IN THE LABOUR COURT OF LESOTHO

CASE NO LC/137/95

HELD AT MASERU

IN THE MATTER OF:

MORAMANE MABINA APPLICANT

AND

WATER & SEWERAGE AUTHORITY RESPONDENT

J U D G M E N T

The facts of this case are common cause. On or around 9th May 1994 applicant had a fight with a fellow worker at the living quarters of respondent's employees which are owned by the respondent.

The fight resulted in the death of the fellow worker. It was on a Saturday. Applicant was subsequently arrested by the Police and was released sometime in July. On the 1st August 1994, the respondent suspended applicant without pay pending the determination of the criminal case arising out of the aforesaid fight and the subsequent death of the fellow employee.

The applicant seeks a declaratory order nullifying his suspension on the grounds that:

- **(a) Respondent's living quarters is not a place of work as such applicant did not fight at work.**
- **(b) Applicant did not fight contrary to the Regulations as respondent alleges in the letter of suspension (Annexure "A"), he instead fought in self-defence.**
- **(c) In suspending the applicant respondent did not give applicant a hearing.**
- **(d) In terms of the Discipline and Grievance Procedure (Annexure "B")**

suspension as a penalty can only be imposed following a disciplinary process, which was not done in casu.

(e) Contrary to Clause 5.1(a) of Annexure "B" which provides that a suspension will be for a fixed period applicant's own suspension is indefinite.

The respondent on the other hand contended that its living quarters is a place of work and that applicant and his deceased colleague had been allocated living quarters because they were on duty 24 hours because of the machines they operate. The respondent further averred *"that any fight that ensues at the work place is contrary to respondent's regulations."* As to the contention that applicant fought in self defence the respondent contended that that is for the criminal court to decide.

The respondent denied that the suspension imposed on applicant is a penalty. It contended that according to its regulations an employee can be suspended with or without pay while his case is being processed. Mrs. Pholo submitted on behalf of the respondent that applicant's suspension was based on paragraph 6.1 of Part A of the Discipline and Grievance Policy which provides:

> ***"Depending upon the nature of the alleged offence, the Authority may suspend the employee from duty pending the formal enquiry. Such suspension may be with or without pay."***

Regarding the hearing respondent contended in paragraph 3.3 of the Answer that it *"...could not give applicant a hearing as it has no power to hear murder cases under any given circumstances."* In paragraph 3.2 it argued that *"according to its regulations applicant has committed a serious crime and cannot be retained at work until the court says he is not guilty."* It was respondent's further contention that by its nature this is not a case whereby disciplinary hearing can be instituted. *"It is purely a state case. Therefore respondent could not give him hearing, hence suspension until the matter is disposed of,"* the argument went. Mrs. Pholo submitted in argument that in any event after his release from custody applicant came to management and explained what happened. Mr. Sooknanan contended correctly in our view that whatever it is worth, this explanation did not amount to a hearing.

There is ample authorities for the proposition that the fact that an employee committed a criminal conduct off the employer's premises and not during working hours does not preclude the employer from taking disciplinary action against such an employee. In SA Polymer Holdings (Pty)Ltd t/a Megapak .v. Chemical Workers Industrial Union, and Two Others (1994)5(3) SALLR 18 the Labour Appeal Court upheld the employer's right to discipline two employees who had been charged of armed robbery committed away from the employer's premises and outside working hours.

In Scaw Metals Ltd. .v. JG Vermeulen (1993)4(5)SALLR 5 the respondent stayed at the appellant employer's flats by virtue of his being employed by the appellant. The respondent's car had been stolen whilst he was off duty. He suspected that one of the employees who had been employed by the appellant to carry out the cleaning and maintenance of the flats had either stolen the car or assisted others to steal it. The respondent accused the employee of stealing his car and pointed a revolver at him, threatening to shoot him. The respondent was disciplinarily charged and found guilty and dismissed. The Labour Appeal Court upheld the appeal and set aside the Industrial Court's determination that the dismissal constituted an unfair labour practice. In so doing the Labour Appeal Court confirmed that an attack by one employee on another away from the employer's work premises, even on non-work related incident may nevertheless constitute a misconduct. Accordingly therefore the fact that applicant herein fought with the deceased outside working hours and away from the work premises does not preclude the respondent from assessing this conduct in the context of actual or potential effect on the work place and the other employees of the respondent, resultantly processing such conduct through its disciplinary code.

In the view of the court there is substance in Mrs. Pholo's submission that the suspension imposed on the applicant is not the one envisaged under paragraph 5 of Part A of the Discipline and Grievance Procedure (Annexure "B"), which is imposed on a deserving employee as a penalty for misconduct after he had been found guilty. Mrs. Pholo contended that applicant has as yet not been found guilty of any wrongdoing as no disciplinary charges have been preferred against him. He has been suspended pending the outcome of the criminal case which is only when his fate will be determined.

On the question of a hearing, it is apparent from Mrs. Pholo's response that the respondent is confused with regard to the type of hearing Mr. Sooknanan was talking about. In the first place respondent says applicant cannot be retained at work until the court before which his criminal case is pending acquits him, because he has committed a serious crime. Clearly the respondent is, contrary to well established principle of assumption of innocence until the contrary is proved, assuming applicant guilty before he is duly convicted. In the second place, the respondent is saying that by being required to give applicant a hearing it is being called upon to hear a murder case. It certainly is not within the competence of the respondent or any of its officers to determine the criminal capability of the applicant in the instant matter. However, the respondent has the competence and obligation to administer its disciplinary code, which is what it did when it suspended the applicant under paragraph 6.1 of its Discipline and Grievance Procedure.

It is significant to look back at the words in which paragraph 6.1 of the Disciplinary Code, in terms of which applicant has been suspended, is couched. It will be noticed that the words used are that *"depending on the nature of the alleged offence the Authority <u>may</u> suspend the employee...."* Clearly the Authority has the discretion to

suspend or not to, pending an enquiry. Needless to emphasize, such discretion must not be exercised arbitrarily or capriciously. It must be exercised judiciously. To enable the discretion to be properly exercised, a person who is going to be affected by the exercise thereof, must be afforded the opportunity to be heard before the discretion is exercised.

Would the granting of the hearing in casu amount to hearing of the murder case, otherwise pending in the High Court? In the Australian case of Dixon .v. Commonwealth (1981)55 FLR 34, which this court quoted with approval in the case of Thato Liphoto .v. Lesotho Agricultural Development Bank LC/21/95 (unreported) the Australian High Court held as follows:

> ***"the question as we see it is whether the person involved is entitled to be heard not on the ultimate question of whether the charge is or is not made out but on the question under consideration at the time, namely whether or not he should be suspended as an interim step."*** **(emphasis added).**

In the case of Thato Liphoto supra this court held that whilst the applicant had been given some form of a hearing regarding her bona fides when she dealt with a particular banking transaction, she had infact not been given a hearing on the issue of suspension pending a disciplinary inquiry. The suspension was accordingly declared a nullity.

It is now trite law that officials of public bodies like the respondent Authority exercise public functions, which they are bound to exercise fairly. In Muller and Others .v. Chairman of Ministers' Council, House of Representatives & Others (1991)12 ILJ 761 at 769 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 the decision is taken unless the statute expressly or impliedly indicates the contrary... The question referred to therefore, has two components;***
> ***(a) has there been a decision causing prejudice here? and***
> ***(b) has a hearing been excluded by the legislature?"***

Section 42(2)(L) of the Lesotho Water and Sewerage Authority Order 1991, empowers the Authority to

> ***"appoint and employ such officers and servants as it thinks fit, discharge or suspend them temporarily, grant them such leave, as it thinks fit...."***

Thus in suspending applicant either as a penalty following disciplinary proceedings or as an interim measure, the Authority is exercising powers vested in it by the aforesaid Section of Order No.29 of 1991. Nowhere does this Section imply that in exercising the powers to discharge or suspend employees the Authority may do so without giving them a hearing. The Personnel Regulations have also not either expressly or impliedly excluded a hearing prior to suspension. Indeed such an

exclusion by the Regulations would be ultra vires as it would conflict with Section 42(2)(L) of Order No.29 of 1991, which does not exclude a hearing.

In the opinion of the court the suspension of the applicant without pay was an act which prejudicially affected his existing rights regarding enjoyment of office and monthly salary. He therefore ought to have been given a hearing before the suspension was imposed. The hearing would not be concerned with whether applicant fought in self-defence or was provoked. It would be a hearing on the pertinent question at the time namely, whether he should be suspended pending the outcome of the criminal case against him. The suspension was therefore procedurally defective and as such unfair.

AWARD

(a) **The suspension of the applicant is unfair and as such null and void for failure to observe the audi alteram partem rule.**

(b) **Respondent is ordered to allow applicant to resume his normal duties forthwith.**

(c) **The cause of action in this application arose on 1st August 1994 when applicant was purportedly suspended. For unexplained reasons, this case was only lodged on 18th October 1995.**

Assuming that applicant was first seeking an amicable solution to the problem it is clear from Annexure "C" of the originating application that the respondent rejected applicant's overtures as far back as 15th August 1994. The case could therefore still have been filed earlier than October 1995. For this reason the respondent is ordered to pay applicant his salary from the date of the originating application to the date of assumption of duty.

(d) **Applicant has not justified his claim for 18% interest as such this prayer is not acceded to.**

THUS DONE AT MASERU THIS 3RD DAY OF APRIL 1996

L. A. LETHOBANE
PRESIDENT

S. LETELE **I CONCUR**
MEMBER

A. KOUNG **I CONCUR**
MEMBER

FOR APPLICANT : MR. SOOKNANAN
FOR RESPONDENT : MRS. PHOLO