IN THE LESOTHO COURT OF APPEAL

C OF A (CIV) NO.20 OF 1994

HELD AT MASERU

In the matter of:

LESOTHO OIL (PROPRIETARY) LIMITED	1ST APPELLANT
CHAIRMAN OF APPEAL HEARING OF S. MAPHIKE	2ND APPELLANT
AND	
SECHABA MICAH MAPHIKE	RESPONDENT

CORAM:

STEYN JA,
BROWDE JA,
KOTZÉ JA.

JUDGMENT

BROWDE JA:

In the Court *a quo* Respondent succeeded in obtaining the following order:

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"(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."

It is against this order that Appellants appeal to this Court. The notice of appeal cites the following grounds:

"1. That the Honourable Trial Court misdirected itself as to the Respondents' cause of action.

2. That the Honourable Trial Court misdirected itself by adjudicating the review on grounds not covered by the Respondents' Founding Affidavit.

3. That the Honourable Trial Court misdirected itself by directing its attention to matters not covered by the Respondents' cause of action or their Founding Affidavit and on

which the Appellants were not called upon to answer in their Replying Affidavits.

4. That the Honourable Trial Court misdirected itself by finding that the actions of the Appellants were *ultra vires* the provisions of the *Employment Act*, 1967.

5. That the Honourable Trial Court misdirected itself by finding that the provisions of the *Employment Act* 1967 were applicable to the facts of the Respondents' Application.

6. That the Honourable Trial Court misinterpreted the provisions of the *Employment Act* 1967.

7. That the Honourable Trial Court misdirected itself by finding that "the charge (against the Respondent), is grossly unreasonable"."

The facts are the following:

Respondent was in the employ of the First Appellant (Appellant) as a depot manager in Maseru. Appellant evinced

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dissatisfaction with the manner in which Respondent was discharging his duties. After the holding of a disciplinary hearing and on the 19th August, 1991, Respondent was given a written warning and on the 10th of December, 1991, and once again pursuant to a disciplinary hearing a final warning was conveyed to Respondent. After an appeal hearing in September 1992, the Respondent was dismissed from his employment.

The warnings related to stock losses sustained by Appellant at the depot under Respondents control. These were attributed by Appellant to Respondent's failure to ensure compliance with established procedures by employees under his control and supervision.

It is common cause that these stock losses did occur. It is also not disputed that these losses were attributable to a non-compliance with procedures as alleged and that as a depot manager it was Respondent's responsibility to ensure compliance and to staunch the illegal outflow of stocks. The manner in which these irregularities occurred and their gravity are described as follows by the Appellant (Respondent in the application):

16.2 I respectfully point out that the misconduct in question was very serious indeed. Although there is insufficient proof at this stage to lay criminal charges, the facts indicate very strongly on the probabilities that there was a large scale conspiracy, involving a number of people including the Applicant and drivers, to steal very large quantities of petroleum products from the First Respondent. As a result thereof, the First Respondent suffered damages in the sum of approximately M750 000,00 in the eighteen months prior to the dismissal of the Applicant. Ever since the Applicant was dismissed, these stock losses came to sudden end, and operations are once more running smoothly. To illustrate the nature of the problem, I respectfully refer to annexure JM5 hereto, being a report on the matter, which I verily believe to be true and correct and which can be substantiated if necessary.

16.3 Eventually it transpired that the method of theft was predominantly by loading more product into the truck, and simply driving it out of the depot. I explain that a petroleum truck typically is divided into four compartments. There would, for instance, be an order for a

delivery which would require only two compartments to be filled. The documentation with the driver would show that two compartments are filled, but in fact all four would have been filled. As part of the scheme, there would be no physical checking of the truck when it left the depot. I explain that a physical inspection is a relatively easy matter, since one climbs on to the truck and inspects physically. The process is called "*dipping*". Every compartment is calibrated, and physical inspection is acceptably accurate.

16.4 Furthermore, there was deliberate sabotage of certain control systems. For instance, the trucks are fitted with tachographs, which, when properly working and applied, keep an accurate record of the movements of the truck, the times that it stopped, the times that the pump was operated, and the distances of various trips. Tachograph analysis, when properly done, is a very effective control mechanism, since the driver cannot depart from his allotted route or timetable, without it showing up on the tachograph. We eventually found that a tachograph had been deliberately tampered with, as appears from annexure JM6 hereto, a report by

the experts on the subject."

Save that Respondent in his replying affidavit vigorously contested any allegation that he was himself involved in any conspiracy to steal or theft, these averments were largely unchallenged. In the end the issues on appeal were confined to a consideration as to whether Respondent had received a fair hearing. This in turn was confined to an issue which can be summarised as follows:

> Was a proper consideration given and due weight and attention attached to factors that may have had a bearing on "Respondent's default"? (The quotation is from Respondent's counsel's heads of argument)

Respondent's Counsel found himself unable to support the reasoning which underpinned the learned Judge *a quo*'s findings. He was right in doing so and to limit his contentions in the manner set out above. With one exception mentioned below it is not necessary to deal with those findings but to confine ourselves to an examination of the issue defined above. The learned Judge *a quo* found that the dismissal of the Respondent on the grounds of his failure to

meet the standard of performance required was not in accordance with Section 15(3) of *The Employment Act* 1967. He came to the conclusion that the only offence the Respondent might have been guilty of was that of disobedience of orders and said "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". He then went on to say: "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 (by which the learned Judge obviously was referring to the procedure adopted by the Appellant leading to the dismissal of the Respondent) are irregular".

In coming to that conclusion, the learned Judge appears to have overlooked the provisions of Sec. 15(3)(d) which provides that an employer may dismiss an employee summarily for habitual or substantial neglect of his duties. Indeed it appears from the papers before us that from about July 1991, the Respondent was well aware that his own ability and general managerial procedures were in doubt. When he

received the final written warning, the Respondent knew without doubt that stock control was up to him and that if he had problems with the staff he could attempt to remedy the position by reporting the matter to his superiors in the company. This he never did as far as can be gleaned from the evidence before us.

The question regarding the alleged lack of support received by the Respondent was aired and fully investigated both at the disciplinary hearing of 13 November, 1991 and again at the hearing of the appeal on 14 September, 1992. In my opinion there can be no doubt that the Respondent received a fair hearing and that the decision to dismiss him - apparently on the basis of habitual and substantial neglect of his duties - cannot be assailed on any of the bases which would justify a court in setting aside a decision such as that arrived at by the Appellants. I refer of course to matters such as bias, gross unreasonableness, or the failure to afford the Respondent a fair hearing.

That would end the matter were it not for a submission made by Mr. *Pheko*, who appeared on behalf of the Respondent, that there had been a contractual breach by the Appellants in that they failed, so the argument went, to implement the

guidelines set out in the booklet containing the disciplinary and grievance procedures which the Respondent alleged were binding on the Appellant in terms of the Respondent's employment contract. The aspect of those guidelines relied on by the Respondent is that the Appellant failed "to give proper weight to the factors which may have influenced or caused the employee's default". Assuming without deciding that this was a contractual obligation, I am of the opinion that the factors referred to were fully considered and that the question of pressures of the work which were on the Respondent, to which Mr. *Pheko* specifically alluded, were also taken into account. Mr. *Pheko* also submitted that the appeal hearing was flawed because it does not appear that minutes of the previous hearing were made available. Even if that were so I agree with Appellant's Counsel Mr. *Alberts*, that the appeal was effectively a rehearing, during which all the issues were fairly and comprehensibly dealt with.

I am of the view, therefore, that the order of the learned Judge *a quo* was wrong, and that the appeal should be upheld with costs. The order of the Court *a quo* should be set aside and the following order substituted:-

"The application is dismissed with costs."

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J. BROWDE
JUDGE OF APPEAL

I agree and it is so ordered: .....
J.H. STEYN
JUDGE OF APPEAL

I agree: .....
G.P.C. KOTZÉ
JUDGE OF APPEAL