IN THE LABOUR COURT **CASE NO. LC/86/95**

HELD AT MASERU

IN THE MATTER OF:

CASWELL TŠIU **APPLICANT**

AND

HIGHLANDS WATER VENTURE **RESPONDENT**

JUDGMENT

Respondent is a Joint Venture of some seven companies and has a contract with the Government of Lesotho represented by the Lesotho Highlands Authority to build the giant Katse Dam on the Maliba-Matso River. As is common with construction work, retrenchments are a common feature, whenever certain aspects of the work have been completed. The background facts to this case are more or less common cause. Applicant gave oral evidence. The case arises out of the dismissal and retrenchment of the applicant on 23/03/92 and 26/05/93 respectively.

On the 9th March 1992 applicant together with one Sebibinyane (since deceased) were loading sand using Terexes which understandably are huge load carrying machines. Applicant was driving downhill with a load while Sebibinyane was coming uphill without a load, when the two accidentally collided at a corner in consequence whereof the two Terexes were damaged and Sebibinyane suffered minor injuries. According to applicant's evidence, the road was narrow and had curves. Two trucks could not pass each other unless one waited for the other. There were also trees on the sides of the road, which added to the impairment of a driver's proper view.

The respondent commissioned its Safety Officer to conduct an investigation into the cause of the collision. Statements were taken from both drivers and the workshop people who serviced and repaired the Terexes. Applicant stated that he had managed to stop his Terex in time but Sebibinyane's Terex slammed into his while already stationary. Sebibinyane on the other hand alleged that the brakes of his Terex failed, as a result he could not control it. The mechanic for Sebibinyane's Terex, however, denied that the Terex had any brake fault. The Safety Officer's finding was that;

> ***"the vision at the place of accident of both drivers is obscured by large trees at this bend. The drivers should warn each other by means of hooting and should approach with caution. There is no sure way of avoiding an accident whilst driving at high speed."***

The respondent's conclusion was that both drivers were at fault and they dismissed both of them although at different times. Sebibinyane was dismissed immediately while applicant was dismissed on the 23rd March 1992, two weeks after the accident. Applicant subsequently made representations through his attorney of record for reinstatement, contending that his dismissal was unlawful. After numerous correspondence, respondents wrote to applicant's attorney on the 23/07/92 stating that;

> ***"in good faith to your client and your goodselves the matter was referred to the Works Manager for review. The Works Manager declared himself prepared to reengage your client subject to the normal company rules."*** **(emphasis added).**

Applicant was duly reengaged on the 19th August 1992. He entered into a new contract of fixed duration of three months, which was however extended until May 1993 when applicant was terminated again by way of retrenchment. He was issued with a new company employee number. On the 1st March 1993, which was seven months after applicant's reengagement, applicant's attorney wrote to respondent's management informing them that *"... our client would like to be given back his original number as it will affect his position when retrenchment is made in future."*

Indeed on the 25th April 1993, the respondent announced that due to completion of certain aspects of the works among which were *"Arch Dam and Tailwater Excavations"*, which was where applicant worked, some 500 workers would be made redundant. In those sectors where work was no longer required the whole sector was to be redundant. In sectors where a number of workers only had to be reduced the LIFO principle was to apply. On the 11th May 1993 applicant received a notice of retrenchment, which had been based on LIFO criteria as aforesaid.

Applicant contends that if he had been given back his original number, in other words reinstated as opposed to reengagement, he would not have been affected by the retrenchments of May 1993. Accordingly therefore, applicant seeks an order reinstating his original number. Even though applicant did not specifically mention it, it is however, clear from the submissions of Mr. Tsotsi for the applicant, that the issue of retrenchment is only relevant if an order is given reinstating applicant to his original number. They do not dispute that applicant's new employee number placed him within the ambit of the LIFO criteria. They merely say this ought not to have been the case if applicant had been reinstated. The cardinal issue for determination is therefore, whether applicant ought to have been reinstated to his original position without loss of seniority or other benefits following his dismissal on 23/03/92.

Both parties agreed that the applicable law to this case is the Employment Act 1967 as amended. Thus Mr. Streng who piloted the closing address on behalf of the respondent in the absence of Mr. Malebanye, submitted that this court has no jurisdiction to hear cases that arose before the Labour Code Order 1992, came into operation. He relied in his heads of argument on Section 70(1) of the Employment Act 1967. It is the belief of the court that this must be an error, because Section 70 of the Employment Act has nothing to do with jurisdiction of this court or any other court. It deals with restrictions on the employment of children and young persons on night work. Section 70(1) of the Labour Code too deals with time limits for presentation of cases of unfair dismissal, not jurisdiction in respect of cases which arose before the Code came into operation. If however, Mr. Streng's submission related to the time limit for presentation of the claim,

the said Section 70 of the Code would not be relevant, because as agreed by the parties the Code does not apply to this case. We can only conclude that there being no authority for Mr. Streng's proposition, the submission has no merit.

Coming now to the merits of this case, a person is entitled to reinstatement if his dismissal is so grossly unfair, or irregular or patently unlawful as to render his dismissal a non-dismissal in law and in fact. It was applicant's contention that his dismissal was unlawful. Firstly Mr. Tsotsi submitted that dismissal of the applicant was in contravention of the respondent's Disciplinary Code and Grievance Procedure in that:

(a) according to the disciplinary rules damage caused to property must be deliberate in order to warrant dismissal, yet applicant has not been alleged to have deliberately caused damage to the Terex.

(b) There is no evidence that applicant was ever warned prior to the penalty of dismissal as the rules require.

(c) There was no hearing.

Mr. Streng submitted on the other hand that applicant's dismissal was lawful in terms of the applicable legislation namely the Employment Act 1967 as amended. He stated that the Act did not require a formal enquiry, but the respondent went beyond the requirements of the legislation in that a formal investigation was conducted by the respondent's Safety Officer. With regard to the contention that the applicant was not warned prior to dismissal he stated that this was not a proper case for incremental warnings. He argued that the company has a serious responsibility for the safety of all its employees and any unsafe act such as negligent driving demands firm and fair action.

Applicant's letter of termination, *"CT2"* of the record, gives the reason for his termination as *"wilful damage and misuse of the employer's property."* It is therefore

incorrect to allege as Mr. Tsotsi does that applicant has not been said to have deliberately caused damage to the Terex Machine. With regard to the contention that applicant was not first given a warning, Mr. Streng made two important submissions with which we are in full agreement. Firstly, he said that the respondents have serious responsibility for the safety of the employees and that unsafe acts must be severely dealt with. There is no doubt that safety of workers at the workplace and a safe working place are of paramount importance in labour relations. It is the employer's duty to ensure that the workplace is safe and that employees' work practices are safe. Unsafe practices must be ruthlessly eradicated as they are not a danger only to a worker concerned, but also to the rest of the workforce, the future of the organisation concerned and at times the economy of the country.

Secondly, Mr. Streng contended that applicant's case was not appropriate for incremental warnings or counselling, it actually rendered continued employment relationship intolerable. There is no invariable rule that an employee shall first be warned before the ultimate penalty can be imposed. Each case must be treated on its own merits, in particular the nature of the offence with which the employee is found guilty will play a decisive role. A person does not qualify as a driver unless he possesses a valid driver's licence. The prerequisite for granting of a driver's licence is that a person knows the driving code. According to the findings of the Safety Officer the two drivers had clearly failed to observe the driving code pertaining to such dangerous places as where the vision of the drivers is obscured by bends and trees. Furthermore the road was narrow and one of the Terexes was carrying a load. Extreme caution is what is required when driving at such dangerous places, in particular the drivers must maintain a safe speed. It turned out that the two drivers were not cautious and they were speeding. This was clearly reckless driving. It seems to the court that such recklessness impinges on the capacity of the driver to perform his driving duties. It further affects his suitability for continued assignment of driving duties. Consequently it cannot be expected that the employer will first warn such a person, because continued employment relationship is rendered intolerable by the driver's unsuitability for the job he is employed to do.

According to *"CT2"* which was handed in as respondent's Disciplinary Rules (p.5 thereof), in the fist instance of a misconduct the offending employee receives a warning. But depending on the seriousness of the offence an employee may be dismissed instantly. We have already shown that disregard of safety rules and unsafe practices are a serious transgression which must be severely punished. Applicant's alleged offence fell into this category and as such did not deserve prior warnings.

On the issue of a hearing it was Mr. Streng's submission that the investigation by the Safety Officer amounted to a hearing. It is now common cause that statements were taken from the applicant and Sebibinyane as well as the workshop people who serviced Sebibinyane's Terex. Both applicant and Sebibinyane gave their versions as to how the collision occurred. They were both found guilty and dismissed. It seems to us that what the respondents did in the circumstances of this case, particularly in the light of obtaining legal position at the time, which did not require formal hearing prior to dismissal, substantially complied with the requirements of fairness. There is no hard and fast rule that for an enquiry to be fair it must be conducted by a committee. The essence of the *audi alteram partem* rule is that a person must be heard before an adverse decision is taken against him. However, the right to a hearing has no fixed content. Each employer or establishment is free to device procedures that are suited to his own needs, provided the procedure so devised is fair, (see Edwin Cameron, Right To A Hearing Before Dismissal - Part 1 (1986) 7 ILJ 183).

It is common cause that what applicant said in a statement that formed the basis of the Safety Officer's report is essentially the same as what he said in court. Which means that applicant told all that he had to tell about the accident. It would have been a futile exercise to have called him before any other forum to come and say exactly what he had already told in his statement. Accordingly therefore the procedure adopted by the respondent has not prejudiced applicant's case and as such was not unfair. We accordingly hold that applicant was afforded an opportunity to state his case.

Applicant contended further that he was not given notice of termination upon his

dismissal. He said that this was contrary to the rules of the respondent. The so-called respondent's Disciplinary Rules is essentially a booklet which contains what can be described as a synopsis or simplified notes of the respondent's Disciplinary Rules and Grievance Procedure. It is significant to note that in this booklet there are two types of termination of contract which are envisaged. The first termination is the one following disciplinary action. This would be termination by dismissal and it is covered on page 5 of the booklet. The second type of termination is one that may come as a result of resignation on the part of the employee or the employee's job being declared redundant. In other words there is no wrong doing, but for some reason, one of the parties wants to terminate the relationship. It is in this context where it is required that an advance notice of termination be given by the party that initiates the termination. (See p.6 of the booklet *"CT2"*). It is common cause however, that applicant's contract was terminated by way of dismissal. The rule concerning advance notice which governs termination of the contract other than by dismissal did not therefore apply to him. The notice he could claim as of right would be regulated either by the Employment Act or his employment contract if he was entitled to it under the Act or the contract. This was however, not applicant's claim.

Mr. Tsotsi contended further on behalf of the applicant, that the accident was not attributable to the fault of the applicant, because Sebibinyane admitted that his Terex had brake fault. He said that it was hearsay for the Safety Officer to say that he was told the Terex had no brake fault. It is important to note that the Safety Officer was making a report of his findings after carrying out an investigation. He was not himself giving evidence. The rules against hearsay do not therefore apply to him. It is also important that the person he interviewed at the workshop told him what he knew about the Terex not what he was told about it. His evidence was therefore not hearsay and therefore admissible.

Mr. Streng submitted that following the investigation it was found that both drivers were negligent. He contended that the two drivers concocted a story that the brakes of the other Terex failed in an attempt to both escape responsibility. To prove his

contention he pointed out that it is a physical impossibility to simultaneously accelerate uphill and to have the brakes supposedly fail. It will be recalled that applicant stated in his evidence in chief that he was driving downhill carrying a load, while the other Terex was being driven uphill. In that situation it would be understandable if the brakes that allegedly failed were those of applicant's Terex. The physical effect of the brakes of the Terex going uphill failing would be for it to roll backwards, not to continue moving at high and uncontrollable speed uphill. This clearly shows that the stories of the two drivers were deliberate lies to mislead investigations into the cause of the accident. The irresistible conclusion to which one arrives is that both applicant and Sebibinyane agreed to invent stories regarding the real cause of the accident, because they noticed they were both guilty of contributory negligence. They had approached the bend at high speed on a narrow road and yet their vision was obscured by both the trees and the corner. The story they created was such that if it was accepted, none of them was responsible for the collision. This is a veil attempt to mislead the court regarding the real cause of the accident.

This much is clearly known to the applicant. Hence he accepted reengagement without raising a finger regarding his innocence despite the fact that he was being assisted by a lawyer. He happily worked under the new contract for seven months, only to raise the issue of reinstatement when it became apparent that there were impending retrenchments. The issue of reinstatement was no longer being pursued in order to clear the name of the applicant, but to ward off the coming retrenchment.

Mr. Streng contended that the offer to reengage applicant was a settlement which was entered into with the understanding that neither party would pursue any claim each may have had against the other and that it would be in full and final settlement of the dispute. Mr. Tsotsi on the other hand argued that no settlement was made. Much as there is no signed document styled a settlement, there are a few illustrative indicators which in our view give guidance as to the motive behind reengagement of applicant. The letter of offer of reengagement was addressed to applicant's attorney. It specifically made it clear that applicant is being reengaged in good faith. Applicant accepted the

reengagement and worked under its terms for seven months. Normally if a party accepts an offer without giving away his rights he will indicate that he accepts the offer *"without prejudice"*. This is a well known jargon to lawyers. Alternatively applicant could have insisted that he has not asked for reengagement. The silence of both applicant and his attorney when they were offered reengagement, and not reinstatement as originally claimed shows that they knew that the intention was to open a new chapter. If they did not know, they acquiesced to the extinction of their claim to reinstatement by offering reengagement. Applicant cannot at this late stage be allowed to resuscitate the claim of reinstatement after enjoying, without complaint, the fruits of reengagement.

In the premise we find that applicant was rightly found guilty of reckless/negligent driving which resulted in the damage to respondent's two Terexes. This having not been a proper case for applying the doctrine of progressive discipline respondent rightly dismissed applicant without prior warnings. The question of reinstatement which applicant claimed therefore did not arise. In good faith and in an attempt to put an end to the dispute applicant was offered reengagement by the respondent for which he must be thankful, because not all employers in respondent's position would have done so.

This being the case, it follows that, when retrenchments were done in May 1993, applicant had a service of nine months, since the previous service was not taken into account due to the disruption arising out of the dismissal in March 1992. Applicant does not claim that his service record of nine months placed him out of reach of the LIFO criteria. He himself admitted in the letter of 1st March 1993, when his attorney resurrected the claim for reinstatement that if he was not reinstated, he would be prejudiced when retrenchments were made in the future. It is our view therefore that our finding against applicant on the main issue of whether he was rightly dismissed in March 1992 effectively disposes of the dispute regarding retrenchment, because the

latter dispute was premised on the allegation that applicant's dismissal of 23rd March 1992 was unlawful and therefore, his service was wrongly and unlawfully interrupted. They were contending that if it were not for that disruption of their service applicant would no have qualified for retrenchment in terms of the LIFO criteria.

The application is therefore dismissed together with the prayers attendant thereto.

THUS DONE AT MASERU THIS 18TH DAY OF JANUARY 1996.

L. A. LETHOBANE

PRESIDENT

M. KANE **I CONCUR**

MEMBER

K. MOJAJE **I CONCUR**

MEMBER

FOR APPLICANT : MR. TSOTSI

FOR RESPONDENT : MR. MALEBANYE assisted by MR. STRENG of Respondent's Human Resources Department