IN THE LABOUR COURT OF LESOTHO

CASE NO LC 143/95

HELD AT MASERU

IN THE MATTER OF:

SELEBALO QHOBELA **APPLICANT**

AND

LESOTHO HIGHLANDS PROJECT CONTRACTORS RESPONDENT

JUDGMENT

This is case in which applicant claims damages from the respondent for an alleged breach of contract. The facts were briefly that; on the 21/11/94 the applicant was served with a safety violation notice committed on the 27th September 1994. The same notice reminded applicant that he had already previously been warned for similar violations on the 18/08/94 and 26/09/94.

In his statement of case the applicant states that he refused to sign the safety violation notice because he had told the authorities that his safety equipment namely; a helmet had been stolen by casuals. He went further to say that the respondent refused to accept his defence, an action which he said *"....* *was unlawful as it exerted undue pressure on the mind of the applicant to feel insecure in his employment."*

On the 15th February 1995, the applicant was served with a letter of suspension pending disciplinary hearing. The hearing arose out of applicant's alleged failure to unload a petrol tanker. The applicant avers that, he was charged with the alleged misconduct notwithstanding that there were some administrative problems

which gave rise to the misconduct complained of, which ought to have been resolved before he could be charged. It came out during applicant's testimony that the so-called administrative problem was that, the applicant had been told not to work overtime. In his evidence applicant said he did not unload the truck because it was nearly 5.00p.m. already, which is his time to knock off. The disciplinary proceedings were nevertheless continued with and applicant was issued with a final written warning, which applicant says ".... ***was still improper and had the sole effect of promoting a haunting feeling and a feeling of insecurity in the mind of the applicant."***

On the 24th July, 1995 applicant was served with yet another notification of hearing for arriving late. When he received the notification, he wrote a memo at the back thereof complaining of certain procedural irregularities. In particular, he objected to the proceedings being chaired by one Compere instead of one Layland. He contended that he was directly answerable to Layland, as such he was the one who should chair an inquiry involving him. It must be said right away that no evidence was adduced to support this claim. At the end of the Memo applicant stated that he was resigning, but that this was not his intention; instead it was a result of " ***a set of complaints against me including the abovementioned."***

As would be expected the respondent adduced evidence to show that the applicant was properly given warning letters for violating safety regulations and also that he was properly charged for failing to unload the Total petrol tanker. Respondent's witness Mr. Oscar Monduair confirmed that it was 4.45p.m. when the applicant declined to offload the truck. He also confirmed that the applicant had been told not to work too much overtime; as such he had to deliver the keys to the storeman who was the one charged with unloading the truck after 5.00p.m.

Mr. Monduair testified that the truck had infact arrived at 3.30 p.m., but the applicant could not be found to come and unload it. It was only at 4.30p.m when he was found and as the applicant himself said, it was already nearly time for him to knock off. Mr. Monduair testified further that the applicant then had to hand over the keys to the storeman so that he could start unloading after 5.00p.m, but the applicant did not do so.

Regarding the charge of arriving late, it is common cause that in his testimony, the applicant admitted the same. He was only concerned that there had already been spades of other "unfounded" allegations against him, which resulted in him being served with warnings. He stated in answer to a question in re-examination that he was certain that since he was truly guilty of late-coming as charged he was going to be dismissed because "..... ***even in cases where I was innocent I had been given written warnings."***

As it can be seen from the evidence, applicant's concern is that his defences to the charges were not considered or that they were not upheld. As for the occurrences

giving rise to the charges, he does not deny them. For instance, he does not deny that he failed to wear a helmet. His defence is that his helmet had been stolen by casuals. At another occasion which also resulted in him being given a written warning he said, he did not need to wear the hard hat because he was in a car. He never denied that the truck arrived at 3.30p.m, but he could not be found to unload it, nor did he deny that he did not hand over the keys to the storeman as required to enable him to unload the truck after 5.00p.m.

In our view the court should focus its attention on whether the charges preferred against the applicant had the effect that the applicant claims they had on his mind. Indeed at the pre-hearing conference held on the 18th October, 1996, the parties agreed to formulate the issue for determination of the court as follows:

"Does applicant's resignation in the circumstances of this case amount to a dismissal in terms of section 68(c) of the Labour Code Order 1992? If so the court should award an appropriate relief."

Mr. Sooknanan for the applicant contended that the respondent is in breach of applicant's contract by not allowing applicant to perform his duties. The hindrance it was argued, was brought about by the chain of malicious prosecutions which worked on the applicant and effectively prevented him from applying his mind to his job.

On the other hand Mr. Van Tonder submitted that applicant resigned voluntarily as it is evidenced by his admission that he resigned because he feared that the respondent was going to dismiss him. He denied that there was a barrage of malicious prosecutions. On the contrary he contended that in all the cases there were good reasons for the respondent to take the action that it took against the applicant. He referred us to the cases of Thabo Memela .V. Lesotho Mineworkers Suppliers (Pty) Ltd LC 37/96 (unreported) and Thabo Seala .V. Loti Brick (Pty) Ltd. LC 66/95 (unreported).

Section 68(c) of the Code provides as follows:

"*68 Definition of "dismissal"*

"*For the purpose of section 66 "dismissal" shall include*:-

"*(a)*
"*(b)*
"*(c) resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employer to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract."*

Mr. Van Tonder submitted that the applicant has not discharged the burden of proof to show which particular term of applicant's contract has been breached. Mr. Sooknanan replied by referring to paragraph 12 of the applicant's further particulars where it is averred that;

> ***"it is trite employment law that the employer's conduct which makes it impossible or unbearable for an employee to perform his duties is tantamount to repudiation of an employment contract and as such a breach of the same."***

Clearly, the thrust of the applicant's case in casu is that he was constructively dismissed by the respondent. As we were appropriately referred by Mr. Van Tonder, this court had occasion to deal in detail with a case of an alleged constructive dismissal in the case of Memela V. Lesotho Mineworkers Suppliers (Pty) Ltd. supra. In that case the court, after reviewing various authorities, laid down the principle that in the case of an alleged constructive dismissal, the first factual inquiry should be into whether, in resigning the applicant did not intend to terminate the relationship.

Can we in the present case say that the applicant did not intend to terminate the employment relationship? Mr. Van Tonder submitted that he did, because applicant's real reason for resigning was his fear that he was going to be dismissed any way. Indeed this is what the applicant said in so many words in his evidence. It must be stated however, that in the memorandum that he wrote at the back of the notification of disciplinary hearing form which was served on him on the 24th July 1995, (Annexure "E" to Originating Application) the reason he gave for resigning was that he was objecting to the proceedings being chaired by Mr. Compere. Assuming that this is the reason why he resinged, we are not persuaded that this constitute a valid reason in terms of section 68(c) of the Code for an employee to resign. In the view of this court whatever the real reason for his resignation could be, it is clear that it was applicant's intention to terminate his employment contract in terms of its provisions, and the law.

The second inquiry is into whether the employer's conduct was contractually repudiatory. Furthermore, even if an employee may resign on notice as is the case in casu, do the circumstances surrounding the resignation justify a resignation without notice? As it has already been said Mr. Sooknanan's argument was that applicant was harassed by the respondent with " a chain of malicious prosecutions," which exerted pressure on the mind of the applicant effectively preventing him to apply his mind to his job.

In the case of Sebolai Senaoane V. Christian Council of Lesotho LC45/96, this court, relying on authorities from other jurisdictions dismissed the idea of bringing

criminal distinctions into the definition of employment related misconducts, because such distinctions are not relevant in the context of employment. In the circumstances disciplinary charges preferred against the applicant herein cannot be classified as prosecution in the criminal sense, which could later give rise to a complaint that the prosecution was malicious. The jurisdiction of this court is limited to dealing with those case of unfair dismissals or unfair labour practices.

The question in our view is whether in preferring the charges against applicant as it did the respondent acted in such an unfair manner as to amount to repudiation of applicant's contract. In the first place it is an employer's duty to charge an employee in appropriate circumstances and to impose a suitable penalty where the charge is proved. In the second place the employer is entrusted with ensuring order and good discipline at the work place and to do so he has a number of options including preferring charges of misconducts. Accordingly therefore, there is nothing unfair let alone repudiatory in disciplinary charges being preferred against the applicant.

In his evidence in chief the applicant stated that he resigned because "*there had been a number of complaints against me all of which I felt as well as other people around me that the final judgments thereof were not correctly done.*" He stated further in his evidence in chief that he felt that the "*incorrect*" decisions amounted to harassment because; "*.... in all of them I gave evidence in defence but at the end I felt the decisions were not correct.*"

Clearly applicant's concern was that the decisions which resulted in him being warned were incorrect because his evidence was not considered. However, exfacie all the allegations against him, there were as Mr. Van Tonder argued, good reasons for the respondent to take the action it took against him. The misconducts complained of had indeed been committed. For instance, he admitted that he did go about without wearing a helmet even in areas where he had to wear it because he says he was in a car. However, even if he was in a car as alleged, the fact remains that he was in a hard hat area and he had to wear one in terms of the regulations.

Regarding the issue of the petrol tanker, the applicant has not been able to deny that the tanker arrived at 3.30p.m and he could not be found to start the unloading until an hour later. He sought to show that he did not give the keys to the storeman because the storeman was not responsible for unloading, but Mr. Monduair was firm and convincing that the storeman was the one responsible after 5.00p.m and that it was infact not the first time that the truck arrived late. In our view none of the actions the respondent took against the applicant could induce him to resign let alone resign without notice.

The series of charges against the applicant appear to establish that the applicant was as the respondent says in its answer, a very difficult person. The charges against him were legitimate and no reasonable person would feel harassed as

applicant alleges he did, when management carries out its lawful duty of enforcing discipline. Consequently, such legitimate management action cannot be said to amount to constructive dismissal. In the premises we are of the view that this case ought not to succeed and it is accordingly dismissed with costs as it is not a case of unfair dismissal.

THUS DONE AT MASERU THIS 6TH DAY OF JUNE, 1997.

L.A LETHOBANE
PRESIDENT

A.T. KOLOBE **I CONCUR**
MEMBER

P.K. LEROTHOLI
MEMBER **I CONCUR**

FOR APPLICANT : **MR SOOKNANAN**
FOR RESPONDENT: **MR VAN TONDER**