IN THE LABOUR COURT *CASE NO.LC/18/95*

HELD AT MASERU

IN THE MATTER OF:

MATHIBELA NTHATI	*APPLICANT*
AND	
LESOTHO HIGHLANDS PROJECT CONTRACTORS	*1ST RESPONDENT*
SPIE BATIGNOLLES (PTY) LTD	*2ND RESPONDENT*
BALFOUR BEATY (PTY) LTD	*3RD RESPONDENT*
CAMPENON BERHARD (PTY) LTD	*4TH RESPONDENT*
L.T.A. (PTY) LTD	*5TH RESPONDENT*
ED ZUBLIN A. G.	*6TH RESPONDENT*
C. A. VORSTER	*7TH RESPONDENT*

JUDGMENT

The applicant was employed by the 1st respondent at their training centre in Butha Buthe. Part of his duties was to collect duly requisitioned property from the stores for use at the centre. On the 22nd February 1994, he was seen by the security guard, by the name of Letele leaving the store carrying something under his arm. He was wearing a jacket. If the applicant was carrying items which had been lawfully issued, he ought to have been in possession of an invoice which he would present to the security guard at the entrance for endorsement. The applicant, however, bypassed the security guard and went straight to a waiting bakkie.

The security guard followed him to the van and saw him take out a box and put it at his feet. When he asked him about the box he said it had been given to him by one Teboho Shoai to hand it to one Moremi. One Masia was called to come and confirm the discovery of the box in the possession of the

applicant and he identified it as an article removed from the store as it bore a stores number.

A report of the incident was made to Mr. Morrison, the Store Manager who charged the applicant of the unlawful possession of company property. The hearing was chaired by Mr. Vorster of the Human Resources Department. At the hearing the applicant denied everything including his own statement which was taken from him by Sergeant Lefosa and Security Guard Letele on the day of the incident. He continued to allege that the box was given to him by Shoai outside the store building. However, Letele denied that there was ever such person in the vicinity of the store. Instead applicant had entered the store with one Mokete who remained inside when applicant came out. He stated that the applicant had removed the item from the store. The applicant sought to raise another defence to the effect that Letele was telling a lie about him because they once quarrelled over a girl friend.

Letele denied that he ever had such a quarrel with the applicant. He pleaded that he infact did not know the applicant. He was seeing him for the first time on the day they talked about the article that the applicant had unlawfully removed from the store. The respondents stated in their answer that applicant's allegation regarding differences with Letele over a girl friend is irrelevant. It seems to the court that this allegation is indeed irrelevant, because even if it were true that the two once quarrelled over a girl friend, the fact that applicant was found in possession of a box is admitted by the applicant himself. He merely denies that it came from the store and alleges instead that it was given to him by Shoai. When he was questioned by the court as to what lie he says Letele told about him, he said the lie was that he was carrying the box under his armpit, when the truth

was that the box was in the van. As a matter of fact Letele confirmed that when applicant got to the bakkie he took out the box and put it at his feet inside the van. However, from the store to the van applicant was carrying the box under his arm covered with his jacket. It is clear that it is the applicant himself who is telling a lie.

At the end of the hearing applicant was found guilty and dismissed. According to the record of proceedings, applicant's right to appeal was explained to him, after which he asked to plead in mitigation. The following is recorded as applicant's plea in mitigation.

> ***"It was not my intention to pinch the tube for myself, but to use it on Mr. Mokete's bakkie which would be of use to the department. The tube was there and I took it - devil got to me."*** **(See page 16 of record of proceedings).**

In short the applicant admitted the theft, but pleaded that he was influenced by the devil. This plea, however, did not change the chairman's attitude about the seriousness of the offence. He decided that the appropriate penalty is dismissal. Applicant then stated that he wished to appeal and he gave the following as his grounds of appeal:

> ***"To make a plea to senior management for re-engagement, because it was not my intention. It just happened. I really mean it when I say I am sorry. Need people to put an eye over me and I promise it won't happen again."*** **(See page 17 of record of proceedings).**

The appeal was considered on the basis of the record and it was dismissed. His dismissal took effect on the 24th February

1994.

Applicant lodged this case on the 1st February 1995 exactly a year after he was dismissed. He did not seek condonation of his late filing. However, at the hearing he was asked to explain his late filing of the case. He alleged that the case had been lodged with the Butha Buthe District Labour Office which had been making efforts to meet the respondents without success. It is significant to note that this is a bare allegation which is not supported by any evidence. It is therefore not acceptable. Mr. Vorster for the respondent however, asked the court to hear and dispose of the matter despite it being late. The court therefore proceeded to hear the matter as it clearly was in the interests of both parties that the merits of the case be dealt with.

The applicant challenges the fairness of his dismissal on the grounds of alleged procedural irregularities at the disciplinary hearing. There is only one ground of alleged substantive unfairness and that is that there was no evidence on which applicant could have been found guilty as charged, because Teboho Shoai who gave him the box was never called to testify. According to the evidence of Sgt. Moletsane at the disciplinary hearing, both Mr. Morrison and Moletsane made efforts to find Teboho Shoai without success. Sgt. Moletsane was actually told by the person who went to look for Teboho at the Ngoajane Workshop, where he was alleged to be working that there was no such person employed at Ngoajane. Moremi, who allegedly was to be given the box was a well known employee, but Teboho appeared to be a personality of applicant's own creation as nobody knew him. the irresistible conclusion to which this court arrives is that Teboho Shoai is an imaginary person as the applicant himself stated in his statements that he did not know him. There was no way in which the

respondents could secure the attendance of an imaginary and non-existent person. The evidence of Letele, Masia and others who corroborated Letele's story is therefore incontrovertible. There was therefore overwhelming evidence for finding applicant guilty of theft as charged.

The procedural improprieties which applicant complained prejudiced the fair conduct of his disciplinary hearing were the following:

(a) The chairman of the enquiry Mr. Vorster had no authority to chair the enquiry because applicant was not employed in his department. He had to be present at the hearing in his capacity as industrial relations officer.

(b) The chairman had no authority to dismiss applicant.

(c) The chairman was biased.

As it can be seen applicant's complaint mainly relates to the chairman of he enquiry. The first two grounds of complaint are interrelated.

Applicant contends that in terms of clause 6.11.3 of the Recognition Agreement between construction and Allied Workers' Union and the first respondent Mr. Vorster could not chair the enquiry because applicant is not employed in his department. Secondly, as an official of the industrial relations department he could only be present in the enquiry as an advisor not the chairman. He denied that one Mothea who the respondent alleged in their answer was the industrial relations officer at the hearing, was there in that capacity. He said Mothea was there as an interpreter. Mr. Vorster responded by saying that the applicant was infact employed in

his department, hence why he chaired the enquiry. Respondents went further to state that Mr. Mothea was the one who was participating in the enquiry as industrial relations officer. Respondents' answer that Mothea participated in the enquiry as industrial relations officer is confirmed by the record of proceedings, in that Mr. Mothea has signed the attendance list as industrial relations officer.

At the start of the disciplinary hearing applicant's legal representative objected to Mr. Vorster's chairmanship, not on the grounds now being relied upon by the applicant, but rather on the ground that as an officer of LHPC Mr. Vorster was judge in his own case. After explanation he agreed that the case should continue. For the applicant to now come with a new objection that he did not fall under Mr. Vorster's department, we are of the opinion that this is one of those creations of the applicant which he is capable of manufacturing with untold speed whenever he wants to get his way. He ought to have known when the disciplinary hearing was held that he did not fall under Mr. Vorster's department, but he surprisingly did not raise that objection at the time not withstanding that he had the benefit of being assisted by an attorney. As we see it the balance of probabilities favour Mr. Vorster's version that he is infact the Senior Line Manager responsible inter alia, for applicant's department and as such was empowered to chair the disciplinary hearing into applicant's misconduct.

We pointed out that the second objection is related to the first in that applicant challenges the chairman's right to dismiss him because he alleges that the did not fall under his department. However at the hearing of this matter applicant conceited that his section fell under Human Resources Department. He alleged firstly that if he was not satisfied he could appeal to Mr. Vorster as Senior Manager. He later

turned round and said Mr. Vorster is not a Human Resources Manager so he did not fall under him. We have already made a finding in this regard that applicant fell under Mr. Vorster's department. In terms of Clause 6.10.8 of the Recognition Agreement it is the duty of the chairman if he is satisfied that an offence has been proved to *"....decide upon the appropriate action after giving consideration to the circumstances of the employee, including service and previous record as documented on the employee's personal file."*

There is therefore no question as to Mr. Vorster's power to dismiss the applicant as the chairman of the disciplinary hearing.

The applicant further contended that the chairman was biased. He based his contention on two claims;

- **(a) that Mr. Vorster wrote at the bottom of Letele's statement on the alleged theft that *"the suspect was Sidwell Nthati",***
- **(b) that the chairman did not record correctly what he said in that at the bottom of the disciplinary from he said applicant was asking for pardon when he infact said he wanted to appeal.**

It is common cause that as Letele alleged in his evidence before the enquiry that he did not know the applicant, his statement did not mention applicant's name. He kept on referring to *"man"* or *"men"* in the statement. Having established the identity of the *"man"* being referred to in the statement Mr. Vorster noted at the bottom of Letele's statement that the man referred to is the applicant. No reasonable person can impute bias from this type of a note. It is simply a reminder as to who this anonymous man being

talked about in the statement is. In any event by the time Mr. Vorster made this note, applicant's identity was already common cause as he had already been identified by several colleagues of Letele and Mr. Morrison. The store manager had already met and questioned him on the removal of the box from the store. It cannot therefore be suggested that Mr. Vorster had gone to lengths, only permitted of an investigator to establish applicant's identity.

The second contention is that the chairman did not record correctly what the applicant said with regard to appeal. When one studies the record of proceedings of the enquiry into applicant's misconduct there is one glaring feature and that is the efficiency with which applicant can manufacture lies. When he was caught with the box redhanded he was able to come up with Shoai's story with ease. In the hearing he denied his own statement which he signed, as not his. Still at the hearing he quickly invented a story about a quarrel which he allegedly had with Letele over a girl friend. Even during this proceedings applicant jumped from one lie to another. What is clear, however, is that at the end of the hearing applicant accepted the verdict of guilt and pleaded in mitigation for forgiveness as he was influenced by the devil. When the chairman did not heed his plea in mitigation, he sought to appeal for reduction of the penalty. This is very clear from the record i.e. the notes taken by the chairman during the proceedings. It is not enough for applicant to challenge the disciplinary form because it infact confirms what is recorded in the minutes. Clearly applicant is a professional liar who has been blowing hot and cold since the inception of the events which gave rise to this proceedings. When it suits him he fabricates a story. When the story does not work he makes an admission and pleads for mercy. When the plea for mercy is not heeded he seeks to have the case

reopened by denying that he ever made such a plea. We are clearly dealing with the most untruthful person and it is very difficult for the court to accept his story under any circumstances.

Applicant's last contention was that Moremi and Shoai were never called to give evidence. In the first place there is evidence to the effect that efforts were made by all who cared, to find Shoai but to no avail. There is no indication that applicant himself ever made any effort as this was his witness. Secondly, if Moremi could corroborate applicant's version it was for applicant to have called him as his witness. In any event there is nowhere where applicant implied that Moremi knew anything about the box. Clearly it was Shoai who would be of assistance with regard to the origin of the box, but Shoai proved non-existent even for the applicant himself as he could not secure his attendance at the hearing. It would have been fruitless to call Moremi who has not been said at any stage that he ever knew that he was to receive a box from the non-existent Shoai. The application is dismissed.

This is an appropriate case for an award of costs against the unsuccessful party. Applicant has clearly brought a frivolous case founded on transparent lies to this court. He admitted the theft at the hearing, but later turned around before this court to claim that he never made an admission. He pleaded in mitigation for forgiveness but he stood before us to deny what is clear in the record that he never asked for forgiveness. Applicant has clearly all along been on a fishing expedition for a lie that could save him from the ultimate penalty. The court cannot accept this type of behaviour. Accordingly therefore the costs of this application are awarded to the respondents.

THUS DONE AT MASERU THIS 6TH DAY OF DECEMBER 1995.

L. A. LETHOBANE

PRESIDENT

A. KOUNG ***I CONCUR***

MEMBER

K. MOJAJE ***I CONCUR***

MEMBER