IN THE LABOUR COURT

CASE NO.LC/20.94

HELD AT MASERU

IN THE MATTER OF:

NTHABISENG MOSHABESHA	APPLICANT
AND	
LESOTHO BANK	RESPONDENT

JUDGMENT

The applicant is an employee of the respondent. Until November 1993 she was working in the property division as Assistant Property Manager. This post was at a sub-accountant level. In 1990, the applicant took some tools of the respondent without authority to use at her residence. These tools were never returned until the applicant was asked about their whereabouts in July 1993. Even after this enquiry the goods were still not returned until the applicant was disciplinarily charged in September 1993.

The applicant's version is that, her house was broken into and that the tools were stolen in the process. These tools are said to be a wheel barrow, and a spade. She goes further to say that after she was reminded about the items, she promised

to replace them. However before she could replace them she was notified of a disciplinary charge arising out of the unauthorised borrowing of the tools and her failure to return them after she was reminded about them. The hearing commenced on the 21st October 1993.

When the proceedings started, the applicant was accompanied by her legal representative Mr. Matabane. The Chairlady of the enquiry asked the legal representative not to be present and he obliged. After being read the charge, the applicant objected to the presence of the Property Manager in the panel on the ground that he was the complainant in the matter. There is no dispute that the proceedings against the applicant were instituted as a sequel to the letter written by the Property Manager enquiring about the missing tools. The applicant's objection was overruled on the basis that, the Property Manager was not the complainant, but that the bank was the complainant and that the Property Manager was in the panel as an officer representing the bank. The enquiry proceeded and at the end it adjourned without informing the applicant of the recommendation it was going to make to the senior management. However on the 16th November, the applicant was written a letter in which she was informed that "..... the management of the bank has demoted you to the position of sub-accountant with effect from the date of this letter..."

The applicant wrote a letter of appeal to the Board of Directors of the Bank. This letter was, however, addressed to the General Manager. The applicant explains her bypassing the General Manager as borne out of the fact that she was informed by the disciplinary committee that the General Manager would be part of the decision making body and she could not therefore appeal to him. Her main ground of appeal was the

presence of Mr. Tsoaeli, the Property Manager, in the panel. The General Manager, however, reviewed the case and thereafter made the following decision:

"(a) your demotion from position of sub-accountant to that of pro-sub-accountant be reversed."

"(b) A salary reduction from M3,595 to M3,217.00 be effected."

"(c) The foregoing will be effective from 1st February 1994."

It is common cause that when she was initially demoted, the applicant's salary was reduced from M3,595 to M2,951.00.

In this proceedings the applicant seeks nullification of the disciplinary proceedings and a declaration that her reduction in rank and salary are null and void. Mr. Pheko for the applicant premised his contention that the disciplinary proceedings be declared a nullity on three grounds. Firstly he contended that the applicant was denied representation by a lawyer while the bank had the advantage of being represented by its legal officer, Mrs. Mohapeloa. He submitted further that the proceedings were quasi-judicial and as such the applicant had a right to be legally represented. Mr. Makeka for the respondent argued on the other hand that the disciplinary enquiry is a purely internal matter in which outsiders are not permitted to participate. He contended that legal representation in a disciplinary hearing is not a right. He pointed out further that to succeed the applicant would have to show either by way of constitution of the bank or personnel rules that she is entitled to such a representation. He also pointed out that Mrs. Mohapeloa was not the bank's legal representative in the proceedings, but the secretary of the enquiry. This contention is supported by the record of

the enquiry.

We agree with Mr. Makeka that unless the rules of the organisation or the Act establishing it entitle an employee to legal representation, in disciplinary proceedings, such representation is not a right. Authorities which we shall review hereunder will show that whilst an employee must be free to obtain assistance in the conduct of his defence, such assistance need not be of a lawyer. We are satisfied that Mrs. Mohapeloa participated in the enquiry as a scriber hence it cannot be argued that the bank had legal representation while the applicant did not.

It is common cause that the respondent did not debar the applicant from seeking representation by a co-worker even if it could be one of the lawyers in the employ of the bank. In the case of the National Union of Mineworkers & Another .v. Kloof Gold Mining Co. Ltd. (1986) 7 ILJ375 at page 383 it was held that an employee's entitlement to a representative, but not a legal representative such as an advocate or an attorney to assist him at a disciplinary enquiry is an elementary requirement of justice. In Dlali and Others .v. Railit (Pty) Ltd (1989) 10 ILJ353 it was held that whilst an employee is entitled to some form of representation to assist him or her in the preparation of his/her case, the kind of representation permitted is not at large and does not include for example legal representation. The court went further to say that the kind of representation permitted falls within the discretion of the employer. This decision was followed by this court in the case of Ntaole Pae .v. Maluti Mountain Brewery Case No.LC/ 13/95.

In NUM .v. Kloof Gold Mining Co. Ltd supra at page 381 the court held that a disciplinary committee neither sits as a judicial nor quasi-judicial body. Its proceedings must therefore be viewed differently from those of the formal court of law. In Van Lill .v. Basil Read Holdings (1993) 4 (10) SALLR (unreported) the court held that it is seldom that legal representation is allowed at disciplinary hearings since such representation is generally in conflict with the employer's disciplinary code. Where the employer's code does not permit an employee legal representation at a disciplinary hearing the refusal of such employee permission to be legally represented will not invalidate the proceedings.

In our view the bottom line is stated in Dlali's case supra and that is that the type of representation permitted the employee at the disciplinary hearing is at the discretion of the employer. As Cameroon puts it in his article "Right To A Hearing Before Dismissal - Part 1 (1986) 7 ILJ 183 at 203."

"it is not a requirement that the employee should be represented or assisted at every pre-dismissal hearing: Only that he or she should be fully able to exercise the right to call an assistant or representative in aid...."

The representative need not be a trade union official or a legal representative. If the employer's code permits representation by a co-worker of the employee's choice it satisfies the requirement that the employee should if he so wishes be able to obtain assistance in the conduct of his defence. The respondent was therefore entitled to refuse applicant permission to be represented by a legal representative whilst permitting her to be represented by a co-worker. The disciplinary committee was after all not sitting as a judicial or quasi-judicial body as Mr. Pheko

argued.

Mr. Pheko further contended that the disciplinary proceedings were flawed in that the committee interviewed witnesses in the absence of the applicant. The respondent conceited this point in the letter written by the General Manager to the applicant's legal representative in the following terms;

> "yes your client was not given the opportunity to hear the evidence of alleged interviewees against her and to put questions if any to them. This was so because your client admitted liability and there was no point in bringing the interviewees to the hearing to give your client an opportunity to ask them questions."

The above letter was written on the 11th October 1994. On the 11th November 1994, Mrs. Mohapeloa who was the secretary of the disciplinary committee wrote a letter to the applicant in which she, inter alia, stated:

> "on the question of cross examining witnesses, you were informed that there were no witnesses, but there were people who were interviewed whilst the committee was carrying out its investigations on the matter, as it is legally entitled to do so without your involvement. However, you were afforded an opportunity to read a summary of what they had said during the interview, and you were again afforded an opportunity to ask them questions if you so desired. You indicated that you were satisfied after reading the summary."

Two important things need to be noted namely; that the applicant admitted guilt and that when she subsequently objected to witnesses being interviewed in her absence she was given a

summary of their evidence to read and to cross question the witnesses on what they had said if she so wished. It has repeatedly been said that a disciplinary enquiry is not a court of law. It must therefore be allowed the liberty to try cases without following the strict legal rules. It was held in the NUM .v. Kloof Gold Mining Co. Ltd Case supra at page 385 that there is more than one solution to the problem of fact finding. While some systems investigate facts following adversarial principles and a restricted system of evidence others use inquisitorial principles and a free system of evidence. However, whatever system the trier of facts follows, he should handle the dispute in such a way that justice is not only done, but is even seen to be done.

In the present case, the applicant was allowed to cross-examine the witnesses on the testimony they had given, she did not avail herself of that opportunity. It seems to us that she expressed satisfaction with the summary of the evidence, because there was nothing in it which wrongly implicated her. The record confirmed her own admission that she had taken the tools without authority and failed to return them despite demand. For the applicant to succeed in this argument she would have to show that the procedure adopted by the committee resulted in the failure of justice. Not only has the applicant not done this, but the court is satisfied that there has not been any failure of justice. The committee adopted a fair and honest procedure in that, they allowed the applicant to see for herself what the witnesses had said when she raised an objection. This was not quite necessary in the light of the applicant's admission of guilt; because strictly speaking, since the applicant had already admitted guilt, the primary purpose of holding the enquiry should have been to decide on the appropriate penalty and to give the respondent the opportunity to make representations in that regard. (see

Foodpiper cc t/a Kentucky Fried Chicken .v. Shezi (1993) 14 ILJ 126 at page 134, per McCall J.). In the premises we hold that the fact that the applicant did not hear the witnesses does not in the circumstances of this case invalidate the enquiry.

Mr. Pheko raised two further arguments that the applicant was not given the opportunity to plead in mitigation of sentence and that Tsoaeli who was the complainant was a member of the panel. With regard to the first contention, it is a well established pre-dismissal principle that an accused employee should be afforded the opportunity to address the chairman of the enquiry on the appropriate penalty prior to deciding to dismiss an employee (see Edith Mda .v. National University of Lesotho LC/14/94 unreported). The important point is that this requirement has been developed and applied in cases where decisions prejudicial to applicant's legitimate expectations are taken, hence it has also been held that where a decision is taken to suspend the employee he or she must first be afforded the opportunity to be heard on that question of suspension (see Thato Liphoto .v. Lesotho Agricultural Development Bank LC/21/95 and Palesa Peko .v. National University of Lesotho LC/33/95. In the case of Muller and Others .v. Chairman of Ministers' Council, House of Representatives & Others (1991) 12 ILJ761 it was held that;

> "when the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property existing rights or legitimate expectations, he has the right to be heard before that decision is taken unless the statute expressly or impliedly indicates the contrary...."

It is common cause that the applicant in the instant matter

was demoted and reduced in salary after the disciplinary enquiry. Mr. Makeka pointed out that in terms of the applicant's contract of employment the punishment that was imposed was the least that could be imposed in respect of the misconduct she was found guilty of. In her evidence the applicant said the penalty was still heavy. According to her she should have just been asked to replace the missing tools. It is not for this court to say what the appropriate penalty to have imposed in the circumstances of this case was. What is important is that a decision prejudicial to the applicant's existing rights and legitimate expectation was taken against her, without first hearing her on the question of the suitability of that sentence. Her submissions in mitigation of sentence may not have changed the sentence that would finally be imposed but, the point is that she must have been afforded the chance on whether a reduction in salary and rank was appropriate (see Liphoto's case supra at page 8).

With regard to Mr. Tsoaeli, Mr. Makeka argued that, it was wrong for the panel to have said Mr. Tsoaeli was its member, because he was present in the enquiry as the complainant. He further said that Mr. Tsoaeli never said anything during the proceedings which could have prejudiced applicant's case. The report of the enquiry gives the capacities of all the people who were members of the Panel. It shows that there was a chairman, a secretary and two members. Mr. Tsoaeli was one of the two members. The record therefore shows clearly that he was one of the panellists.

It also shows that when the applicant objected to his presence, she was not only overruled but it was said further that Tsoaeli was rightly a member of the panel. It is trite law that a man cannot be a judge in his own cause. Mr. Tsoaeli should not as the complainant have been a member of

the panel.

The issue to determine is what effect if any did the above procedural irregularities have on the proceedings. It is common cause that the applicant launched an appeal to the General Manager who after hearing her reversed her demotion and imposed a lesser salary reduction than had previously been the case. The applicant's major grounds of appeal had been the presence of Mr. Tsoaeli in the panel and that Mr. Tsoaeli had himself previously used the bank property which was destroyed in his possession and yet he was not given a penalty as harsh as that of the applicant.

It is not the intention of the court to get bogged down in the personality clashes that are apparent between the applicant and the Property Manager, Mr. Tsoaeli. What we want to underscore is that, because of this personality clash the applicant genuinely felt she had not been given a fair trial, more so because Mr. Tsoaeli had been the complainant in the matter. The issue is whether the appeal to the General Manager cured the defects that were inherent in the initial hearing. In Adam & Others .v. Protea Industrial Chemicals (1994) 5 (4) SALLR 23, it was held that the rule that defects in a hearing cannot be cured by a proper appeal is not of universal application. The test is whether the taint of the initial enquiry was carried forward to the appeal. This test was used by this court in the case of Seboloki Leleka .v. Lesotho Highlands Project Contractors Case No.LC/5/95 (unreported).

We are satisfied that in noting the appeal, the applicant raised the material issues, which were a subject of irregularity in the initial hearing. We are also satisfied that, in his letter to the applicant, the General Manager

confirms that he further heard the applicant on her grounds of appeal. Thus the possibility of the recommendation for a more severe punishment because of the involvement of Mr. Tsoaeli in the initial hearing was corrected. Also corrected was the imposition of a penalty of reduction both in rank and salary without affording the applicant the opportunity to be heard on the issue. It is common cause that after hearing applicant's appeal the General Manager reversed the initial penalty and imposed a lesser one.

An attempt was made, albeit half heartedly to say that the General Manager could not consider the applicant's appeal because he had already made the decision against which the applicant was appealing after receiving recommendations of the committee. It is significant that the General Manager was not a member of the disciplinary committee. He merely received recommendations from them. We have repeatedly stated that in employment situations, it is almost impossible to find a chairman either of initial hearing or appeal who is wholly unaware of the accused employee, his past history, or who may not be suspected of bias. What is important is that such chairman keeps an open mind. It is our view that the General Manager's previous level of involvement did not disqualify him from presiding on the appeal. If he was part of the panel that would be a different matter. The fact that he reheard the applicant and even imposed a lesser penalty is proof that he maintained an open mind capable of being persuaded differently from the original enquiry.

Mr. Pheko further contended that the proceedings were flawed because the applicant was not made aware of the recommendations of the committee. She thus did not know what to appeal against. There is nothing in the rules that was brought to the attention of the court that says that the

committee should make an accused employee aware of the recommendations that it is going to make. In our view it is significant that the employee is afforded an opportunity to appeal. It is not material that she did not know of the committee's recommendation unless the rules of the bank or the collective agreement between the bank and its employees so required.

Mr. Pheko contended further that there was an irregularity in that in imposing the penalty that it imposed, the management imposed two penalties and yet the contract of service says either one of the two penalties may be imposed but not both. (see top of page 8, sub-rule (ii) of applicant's contract of service). This rule provides that:

> "The bank, in its sole discretion, may caution or reprimand an employee guilty of misconduct, or impose any one or more of the following penalties:
>
> (i) suspension from duties;
>
> (ii) reduction of salary, or demotion;
>
> (iii) stoppage of salary;
>
> (iv) dismissal or be called upon to resign from a specified date, failing which be dismissed."

It is common cause that the applicant was reduced both in rank and salary. This situation continued until it was reversed by the General Manager after hearing the applicant's appeal. Clearly the wording of this sub-rule, is that one or more of the penalties listed in (i) - (iv) may be imposed on a defaulting employee. But as to sub-rule (ii), the comma and word "or" between the "salary" and "demotion" are a disjunction which means that the two penalties must be imposed disjunctively. We do not agree with Mr. Makeka that the use of the comma and "or" between the words "salary" and "demotion" means that both can be imposed at the sametime.

There is no authority for this proposition. Accordingly, therefore, the penalty that was imposed on the applicant as of 16th November 1993 was irregular in that it went contrary to the agreed terms of employment of the applicant. The court is, however, satisfied that, the General Manager's letter of February which reversed the applicant's demotion corrected that irregularity but only from the date that his letter had effect, which was 1st February 1994.

AWARD

In the premises the court makes the following award:

(a) The disciplinary proceedings against applicant were regular and conducted fairly.

(b) The penalty imposed by the General Manager as of 1st February 1994 is confirmed.

(c) The applicant's reduction in rank and salary simultaneously as of 16th November 1993 until January 1994 is declared null and void and of no force and effect.

(d) It was submitted by Mr. Makeka, which submission was not denied that in November 1993, applicant's salary was reduced by M321.00 and in December and January it was reduced by M664.00 each month, making a total of M1,649.00 of irregular deductions from the applicant's salary. The respondent is ordered to repay to the applicant the foregoing amount as it was deducted during the period of demotion and reduction in salary that has been declared null and void by this court.

(e) There is no order as to costs.

THUS DONE AT MASERU THIS 23RD DAY OF AUGUST 1995.

L. A. LETHOBANE

PRESIDENT

A. T. KOLOBE I CONCUR

MEMBER

M. KANE I CONCUR

MEMBER