CIV/APN/226/94

IN THE HIGH COURT OF LESOTHO

In the matter between

SIMON PHAMOTSE MOSEHLE **APPLICANT**

and

LESOTHO BANK **RESPONDENT**

REASONS FOR JUDGMENT

For the Applicant : Mr. N. Mphalane

For the Respondent : Miss N.G. Thabane

Delivered by the Honourable Mr. Justice T. Monapathi on the 20th day of June 2000

These written reasons follow my *ex-tempore* judgment of the 24th May 2000.

The facts in this proceedings were amply shown in the affidavits of the parties including the founding one attached to the notice of motion. It was in an application for review of the dismissal of the Applicant by a domestic disciplinary tribunal, in the form of a committee of his employer the Respondent Bank. The panel consisted of the following: Mrs Thakalekoala (Personnel Manager) Mr. S. Sehlabaka (Internal Auditor) Mr. M. Tšoaeli (Property Manager) Mrs M. 'Mefane (Assistant Personnel Manager) Miss L. Motjope (Advance Manager). No attack was

made nor was there any point taken against the composition of this Committee.

The charge which the Applicant had faced before the said disciplinary committee concerned a disappearance of keys to the Forex Section of the bank. The Applicant had allegedly known about the disappearance of the keys and had neglected to inform the employer about the person who he knew to have had possession of the keys. This Court's error was later corrected to say that the amount of One Thousand and Two Hundred Maloti (M1,200.00) concerned damages for repair and replacement of the key and did not concern a disappearance of cheque (in that amount) as had been the Court's error.

The circumstances of the misconduct were explained before the Committee in the presence of the Applicant who was being asked to explain. This followed a charge which was communicated to the Applicant and which was dated the 3rd November 1993. It was followed by a letter dated the 4th November 1993 which appointed the hearing of the disciplinary matter on the 11th November 1993.

Before the Committee as said before the circumstances were explained as suggested in the charge and in the questions which were put to the Applicant in which he was asked to explain. The tribunal concluded that the Applicant's explanation did not make sense having also decided that the Applicant appeared to be unreliable and untruthful. The last two pages of the eight paged proceedings recorded the reasons for the finding and the recommendations which included one for the Applicant's dismissal. Interestingly the Applicant had also stated that he had been to a diviner hence his discovery and knowledge that the keys had been with one Tayob. The unanswered question had been why the Applicant delayed to inform his superiors of the facts for close to three (3) months.

Originally the Applicant's sole explanation and the ground for revision of the proceedings was that he had not been allowed to cross examine a witness or witnesses. Later when it was shown that no witnesses were called and the nature of the inquiry, he retorted that he was not allowed to call witnesses. This was an additional ground which was not part of the founding papers. It had been indicated that there had not been anything in the nature of witnesses eliciting facts such as where one would then have had an opportunity to question a witness.

Applicant added that he was not even granted an opportunity to (himself) call a witness nor to testify on his own behalf or make a statement. This became his attack as his Counsel Mr. Mphalane argued. In addition Mr. Mphalane picked up a point that the tribunal acted as a judge and prosecutor in this matter (over the Applicant) at the same time contrary to what is known as *memo judex in sua causa* principle.

I have found that there would have been a lot to complain about the way these proceedings were conducted. This would be so if lawyers of administrative law would have had their way with their legion of attacks as found in the law books. I may illustrate what the Applicant could have done to have brought this into play. Firstly, he could have asked for an opportunity to get legal representation. Secondly, he could have asked for particulars to the charge. Thirdly, he could have asked for a list of witnesses. Fourthly, he could have asked for a list of documents. Fifthly, he could have taken that point obliquely raised as to who of the persons (of the Committee) present was a prosecutor. Sixthly, he could have asked who of those was a witness. This he could have asked before or after his explanation. Seventhly, he could have asked for the opportunity to put in his own statement. Eighthly, he could have asked to put in his own witnesses to testify and ninthly, he should have been allowed to comment on the evidence led. And finally, there

should have been reasons for the decision reached. Most of these are tests as to whether interests of natural justice has been followed, whether there was an opportunity for a fair hearing, whether there was a fair hearing and whether or not there was a miscarriage of justice. There is nothing mythical or axiomatic about them. Had the Applicant made a prior demand and or invoked and or adopted of those procedures that would have been a different thing. But then the question would have still been: "Did fairness require it?" See ADMINISTRATIVE LAW, Lawrence Baxter, 1st edition, pages 593 - 597, particularly at 597.

I was not prepared to accept that there was unfairness in the way the proceedings were conducted in the total circumstances. To take up one issue in isolation would be a technical approach which would work against the need to act simply but fairly. As it is said:

> "In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complaint: there is no such thing as a merely technical infringement of natural justice" - ADMINISTRATIVE LAW. H.W.R. Wade & C. F. Forsyth, 7th edition at page 519.

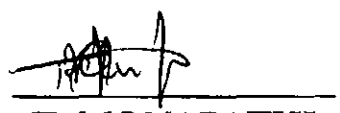
In the circumstances of the present case the Applicant was given a notice of hearing of about seven (7) days. And then in the notice and the charge the content of the complaint against him was stated so clearly and abundantly to have enabled him to explain. And furthermore where as herein most centrally the approach was that of asking the Applicant to explain and where the result was that he did explain and he having had notice of the procedure intended for seven (7) days before. Where there was no sign (nor was it alleged) that there had been bias nor bad faith nor prejudice towards the Applicant. Then I would conclude that there was utmost

possible fairness. This I do consider also that the nature of the charge had been put to the Applicant. I decide that this was done most fairly and openly. He was therefore given an opportunity to state his case.

As the tribunal had been acting in what appeared to be its normal way of inquiry into disciplinary conduct of the Respondent bank's employees, there was no reason to suggest that the procedures adopted by the tribunal ought to be inflexible or less simpler than what they were. There is normally no reason for a Court to insist on a judicial approach or an inflexible one unless in apparently most simple investigations. This is because the demands for fairness vary and what is called a strict adjudicative procedures and evidential requirements are not always called for. Once there has been a fair and unbiased hearing then there ought to be no complaint. See MONDI TIMBER PRODUCTS v TOPE (1997) 3 BLLR 263 (LAC).--

It appeared that the proceedings were conducted with all fairness despite that appearance of no distinction between a prosecutor as one had and a judge on the other. I said I would not insist on such a requirement to be always built into the rules of every procedure. This seemed to have been the way the tribunal was prescribed to work unless the opposite was suggested and it was not. There is certainly no need to import a strictly judicial approach into the scheme which appeared to have been always accepted as workable.

In the circumstances the application fails with costs.



T. MONAPATHI
JUDGE

Judgement noted by Mr. L. A. Molete

CRI/APN/84/2000

IN THE HIGH COURT OF LESOTHO

In the matter between

LEKHOOA NAMANE **APPLICANT**

and

HER WORSHIP PINDA - SETŠABI **1ST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS **2ND RESPONDENT**

For the Applicant : Mr. R. M. Masemene

For the Respondent : Mr. R. M. Rantsane

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 12th day of June 2000

The Accused had been convicted of assault with intent to do grievous bodily harm and was sentenced to three (3) years imprisonment with an option of a fine of Three Thousand Maloti (M3,000.00) by the magistrate of Maseru (First Respondent). This application for review was refused. The proceedings were

substantially in accordance with justice and fairness including the sentence which was not harsh in the circumstances. Nor did it require the Court's intervention for any reason whatsoever.

The fact of the Accused not being advised of his right to legal representation alone, which resulted in no prejudice to the Accused, cannot vitiate the proceedings where as in the instant case, the Accused understood the proceedings and particularly the charge which was a simple one and where he was offered an opportunity to defend, reply and state his case. Nothing was reviewable at all. That is why the application ought to fail- contra MAKHEBE RAMOKOENA v DPP CRI/APN/152/2000 of 3rd May 2000.

In the RAMOKOENA CASE what the Court was mainly concerned with was the requirement which is constant and unambiguous, namely: That a magistrate is required to cause proceedings to be interpreted from Sesotho language to English language and vice-versa. It did not appear that this had been done. Hence the absence in the record of those proceedings of any statement to the effect nor indication on the charge sheet that there had been an interpreter. I also referred in that case to R v TŠELISO MAFEKA 1991-1996(2) LLR 1119 in that regard.

I also felt in RAMOKOENA case, on the force of section 12(d) of the Constitution of Lesotho, that the provision could only be given force, strength and efficacy when a practice is entrenched whereby magistrates be obligated and enjoined to ask accused persons whether or not they have lawyers of their choice:

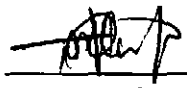
"That would lead to the issue of whether a subsidized representation (Legal Aid) would be sought if events led to that."

In that way the right of an accused to A fair trial would be clothed and given a

proper Constitutional effect and not a pious pronouncement.

It remains a useful attitude by the Crown, though not frequently adopted nowadays, to protest that matters raised in some of these complaints against convictions and sentences belong to appeals procedure and not review procedures strictly speaking. This appeared to be one of them.

One clearly sees in most of these criminal applications for review a manifest abuse of process of Court. It cannot be said that any minuscule non-compliance with principles of natural justice, unfairness, unreasonableness and errors of law or fact is a vehicle for these proliferating applications which conveniently avoid launching of regular appeals for the least of excuses.



T. MONAPATHI
JUDGE