C of A (CIV) NO.18 of 1997

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

LESOTHO ELECTRICITY CORPORATION APPELLANT

AND

GODFREY LEBOHANG MAFOSO RESPONDENT

Held at:
MASERU

CORAM:

BROWDE JA
SHEARER AJA
GAUNTLETT JA

JUDGMENT

BROWDE, JA

This is an appeal against the judgment of the High Court setting aside as irregular the proceedings of the appellant's committee investigating the respondent's conduct and the management's decision on such misconduct.

The founding affidavit to the application of the respondent said no more than that on or about the 24th August 1995 disciplinary proceedings were held against him on alleged misconduct; that witnesses were called and gave evidence before a panel which consisted of Mrs Letsie, Mr Mahosi and Mrs Phoofolo; at such proceedings, he was not given an opportunity to cross-examine the witnesses who were called while he himself was cross-examined and that the respondent had been found guilty and had been demoted and given a strong and final warning.

It thus appears that the sole complaint contained in the founding affidavit was the allegation that the respondent was not given an opportunity to cross-examine the witnesses.

In his opposing affidavit on behalf of the appellant the managing director M.S. Shale contended in limine that the applicant ought to have filed his application before the Labour Court since, as it was put, "the matter is within the jurisdiction of the Labour Court being a specialised Court which has full jurisdiction to consider the fairness or otherwise of the disciplinary proceedings". That objection was dismissed by Mofolo J. in a preliminary application and that decision does not form part of the appellant's grounds of appeal. Consequently it is not necessary to deal with it since whatever might be the merits of the

objection the High Court certainly had jurisdiction to entertain the application which, in effect, was asking the Court to review the proceedings before the disciplinary committee.

After stating that a full disciplinary hearing was conducted, the appellant denied the contents of the paragraph of the founding affidavit in which the allegation was made that the respondent was not given an opportunity to cross-examine the witnesses. It was stated in answer that:

> *"Applicant was given full audience to cross-examine witnesses and furnish his own evidence. The record of the proceedings show that applicant was acquitted in some other counts and this was on the basis of evidence submitted by him and submissions which he made when cross-examining witnesses. I am advised and verily believe same to be true that the conduct of the proceedings being administrative were sufficient in the circumstances. They accorded with standards of hearing in employer/employee relations."*

What is referred to as "the record of the proceedings" is attached to the answering affidavit and it appears therefrom that at the hearing on the 24th August 1995 the respondent and his lawyer **Mr. Khauoe** were present and agreed

> *"That the matter was LEC internal affair and should be treated as such and also agreed that the respondent*

would make himself available to be questioned by the corporate secretary and the disciplinary committee in the absence of his lawyer."

In his reply the respondent disputed the admissibility of the "record" averring that the deponent Shale had no personal knowledge of the facts deposed to as he was not on the panel and further stating that the "record" does not indicate that he was given an opportunity to cross-examine witnesses. A perusal of what is referred to as the record reveals that there is in any event no reference to cross-examination of any kind, either by the respondent or directed at him. It is pointed out by Maqutu J, who heard the application, that the document purporting to be the record is "neither a record of proceedings or minutes of the proceedings of the investigating panel." The learned judge correctly states that what has been annexed to the papers is a report to the managing director and is clearly not a verbatim minute of what occurred at the disciplinary enquiry. Consequently insofar as the respondent alleged that he was not given an opportunity to cross-examine witnesses I am of the view that the learned judge was correct in finding that the respondent's averment stood unchallenged by competent evidence since the managing director was not present at the hearing and his version is therefore hearsay. No member of the panel filed an affidavit to refute the allegation made by the respondent that he was not given the opportunity to cross-examine the witnesses and one can only assume that their evidence would not have supported

the appellant on this issue.

The only question which remains for decision, therefore, is whether the denial of the right to cross-examine fatally affects the proceedings at the disciplinary enquiry. The appellant's personnel regulations which appear to have been attached to the replying affidavit have an annexure which is referred to as "Disciplinary Procedure". In paragraph 3 of that Procedure it is laid down that the Corporation (i.e. the appellant) shall at all times observe the following before conducting a disciplinary hearing:

> *"3.1 .....*
>
> *(d) inform the employee of his right to call witnesses to the enquiry and cross-examine witness (es) who will give evidence against him."*

It is not without significance, in my view, that the letter of notification of the disciplinary hearing addressed to the respondent by the appellant on 28 July 1995 refers to the right of the respondent to bring any evidence he may have and to the fact that he was entitled to be represented by either a co-worker or shop steward of his choice. There is, however, no reference as is required by the disciplinary procedure to the respondent's right to cross-examine witnesses. That by itself

may well have been fatal to the case of the appellant since the omission clearly means that the respondent was not given proper notice.

In paragraph 3.2 of the Disciplinary Procedure the following appears:

> "*3.2 Disciplinary Enquiry*:
>
> *3.2.1 At the enquiry the employee is entitled to hear allegations brought against him, to cross-examine witnesses, to call witness (es) in his defence and to defend himself against the charge (s)".*

If, therefore, the respondent was not accorded an opportunity to cross-examine such witnesses who may have given evidence against him (which, for the reasons already set out above, must be assumed) in my opinion the respondent was not given a fair hearing. In **Marlin v. Durban Turf Club & Others** 1942 AD 112 it was held that in considering whether a body, which is in the nature of an arbitral tribunal and not an ordinary court of justice, has observed the fundamental principles of fairness at an enquiry due regard must be had to the nature of the tribunal or adjudicating body and the agreement, if any, which may exist between the persons affected. The Disciplinary Procedure is part of the personnel regulations, paragraph 4.1.1. whereof reads:

> *"Save as hereinafter specified, all employees (including*

> *those on probation) shall be subject to these regulations."*

It is clear therefore that the parties were both bound by these regulations and that the principle in **Marlin's** case (supra) applies. At page 127 of the said report Tindall JA who delivered the judgment of the Appellate Division said -

> *"The remarks of Maugham J in **Maclean v. Workers Union** (98) L.J.CH. 293 are interesting on this aspect of the argument for the appellant. In that case the tribunal was the result of rules adopted by persons who had formed a trade union, and the rights of the plaintiff against the defendant depended on the contract to be found in the rules, as do the rights of the appellant against the respondents in the present case. The learned judge remarked:*
>
> > *'It seems to be reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract, and that the material terms of the contract must be found in the rules.'*

It seems to me, therefore, that cases such as **Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture** 1980 (3) SA 476 (T) in which it is stated that a person who is entitled to the benefit of the ***audi alteram partem*** rule need not be afforded the right to cross-examine, are not applicable in the instant case. The appellant and the respondent were bound, by agreement, to observe the rules, and since the appellant must be assumed to have deprived the respondent of his right to cross-examine witnesses the appellant breached the rules. Consequently the

hearing was not a fair one.

The appeal is dismissed with costs.

J. BROWDE
JUDGE OF APPEAL

I agree

J.J. GAUNTLETT
JUDGE OF APPEAL

I agree

D.L.L. SHEARER

Delivered at Maseru on this 31st day of July, 1998.