IN THE LABOUR COURT OF LESOTHO

CASE NO LC 18/96

HELD AT MASERU

IN THE MATTER OF:

J. M. MASILO

APPLICANT

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY (LHDA) 1ST RESPONDENT

THE CHAIRMAN OF THE DISCIPLINARY SUB-COMMITTEE OF THE LHDA, MR. M. S. SHALE 2ND RESPONDENT

JUDGMENT

This is an application in which the applicant seeks an order directing the first Respondent (the respondent) to reinstate him in his position as Deputy Chief Executive of the Respondent. The second respondent is nominally cited as the chairman of the respondent's disciplinary sub-committee which was established to hear applicant's alleged misconducts.

This case was lodged on the 5th February 1996 as an urgent application. The reason advanced for the urgency was given as being that the applicant would "... *become unemployed as at 15th day of March 1996."* Understandably this would be the last day of the three months notice of termination that the applicant had been given. However, the court was not persuaded by this reason because over 90% of the cases before this court are cases of unfair dismissal whose applicants are already out of employment. There is therefore no justifiable reason why one case should be prioritized over others as all affected employees are out of employment.

The matter was set down for two days on the 3rd March 1997 and 5th March 1997. It was however, heard over one day namely 3rd March 1997, when only the legal objection to respondent's legal representation was heard. The applicant was invoking Section 28(1)(b) of the Labour Code Order 1992 (the Code) which provides

that at hearings before the court a party may be represented by a legal practitioner only when all parties, other than the Government are represented by legal practitioners. On the 13th March the court delivered judgment in which it found in favour of the respondent and ordered that they be represented by their Attorneys of record and counsel. The matter was thereafter postponed *sine die* to enable the applicant to brief counsel.

On the 4th June 1997, the respondent's attorney served a notice on the applicant that on the 23rd June 1997, the respondent intended to apply to the Registrar for the allocation of the date when this matter can be heard. According to the affidavit of Ntuba Tlaba, a clerk of the respondent's attorneys who was charged with the task of serving the notice on the applicant, the latter refused to accept service of the process nor to acknowledge receipt thereof. In the premises the matter was set down, without applicant's involvement for the 28th November 1997. However, by letter dated 30th October 1997 and 27th October 1997, both the applicant and attorneys for the respondent respectively indicated that the 28th would be unsuitable. The former even went further to say that he would in fact only be available in November 1998 i.e. exactly a year later. On the contrary the latter requested in their letter that the matter be set down for 15th and 16th January 1998. On the 9th December 1997, the Registrar wrote to the applicant advising him that the suggestion that the matter be set down for November 1998 was untenable as the matter cannot be allowed to hang for another year. She informed him that the matter is proposed to be set down for the 15th and the 16th January 1998 and if the two dates are not suitable he should suggest alternative dates around January 1998. On the 19th the applicant wrote back to say that because of circumstances beyond his control he stands by the contents of his earlier letter. The letter of the 19th was only received by the court registry on the 9th January 1998. However, on the 22nd December 1997, the Registrar had already issued a formal notice of hearing which fixed the 15th and the 16th January 1998 as the new dates for the hearing of the matter and the notice had duly been sent to the parties.

On the 13th January the Registrar wrote yet another letter to the applicant advising him that whatever reservations he had he should come to court on the appointed day and voice them in court. But by letter which the Registrar received at around 10.00 a.m. on the 15th January, though it was dated the 13th January, the applicant said he was unable to come to court as he would be out of the country. By this time i.e. when the letter was received, the respondent's legal team were already in court waiting for the proceedings to resume.

It appears that after receipt of the letter alleging that the applicant was out of the country, the Registrar made certain enquiries which resulted in her filing an affidavit. In her affidavit the Registrar says she inquired from the messenger who delivered the letter, where the applicant was and he told her that the applicant was still at the office of the Ministry of Agriculture where he now works as the Principal Secretary. This prompted her to phone the office of the applicant. She was

answered by his Secretary who told her that the applicant had gone to Teyateyaneng on official duties. The Registrar says she went further to phone the office of the Minister to inquire after the applicant, she was again answered by the Minister's Secretary/Personal Aide who confirmed that the applicant had gone to Teyateyaneng. The matter was stood down to 1400 hours.

At 1400 hours the court convened in the absence of the applicant. Mr. Penzhorn who appeared for the respondent applied that the court proceed to hear the matter in terms of Rule 16 of the Rules of court which empowers the court to;

> ***"...dismiss the originating application, appeal or application or, in any case, proceed to hear and dispose of the matter in the absence of (the) party (if the party that fails to appear and to be represented at the time and place fixed for the hearing of an originating application or appeal or application is an applicant or appellant)."***

He contended that when the matter was postponed on the 28/11/97, the applicant had advanced no good reason for failure to attend, and had made no application to court for the matter to be postponed to a later date. He argued further that the applicant merely said he would only be available in November 1998 without telling the court what he will be doing the whole of 1998. This much is true that whilst respondent's attorney had indicated that he would be engaged in Johannesburg on the day in question, the applicant had not said in his letter why he would not be available.

When the matter was again enrolled to the 15th and 16th January the applicant simply said he will not be available without saying what his reason is, he argued. He stated further that by the letter dated 13th January the applicant says he will be out of the country without saying whether he will be on holiday or he will have gone on tour of duty. However, from the Registrar's affidavit it appears applicant had gone to Teyateyaneng, Mr. Penzhorn argued.

After a brief adjournment the court reconvened and pronounced a judgment in which it upheld Mr. Penzhorn's arguments. In particular the court was satisfied that everything possible had been done to inform the applicant of the date, time and place of the hearing; including the importance of attending. However, the applicant contended himself with saying because of circumstances beyond his control he will not be able to attend court on the fixed date, without taking the court into his confidence by saying what those circumstances beyond his control were. At the end of it all he decided to be untruthful by saying he would be out of the country when he had gone to Teyateyaneng. Even assuming he was out of the country as he claimed, he had again failed to disclose to the court why he had to be out of the country. Indeed as Mr. Penzhorn submitted it could well be possible that he had gone on holiday or even for shopping, but in the absence of any reason advanced by him this court is not in a position to know why he had to be out of the country. In

the circumstances the court agreed to proceed to hear the matter in the absence of the applicant.

This matter arises out of the dismissal of the applicant on the 5th December 1995. His dismissal followed disciplinary proceedings which were chaired by the second respondent. The two main charges against the applicant in the proceedings were that;

> **(a) On the 21st August 1995, the applicant had refused without good cause to complete his evidence at a hearing of the Board sub-committee considering allegations of misconduct against Mr. M. E. Sole, the former Chief Executive of the first respondent; thereby breaching;**
> ***"the duty to make full and honest disclosure to the Chief Executive and/or the Board or any sub-committee thereof of all material information concerning the affairs of the LHDA, more particularly when required to do so;"***
>
> **(b) The applicant had been incompetent in his duties in that;**
> **"During the period November 1991 to August 1995 the (applicant had) made himself guilty of contravening Regulation 4.1.10 of the Personnel Regulations... in that;**
>
> **"(i) he in the performance of his duties failed to implement such programs and/or projects, and to discharge such other duties which he was responsible for, timeously, adequately comprehensively or at all, and**
>
> **"(ii) in so doing he acted inefficiently and/or negligently in the performance of his duties."**

The applicant's plea to the first charge was that whilst admitting refusing to complete his evidence as stipulated in the charge, he, however, had good cause for so refusing. In count 2 the applicant denied that he was guilty of contravening the Regulations as alleged. He pleaded that;

> ***"..... he infact did implement all such programmes and/or projects that he was responsible for timeously, adequately and/or comprehensively and that in so doing he acted efficiently in the performance of his duties."***

It may be worth mentioning that initially the charges levelled against the applicant had been contained in Annexure " C 1"- "C4" to the Answer (Annexure "A" to the Originating Application). In Annexure "C4" the respondent's Acting Chief Executive had told the applicant that he (the Acting Chief Executive) would give him (the Applicant) a hearing on 8th September 1995 to enable him to answer whether he was guilty as charged or not. However on the 7th September

Applicant's, Attorneys served a letter on the Acting Chief Executive advising him that,

> **(a)** ***they had been instructed by the applicant to represent him at the disciplinary hearing to take place on the 8th September 1995 at the Acting Chief Executive's office;***
>
> ***(b)*** ***the applicant requires a postponement of three weeks in order that his attorneys may take proper instructions to represent him properly at the enquiry.***

By letter dated 14th September the Acting Chief Executive advised applicant's attorneys that whilst the inquiry into Mr. Masilo's conduct is an LHDA internal inquiry, he had however, decided to afford him (Mr Masilo) the privilege to be represented in accordance with his desire. He indicated that in the light of this development he decided to appoint attorneys for the respondent as well. In the same letter he advised applicant's attorneys that the disciplinary enquiry would now be held on Tuesday 17th October to Thursday 19th October 1995. He further informed applicant's attorneys that he had instructed respondent's attorneys to formulate the charges afresh and to serve them on them (applicant's attorneys) by Monday 18th September 1995. This is how the new charges stipulated above came about.

On the 19th September 1995 applicant's attorneys again wrote to the Acting Chief Executive of the respondent inquiring, inter alia, who would chair the enquiry. They also stated that in regard to applicant's hearing, counsel would not be available on Tuesday 17th October 1995 but had indicated that he would be available on 18th and 19th October 1995. This resulted in the Acting Chief executive writing annexures "C23" and "C24" to the answer dated 26th September 1995, in which he stated that, he would accommodate applicant's counsel with regard to the 17th October, but directed that the hearing would then start on Monday 16th October and then continue on 18th, 19th and 20th October 1995.

With regard to the Chairmanship he stated that in terms of Regulation 4.2 of the Personnel Regulations, disciplinary proceedings are heard by the Chief Executive. He advised, however, that he had considered it advisable that he did not himself hear the matter. As such he had with the approval of the Board of the respondent appointed a three man sub-committee to conduct the enquiry. The sub-committee would submit its report to him (Acting Chief Executive). He invited them (applicant's attorneys) to advise him by not later than 29th September 1995 if they had any objection to the proposed procedure. By letter dated 27th September 1995 (Annexure "C25" to the Answer), applicant's attorneys advised the respondent's attorneys that;

> ***"our clients welcome the fact that the Acting Chief Executive Mr. Putsoane has recused himself from these proceedings."***

According to paragraph 7 of the applicant's originating application, he (the applicant) duly appeared before Mr. Putsoane on Tuesday 17th October 1995. This allegation is denied by the respondent in paragraph 17 of its Answer. In particular it is denied that the applicant appeared before Mr. Putsoane on the 17th October 1995 either as alleged or at all. Indeed it does seem improbable that by the 17th October 1995, the applicant would still appear before the Acting Chief Executive for a hearing when in terms of the correspondence between the applicant's attorneys and the respondent's Chief Executive a sub-committee had already been established as far back as 26th September 1995, (see Annexure "C23" to the Answer) to conduct the enquiry.

It is even more improbable given that on 19th September 1995, applicant's attorney had written to the Acting Chief Executive to request that Tuesday 17th October be changed because applicant's counsel would not be available. This resulted in the enquiry being rescheduled to start on Monday 16th October and continue on 18th, 19th and 20th October. In the premises this court accepts respondent's version which is that it is not true that the applicant appeared before Mr. Putsoane on Tuesday 17th October.

The respondent state in their Answer that after the enquiry was rescheduled to start on Monday 16th October in accordance with the request of the applicant's attorneys, no objection was ever received by the respondent to the newly appointed date of the start of the enquiry, notwithstanding that further correspondence on other issues took place between the parties as is evidenced by Annexure "C28" to the Answer. (See Paragraph 20.2 of the Answer). In paragraph 20.3 of the Answer the respondent state that;

> ***"the first and only intimation from applicant's attorneys that they will not be available and will not appear on 16 October appears in the letter of 13 October "C36", delivered to the First Respondent's attorney at 3.10 p.m. that afternoon."***

In the heads of argument the respondent contend that this was the Friday afternoon preceding the Monday on which the enquiry was scheduled to start (see paragraph 19 of respondent's heads of argument).

Consequently on Monday 16th October 1995, neither the applicant nor his attorneys appeared at the inquiry either to proceed, apply for postponement or otherwise explain the postion (paragraph 20.4 of the Answer refers). The sub-committee however, convened with respondent's attorneys backed by two advocates in attendance (see p.16 of Vol. 1 of the record of proceedings of the inquiry).

The sub-committee resolved to postpone the inquiry to Monday 20th November 1995 and to sit for the whole of that week until Saturday 25th November if necessary. By letter dated 17th October 1995, applicant's attorneys were informed of the new dates (Annexure "C38" to the Answer).

Applicant's attorneys responded on the same date advising that Advocate Fischer who would be representing applicant would only be available on 24th and 25th November 1995 (Annexure "C39" to the Answer and Annexure "N" to the Originating Application). On the 23rd October respondent's attorney wrote to applicant's attorneys (Annexures "C40" and "O" of Answer and Originating Application respectively), informing them that the sub-committee had instructed that the disciplinary inquiry simply had to go ahead on the 20th to 25th November as no other dates could be found in that year i.e. 1995. Applicant's attorneys were further informed that should applicant fail to appear at the inquiry on the said dates the inquiry would proceed in his absence. Applicant's attorneys' response was that, *"our client's written instructions are that he will not appear unrepresented by Harley and Morris between the 20th to the 23rd November 1995 at your disciplinary inquiry."*

Thereafter other correspondence ensued between the parties' legal representatives which is not necessary to burden this judgment with, save to record that it still related to the applicant's attorneys saying they will not be attending on the 20th to 23rd while respondent's attorneys insisted that the inquiry could not be postponed any further. On the 20th and the 21st the inquiry proceeded without either the applicant or his legal representatives attending. The inquiry was concluded on the evening of the 21st November, 1995. The applicant was found guilty as charged. By letter dated 1st December, 1995 (annexure "C 51") the Acting Chief Executive forwarded the report of the sub-committee to the applicant and invited him to make written representations on the appropriate sanction by not later than Friday 8th December, at 4:30 pm. However, no representations were made by the applicant and on the 15th December, 1995 he was dismissed from the employ of the respondent on three (3) month's notice.

As already alluded to hereinbefore, on the 5th February the applicant lodged the present application. In essence he was seeking the declaration of his dismissal as unfair on two procedural grounds, namely; that he was not afforded the opportunity to present his case and that contrary to Regulation 4.2 of the Personnel Regulations the Chief Executive declined to hear his case and instead delegated his powers to a sub-committee.

Before coming to the two grounds on which applicant is seeking relief, it makes good sense to deal first with the merits which though applicant has not challenged in his originating application, both The Disciplinary Committee and Mr Penzhorn dwelled on in detail. At the inquiry Mr Penzhorn presented a lot of documentary

evidence to show that the environmental aspect of the giant Lesotho Water Project for which the applicant was the overall in charge was lagging far behind schedule. The effect of this slow progress was that one of the major sponsors of the project namely; the World Bank was threatening to withdraw its support for the next stages of the project namely; Phase 1B, unless there are major improvements in the environment division; in particular the Rural Development Plan which was to ensure the social well being of the communities affected by the project; the natural environment and heritage plan which was to ensure the protection of the flora and fauna and the monitoring of the impact of the project on the natural environment. The documentary evidence was supported with viva voce evidence by three high profile officers of the respondent and the Government of Lesotho. Those were Mr Mochebelele who is the Lesotho Government representative on Lesotho/South Africa Joint Permanent Technical Commission. Mrs Mohapi who was the LHDA's Deputy Finance Manager and Dr Maema who was the Divisional Manager immediately under the applicant.

It is common cause that save for the bare denial as contained in his plea to the charges, the applicant never adduced any evidence either before the sub- committee or before this Court to support his denials. Needless to emphasise, given the respondent's uncontroverted documentary and oral evidence which was presented at the disciplinary inquiry, the sub-committee could not find otherwise than on the basis of the evidence which Mr Penzhorn relied upon even before this Court. In the view of this Court, there is no basis in law or in fact for this Court to interfere with the finding of the sub-committee that the applicant was guilty as charged in count two.

With regard to count one, it is common cause that the applicant in his written plea to the charges admitted that he refused to complete his evidence at the hearing of the Board Sub-committee considering allegations of misconduct against Mr Sole. His contention was that he had good cause for refusing. It is again common cause that the applicant neither gave evidence before the sub-committee constituted to hear his case nor before this Court to say what good cause he had for refusing to complete his evidence.

Such cause may however, be discerned from the record of proceedings of Mr Sole's inquiry, the relevant excerpt of which is attached to the Working Bundle 1 pp. 462-477 of the typed record. What comes out from this record is that, Mr. Masilo having given his evidence in chief the previous day, simply refused to be cross-examined by the LHDA lawyers when the enquiry resumed the following day. The reason he advanced was that Mr Sole who had called him to testify in his defence had withdrawn from the enquiry together with his lawyers telling the chairman that the evidence he had given was enough for the committee to report to the Minister. He contended that even the evidence he had given was enough. The sub-committee informed him, correctly in our view that it was for it (the sub-committee) to decide what evidence it requires and to decide when that evidence is enough.

At this stage the applicant changed the reason for his refusal to complete his evidence and said he would only subject himself to cross-examination if Mr Sole and his lawyers are called back so that they can protect him. It was explained to him that he needed no protection of a lawyer as he was not himself charged with any wrongdoing. All that the sub-committee needed was the clarification of certain aspects of his evidence. He then said it was not so much the lawyers that he needed, but Mr Sole so that he could protect him. He stated that the Board Sub-committee had not called him to give evidence, consequently he could not continue to give evidence before it, when the person on whose behalf he was testifying had withdrawn from the proceedings, clearly stating that the information he had given was sufficient. In the view of this Court it is from this evidence of the applicant that we should determine whether the applicant had "good cause" for refusing to complete his evidence.

Mr Penzhorn noted in paragraph 27 of his heads of argument that applicant's only defence to the charge was that he had good cause for refusing to complete his evidence, "*he does not deny the allegations in the preamble to the charge which, inter alia, alleged a duty to*

> ***'make full and honest disclosure ..... of all material information concerning the affairs of the LHDA, more particularly when required to do so'"***

He contended that this duty flows from the employer/employee relationship which is one of good faith. He referred us to the case of Council for Scientific and Industrial Research .V. Fijen 1996 (2) SA 1 (AD), where Harms JA held at p.9 of the judgment that;

> ***"It is well established that the relationship between employer and employee is in essence one of trust and confidence and that at common law conduct clearly inconsistent therewith entitles the innocent party to cancel the agreement".***

He argued that the duty to make full and honest disclosure includes the duty to give evidence at a hearing when required by the employer to do so.

Mr Penzhorn argued further that so important is the duty to make full and honest disclosure that an employee may not even exercise his right to remain silent in an employer/employee relationship without running the risk of breaching this duty. Indeed in the case of Davis .V. Tip No & others 1996 (1) SA 11 52 to which we were referred by Mr Penzhorn Nugent J. refused to uphold an argument that proceeding with a disciplinary inquiry while criminal prosecution is pending on the same allegations interferes with an accused employee's constitutional right to remain silent. He stated at pp. 1158 of the judgment that;

> ***"The right to remain silent derives from an abhorrence of coercion as a means to secure convictions by self-incrimination, and it exists to ensure that there is no potential for this to occur. It achieves this by protecting an accused person from being placed under compulsion to incriminate himself not by shielding him from making legitimate choices..... What distinguishes compulsion from choice is whether the alternative which presents itself constitutes a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so".***

And at p. 1159 he goes on

> ***"In the present case the applicant may well be required to choose between incriminating himself or loosing his employment. If he chooses his employment that is a consequence of the choice which he has made but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak".***

In the present case, there were no criminal charges awaiting applicant at a later stage, let alone an indication that he was set to face similar disciplinary proceedings such that he could fear to incriminate himself. It was by no means the case of choice between the devil and the deep blue sea. In our view it was a case of simple defiance which flew in the face of a duty to disclose fully and honestly all information relating to applicant's employer, which duty he had not denied in his plea to the charge.

Mr Penzhorn submitted that applicant's breach of the duty aforesaid caused an irreparable harm to the employer/employee relationship and that that alone entitled the first respondent to dismiss the applicant. In the case of J.D Group .V. De beers (1996) 17 ILJ 1103 (LAC), it was observed that in deciding whether dismissal is fair the test commonly used is whether the employment relationship is destroyed or seriously damaged. The factors to which regard should be had include the following;

(a) nature of the employer's business;

(b) the work performed by the employee;

(c) the rules of the disciplinary code;

(d) previous warnings;

(e) the disciplinary record of the employee;

(f) the length of service of the employee;

(g) the consistency of treatment of similar cases;

(h) the likelihood of the recurrence of the misconduct.

Without doubt the nature of the work of the LHDA is very sensitive and it depends on utmost good faith and full cooperation of all involved, because it is a biparty project involving the Governments of the Kingdom of Lesotho and the Republic of South Africa. It involves large sums of money which are sourced from international donor organisations. Obviously continued international donor funding could be jeopardized if there appeared to be any cover ups and dishonesty at high level.

The applicant was second only to Mr Sole in the organisation. His bona fides and good faith towards his employer had without doubt to be beyond reproach. His siding with his superior as he clearly stated when he refused to be cross-examined, which in the process led him to refuse to disclose certain information, which was crucial to his employer, was the highest act of disloyalty which damaged the employment relationship beyond redemption.

Even if the foregoing had not been the case, the fact that in terms of the Personnel Code the applicant had a duty to make full and honest disclosure especially when required to do so, rendered applicant's refusal to testify a breach of contract. It is trite employment law that when a party breaches a term of employment, the innocent party is at liberty to accept the breach and terminate the contract. It appears that this is what happened in hoc casu. In our view, these three factors are individually sufficient for the LHDA to have terminated applicant's contract. The combination of the three of them make applicant's case worse, such that it is not even necessary to consider the other factors. In our view therefore, the respondent was justified to have found applicant guilty as charged in count one and its decision to terminate his contract on the basis of that conviction was by no means unfair.

Coming now to the thrust of applicant's case before this court. As we said applicant's case is that his dismissal was procedurally unfair because he was not given an opportunity to present his case and that the Chief Executive declined to hear his case in terms of Rule 4.2 of respondent's Personnel Regulations. With regard to the first alleged procedural irregularity, applicant states in his originating application that the enquiry commenced in his absence and finalized its deliberations without hearing him or his attorney or allowing him to cross-examine any of the first respondent's witnesses. (See paragraph 11 at p. 10 of the originating application). He contends further that the dates were imposed on his attorneys and that the fact that the first respondent was assisted by attorneys backed by senior counsel he felt that he had to be represented by a similar team of lawyers. Applicant argues further that his counsel had been made to understand that the hearing would be held over six days (6) from 20th to 25th November.

However, his attorneys could not represent him on the two other dates namely; 24th and 25th because the enquiry had ended.

If we may start with this very last contention, it is clear that there was no way that applicant' attorneys could represent him on the said two dates, as the enquiry was no longer sitting. When several dates for a hearing are given, this is in essence the booking of those dates that, should the enquiry/hearing not be completed on the first day, then it will proceed on those other dates. But if the enquiry is finalised on the first or second day the rest of the booked dates fall away automatically.

The record of the correspondence between respondent's attorneys and applicant's attorneys show that this hearing into applicant's misconduct was postponed and dates therefor adjusted on numerous occasions. Of significance however, is the fact that on all these occasions, the postponements were at the initiative of applicant's attorneys or his counsel. At times even on dates when they had undertaken to attend they would request for a postponement at the eleventh hour, as was the case when applicant's attorneys advised respondent's attorneys of their non-availability on Monday 16th October only at 3.10 pm on the preceding Friday. (See annexure "C 36" to the answer and paragraph 20 of respondent's heads of argument).

It is common cause between the parties that on the 17th October, 1995 applicant's attorneys were advised per annexure "C 38" to the answer that the enquiry had been postponed to the 20th to the 25th November. A similar letter was sent to the applicant personally by registered mail (annexure "C 37"). What is clear from annexure "C 38" is that the committee hearing the applicant's disciplinary case postponed the enquiry because of the absence of applicant and his attorneys. It then chose new dates which were fixed in their absence. (See paragraph 21 of heads of argument).

If by imposition of the dates this is what the applicant meant, this Court cannot regrettably agree with him. Respondent's unsuccessful attempts to involve the applicant in the setting of the dates did not mean that it was obliged to do so. Neither could the applicant frustrate the enquiry by not being present on the date fixed for the hearing to assist in the process of finding new dates when the enquiry could be held. The holding of a disciplinary enquiry, the form it will take, the place and time for the hearing to commence are all the responsibility of the employer. As such it is the duty of the employer to determine when and where the inquiry will be held. (See Slagment (Pty) Ltd .V. Building Construction and Allied Workers Union and Others 1995 (1) SA 742 (AD) at P. 755). The Committee cannot therefore, be faulted for having fixed the dates for the hearing as it was its duty to do so. If however, the applicant had been in attendance, he might have successfully persuaded it to choose other dates which would be more suitable to him and his lawyers. By failing to attend he gave the committee a blank cheque to fix any dates it deemed suitable.

Applicant contends that his rights were transgressed by second respondent continuing with the enquiry in his absence and in the absence of his attorneys. (Paragraph 12 of the originating application). It is common cause that the applicant was advised of the new dates for the enquiry more than a month before the commencement of the enquiry i.e 17th October, 1995. By letter of even date applicant's attorneys responded that they would only be available on 24th and 25th i.e the last two days of the enquiry. On the 23rd October, respondent's attorneys advised applicant's attorney that the committee had instructed that the enquiry will proceed even on those other dates when they will be unavailable. Respondent's attorneys concluded the letter by stating;

> ***"I am further instructed by the committee to inform you and Mr Masilo that if Mr Masilo fails to appear at the enquiry on the dates advised above the disciplinary enquiry would proceed in his absence".***

On the 9th November, 1995, applicant's attorneys' response was a blunt, "*our client's written instructions are that he will not appear unrepresented by Harley and Morris between the 20th to the 23rd November, 1995 at your disciplinary hearing".*

On the 13th November respondent's attorneys caused a letter to be served on the applicant personally. (Annexure "C 43"). The purpose of the letter was to convey the committee's instruction to applicant to attend the inquiry on the 20th November with or without legal representation. The letter also advised him that that if his present lawyers are not available it is his duty to find the services of another lawyer. Applicant's response through his attorneys was that all correspondence addressed to him by the LHDA should be delivered to his attorneys and not to him directly. The fact of the matter was that on the 20th November, neither the applicant nor his attorneys attended the enquiry hence the proceedings went ahead in their absence. Clearly therefore, the applicant refused to heed the sub-committee's instruction to attend the enquiry. In the case of Reckitt & Colman (SA) (Pty) Ltd .v. Chemical Workers Industrial Union & Others (1991) 12 ILJ 806 the Labour Appeal Court held thus;

> ***"(The industrial) Court has a duty to apply equitable principles in assessing what is fair between employer and employee. If the employer and the employee have entered into an agreement regulating disciplinary enquiries and providing for internal appeals, it would appear that under normal circumstances an employee who is to be disciplined has to attend and partake in those proceedings. If he refuses to do so he could hardly allege that the proceedings and the outcome of the proceedings were unfair or amounted to unfair labour practice. There may obviously be occasions when employees with reason could refuse to attend such proceedings". (*At p. 813 B-D)**

The above passage was quoted with approval in yet another Labour Appeal Court decision in Hoescht (pty) Ltd .V. Chemical Workers Industrial Union & Another

(1993) 14 ILJ 1449 at 1457 A-B. In this latter case Joffe J added that an employee who fails to participate in the disciplinary enquiry "..... would require a proper and satisfactory explanation should he later participate in the industrial court proceedings".

There is no doubt from the record that the applicant herein refused to participate in the disciplinary enquiry scheduled to start on the 20th November, 1995. The issue that falls to be determined is whether he has discharged the burden of providing a proper and satisfactory explanation why he could not attend the enquiry. It appears to us that applicant's explanation is to be found in his attorney's letter of 9th November, 1995 (annexure " C 42") where he instructed his attorneys to inform respondent's attorneys that he will not appear unrepresented by Harley and Morris at the enquiry. Even in paragraph 11 of his originating application applicant informs this Court that since respondent was represented by attorneys and senior counsel he "naturally felt it appropriate and necessary to be represented by a similar team of lawyers in order that my case may be fully aired before the committee".

Clearly therefore, applicant's reason for failing to attend the enquiry was that his lawyers would not be available and that he needed a reputable team of lawyers so that his case could be fully aired. Is this a proper and satisfactory explanation? It seems that in view of precedents on this subject, this question ought to be answered in the negative. In the case of Delta Motor Corporation (Pty) Ltd .V. National Automobile & Allied Workers Union (1988) 9 ILJ 743, the South African Industrial Court sitting in Cape Town refused to uphold a request for postponement of the hearing simply because when his counsel could not be present on the day of the hearing the applicant had not found alternative counsel sufficiently experienced in Labour law matters to represent him. In refusing the Court stated as follows;

"The starting point is that the respondent opposing the application for postponement finds itself in the superior position. It has a procedural right to have its case heard on the appointed day. That right will prevail in the absence of strong reasons for postponement".

In the case of T.V Liphapang .V. Transkei travel Agency & Transkei Airways Corporation Ltd (1993) 4 (10) SALLR 4, the Transkei industrial court refused to uphold the applicant's argument that he was not given a proper hearing because the respondents had proceeded with the enquiry in the absence of the applicant despite having been informed by the latter that his attorney had gone overseas on a five week study tour. In arriving at the conclusion the court considered among others the following factors;

(a) that despite being given an advance notice of enquiry by seven days the applicant only notified respondents of his predicament two days before the hearing;

(b) the applicant had the duty to seek the services of another attorney timeously but he did not do so;

(c) the applicant did not even attend the enquiry on the scheduled day to formally request for a postponement.

If the above precedent is applied to the facts of the present case it will be noticed that after applicant's attorneys indicated that they would not be able to attend the enquiry on the 20th to 23rd November, 1995, the respondent promptly advised that there will be no further postponements and that the enquiry would proceed with or without the applicant. Applicant knew full well what would happen if he did not attend the enquiry, but he decided he would not attend.

It seems to this Court that if the applicant had been serious about the enquiry he would have seen to it that he obtained the services of another lawyer when his then attorneys indicated that they would not be able to attend. He had more than enough time to find other lawyers to represent him as he knew well before November that his attorneys would not be available. This much was even advised to him by respondent's attorneys (see annexure "C 43" to the answer) that, "*if your present legal representatives are not available it was incumbent upon you to find lawyers that are*". Applicant's attitude on the other hand was that he would not appear unrepresented by his then attorneys of record.

Even if applicant's attorneys were not going to be present and he had not secured alternative legal representation, the applicant was under a duty to attend and explain the situation and possibly request for a postponement. His decision not to attend despite being advised of the consequences is a clear indication that he was not interested in the proceedings. The respondent was entitled to proceed in his absence. He cannot later turn around and say the enquiry was unfair, for he was the author of his own misfortune.

Regarding the second leg of his argument that the Chief Executive declined to hear his case contrary to Regulation 4.2 of the Regulations, it does seem correct that in terms of the said regulation "*any disciplinary matter shall be heard by the Chief Executive*". It is equally correct that the enquiry into applicant's misconduct was conducted by a committee and not the Chief Executive himself. It is, however, significant that in adopting the procedure that was followed in the conduct of the hearing of applicant's misconduct the Chief Executive did not act alone. He first sought the permission of the board, which is the supreme governing body of the

respondent. (See annexure "C 23" paragraph 3 thereof). The Board duly approved that regulation 4.2 be bent to enable the Chief Executive to recuse himself.

Notwithstanding the Board's approval of the change to the regulations, the Chief Executive still invited applicant to indicate if he had any objection to the proposed procedure. Applicant's response through his attorneys was a delighted ;

> ***"our clients welcome the fact that the Acting Chief Executive Mr Putsoane has recused himself from the proceedings".***

Clearly therefore, the change to the regulations was done by a body that is in law entitled to do so. Moreover, the change was intended to ensure that applicant got a fair and just treatment. Above all the applicant himself welcomed the changes. He cannot therefore later turn round and say the regulations were breached. In the premises we are of the view that applicant's dismissal was both substantively and procedurally fair. This applicant is therefore dismissed.

Costs shall be costs in the suit.

THUS DONE AT MASERU THIS 2ND DAY OF FEBRUARY, 1998.

L.A LETHOBANE
PRESIDENT

M. KANE
MEMBER **I AGREE**

T. KEPA
MEMBER **I AGREE**

FOR APPLICANT : **NO APPEARANCE**

FOR RESPONDENT: **ADVOCATE PENZHORN S.C**
MR H.H.T WOKER
MR .J.T. M MOILOA