CIV/APN/236/92

IN THE HIGH COURT OF LESOTHO

In the matter between:

EDWIN LIAU RABELE **APPLICANT**

and

STANDARD CHARTERED BANK AFRICA PLC **RESPONDENT**

JUDGMENT

To be delivered by the Honourable Mr. Justice G.N. Mofolo
on the 8th August, 1997.

On 4th June, 1997 after preliminary addresses by both counsel Mr. Sello for the applicant applied that as he was not quite ready the matter be further postponed. The reason for the postponement according to Mr. Sello was that it had been agreed between counsel who had appeared earlier that a settlement be attempted and he was expecting tentative settlement moves other than a hearing. The matter was accordingly postponed to 23 June, 1997 and it being understood that the bone of contention was whether the applicant was lawfully discharged from his duties.

The application was couched as follows:

(a) Declaring null and void the purported termination of Applicant's employment by the Respondent.

(b) Re-instating the Applicant to his post in Respondent's employ.

© Directing the Respondent to pay Applicant's salary from the date of the said purported termination.

(d) Granting the Applicant such further or alternative relief as to this Honourable Court may seem just.

(e) Directing the Respondent to pay costs of this application.

Ad Paragraph 3 of his Founding Affidavit the Applicant at sub-paragraph © says:

> On the 7th October, 1988, on my return from Butha-Buthe, I handed over to the said Phafane Phafane the sum of M40,000-00 which, after he had checked it out of my sight, he informed me it was in fact M36,000-00 and not M40,000-00.

In the opinion of this court all the applicant is saying is that a shortfall occurred in the transaction between him and Phafane.

According to a letter by the Manager dated 13 October, 1988 amongst other things the manager says

> 'After handing over the cash Mr. Rabele did not see to it that Mr. Phafane checks his cash immediately but instead turned away to attend to lock his cash canister. Thereafter Mr. Phafane enquired how much he had given him and when he said M40,000-00 Mr. Phafane refused and said the had given him M36,000-00.'

It appears explanatory letters were annexed to the manager's letter above. The manager's letter above in so far as the applicant not checking the cash handed to Phafane is substantially the same as contents of applicant's paragraph 3 © above.

Phafane's letter of 7th October, 1988 is no different from paragraph 3 of his founding affidavit. As for the manager's letter of 13th October, 1988, the letter was a report of what the manager had found in scrutinising documents and systems relating to the cash transaction that resulted in the cash shortage. Moreover, as the manager apparently suspected foul play, he had reported the matter to the C.I.D. police Leribe on 10th October, 1988 for appropriate action by them. Significantly, the manager by his letter referred to above claims that he reported the deficiency by telephone the same day to the Administration Manager.

Another letter was written to the applicant by the Manager one J.J.M. Khaebana on 24 November, 1988 with remarks such as 'paragraph two thereof).

> "It is not understood why you changed the entry from M40.000 to M36,000 so readily, and the explanation

given that you did not want to delay the vouchers hardly seems acceptable. You appear readily to have accepted the shortage of M4,000.'

Also paragraph three:

'The specification of cash transferred was not indicated on the voucher as is required. Was this an exception or have you ceased following this requirement?'

Paragraph four:

'You stated you nearly overpaid TEBA with M4,000 and realised this mistake and took the amount back into your cash. It is difficult to see how this is significant in relation to the M4,000 shortage, and if the payment had indeed been short, TEBA would have been underpaid by M4,000 and a cash surplus of M4,000 would have declared.'

And then again on paragraph two p.2 of Annexure "B"

'We find it difficult to accept your statement why you did not insist upon a search of Phafane's cubicle. We would have thought that in the circumstances you would have insisted upon this. Please comment.'

Paragraph five thereof:

'Regarding your report to the Police of 10th October, 1988 you now state you informed the Manager of the loss of M4,000. A contradiction from your statement of 10th October, 1988. Did you proceed to Butha-Buthe Agency alone or did a clerk accompany you and carry out a joint search?'

The last paragraph but one:

> 'The Standing Instructions Volume II, Cash II.1 clearly state that where losses occur both tellers are equally to blame.'

By his letter of 25th November, 1988 and Annexure "C" applicant answered as follows though he did not seem to be answering paragraph by paragraph:

His first paragraph:

> 'In as far as I have been a Teller in this Branch and Agencies, we normally bundle-check the transfers of Treasury cash and thereafter undergo a detailed check.'

> On return from annual leave, I was told there was no more detailed check, only a dip count of each Teller's Treasury cash after passing entries by another Teller.

On page 2 he says:

> 'It has never occurred to me that the Teller's cash to Treasury should be specified until after this case when I found it in the revised Digest.'

In the letter he also denies that he spoke of underpaying TEBA with M4,000-00 for it was M6,000-00. His reply to why he did not insist on searching Phafane's cubicle he says at page 3;

> 'After showing my wish to have checked Mr. Phafane, according to my report of 10-10-88. I did not know how and in what way should I know how and in what way should I show my insistence to his cash being checked. And at the same time not providing the warning and

the Chief Manager had summarily dismissed the applicant because

> 'The Bank has determined that your involvement in the cash deficiency constitutes a breach of clause 9 inter alia of the Employment Contact which you signed on the 2nd August, 1982.'

Further

> 'In the opinion of the Bank, your involvement in this affair constitutes a dereliction of duty and a misdemeanour of a very serious nature.'

In his letter of dismissal the Chief Manager had amongst other things referred to clause 9 of the Contract of Employment authorising the Chief Manager to act as he did. Now, clause 9 of the Articles of Agreement entered into by the Respondent and applicant reads as follows:

> 'This Agreement may be terminated by either party at the expiration of one month's notice in writing, such notice when given by the employee to be addressed to the General Management and to be submitted through the Manager or other person under whose control the employee may at the time be placed and such notice shall run from the date on which it is received by such Manager or other person aforesaid.'
>
> 'The Bank may further cancel this Agreement forthwith without giving any reason therefore on payment to the employee of one month's salary in lieu of notice.'
>
> 'This Agreement shall further be subject to immediate cancellation by the Bank without notice or payment of salary in lieu thereof in the event of the breach of any

cautionary letters I had just received.'

And then at pp. 3 - 4 the applicant says:

> 'I am sorry to have put this one matter obscurely in my report; during that time of dispute the Manager had been going up and down in the strong-room not saying a thing. He ultimately came to sit behind our cubicles. Is then that after a long time I told him what was happening. He took no action and I telephoned the Accountant at Maputsoe. But it's true I was hesitant to tell him (I have underlined).'

The applicant says he went to Butha-Buthe to conduct a search and returning he found Phafane standing at the gate entrance to the agency and he had told him his search was fruitless. According to the applicant Phafane had then said they were to cross check each other 'and escort each others cash to the strong room' as, according to the applicant, 'this would have involved the search of his cubicle which, in my opinion, he did not want to give me access to before perpetrating his mission.'

The applicant concludes his report by saying at page 5:

> 'On the other hand I was there listening to him how the agency is now run because I have worked there before locking away cash with the manager. In this case he was the Teller and custodian.'

By his letter of 14th March, 1989 the General Manager had suspended the applicant on full pay and asked him to report daily at [illegible] a.m. to his Branch until further notice. On 19th October, 1989 a year after the discovery of cash deficiency

> provision or condition hereof by the employee or in the event of such conduct of the employee as in the opinion of the Bank amounts to dereliction of duty or misdeneavour, whether in the course of his duty or otherwise.'

Against this background Mr. Sello for the applicant while he has rightly conceded, in my opinion that he cannot claim re-instatement, he has nevertheless submitted that the applicant had a 'legitimate expectation' to remain employed and that in any event he was entitled to a fair hearing before being dismissed. Mr. Sello has also said that clause 9 is not to be read in isolation but together with other clauses like 1, 2, 3, 4 and 5 which impose an obligation on the employer. Mr. Sello has said there has to be an investigation and a fair hearing amounting to an opportunity to be heard if an employee is going to be dismissed. Mr. Sello has gone further to say the fact that applicant was given a criminal charge was because the management was leaving everything to the result of the criminal charge so that if the applicant was found guilty on this basis he could be dismissed and not if he was found not guilty. Mr. Sello also says the Respondent abdicated his responsibility by passing the buck in instituting criminal proceedings against applicant and dismissing him before the result of the criminal hearing was known.

Mr. Sello has also said banking is a career and such that an employee cannot be dismissed at the employer's whim.

Concerning the manager's report of the case to the police, this reporting was one aspect of the case in that foul play was suspected. This was, in the view of this court, a separate and distinct action from that which the management took to dismiss

the applicant and it cannot be said that in reporting the offence to the police management was abdicating its responsibility.

As for the M4,000 referred to by the manager Mr. Khaebana in his letter of 24th October, 1988 paragraph 4 thereof, although the applicant has said it was M6,000 and not M4,000, the difference is in figures only and the transaction is or would have been the same and this court wonders whether this declaration by the applicant was an admission of shortage or affluxion of coincidence.

The applicant asked to comment on why he did not insist on searching Phafane's cubicle, by his letter of 25th November, 1988 referred to above, the applicant says 'I did not know how and in what way should I show my insistence to his cash being checked.' This explanation is baffling because if indeed Phafane was short it was up to the applicant to confront Phafane there and then and demand a physical check; and to this natural step in the circumstances the applicant is saying he does not know how he could have insisted that Phafane's cubicle be checked.

Noticeably, according to the Standing Instructions, where losses occur both tellers are equally to blame and it cannot be said, as was submitted on behalf of the applicant, that the management was at a loss as to who between the two tellers was guilty.

According to the applicant on his return from annual leave he had been informed no detailed check was necessary or words to that effect. It is unfortunate, in the view of this court a Teller is bound by his accounting procedures until these

have been amended or abolished. Up to the time of the shortfall Respondent's accounting procedures had not been changed or done away with. Applicant's assertion that it had never occurred to him that the Teller's cash to Treasury was to be specified and he had learned this after the case from the revised Digest shows applicant's lack of commitment to his duties and lends credibility to applicant's intention not to follow the rules and to hide, for his faults, behind his ignorance.

In his letter above, applicant also says he was hesitant to tell the manager what was happening and did so after a long time. In this court's view a man who hesitates to report an incident in circumstances in which he should have shows his doubts about the veracity of the report or its implications. It is not usual for an innocent man not to report an incident immediately.

In his letter applicant also says he was listening to Phafane how the agency was run and so on and so forth. This is hardly convincing; applicant is expected to draw his information from Respondent's accounting regulations and procedures and not from individual Tellers of the Respondent.

As far as Mr. Sello's submissions are concerned, the contract between the applicant and respondent makes no provision for a hearing as Mr. Lubbe has rightly contended. Indeed there is no hearing in the conventional sense though this court is of the view that common sense and equity dictate that there be such a hearing before an employee is dismissed.

In this case though, considering considerable correspondence between the

manager Mr. Khaebana and the applicant and this, taken in conjunction with respondent's contract with the applicant, it cannot be said that the applicant was not heard for the correspondence constitutes such a hearing. As for the criminal charge, this court distinguishes between criminals trials and civil proceedings in other fora or quasi-judicials tribunals to the extend that as Blackstone (Commentary 111.2 says:

> 'Wrongs are divided into two sorts or species, public wrongs and private wrongs. The latter are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals and are frequently termed civil injuries; the former are a breach and violation of public rights and duties which affect the whole community ____; and are distinguished by the harsher appellation of crimes and misdemeanours.'

The distinction is not so clear cut though it can also be said that it lies in the fact that whereas a criminal sanction may deny one of one's freedom and liberty in that it is punitive, civil sanction has to do more with proprietary rights and that the fora or tribunals for the decision of these claims are different the result of the one having no direct influence on the other. An employer like the respondent acting in accordance with principles as enunciated in a contract of employment cannot have his action to dismiss an employee subject matter of or dependent on the outcome of a criminal proceeding.

The respondent acted rightly by not waiting for the result of the criminal proceeding before dismissing the applicant because the criminal result belonged to a different forum which could in no way influence the respondent in his decision.

Regarding the doctrine of legitimate expectation, Mr. Lubbe has quoted a number of cases including LAMPRECHT AND ANOTHER v. MINEILLIE, 1994 (3) S.A. 665 (A) as authority for the proposition that 'no factual basis is set out by the applicant for the application of the doctrine'. Lamprecht case, in effect, save showing that the doctrine 'can be applied in a contractual context' and that 'an opposite view was expressed' (P.671 C) the case did not establish basic principles of the doctrine though it did say

> 'There is an indication that the doctrine, as it applies to the relationship between a public authority and an individual, applies to that between 'certain domestic tribunals and the individual' (671 D).

There is therefore authority that the principle of legitimate expectation applies to 'certain domestic tribunals' and individuals.

In EMBLING v. HENYMASTER ST. ANDREWS COLLEGE (Grahamstown) 1991 (4) S.A. 458 (E) Cooper, J. said at p.468 E - F.

> 'In the present instance the agreement made provision for the termination of contract and in' accordance with Monckton v. British South Africa Co. (1920 A.D. 324 at 330) and Nchabeleng v. Director of Education (Transvaal) and Another (1954 (1) S.A. 432 (T) at 440 F - G) ___ There is no room for the operation of the audi alteram partem rule.' (I have underlined).

Although I have answered queries whether the applicant was given a hearing, I wish, in addition, to associate myself with the underlined finding in the case above noted.

A distinction is made between Embling's case and Lunt's case (Lunt v. University of Cape Town and Another, 1989 (2) S.A. 438 ©) for Lunt was a post graduate student following a four-year course in forensic pathology at the time the university refused to re-register him. Because his previous academic record was considered adequate for admission to the post-graduate course and had completed 2½ years of the four year commitment when the decision was taken not to re-register him, the court held that the applicant had a legitimate expectation that he would have the opportunity of being heard should the university contemplate refusal of registration.

This court draws attention to the fact that the doctrine (if one can call it that) of legitimate expectation appears to have been developed by English jurisprudence and courts there have applied it extensively as mainly extending to the area of audi alteram partem. It appears to be making an intrusion in the South African judicial system and popping up now and then in our courts.

In Embling's case above it was no less than Cooper, J. who said at p.468 - 3:

> 'It is difficult to appreciate how the applicant's substantial period of service can objectively justify his expectation of a hearing in view of the plain wording of clause 7 (a) of the agreement.

Indeed one wonders how it can be said applicant's period of service justifies the assertion as deposed to by the applicant in his paragraph 8 of the Founding Affidavit that

> '___ and considering the fact that my contract provided for a pension scheme which created a legitimate expectation in my mind that my employment would not be terminated except as a result of proven-wrong-doing.'

Applicant's reference to legitimate expectation is not at all reconcilable with clause 9 paragraph three thereof of the Articles of Agreement entered into between himself and the respondent and this court is of the view that in this particular case the principle was not properly taken as it has no application.

Accordingly, this court has no choice but to dismiss this application and it is so dismissed with costs to the respondent.

G.N. MOFOLO
JUDGE
6th August, 1997.

For the Applicant: Mr. Sello
For the Respondent. Mr. Lubbe