IN THE LABOUR COURT OF LESOTHO

CASE NO LC 120/95

HELD AT MASERU

IN THE MATTER OF:

MOEKETSI MPUTSOE APPLICANT

AND

CENTRAL BANK OF LESOTHO RESPONDENT

JUDGMENT

Applicant herein challenges his dismissal by the Governor of the respondent bank on or around 2nd February 1995 on the grounds that:

> **(a) He was never charged in terms of regulation 19.12 of the respondent's service conditions and regulations; (the regulations).**
>
> **(b) One Mrs. Molekane participated in all the committees that were set up to investigate and lay charges against the applicant.**

It was Mr. Pheko's further submission during argument that the Governor failed to act against applicant's alleged misconducts within a reasonable time. Counsel for the respondent neither objected to this point being raised in argument when it is not covered in the applicant's statement of case nor offered any reaction to it.

Sometime in 1986 or 1987 applicant built a residential house with the assistance of the respondent's staff housing scheme. It is a term of this scheme that a staff member shall take occupation of the house when it is completed. According to "MM2" to the originating application, applicant's house was ready for occupation on 1st August 1987. It is common cause that applicant did not take occupation of the house despite numerous attempts on the part of the respondent to get him to occupy the house.

On or around 25th March 1993, all staff of the respondent were instructed to retake the oath of Office Secrecy. The applicant allegedly refused to retake the oath. On the 28th June 1993 the Governor of the respondent appointed a three man committee in terms of regulation 19.12 of the regulations to investigate applicant's :

> **(a) failure to move to the house procured for him by the bank under the housing loan scheme;**
>
> **(b) refusal to retake the oath of office secrecy.**

The committee was to;

> ***"make a thorough investigation of the circumstances that led to the officer refusing to comply with the official procedures, practices and instructions."***

The committee interviewed a number of people including the applicant. It established a number of important facts which it submitted to the Governor in an undated report which is annexed to the originating application as annexure "MM2". At the end of the report the committee recommended that;

> ***"....an appropriate disciplinary action be instituted against him (the applicant) in terms of regulation 19.5 of the service conditions and regulations of the bank."***

On the 19th may 1994 applicant appeared before a disciplinary enquiry chaired by Mr. Mapetla. Mr. Mapetla was assisted among others by Mrs. Molekane who had been a member of the investigating committee set up on 28/06/93. At the end of the hearing Mr. Mapetla held, inter alia, that he had no jurisdiction to hear the matter.

On the 13th October the applicant appeared before yet another disciplinary committee facing substantially the same charges as those he faced before Mr. Mapetla. Mrs. Molekane was still a member of this committee. The committee submitted its report to the Governor on the 25th November 1994. A copy of this report has not been availed to the Court. Neither has it been stated in papers before Court what its findings and recommendations were. Of significance, however, is the fact that the applicant does not in his statement of case challenge the findings of the committee or its recommendations.

On the 2nd February 1995, the Governor wrote a memo to the Head of Administration in which he stated that he considered the report and recommendations of the committee appointed on the 28th June 1993. He listed a number of misconducts about which the applicant had allegedly been charged before the said committee of which he singled some as not misconduct related and as such he ruled that he could not make a decision on them as contemplated by

regulation 20. The Governor, however, ruled that he finds applicant guilty of the following misconducts, for which he imposed a penalty of dismissal:

> ***1. "(That) he disobeyed a lawful order given by an authorised officer of the bank in that he had:***
>
> ***"(a) on or about 25 March 1993, without lawful justification and/or excuse failed to present himself in the Boardroom to retake an oath of office secrecy which conduct is in contravention of regulation 19.5.***
>
> ***"(b) He had on or about the 26th May 1993 engaged in conduct which is prejudicial to good order and discipline within the bank by responding to the Head of Operation's request for an explanation as to his failure to retake the oath in an insolent manner, which conduct is prejudicial to good order and discipline within the bank and is likely to bring the bank into disrepute."***

It was Mr. Pheko's contention that the Governor's findings in relation to the work of the committee of the 28th June 1993 were flawed in that they were based on the assumption that the applicant was formally charged when this was not so. To substantiate his point he stated that regulation 19.13 requires that an employee charged with misconduct must be given a copy of the charge at least 14 days before the enquiry is held. The committee did not only fail to charge the applicant but it did not even give him the advance 14 days notice, he argued.

Mr. Matabane on the other hand contended that applicant did appear before the committee and the purpose of his being before the committee was explained to him. He went further to say that in terms of the decision of this Court in Marino Lehloenya .v. Manager, TEBA Ltd. LC 63/95 there are circumstances where even if a formal charge has not been given the proceedings may still be found to be fair. He submitted further that the applicant did not in any event complain about his being informally called before the committee.

We agree with Mr. Pheko that the fact that applicant did not complain is not a bar to his raising that complaint before this Court. The case of Marino Lehloenya is far different from the present case. Firstly, as Mr. Pheko rightly pointed out the Court's remarks in that case were obiter. Secondly, the applicant in that case was clutching at the straws as he had already pleaded guilty at both the investigation level and when he was asked by the manager what had happened. Thirdly, there was no evidence of any express regulation of the respondent which required that charges of misconduct shall be in writing as in the present case. Lastly the employer in the Lehloenya case being a private employer is not enjoined to act with similar degree of fairness as the respondent in casu which is a public employer. the Court is therefore, of the view that the Lehloenya case is not relevant in the present case.

It is evident from the very first page of the report up to the point where the committee talks about its meeting with the applicant that no charges of any type were communicated to the applicant. Even clearer is that none were communicated to him in writing 14 days in advance as required by regulation 19.13. Throughout its report the committee shows that it never considered itself as a guilt finding committee and clearly this is the impression it gave to the applicant. It saw itself as a fact finding committee and this is confirmed by the committee's recommendation at the end of the report *"...that an appropriate disciplinary action be instituted against (the applicant) in terms of regulation 19.5 of the service conditions and regulations of the bank."*

In as much as the Governor had said he was appointing this committee in terms of regulation 19.5, he however, gave it a wide scope to *"...determine (its) modus operandi for the conduct of the exercise."* The committee then decided to establish facts and on the basis thereof, recommended that disciplinary proceedings be instituted. Indeed this was duly done when Mr. Mapetla was appointed to conduct an enquiry based on the facts established by the committee under reference. It does seem meritorious that if the committee did not prefer any charges against the applicant, but instead recommended further disciplinary enquiry, there was no basis on which the Governor could find the applicant *"guilty as charged."* In the premises the Governor's alleged finding of the applicant guilty in terms of the charges he allegedly faced before the committee set up on 28th June 1993 is null and void and as such it is set aside.

Under part B of the memo to the Head of Administration, the Governor stated further that he had also;

> ***"studied the report and recommendations submitted to me by a disciplinary committee comprising Mr. P. Molapo, Mr. M. Tsunyane and Mrs. M. Molekane dated 25th November 1994...."***

According to the memo the applicant faced substantially the same charges as those that he faced before Mr. Mapetla. Mr. Mputsoe was found guilty on each of those charges and the penalty imposed was summary dismissal. Mr. Pheko submitted in relation to this finding that Mrs. Molekane's presence in this committee vitiated the findings of the committee in as much as she had sat in all the committees and heard all the evidence which was adduced before Mr. Mapetla on the same charges.

Mr. Matabane countered by arguing that Mrs. Molekane's presence in the committees was permitted by regulation 19.12 which stipulated that *"any misconduct involving an employee which may lead to dismissal, shall be investigated by a committee of three persons including the personnel officer, or his deputy...."* He referred us to the case of Supreme Furnitures & Another .v. Letlafuoa Molapo C. of A. (CIV) No.13 of 1995, where the Court of Appeal held that the presence of the second appellant in the disciplinary panel as chairman of the enquiry did not taint

the proceedings because his participation was not excluded by the Code which provides that disciplinary enquiries will be convened and chaired by management. Mr. Pheko replied that the respondent had infact breached its regulations by having Mrs. Molekane involved in all the committees.

It is significant to note that the decision in the Supreme Furnishers case was based on a clearly articulated distinction between a private employer terminating a pure master and servant contract and an employer performing a public function. Secondly the applicant in that case challenged the branch manager's chairmanship of the committee which was otherwise permitted by the disciplinary code. It was the Court's feeling that to uphold that contention would be importing the formal standards of the proceedings adopted by the courts of law into domestic administrative tribunals which must as a matter of policy be allowed less formality and greater flexibility.

The present case is significantly different from the Supreme Furnishers case. In the first place there is no opposition to Mrs. Molekane's participation in the committee established persuant to regulation 19.12. The objection is to her repeated presence where the enquiry goes through more than one stage as was the case in casu. Regulation 19.12 has an important rider namely; that in such a committee the personnel officer or his deputy shall be present. If Mrs. Molekane had participated in the investigation she should have not also participated in the disciplinary enquiry based on the facts which she investigated. Her deputy should in such a case have been the one to represent the personnel office in the enquiry. It is a manifestly unfair procedure to have one person participating in all levels of enquiry investigating the same person's guilt.

Furthermore it is important to note that the respondent bank is a public employer and as such is enjoined to act fairly in all the circumstances affecting the interests of its employees. It is not proper to equate it with Supreme Furnishers which is a private employer. We are of the view that the enquiry was indeed tainted by the presence of Mrs. Molekane who had been an active participant in all other committees which preceded it and yet were dealing with the same facts involving the same individual.

As we said Mr. Pheko also raised the issue of the delay in disciplining the applicant for the alleged misconducts, which was not challenged by counsel for the respondent. It is common cause that the first committee to be set up to investigate applicant's alleged misconduct was formed seven years after the alleged misconduct of refusing to occupy the house, had been known by the respondent. The one relating to the refusal to retake oath of office secrecy was about three months old. Thereafter the respondent took no action until May 1994, which was another year, before bringing applicant before a disciplinary committee. In October which was now eight years and one year respectively, since the offences of refusal to occupy the house and to retake oath of secrecy were committed, applicant was brought before

the committee of enquiry in terms of the recommendations of which the Governor found applicant guilty under paragraph B of his memo and dismissed him summarily.

No attempt was made by the respondent to explain this inordinate delay in charging the applicant. In particular it is hard to understand how he had been kept as an employee of the bank when he had refused to take an oath of office secrecy for such a long time. This delay can lead to only one conclusion that contravention of these policies or codes is not such a serious offence as to warrant immediate action let alone imposition of a penalty of dismissal when an employee is found guilty.

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."***

In terms of Section 4(c) of the Code, this Court is empowered to use Conventions and Recommendation of the ILO as a guide in interpreting the law where there is an ambiguity in the law. In the present matter there is no ambiguity as such, but the law is silent on time within which action must be taken against an employee for a misconduct about which the employer is aware. In our view it is an appropriate case for application of ILO standards as a guide. We are fortified in this view by the fact that regulation 19.12 enjoins a committee established thereunder to submit its report to the Governor within three weeks. This provision clearly shows that even in terms of the respondent's own code it is paramount that an alleged case of misconduct be handled and disposed off without delay.

In the light of the foregoing observations we are of the view that the purported termination of the applicant on or about 2nd February 1995 cannot stand the test of fairness and as such must be quashed.

AWARD

(a) The dismissal of the applicant is declared unlawful.

(b) Within the spirit of Section 74(2) of the Code there is no order as to costs.

THUS DONE AT MASERU THIS 13TH DAY OF DECEMBER 1996.

L. A. LETHOBANE
PRESIDENT

T. KEPA **I AGREE**
MEMBER

P. K. LEROTHOLI **I AGREE**
MEMBER

FOR APPLICANT : MR. PHEKO
FOR RESPONDENT : MR. MATABANE