IN THE LABOUR COURT OF LESOTHO

CASE NO LC 131/96

HELD AT MASERU

IN THE MATTER OF:

SEBOLOKI LELEKA APPLICANT

AND

L.T.A. GROUP 5 (MOHALE JOINT VENTURE) RESPONDENT

JUDGMENT

This case arises out of the dismissal of the applicant and three others in November 1995, for allegedly stealing the property of the respondent valued at approximately M68,500-00. It is common cause between the parties that during the 1995 Independence holidays which was a long weekend, a radio telephone unit valued at approximately M65,00-00 went missing at respondent's workshop at Bushmen Pass. It came out from the evidence of Mr. Le Roux, the Workshop Manager that infact a heavy duty starter motor valued at approximately M3,500-00 had also gone missing. However, for the purposes of this judgment only the radio telephone is relevant as this is the equipment the applicant and his colleagues are accused of stealing.

According to the testimony of Mr. John Slade Baker of the respondent's Administration Department the theft was discovered when the company reopened after the holidays. The matter was reported to the police and with the approval of Management all the employees of the Workshop were taken by the Ha Matela Police for questioning. He testified further that virtually all the employees with the exception of four, the applicant included; were subsequently released. The applicant and the other three were kept in custody for further questioning.

After a while the Police recovered the radio telephone unit at a residence in Masianokeng near Maseru. According to the information the Police gave to the Management of the respondent, the property was recovered after the applicant and his three colleagues had led them to the place where they found it. In a

confirmation statement subsequently made by one Trooper Mokhosi to the Management, (Annexure "A" to the Answer) Mr. Leleka himself had confessed that he and one Rantseli, who was in detention with him, had sold the radio telephone unit to one Russel Pitchers at Masianokeng. The statement went further that Mr. Leleka led them to Mr. Pitchers' residence where they found the unit.

Criminal charges were instituted against the four employees in the Magistrate Court. They were, however, subsequently released on bail. After their release they went back to work where after a brief encounter with Mr. Slade-Baker they were suspended on full pay pending disciplinary enquiry. On the 15th November 1995 the applicant was dismissed after appearing before the Workshop Manager on a date that has not been specified, on a charge of unlawful entry into respondent's premises and theft of property.

The decision was appealed against on several grounds one of which was that Mr. Le Roux was complainant and prosecutor. At the appeal hearing both the applicant and the Workshop Manager were called to testify and to cross examine each other. Whilst conceding that there was a flaw in that *"...there was no clearly identifiable complainant,"* the chairman of the appeal hearing was of the view that that *"did not materially affect the core of the issue namely that you were charged in one involvement of theft of company property."* After dismissing all other grounds of appeal the chairman of the appeal hearing upheld the decision to dismiss the applicant.

The applicant subsequently approached this court seeking the setting aside of his dismissal and an order of reinstatement. The ground on which the relief was sought was that the hearing was inconsistent with the general principles of legality and the rules of natural justice in that;

(a) no evidence was led to prove the charge;

(b) no record of proceedings was recorded or written;

(c) the chairman was a judge and a prosecutor;

(d) applicant was put to task to prove his innocence by a chairman who simply relied on information he claimed was from the Police who had informed him that the applicant was involved in the theft of respondent's property;

(e) criminal proceedings have been preferred against applicant which are pending in the Magistrate Court in which applicant will have an opportunity to defend himself whilst the respondent company has already sanctioned him by dismissal.

During his testimony the applicant also challenged the propriety of the appeal hearing on the basis that the chairman of the appeal should have remitted the case for fresh hearing if he felt it was necessary to hear new evidence and not for him to hear such evidence.

The applicant himself supported by Mr. Makosholo who represented him at the enquiry chaired by Mr. Le Roux testified. In his testimony the applicant says he was notified of the hearing by letter. He stated that there were only three of them, Mr. Le Roux the chairman, himself and his representative. Mr. Le Roux read him the charge which was contained in the letter of dismissal. He goes further to testify that Mr. Le Roux led no evidence save to tell them what he said he had been told by the Police. He added that Mr. Le Roux did not take any minutes.

During the course of his testimony Mr. Leleka introduced a new ground of relief that he was infact never given any opportunity to defend himself. The respondent's Counsel did not object and the evidence went on that infact when Mr. Le Roux walked into the meeting room he was already holding applicant's letter of dismissal. He testified that he read it to him after which he asked him if he was satisfied and he said he was not satisfied with the procedure followed. Regarding the stolen property, the applicant agrees that it was found at Masianokeng. He however denies that he is the one who led the Police to where it was found. He states that he and others learned later that the police had infact been told of where the property was by Rantseli.

Mr. Makosholo confirmed that the applicant was never given the opportunity to defend himself. He testified that at the hearing there were four of them, the chairman and another person who he says was doing his own business, the accused and himself. When they were called in Mr. Le Roux was already holding applicant's letter of dismissal. He denied that the applicant was read a charge, which was a clear contradiction of applicant's own evidence. However, in answer to questions under cross-examination Mr. Makosholo gave answers which amounted to completely different evidence from his testimony in chief. For instance when he was asked to state step by step precisely what happened at the enquiry, the chronology of events that he narrated differed materially from what he claimed happened in his testimony in chief, especially the claim that when they entered the meeting room virtually nothing was said, the applicant was served with a letter of dismissal. He outlined a discussion which he said took place between *"Leleka and his supervisor,"* which he said he did not take part in. Significantly, the discussion related to the charge the applicant was facing. However, in his testimony in chief he had claimed that he had made several interventions on behalf of the applicant regarding who the complainant was and who would record the proceedings. We have no hesitation in finding that Mr. Makosholo's testimony was a litany of fabrications and lies and as such was most unhelpful.

Mr. Le Roux's testimony is that there were infact four of them at the hearing. Himself, another Le Roux, the applicant and Mr. Makosholo. He testified that he was the chairman while the other Le Roux was the company representative. He testified further that this Le Roux who represented the company was the same Le Roux who was the company representative at the inconclusive hearing of 17/10/95 chaired by Mr. Slade-Baker.

He stated further that the applicant was informed of the hearing by a letter which stipulated the charge he was to answer. He informed the court that he asked the applicant if he understood the contents of the letter calling him for the hearing and he answered in the affirmative. He then explained to the applicant and the company representative the purpose of the hearing, he testified. He stated further that he told them about the information he had received from the Police and asked the applicant if he had anything to say regarding the hearing and the applicant said he had nothing to say.

Mr. Le Roux confirmed that he did not call witnesses to prove the charge but said that he had believed what the Police told him about applicant's involvement in the theft. Regarding the minutes he agreed that no minutes of the inquiry were kept but that he did make some notes in his diary. Asked under cross-examination why he did not keep the minutes his response was a frank *"this was honestly the first hearing I conducted."*

Whilst it may not be said that Mr. Le Roux's evidence was entirely consistent it however, struck us as the more probably version of all the accounts the court heard. The main inconsistency in his testimony relates to Annexure "A" to the Answer which he says he already had in November when he heard applicant's case and decided to dismiss him. The fact is that Annexure "A" was made on the 26th May 1996, long after applicant's disciplinary case. This inconsistency, however, does not invalidate the fact which is admitted by both parties that in conducting applicant's case Mr. Le Roux relied on information received from the Police.

Another factor which lends credibility to Mr. Le Roux's testimony is that it is corroborated by Annexure "B" to the Originating Application which is the record of the proceedings of applicant's appeal. It will be recalled that at the hearing of the appeal both parties were invited to make statements and to cross-examine each other. Even though applicant and his representative were unhappy with the approach, in their testimony, they said they availed themselves of the opportunity to clear their name. The following significant record appears on paragraph 3 of Annexure "B" which was not controverted by the applicant and his representative:

> ***"Mr. Le Roux explained that he conducted the hearing as follows: He explained the charges to Mr. Leleka of unlawful entry into company property. This was based on evidence given to Mr. Le Roux by the police and later***

substantiated in writing. He told Mr. Leleka that he was dismissing him on this basis and asked him if he had any comments or defence.

Mr. Leleka agreed that this process did take place."

In the view of the court the above record is substantially similar to the account of events given by Mr. Le Roux in his testimony. Mr. Heshepe who represented applicant on appeal tried belatedly under cross-examination to say that the Minutes kept by the chairman were inaccurate, because only respondent's version appears. If this was so this fact would have been alleged in papers and applicant would have taken steps to dissociate himself from the concession he is alleged to have made. Not only did he not do so, but he also annexed the minutes to his Originating Application in support of his case.

In the light of the foregoing accepted evidence it seems to this court that there is no merit in applicant's claim that he was never given an opportunity to defend himself. The procedure adopted by Mr. Le Roux in asking Mr. Leleka if he had any defence to the complaint he read to him was substantially in compliance with Section 66(4) of the Labour Code Order 1992, which requires that an employee who is dismissed for poor performance and/or misconduct at the workplace should *".....be entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made...."*

There is no dispute that the minutes of the proceedings were not kept. The issue, however, is; in terms of which law or rule should such minutes have been kept? There is no invariable rule that an employer's disciplinary tribunal should keep the record of its proceedings, unless such a requirement is dictated by law, employer's own rules or a collective agreement. Equally baseless is the applicant' claim that the chairman of the appeal should have sent the case back for new hearing if new evidence was to be led. The reasons for this finding are essentially two. Firstly, the chairman was not hearing new evidence. He was merely saying the chairman of the initial enquiry and the applicant should come and give evidence before him about what transpired at the hearing which was the subject of the appeal. There is nothing irregular in this procedure. Secondly, the hard and fast rule being foisted on the chairman to refer the case back could only be relied on if there was a rule, code or agreement providing for that procedure.

The Court did ask Mr. Heshepe if his union had an agreement with the respondent which provided the procedure he was insisting on. He said they did have the agreement. He however, could not make it available to the Court. It came out in Mr. Baker's evidence that infact the respondent and applicant's union only entered into an agreement in May 1996. The incidents giving rise to these proceedings occurred in October 1995. Even if the appeal may have been subject to the provisions of that agreement as it was conducted in July, this Court is unable to make that finding because the agreement was not made available.

Regarding the evidence and the contention that the applicant was put to task to prove his innocence, there seems again to be no material dispute of fact about exactly what happened. Mr. Le Roux read the charge to the applicant and told him he was dismissing him, but asked him to advance his defence first if any. It seems that the applicant's understanding is that having been read the charge, the chairman was to proceed to lead evidence in support of the charge in line with the conduct of a criminal trial. Baxter's often quoted passage from his book, Administrative Law (1984) at p.543 is relevant here;

> ***"the courts have refused to impose upon the administration the duty to hold trial-type hearings where these are not prescribed by statute."***

The standard of proof required in cases of dismissal is the balance of probabilities. Once the chairman had overwhelming information as to the applicant's culpability, as was the case in casu the burden shifted. It is significant that the applicant had been directly connected to the theft by Police investigations. According to the information supplied to the respondent which the latter was entitled to rely on, the applicant had told them he had sold the property and even led them to where the stolen property was found. Faced with such overwhelming evidence implicating him it seems the applicant had to do something to clear his name. But according to evidence he said he had nothing to say.

It can be inferred that the applicant chose not to say anything because he thought he would have the chance to clear his name in the criminal case which was pending in the Magistrate Court. Indeed paragraph 3(b)(v) of the applicant's Originating Application does say that the respondent *".....has already sanctioned applicant by dismissal"* yet there is a criminal case pending *"...in which applicant will have an opportunity to defend himself."* The general rule is that criminal law has no place in employment law. (See Jan Tonga .v. ICA Group t/a Renown Meat (1993) 4(12) SALLR1 and Olkers .v. Monviso Knitwear (Pty) Ltd (1980) 9 ILJ857.) The fact that an employee's alleged offence is also a subject of Police investigations with a view to possible criminal prosecution is not a bar to the employer proceeding with disciplinary proceedings against the employee which may as was the case in casu result in the dismissal of the employee. (See Thabo Seala .v. Loti Brick (Pty) Ltd LC66/95 (unreported); Moramane Mabina .v. Water and Sewerage Authority LC137/95 (unreported) and Marino Lehloenya .v. The Manager, TEBA Ltd LC63/95 (unreported).

There was therefore no irregularity caused by the respondent proceeding with the disciplinary case against the applicant notwithstanding that a criminal case arising out of the same offence was pending at the sametime.

Mr. Mpopo for the applicant contended that the disciplinary tribunal was improperly constituted because Mr. Le Roux being an employee of the respondent

was a Judge in his own cause. It was also contended that Mr. Le Roux was prosecutor and complainant whilst also being the chairman. We have already stated that criminal distinctions are not relevant in the employment context. There is no need, unless dictated by statute or some other law, for a disciplinary case to be conducted by a prosecutor in a criminal court context. A hearing in the employment relationship is essentially an enquiry into the acts. In that exercise the presiding person has a more active role than in a court-room setting. Indeed it may even happen that the enquiry is conducted on a one to one basis with only the accused employee and the employer present depending of course on the size of the establishment.

As a general rule disciplinary enquiries are conducted by Management. Obviously as Workshop Manager Mr. Le Roux is part of Management and as such he can chair disciplinary enquiries. The fact alone that he is an employee of the respondent is not sufficient to infer bias. As Judge Cameroon puts it in his Article, The Right To A Hearing Before Dismissal - Part 1 (1986) 7 ILJ183 in the employment context *"....the employer is necessarily a judge in his or her own cause."* At p.213 of the article the learned judge states the rule as follows:

> ***"The principle seems to be this: while allowance will be made for the unavoidable practicalities of prior contact, personal impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective and fair judgment to bear on the issues involved - such as bias or presumed bias stemming from a closed or prejudiced mind or from a family or other relationship will render the proceedings unfair."***

It is noteworthy that the applicant does not allege bias. He merely perceives that the structure of the tribunal is impartial. This court has found that Mr. Le Roux was by and large an impressive witness. Above all he appeared to be a person who had no ill-feeling against the applicant. Indeed he even admitted that he was disappointed that he was implicated as he was a very good employee. We are satisfied that he handled this case with an open mind and that no unfairness or injustice was meted to the applicant.

In our view therefore, this application ought not to succeed and it is accordingly dismissed.

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

L.A LETHOBANE
PRESIDENT

A.T. KOLOBE
MEMBER **I AGREE**

P.K. LEROTHOLI
MEMBER **I AGREE**

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