IN THE LABOUR COURT OF LESOTHO

CASE NO. LC/25/95

HELD AT MASERU

IN THE MATTER OF:

TOKOLOHO NKHAHLE **APPLICANT**

AND

SACES LESOTHO **RESPONDENT**

JUDGMENT

Applicant herein went missing from his employment from the 6th February, 1994 until the 21st February when he resurfaced armed with a letter from his attorney which reads as follows:

> ***"The Manager*** ***Saces***
> ***Katse Dam***
>
> ***Sir,***
> ***<u>RE: JEFFREY NKHAHLE</u>***
> ***We write to indicate that from our observation of the law, this employee is still on the service of your company.***
>
> ***Kindly treat him as such and engage him in his daily duties.***
>
> ***As far as we can assess the dues continue to accrue and shall accordingly have to***

be paid to him.

Yours faithfully

T. HLAOLI & CO.,"

No attempt was made to explain where the applicant had been all along. However, on the same day, the respondent received a note from the Thaba-Tseka police confirming that the *".... tool box of Saces was found from accused Nkhahle and it is still in our (the police) custody and we kept it as exhibit."*

On the 22nd February, the respondent wrote to the applicant notifying him of disciplinary charges against him, arising out of his;

(a) being in possession of company property without permission,

(b) removal of company property from the company premises without ermission,

(c) absence from work from 6th February to 21st February, 1994 without permission.

The letter further notified the applicant that he was suspended with immediate effect until the date of the hearing.

On the 25th February, applicant's attorney wrote yet another letter in which he reaffirmed the position of the applicant vis-a-vis his employment with the respondent as contained in the letter of the 18th February. He further advised the respondents that they were attorneys of record for the applicant and that they will be representing him at the enquiry, therefore all correspondence intended for the applicant should be send to his offices. On the 3rd May, the respondent wrote to the applicant using the address of his attorneys of record advising him that the hearing of his case would be on the 16th May, 1994 at 1400 hours.

The applicant did not attend. On the 17th yet another letter was written by the respondents still using the attorney's address fixing the next date of hearing for the 30th

May, 1994. On the 25th May applicant's attorney wrote to say that the first letter fixing the date of hearing for the 16th May, 1994 reached him just three days before the date of hearing. He could not therefore, reach his client within that time. He went further to say that even the second letter rescheduling the hearing for the 30th had just been received and he could not contact his client within that time.

On the 31st May, the respondents wrote another letter, this time advising the applicant that they were closing their files on the matter and that they were going to employ a replacement. Thereafter further correspondence was entered into between the applicant's attorney and a Mr. Zanellati of the respondent, which we need not burden this judgment with, save to mention that finally Mr. Zanellati wrote a letter of compromise which in part read as follows:

> ***"As it appears evident that you might be facing problems in contacting your client, we would like to compromise and invite you to present your client at our offices upon giving us fourteen days' notice for the envisaged hearing much as we stand by our previous communications to you".*** **(Emphasis added).**

Following receipt of this letter Mr. Hlaoli wrote back to say that he and his client would be before the respondents disciplinary committee on 28th October, 1994. The respondents wrote back to say that the date was not suitable for them. Finally the two sides agreed on the 11th November, 1994 as the date on which the hearing would be conducted.

At the hearing, the respondents did no more than to refer the applicant to clauses of his contract of employment entitling them to terminate the applicant if he is found guilty of the offences with which he had been charged. In our view this clearly shows that the so-called hearing was infact a meeting at which the applicant was going to be informed that the decision to dismiss him complied with the terms of his contract of employment.

No charges were read to him and he was never required to answer any allegations. On the 21st November, Mr. Zanellati wrote another letter telling the applicant that following the *"hearing"* on the 11th November he was being dismissed.

There was a dispute about the date on which the applicant was dismissed. Mr. Sekake for the respondent said he was dismissed on 16th May, 1994 when he failed to show up at the first disciplinary hearing. Mr. Hlaoli on the other hand contended that the applicant's contract was terminated on the 21st November, when he was written a formal letter of termination. It was Mr. Hlaoli's further contention that the applicant's dismissal was unfounded as no wrongdoing was proved against him at the hearing.

We have already said that the so-called hearing was a fuss in as much as it did not serve the purpose of a hearing. No allegations were put to the applicant. He was only shown clauses that confirmed that he had rightly been dismissed, for having contravened them. As we see it, on the day of the so-called hearing, the applicant had already been dismissed. The issue is when was the applicant dismissed? Mr. Zanellati's letter of 31st May clearly conveyed the message that after the applicant's failure to attend disciplinary enquiry on two occasions, they had decided to terminate the applicant and to hire a replacement. When he invited Mr. Hlaoli to find a suitable date when he could present applicant before the respondents, Mr. Zanellati made a very important qualification namely; *".... we stand by our previous communications to you."* In the letter of the 21st November, Mr. Zanellati makes a further instructive statement in paragraph two of the letter when he says: *"we consider it imperative to now formally terminate your services, as we hereby do...."* (emphasis added). Our construction of these words is that, the applicant's contract had already been terminated, what the letter was doing was to formalize the termination.

What is clear is that the termination was done without affording the applicant an opportunity to be heard. If no hearing was held the question of the respondent failing to prove applicant guilty of wrongdoing does not arise. It seems to the court that the respondent did all it could in an attempt to inform the applicant about the date of the hearing. Mr. Hlaoli argued that an attorney's address is not the address of the client, therefore he should have been given more time to secure the applicant's attendance at the hearing. We are of the view that the two weeks notice of a hearing that the respondent gave to the applicant through his attorney was a reasonable and sufficient time to enable applicant's attorney to contact him and inform him of the date of the

hearing.

In his letter of the 24th May, 1994, applicant's attorney said that the letter setting the hearing for 16th May, reached him three days before the date of the hearing. In our view not enough effort was made by applicant's attorney to contact him. The three days at his disposal was not that short if he had made an effort. It is, however, significant that, the applicant himself chose his attorney's address as his contact address. They should therefore have arranged how to facilitate contact between themselves. When the letter of the 24th May was written the rescheduled hearing was still six days away, as it was to have been held on the 30th May, 1994. Applicant's attorney's failure to contact him within that time is further proof of their laxity with time. It would be unfair to hold the employer guilty of improper conduct if he terminates the employee without a hearing in circumstances like the present.

In terms of Article 10 of the Termination of Employment Recommendation No. 166 of 1982 of the International Labour Organisation:

> ***"the employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct."***

If the respondent had given in to the machinations of the applicant and his attorney, it might well have found itself prevented by the above article from taking any action against the applicant. It is important that the employer conducts disciplinary proceedings as promptly as it can be practicable. According to Edwin Cammeroon in his article, The Right To A Hearing Before Dismissal - Part 1 (1986) 2 ILJ 183 at page 200,

> ***"promptness .... is essential to ensure that the employee can present his case effectively since delay can lead to inadequate recall on the part of the employee or to the unavailability of his witnesses. Moreover undue delay between the occurance of the alleged misconduct and the employer's disciplinary response blurs the impact of corrective discipline. From the employer's point of view promptness is necessary for the additional reason that dispatch of a disciplinary matter allows***

his enterprise to move forward unhampered by the anxieties, animosities and uncertainties which pending action may produce."

An additional factor with regard to the present respondent is that it is a sub-contractor under the Highlands Water Venture, which is contracted to meet targets within prescribed time frames. (See Annexure *"L"* to respondent's answer). It could not be reasonably expected that the respondent should endure any further postponement of the hearing. We are of the view that this is a case of waiver of the right to a hearing prior to dismissal on the part of the applicant. The respondent having given him sufficient prior warnings of the date of hearing, which he did not honour, was entitled to terminate his contract of employment as it did on the 31st May, 1994. In the circumstances the application is dismissed.

THUS DONE AT MASERU THIS 30TH DAY OF AUGUST, 1995.

L. A. LETHOBANE

PRESIDENT

A. T. KOLOBE **I CONCUR**

MEMBER

M. KANE **I CONCUR**

MEMBER

FOR APPLICANT : **MR. HLAOLI**

FOR RESPONDENT: **MR. SEKAKE**