IN THE LABOUR COURT OF LESOTHO

CASE NO LC 102/96

HELD AT MASERU

IN THE MATTER OF:

TSOKOTSA KETANE APPLICANT

AND

SECURITY LESOTHO (PTY) LTD RESPONDENT

JUDGMENT

The applicant herein is suing the respondent company for allegedly unfairly dismissing him without a hearing. The respondent contends that it dismissed the applicant in terms of its Personnel Regulations for allegedly refusing to obey instructions. It argues further that on the 12th April, 1996 the applicant appeared before a properly constituted disciplinary committee to answer charges of insubordination arising out of two incidents when the applicant allegedly refused to take instructions. The respondent attached annexure "A" to the answer as proof of the record of proceedings of the said inquiry.

The applicant does not deny that he was at the meeting on the 12th April 1996, with the persons listed in annexure "A" attending. He however, denies that this was a disciplinary inquiry. He averred on the contrary that this was an ordinary management meeting. Asked by Ms Thabane under cross-examination if he was questioned about the two incidents of alleged refusal to take instructions, the applicant agreed that the Managing Director questioned him about his refusal to obey his instructions. He recalled being asked about his alleged refusal to obey

instructions to exhaust his 15 days leave balance and to permit one Matsepe to work under him in Mafeteng.

Applicant testified that he was a Senior Security officer in charge of the Mafeteng District. He confirmed refusing to accept security woman Matsepe to work in his district, because she had allegedly been transferred to Maseru. However, exhibit "C" which was handed in by Hlabana who testified in support of applicant's claim showed that the decision to transfer Matsepe to Maseru was changed to enable her to complete her studies. Applicant further agreed that he refused to take the balance of his leave because the person who communicated the instruction to him was allegedly junior in rank to him.

According to the applicant, the procedure for charging employees of misconduct is for the Managing Director to appoint a prosecutor and a disciplinary committee which will be composed of a chairman and three other members. He handed in exhibit "A" which he said is a disciplinary action warning form, which the committee, once set up would communicate to him. He stated further that if the meeting of the 12th were disciplinary proceedings it would have been convened persuant to the above procedure. On the contrary he alleged he was only called by phone to attend the meeting of the 12th April.

Hlabana who attended the meeting of the 12th April held the position of Operations Manager at the time. His version was that an employee who is to be charged is asked to make a report about the incident. The report is then send to the Managing Director through his (Hlabana's) office. The Managing Director decides after seeing the report whether the concerned employee should be charged. He testified that if disciplinary proceedings are to be held, a committee composed of three or four members is appointed to conduct the proceedings. Asked if the prosecutor is appointed he stated that the chairman is normally the prosecutor himself.

The witness was asked if he knows the form by which employees are notified of disciplinary hearings, he said that he knew the form. He was shown exhibit "C" which he said it is the form used for notifying employees of proceedings against them. Exhibit "C" is a completed notification of disciplinary action form. In other words, it is a

completed exhibit "A". Asked if according to him applicant was given a hearing, he said in his view applicant was not given a hearing in the usual way. One of his main reasons being that the Managing Director does not normally preside over disciplinary proceedings.

Ms Thabane for the respondent asked the witnesses if they were aware that the respondent has Personnel Regulations which outline respondent's disciplinary procedure. The applicant said he did not know of the existence of such regulations. He only knew what he called the disciplinary Code. Mr. Hlabana on the other hand knew of the regulations. He also said that new recruits were taught about the Personnel Regulations, although some recruits were not taught. Asked how this discrimination would come about he said the recruits who were employed to fill existing vacancies were normally recruited straight into the vacant positions and posted straight away without going through the normal recruits training programmes. Such persons he said were inducted by their respective Supervisors. Asked if he knew if their Supervisors inducted them also in respect of Personnel regulations he conceded that he did not know.

The Disciplinary Code which the applicant admitted knowing is an abridged and simplified version of the regulations which has been translated into Sesotho. Its preamble makes it clear that it is only a summary and that the complete text of the regulations is available in English and that it can be obtained at the Personnel office. In our view, available evidence overwhelmingly shows that applicant was either aware of the Personnel Regulations or ought to have been aware, but deliberately kept himself ignorant about them. The Court accepts Hlabana's evidence that recruits were taught about the regulations. He, however, could not substantiate his allegation that some recruits were not taught about the regulations. This is because as he testified he was either away in the districts and therefore did not know what was happening in Maseru; or in the case of recruits who had been employed into the vacant positions, he did not have personal knowledge whether their induction included their introduction to the Personnel Regulations.

One possible reason why the applicant would profess ignorance about the Personnel regulations is because they do not anywhere provide for

the type of procedure which he outlined in his evidence. Neither is the procedure narrated by Hlabana in his evidence to be found anywhere in the regulations. Significantly, however, the procedures outlined by the two namely, applicant and Hlabana are not at all consistent with each other.

The right to a hearing in a private employment relationship is governed by section 66(4) of the Code. All that this section requires is that an employee who is dismissed for incapacity or misconduct is entitled to have an opportunity to defend himself against the allegations made. It does not outline the procedure that ought to be followed. Such procedures are often contained in employers' disciplinary Codes. If however, the disciplinary Code is silent the court will be guided by whether the procedure adopted by the employer in discharging the duty to give an employee a hearing has been fair and equitable in the circumstances.

The applicant herein admitted being called by phone to attend what he called routine administration meeting. In his evidence Hlabana testified that a management meeting was convened which resolved that applicant be called to attend the meeting of the 12th April 1996. He also testified that one of them was charged with the task of informing applicant to be present at the meeting to explain his conduct. He was asked under cross-examination whether he was the one who informed applicant about the meeting he said no. He also could not remember who called applicant. He further did not know what the person who called applicant said to him about the meeting. The applicant on the other hand also admitted that at the meeting of the 12th April, which he regarded as routine administration meeting, he was confronted with accusations of refusing to obey instructions.

It is significant that Hlalabana's response to the question whether applicant was given a hearing was that he was given a hearing, though in his view, not in the usual way. In the view of the court it matters not what the different parties brand the 12th April discussion. What is significant is that the discussion related to applicant's improper conduct which by his own admission he was required to explain at the meeting. In his Article Right to a Hearing Before Dismissal: Part 1 (1986) 7 ILJ 183 at P. 185 judge Cameron states that:

> ***"The right to a hearing is not an inflexible package. Once it is held applicable, the employer will not be burdened with a cohesive bundle of duties all of which he must observe and disregard of any of which will vitiate his decision to dismiss. It has been stressed that the rules relating to the holding of disciplinary enquiries cannot and should not be applied mechanically to every situation. In one of the most influential and far going decisions in this area the suggestion was even made that, at its minimum the right to a hearing may involve no more than a series of questions and answers, provided that whatever procedure is adopted is essentially fair and equitable."***

The applicant sought to attack the propriety of his dismissal on the grounds that a committee was not appointed and that a particular form (Exhibit "A") was not used. As it can be deduced from annexure "A" to the answer a committee was set up, even though one of the members of the committee in the person of Hlabana does not seem to have appreciated his role. Exhibit "A" is not a form that is prescribed by the rules. We agree with Ms Thabane that the use of exhibit "A" in notifying employees of pending disciplinary proceedings is not a binding formality, to the extend that it is not incorporated in the regulations.

Applicant's counsel contended that the Managing Director ought not to preside in the proceedings because he was complainant. According to the Personnel Regulations the procedure for the termination of employees is determined by the Managing Director. (Rule 3.1.1) It is common practice that disciplinary proceedings are conducted and chaired by management. In the article quoted above Cameron states at P. 212 that;

> ***" In the employment context the full rigor of the law as it has developed in relation to statutory or domestic tribunals is not applied. The person or persons deciding on quilt or innocence and on the appropriate penalty will in many cases know the***

> ***accused employee..... and may even have formed some initial impression as to the events in issue. In a sense the employer is necessarily a judge in his or her own cause."***

It is sufficient that the person presiding over the inquiry keeps an open mind capable of being persuaded in favour of or dissuaded from a particular view point. In any event, applicant was a Senior employee in charge of a district and the Managing Director might well have deemed it appropriate that his case be chaired by him personally.

In the view of the court there has been substantial compliance with the requirements of section 66(4) of the Code and the respondent's disciplinary Code in particular clause 3.1.1 of the Personnel regulations which empowers the Managing Director to determine the procedure. Such procedure may not neatly fit into the statutory procedures laid down for statutory tribunals. It is sufficient that the procedure adopted enables the accused employee to fairly and equitable present his side of the story. We are satisfied that the meeting of the 12th April complied with these fundamental requirements. That a particular form was not used or that a committee not having the Managing Director as one of its members was not appointed is an argument that cannot be taken seriously, because it is the Managing Director who determines the procedure. In the circumstances we are of the view that this application ought not to succeed and it is accordingly dismissed.

THUS DONE AT MASERU THIS 10TH DAY OF JUNE, 1997.

L.A LETHOBANE
PRESIDENT

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

M. KANE **I CONCUR**
MEMBER

FOR THE APPLICANT : **MR. NDLOVU**
FOR THE RESPONDENT: **MS. THABANE**