chairman of the appeal hearing Normally, the chairman would review the minutes and/or documents relating to the hearing/incident Only in exceptional cases, shall further oral evidence be allowed. "
>
> "It has been suggested that an appeal should in all cases be a complete rehearing of the matter I do not believe a complete hearing is always required if, however, an employee wants, this should not be rejected outright However, the parties could agree on something less extensive if they so wished "

Having perused this portion on page 19 dealing with the record in the Guide to Disciplinary and Grievance Procedures, I am unable to agree with Mr Maile that "the only hearing relevant for the present purposes, is the final appeal hearing" The reverse is the case, it is minutes of the original hearing that are the most important

This record of 26 June,1992 causes a few blushes because it is far from satisfactory This becomes apparent when it is compared to the minute of the

Disciplinary Hearing against Applicant dated 13th November, 1991 in which Mr J H Pienaar presided These are marked "JM3" This record should also be compared with Appendix C the minutes of another earlier disciplinary hearing against the Applicant. These minutes are detailed and meticulously kept The record kept by Mr. F Smit does not reveal that he was mindful of the fact that this was a formal hearing which in terms of page 3 of the Guide to Disciplinary and Grievance Procedures booklet he was obliged to conduct The documentary evidence that was handed in is not shown nor does what is written on the original minutes of 26th June, 1992 correspond with the documentation that forms part of the record in this review Applicant

The record of the adjudicator at the appellate stage has not been able to reconcile the documents with the numbering of the original record Were these before the adjudicator of first instance? How did they come to the adjudicator who dealt with the appeal and in what order? These are questions that cannot be answered. The record taken by Mr. W de Villiers Cleverly (the adjudicator on appeal) is just a record of arguments pleas of Applicant and submissions.

There are two charges which Applicant had to answer These (according to the minutes of the Disciplinary hearing before Mr F Smit) are as follows·

1 Breakdown in controls, procedures and standing instructions which led to stock losses as evidenced in the field audit report completed by Mr R Bath This occurred after the previous disciplinary hearings and subsequent training.

2. Abuse of company telephone and attempting to disguise the fact after being warned verbally in this regard after a previous incident. Refer to telephone account December, 1991 for Number 322208 This charge was dropped See page 2 of the disciplinary hearing minutes of 26th June, 1992

The first charge and the evidence adduced need examination No formal evidence was led according to the minutes Applicant was shown stock loss figures as detailed in May 1992 There was not attempt to show and prove the loss between 13th November, 1991 and May 1992 or June 1992. This was most important because according to the charge this loss "had occurred after previous disciplinary hearing." Paragraph 16 2 of Mr. Maile's affidavit made on behalf of the Respondents did not help in this matter because

it states the loss was over a period of 18 months Applicant according to the original record dated 26th June, 1992 was shown a loss of M100,242 65 in addendum "B" (which was not marked in that manner) Mr Maile's affidavit puts the loss at M750,000 00.

I decided to examine the Field Audit Report to determine whether the date of the losses and failure to comply with the procedures and standing instructions that buttressed the control were shown I found they were not All that was shown were the dates of the three visits in May 1992 that the field auditor had made. There are many comments but in particular they involve debts that are less than 30 days old Dishonoured cheques less than 3 months old that have not been redeposited The audit report shows that other people are responsible but quite properly the manager must answer

I then perused a Memorandum on the Eastern Region Field Audit Report of March, 1992 to end of May, 1992. This report shows other depots had minor problems that were immediately rectified or suitably resolved. When it came to deal with Maseru, the following was said -

> "However, the same cannot be said of Maseru Depot as the audit revealed that there had been a complete breakdown of procedures and controls In fact the situation is of such proportion that remedial action on the part of management cannot be delayed any longer "

This memorandum was used to frame a charge against applicant

This charge is phrased in general terms. The nature of the controls procedures and standing instructions was not clearly spelt out The manner of their breach was also not specified What is beyond any dispute is that Applicant was revealed to be unfit to command and to manage subordinates That he was unfit to be a manager was long discovered, there can be no shadow of doubt about that

The record as presented and built up by Respondents' for purposes of resisting this application reveals the following

1 On the 29th July, 1991, Applicant was charged with exactly the same offence of breakdown of stock control. On top of those were Tank Truck shift reports not checked and administered properly, fictitious recording of dips on form 310, no proper checks of invoice adjustments and non-compliance with

instructions/recommendations The record of proceedings is 15 pages long It emerged that Applicant had not taken any disciplinary steps against his subordinates who were to blame for his problems Disciplinary proceedings against his staff were recommended Drivers of transport contractors were to be confronted to explain anomalies Finally the Field Operations Manager was to do frequent checks to ensure that controls are maintained and quality of checks are up to standard

2 On the 13th November, 1991 about four months later applicant was again charged with a similar though much more general offence of <u>failure to meet performance standards</u> Details were the same, that is failure to have adequate stock control, failure to check tank shift reports and failure to implement instructions/recommendations See annexure "JM4" The same complaint about the staff that did not give him support and co-operation was found to be at the root of his problem He did not check and supervise the staff to see the standing instructions are kept Finally, it was recommended that his supervisor undertakes frequent checks to ensure that the controls are implemented and maintained as well as the quality of checks are kept up to standard He was given a final warning

(3) Then followed the 26th June hearing that was virtually identical with the two others, the charges being the same. The difference is that the record at the hearing of first instance on this occasion is deplorable The outcome of this was the dismissal of

Applicant and we are reviewing these proceedings

In the light of the aforegoing, it seems Applicant who was clearly unfit for management was maintained at his post for a reason that I find puzzling Was the senior management of First Respondent intent on ruining the First Respondent company? Mr Maile, the Manager who laid the charge is either untruthful when he says the final warning that was given to Applicant did not direct him to police and keep Applicant under surveillance or the minutes of 13th November, 1991 were never part of the record at the hearing of first instance Indeed they do not form part of the package W de Villiers Cleverley, the Second Respondent (who is adjudicator of the Applicant's appeal annexed) to the record along with the record or his affidavit What he annexed bear his initials of W C.I just as annexure that go with J Maile's affidavit bear Mr Maile's initials of JM1,2,3,4,5,6,7 and 8

The matter under review is one of employment for which Lesotho has a law. Section 11(2) of the Employment Act of 1967 provides that

"No person shall employ any employee and no

> employee shall be employed under any contract except in accordance with the provisions of this Act any term or condition less favourable to the employee than any corresponding term or condition of this Act, shall be construed as though the corresponding term or condition of this Act were substituted for such less favourable term or condition of service in such contract"
>
> "Provided that nothing in this Act shall operate so as to invalidate any term or condition of any such contract which is more favourable to the employee than the corresponding term or condition of the Act"

The Labour Code of 1992 only came into operation on the 1st April, 1993. The Court in these review proceedings is obliged to check whether or not the provisions of the Employment Act of 1967 were followed. The law of the day bent over backwards to see that the employee is protected and saw to it that whatever was favourable to employees in the provisions of contracts of employment above, the minimum standard set by the Employment Act of 1967 would be enforceable This means if the employer has chosen to make a contract or rules that treat employees with "kid gloves", the adjudicators in the disciplinary case were bound to enforce them

In terms of Section 15(3) of the Employment Act of 1967 grounds for dismissal are specified. The Act emphasises that the grounds mentioned are the only ones and no others Those relevant to this review are

(a) Misconduct which would entitle the employer at common law to dismiss the employee summarily

(b) Wilful disobedience to lawful orders given by the employer

(c) Lack of skill the employee expressly and impliedly holds himself to possess

The proceedings under review do not disclose criminal conduct such as theft or dishonesty or insubordination for which under the Common Law an employee might be dismissed It has to be observed that in the previous disciplinary hearings, there was evidence of falsification of the records that could have legitimately led to Applicants dismissal

There is no allegation that Applicant ever expressly or by implication held himself as possessing skill or ability as manager. All evidence on record shows he could not command or lead men He also displayed incompetence in his failure to supervise his subordinates and to check the work Training is said to have been prescribed as a solution and he was allowed to continue as manager The ability to

command and enforce discipline was never remedied There is always the question whether or not any employer was entitled to discipline Applicant for having no gifts of management

In the case of Wallace v Rand Daily Mail 1917 AD 478 a servant had ben dismissed for negligence because he had allowed a defamatory article to be published without due enquiry The appellant who had been a Managing Director of respondent claimed damages Respondent's defence was that Appellant was habitually negligent in the discharge of his duties Innes C J at page 482 as follows

> "Every servant, every person who enters into the employ of another, implicitly undertakes to exercise due and reasonable diligence in the discharge of his duties And a breach of that undertaking will, under certain circumstances, entitle the employer to dismiss him "

While an employer ought not to keep an employee at his post if he is not capable of discharging the duties of that office, it remains debatable that the inability is a disciplinary offence It is unjust to hold the employee responsible for a wrong appointment and to punish an employee for it by putting its effects squarely on the shoulders of the employee and so

attribute culpability solely to the employee See A guide to South African Labour Law by Rycroft and Jordaan page 58 Yet this is what was traditionally done because by applying for a position, the employee is deemed to warrant impliedly that he or she is suited to that position.

In our law, the employer is free to terminate his employee's employment without giving reason provided he gives the employee due notice See Section 14 of the Employment Act of 1967 read with Section 13. There was no reason why such termination was not made. In Kwete v Lion Stores Pvt Lty 1974(3) S a 477 the plaintiff's employment was terminated after due notice Defendant reason given in the written notice was that it was re-organizing the business The real reason it emerged when Plaintiff had brought a claim of damages for wrongful dismissal that Defendant believed because Plaintiff spent a considerable time studying his employment contract and that the sales he was effecting had fallen off considerably, as revealed when company's accounts were made up Plaintiff claimed he was being victimised for claiming his rights Defendant had later given him a good testimonial The court after noting that an employer

could terminate employment without assigning a reason after due notice, it is not unusual for an employer to take a charitable view of his ex-employee's services when asked for a testimonial Greenfield J who presided after analyzing the facts concluded

> "His dismissal was due, I believe, to the fact that his preoccupation with his supposed unjustified treatment resulted in a deterioration of his work "

I have chosen to deal with the facts of this case at length to show that there were alternatives of dispensing with Applicant's services without charging him with a disciplinary offence Surely Employment Act of 1967 was applicable or there ought to be a term in the contract of Applicant's employment that could enable the employer to get rid of him without pretending he had committed an offence by not being endowed with the ability to manage a depot and its staff To quote from Miller J in Stewart Wrightson (Pty) Ltd v Thorpe 974(4) S A. 67 at page 79A

> "I cannot regard this otherwise than an ignonimous dismissal of Applicant from the employment of First Respondent "

If the agreement between parties obliged the employer to give Applicant reasons as in Blackley v

City of Salisbury 1979(1)S A 348, then Applicants failure to manage the depot could have been given as the reason for terminating Applicants employment after due notice.

In the case under review, the record discloses that since June, 1991, the employer had long discovered that the employee was not up to the job In *November, 1991, it was clear that he just could* never manager his staff instead of terminating the employment contract he was given a final warning as if want of ability is disciplinary offence The problem here is that the promotion of Applicant seems to have been an error of judgment on the part of the employer This error was persisted in even when it was discovered that Applicant was hopeless The manner of reaching the objective which was the removal of an unfit manager was notdirect and business-like To pretend there was a breach of discipline was being unfair and devious.

The record is silent on when applicant became a manager If his eight years with the First Respondent company was as manager, we are not told We therefore, cannot say if his recruitment was

inefficient. He probably was promoted If he had displayed some ability and had become culpably remissive towards his duties then disciplinary proceedings might have been appropriate It was the duty of the employer's investigating officer to do what the Guide to Disciplinary and Grievance Procedures provides at page 12 of the booklet It provides -

> The most fundamental rule relating to any disciplinary procedure is that the employee must be accorded a hearing This entails that the employer must in all instances;
>
> (i) investigate the alleged offence properly and obtain promptly all possible information in regard thereto,
>
> (ii) give due consideration to all circumstances upon which he wishes to rely for disciplinary action, especially where a possible termination might follow
>
> (iii) give proper attention and weight to factors which may have influenced or caused the employee's default
>
> (iv) duly consider the employer's work, personal circumstances and other relevant factors

In terms of the proviso Section 11(2) of the Employment Act of 1967 the conditions favourable to an

employee such as the above had to be followed They do not seem to have been. The reason being the Mr Maile claimed to be at paragraph 8 of the Answering Affidavit the following concerning his ability to investigate -

(a) He does not seem to know that the final warning contained a requirement that he (as applicant's supervisor)

> "should undertake frequent checks to ensure that controls are implemented and maintained as well as the quality of checks are kept up to standard."

If Mr Maile had indeed investigated the case as he was obliged to, he would have not made the denial because this directive comes from the last page of annexure "JM3" which Mr Maile annexed to his Answering Affidavit The denial is at paragraph 15 1

(b) Mr Maile claims he had not the training and competence to investigate what was going on See paragraph 15 2 of his affidavit where he said -

> "I certainly check from time to time whether controls are maintained, in an attempt to minimise stock losses As appears in the minutes of the enquiries, I do not have the operations

background, and was not able to identify the sources of the stock losses "

If Mr Maile had no such impediments to doing investigative work some one else ought to have done the investigation

(c) Neither Mr Maile's Answering Affidavit or the Minutes of the accused's show any consideration was given to all circumstances on which Mr Maile wished to rely at the disciplinary hearing Facts were never clearly and properly put for the chairman to gather as expected on page 3 of the Guide on Disciplinary and Grievance Procedures booklet paragraph 3 Therefore, the record does not show all what transpired at the hearing As already stated, it was very badly taken. The formal and serious nature of the hearing was largely ignored

(d) The accused's personal details such as when he became depot manager, his experience, his training if any, his problems with the job, details of his actual default are not properly and clearly presented This was binding in terms of A (iv) on page 12 of the Guide to Disciplinary and Grievance Procedure booklet If at all such information was gathered, it was not presented to the chairman or adjudicator for collection and consideration

The other problem that the adjudicators both at first instance and on a appeal missed were that failure to meet performance standards was not a ground

for dismissal in terms of Section 15(3) of the Employment Act of 1967 The Act only states those are the only grounds and no others A page 21 of the Guide on Disciplinary and Grievance Procedures booklet, an employee may be found guilty of sub-standard performance In essence that is what Applicant was guilty of

The only offence that Applicant might have been guilty of is that of disobedience of orders The difficulty of the Respondents would be that Section 15(3) of the Employment Act of 1967 caters only "for wilful disobedience of orders given by an employer " There are no orders that are specifically said to have been given and which the accused deliberately disobeyed. The record shows no such orders. All that the record shows is incompetence, failure to run the depot and to impose his authority on subordinates

There is no way that the charge of breakdown in controls, procedures and standing instructions which led to losses to the company could be fitted into categories that entitle the employer to dismiss its employee in terms of Section 15(3) of the Employment Act of 1967 To that extent the proceedings are

irregular

It seems to me that both the adjudicator at first instance and on appeal erroneously disregarded the Employment Act of 1967 and the First Respondent's Guide on Disciplinary and Grievance Procedures and therefore, made a fundamental error that made them proceed on the wrong footing Stratford J A in Union Government v. Union Steel Corporation 1928 AD 220 at page 234 in such circumstances concluded:-

> "If a discretion is conferred by Statute upon an individual and he fails to appreciate the nature of that discretion through misreading the Act which offers it, he cannot properly exercise that discretion In such a case a Court of law will correct him in order to direct his mind to the true question which has been left to his decision "

If the decision in the instant case was erroneous (as I have given reasons for thinking it was) it constitutes an irregularity reviewable by a Court of law - S A Broadcasting Corp v Transvaal Township Board 1953(4) S 169 at 177 A.

In this case (unless information was on record to show that at one time Applicant had the capability to

manage the depot and its staff) wilfulness or defaulting in failure to maintain controls could not be established It has not even been established when Applicant became the depot manager In fact all available information on record shows Applicant never could manage a depot, even sending him for further training could not help If before bringing the disciplinary proceedings details on work performance, qualifications, training, history and length of experience had been given due consideration as the investigator was obliged to do these disciplinary proceedings might not have been brought Because contrary to Disciplinary and Grievance Procedures at page 12 of the booklet the supervisor did not

> "give proper attention and weight to the factors which may have influenced or caused the employees default . duly consider the employee's work and personal circumstances and other relevant factors "

That being the case the supervisor who (on behalf of the employer) placed the matter before the disciplinary committee did not investigate and analyze the information as he was expected to do The record does not show he did If he had done so he would have realised that no offence had been committed on the

facts on record Inability to do a job can never be a disciplinary offence

If I am wrong in holding that a man cannot be charged by an employer of a disciplinary offence because of his inability to do a job where there is no wilfulness or culpability of any kind, then I believe the Court can interfere on the ground that such a charge is grossly unreasonable In so saying I quote from Murray J in Gliksman v Transvaal Institute of S A Architects 1951(4) SA 56 at 62G where he said

> "It is only where the unreasonableness was so gross as to either to raise an inference of its being prompted by mala fides or ulterior motive or to show that the person making the decision did not apply his mind to the matter that the court will interfere "

I feel if indeed the supervisor investigated this matter (a fact which the record does not show) then he did not apply his mind to the facts at all

The two adjudicators also fell into the same trap They assumed that Applicant must have wilfully failed to supervise and command his depot They both say as he was in charge he must be held responsible, therefore, he is guilty of the disciplinary offence of

failing to maintain controls in the depot Indeed the question of his Applicant's inability was considered irrelevant He raised this in his defence but it was not considered relevant

First Respondent did not digest the facts revealed by the two previous disciplinary hearing to the effect that Applicant could not command and supervise men These glaring facts did not register in the minds of the investigator of the matter and the adjudicators If the First Respondent had not made the wrong assumption that being in command is proof of ability to manage, the disciplinary charge might have not been brought against Applicant

As already stated, it is not only the question of breach of First Respondent's disciplinary rules The Employment Act of 1967 in my view does not permit an employer to level a disciplinary charge of the type that was levelled against Applicant. The Employment Act of 1967 was meant to protect employees and create a healthy work environment.

There is no doubt that the Respondents were obliged to terminate the employment of the Applicant

but not through disciplinary proceedings It seems to me that the First Respondent ought to have long terminated the employment of Applicant Pretending he has committed a disciplinary offence was unfair and untruthful He could have been requested to resign or been given notice that his employment was being terminated in terms of the laws of Lesotho or in terms of his contract.

It certainly was never the Law of Lesotho that if an employees is found incompetent "then in the eye of the law he stands in the same position as if he had been negligent in the discharge of his duties " Ndamase v Fype-King NO 1939 EDL 259 at 262 The reasoning of the Ndamase case belongs to the past era It is doubtful if today such reasoning is acceptable simply because it favours the employer at the expense of the employee There is, however, a great deal of difference between what was involved in that case and the present case Wille & Millin Mercantile Law of South Africa 17th Edition at page 275 states that in entering into a contract of employment, the employee impliedly warrants his ability to do the work he undertakes In this case, the employer had known the limitations of Applicant for over a year, therefore,

he had no illusions about him

There is no question of condonation but here we are dealing with an employee who was long found to be unable to manage a depot There is no more any question of any misrepresentation on the part of the employee He is being kept despite his drawbacks in the mistaken belief that he can be improved If all efforts have failed, the First Respondent ought to have terminated his employment in a straight forward way by calling a spade a spade.

Mr Maile makes wild allegations that Applicant must have been acting in concert with thieves. He believes the company lost M750,000 000 during the past 18 months If that is so, the police ought to have been called in instead of making unsubstantiated allegations of this nature Mr Maile's affidavit shows a man who cannot be relied upon He says he had not been directed to supervise and ensure the controls are in place at paragraph 15 1 He provides annexure "JM3" which shows he had in fact been so directed. He says he had no operational experience and training to check the source of the losses at paragraph 15.2 But at paragraph 16 3 he says

> "I explain that a physical inspection is a relatively easy matter, since one climbs on to the truck and inspects physically The process if called "dipping" Every compartment is calibrated, and physical inspection is acceptably accurate "

To make a person like Mr Maile a prosecutor, when he is in fact a co-offender (in the sense that as Managing Director he had co-responsibility along with the Applicant (the Maseru depot Manager) for the losses and break-down of controls is hardly a fair method of conducting a disciplinary hearing It gives an impression that Applicant was being sacrificed for the sins of many. Mr Maile is hardly a bed-rock on which a fair hearing can be based because he ought also to have had his job terminated for incompetence which forms the basis of offences that accused was charged with Then it seems the First Respondent company violated its own Guide to Disciplinary and Grievance Procedures at page 21 of the booklet where it says.-

> Equality of treatment is an important element of the general perception of fairness and equity An employer who had not dismissed others for the same offence will therefore have to justify to the Court (or Union) that he had good reasons for distinguishing between employees "

Maybe First Respondent intends to bring similar

disciplinary proceedings against Mr Maile If he does, the Laws of Lesotho would not permit him so to do for the reasons already disclosed above

What appears in the minutes of the disciplinary hearing of the 26th June, 1992 at page 1 does not disclose that there were in fact standing control procedures If that was not so how could Applicant be requested by Mr Maile to propose in writing procedures to overcome the problems If, indeed Applicant believed the procedures were unworkable and the auditors' reports were dated the beginning of June, 1992 then Applicant could not really have defaulted by the 26th June, 1992 when the disciplinary hearing was held In any event these were not followed up according to Mr. Maile It seems Mr Maile ought to have followed them up Since the procedures and the standing instructions that bolster controls were never specified or singled out one by one they could not be specifically addressed The onus of putting facts before the adjudicator was on the man representing the employer This was not discharged

A lot has ben made about Applicant's admission of

guilty. This is not helpful because it is really an admission of incompetence Rycroft and Jourdan in A Guide to South African Labour Law at pages 211 to 212 have summarised the issue at stake, when they say

> "Culpability is a factor which affects fairness of a dismissal while it may be fair to punish an employee who refuses to perform properly, it will not be fair to do so if the employee is not capable of performing properly, There is no point, it has been said, in trying to discipline an employee for doing something he cannot do Bearing in mind that unsatisfactory work performance is often the result of lack of skill or training, or even poor selection on the part of the employer. This approach is no doubt correct "

That does not mean an employer cannot terminate his employee's appointment, but he cannot try him disciplinary as if he has wilfully defaulted That would not be fair Page 11 of the Guide to Disciplinary and Grievance Procedure booklet speaks of a fair disciplinary hearing The two adjudicators both at first instance and on appeal did not realise that being incapable of performing properly in a work situation can never be a disciplinary offence Applicant was tried for a non-existent offence Therefore, Appellant was not fairly tried because of an error caused by lack of perception of what the rules of the First Respondent (the employer) required I have already said further that sight was lost of the

law of Lesotho on the matter

In Martin v Durban Turf Club and Others 1942 AD 112 at 126 Tindall J A. said -

> "The test of fundamental fairness, however, must be applied with due regard to the nature of the tribunal, adjudicating body and the agreement if any, which may exist between the persons affected.

The fairness that the court has to review must be considered in relation to work performance and the expectations of the parties having regard to the Guide to Disciplinary and Grievance Procedure of First Respondent

In modern times, the employer is expected to try and correct defects in an employee if he can If it is a question of lack of skill or training, he is expected to try and help the employee to acquire the requisite skill The employer may even re-deploy the employee The fact that the employer is eventually entitled to terminate the incompetent employee's employment does not entitle the employer to charge an employee with misconduct

In order for a person to be liable be it for any

criminal act or civil claim some fault or culpa must be proved Culpa in this case would mean a blame-worthy lack of ordinary care on the part of a person It is accepted in our law that culpa caret qui scid set prohibere non potest:- no negligence is attributable to a person who is powerless to avoid danger Claasen Dictionary of Legal Words and Phrases Volume 1 First Respondent has not (nor has an attempt been made) to show that Applicant ever had the barest capability to manage the depot and its staff. What has been proved and demonstrated was that he could not and that he was untrainable for the job First Respondent made a bad appointment when he made Applicant Manager To invert words used by Bresler J. in Stolzenberg v. Lurie 1959(2) SA 67 at page 74D

> "It seems to me that it does not lie in First Respondent's mouth, having created the danger in consequence of his admitted negligence, to demand a conduct of perfection on the part of Applicant "

That case was one of negligent driving but the principle is the same An employee cannot be blamed for everything In this case the losses that occurred were caused by First Respondent's bad recruiting and staff deployment which is clear on record

As already stated, the employer (First Respondent) ought to have given Applicant due notice and terminated his employment if he was unable to manage the depot and its staff I sympathise with the adjudicator who heard the appeal in trying to make the hearing "a genuine one" The whole disciplinary proceedings were misconceived.

I am also not oblivious of the fact that First Respondent was trying to be decent when he sought to retrain Applicant and give him a chance to improve When First Respondent had failed to make a silk purse out of a sow's ear in building the untrainable Applicant into a depot manager he was not entitled to put him on trial for his personal limitations The Eastern Region Field Audit Activity Report of 6th June, 1992 had pointed out about the Maseru Depot

> "There has been a complete breakdown in the various accounting policies, procedures and controls In fact, the situation is such proportions that remedial action on the part of Management cannot be delayed any longer "

It is clear Applicant was warned to pull up his socks regarding controls as Second Respondent (as a adjudicator on appeal) observed The question that

was not addressed (and which was fundamental) was whether Applicant had any socks at all to pull up The record does not discloses any When remedial action is taken employees should not be made scape-goats for the failure to take appropriate timeous action by the entire management Management must accept responsibility for the losses according to accepted business risk principles It must act promptly to stop losses, where it has not done so it must not make one of its brethren to carry the blame unfairly Applicant as depot manager had to go but not in this way

I, therefore, make the following order -

(a) The disciplinary proceedings brought on behalf of First Respondent against Applicant on the 26th June, 1992 and which were finalised by Second Respondent on the 14th September, 1992 are set aside.

(b) Respondents are directed to pay costs

W.C M MAQUTU
ACTING JUDGE

11th March, 1994

For Applicant · Mr. Buys
For Respondent Mr Pheko