IN THE LABOUR COURT OF LESOTHO

CASE NO LC 6/00

HELD AT MASERU

IN THE MATTER OF:

CLEMENT MOTHEBE APPLICANT

AND

LESOTHO FLOUR MILLS RESPONDENT

JUDGMENT

The facts of this case are largely common cause. Even where disputes of facts arise they are not serious or bonafide disputes. The applicant herein was dismissed for having used company vehicle on a holiday. In his Originating application paragraph 7 thereof the applicant "...avers that the date in question was not a holiday." This court has taken judicial notice of the fact that Thursday the 13th May 1999, which is the day in contention, was an Ascension Day as such a public holiday in Lesotho.

There is no denial that on the 13th May 1999, the applicant used the respondent's vehicle which he was authorised to use during the week, to go to Ficksburg in South Africa. In their submissions the respondents contended that the applicant was infact using the vehicle for private purposes. In reply the applicant sought to show that there was no evidence to support this and that in any event it was not the charge with which the applicant was charged. While it may be true that this was not the charge applicant was charged with, it is not unreasonable to infer from the charge of unauthorised use of the vehicle on a day other than a working day, that it was infact used for private purposes. Indeed annexure "LFM1" to the Originating Application which we will soon get into in detail states clearly that salesmen are "disentitled to the private use of company (vehicles) at weekends"(sic).

Respondent's policy on the use of vehicles on weekends was communicated to Salesmen and Marketing Officer by the Sales and Marketing Manager by Memo dated 16th February 1999 and it read as follows:

"MEMO:
TO: Salesmen and Marketing Officer
FROM: Sales & Marketing Manager
DATE: 16th February, 99
Re: Request to see MD by Salesman & Marketing Officer

Your memo dated 12/2/99 refers.

Apparently your request and claim of entitlement to access a Company Vehicle at weekends is based on a misconception of Company policy and structures.

As far as I am concerned I do not manage something which is not inline or against the Company policy. I will never promise any body something which contravenes the Company policy.

Lesotho Flour Mills Ltd Vehicle Policy was communicated to you by me in a meeting held on 5/02/99 in the Boardroom.

It was stated to you that vehicle policy for you is that you park Bakkies on weekends.

You must also be aware that one of you was given a Verbal Warning to stop the practice when misusing the Company bakkie to transport his personal animal feeds products to his personal business during the working hours and yet he is being fully paid by the Company.

You are given a monthly transport allowance and in terms of company policy you cannot benefit from both a Company Vehicle at weekends and a Transport allowance at the same time.

The position still stands as communicated to you on 05/02/99 and you will remain disentitled to the private use of company at weekends.

However, I will still make arrangements this week for you to see Managing Director.

CC: Sales Manager
Human Resources Manager
Operations Director
Managing Director"

In one breath applicant says he was wrongly charged because he had been permitted to use the vehicle during the week. (See paragraph 7 of the Originating Application). In another breath (paragraph 8) he acknowledges the charge but says the disciplinary committee erroneously treated the breach of discipline as a stage 4 breach of discipline which is classified as gross misconduct the penalty for which is dismissal. He contends that in terms of the respondent's disciplinary procedure the breach he was charged of was a stage 2/3 offence (serious offence), penalty for which is final written warning for the following reasons:

(a) Applicant had on the date in question taken home company vehicle with the knowledge of management.

(b) **The 13th May fell during the course of the week as such the alleged use of the vehicle did not occur on a weekend.**

(c) Deviation of 3km from home does not amount to quality of an authorisation envisaged in stage 4.

(d) Unauthorisation in stage 4 contemplates total lack of authority which borders on delinquency.

There is no denial that applicant and his colleagues were allowed use of company vehicles during the week. However, Sales and Marketing Manager's Memo of 16th February 1999 is very clear that "it was stated to you that vehicle policy is that you park bakkies on weekends." This Memo was annexed to the respondent's Answer as "LMF1". The applicant who testified in these proceedings never denied knowledge of it or its contents. On page 2 the Memo again states in the penultimate paragraph; "the position still stands as communicated to you on 05/02/99 and you will remain disentitled to the private use of company (vehicles) at weekends."

Applicant argues that the 13th May 1999 was not a weekend. This is elevating form over substance. By weekend for employer/employee relationship, and the rules governing their relations it is meant a day which is not an official working day. A public holiday is a national non-working day just like a Sunday is a Christian holiday as such a non-working day for Christians. But the dictionary definition of a weekend includes a Sunday even though a Sunday is the first day of the week. We have no doubt in our minds therefore, that when it prevented private use of its vehicles on weekends the respondent included all official holidays in Lesotho which are recognised as such in terms of the Public Holidays Act 1967.

On the question of having deviated a mere 3km from the official route, it seems that this argument must fall away in the light of our finding that weekend for purposes of Annexure "LMF1" includes public holidays. Having taken the vehicle on a prohibited day, this was no longer mere deviation. It was a clear and unambiguous contravention of company policy as set out in annexure "LFM1".

We agree that the degree of unauthorised use contemplated in stage 4 offences is total lack of authority. This is precisely what the applicant landed himself into

when he used respondent's vehicle on a public holiday notwithstanding the very clear policy communicated to him and others per annexure "LFM1". On the Thursday in question he totally lacked the authority to be driving the vehicle in question as it was a public holiday.

Applicant had two further complaints of a procedural nature namely that; the chairman of the initial hearing "...was invited to the appeal committee's hearing and was asked to comment on my statements when he ought not to have so done in terms of the rules and regulations of respondent." Further more, he averred that "the gravity of punishment is not commensurate with the commission of the offence regard being had that the applicant was only first offender and fact that an employee who had driven company vehicle to Bloemfontein was given a verbal warning not dismissal."

The respondent in seeking to justify the participation of the chairman of the initial hearing in the appeal hearing sought succour from the decision of this court in Thabiso Ramokoena .v. Standard Chartered Bank LC116/96. In that case the respondent's Managing Director had in attending to the applicant's appeal invited all members of the original disciplinary hearing to be present. At the appeal hearing itself the Managing Director had clarified that "the members of the original tribunal were present so that Mr. Ramokoena and Mr. Dewar (the Managing Director) could question them on their findings and they could also pose questions where necessary." This court held that this procedure was not unfair to the applicant because the decision maker was going to be the Managing Director alone. As for the members of the initial hearing they were there to defend their findings and this is what the audi alteram partem rule is all about. The present case is identical with Ramokoena's case in that the chairman of the initial hearing's attendance at the appeal was not, according to applicant's own Originating Application, to be a member of the appeal body, but to comment on applicant's statements.

It is only fair that when applicant appealed against the chairman's decision the chairman is informed and allowed the opportunity to rebut what the applicant says about him. No specific rule/regulation was pointed out which outlaws this time tested rule that a person against whom a complaint is made has the right to defend himself before a decision is made dismissing or upholding the complaint. The case of Lesotho Evangelical Church .v. Rev. Phinias Lehlohonolo Pitso CIV/APN/141/91 to which we were referred by Mr. Mosito in his written submissions is distinguishable from the instant case in that, the three persons complained of sat as members of the panel both at the initial hearing as members of the Executive Committee and on appeal as members of the Seboka. That was undoubtedly irregular because the three members were now gong to decide on the appeal against their own decision. That was going against the rules of justice and fairplay.

The respondent's disciplinary procedure has clearly stated that stage 4 offences are those offences which a person found guilty of will be dismissed. If applicant's case fell in this category which the respondents say it did, there is no question of one being a first offender. Applicant claimed that someone who had driven a company vehicle to Bloemfontein was only given a verbal warning, but he (applicant) did not disclose the circumstances under which that other person had driven the vehicle to Bloemfontein. Even when he was in the witness box testifying he did not allege that the facts of that other case where in pari materia with the facts of his own case. Accordingly this defence must be thrown away as irrelevant.

Finally, Mr. Mosito submitted that since the applicant was charged with "unauthorised use of plant, equipment or materials," his misconduct ought to have been classified as a stage 2/3 offence for which a final written warning would have been an appropriate penalty. Mr. Mosito is correct that there is no such offence as "unauthorised use of plant, equipment or material under stage 4 offences. However, even stage 2/3 offences do not have a charge like that which appeared in applicant's letter of notification of disciplinary hearing. What they have under stage 2/3 offences is "misuse of plant, equipment, materials or processes belonging to employer or fellow employees." The issue is precisely what charge was applicant charged with or which charge ought he to have been charged with!

One thing apparent on the face of the papers is the attempt to withhold documentation that would provide vital information. For instance, the letter of 9th June 1999 with which applicant's employment was terminated is not annexed to the Originating Application and yet there is reference to it in paragraph 5 of the Originating Application. Such a letter would normally show the reason(s) for the employee's dismissal which can easily lead to the determination of the offence with which the employee had been charged. Similarly, the letter of the Appeal Committee which upheld applicant's dismissal is methodically kept away and yet paragraph 8 of the Originating Application purports to interpret its contents.

Be that as it may in the case of Sebolai Senaoana .v. Christian Council of Lesotho LC45/96, (unreported) this court held at p.5 of the typed judgment that, "the duty of this court goes beyond the mere labelling of the offence for which the applicant was dismissed. The task is to go further and determine whether evidence before the court establishes a misconduct for which the applicant could be punished with dismissal". In his Article which this court relied upon in the Senaoana case supra,
<u>The Dismissal of Strikers</u> (1990) 11 ILJ 213 Brassey submits that equity, like the common law dictates that dismissal for misconduct and incapacity be judged objectively. He avers further that;

> ***"the enquiry is into the facts, not into what the employer in dismissing, believed the facts to be. In matters of dismissal, mistakes are easy to make; few employers are legally trained and the information they are given is often wrong or incomplete."***

It is common cause that the confusing charge which neither appears in the stage 2/3 or stage 4 offences appeared in the letter written by the respondent's Assistant Human Resources Manager to applicant. This letter was handed in by applicant as part of his evidence and was marked annexure "CM2". In our view the error of misreading the disciplinary code or wrongly stating the charge is something that can be expected given that the author of the letter was communicating information that had been given to him by someone else. The charge it would seem, when it came, corrected that error because in paragraph 5 of his Originating Application applicant avers that;

> ***"sometime on or about 2nd June 1999 applicant was charged by respondent... for breach of discipline/code of respondent in that applicant had used respondent's vehicle without respondent's authority. Applicant was found guilty and respondent terminated its contract of employment with applicant by letter dated 9th June 1999."*** **(emphasis added). We have emphasized the words "without respondent's authority to show that notwithstanding the erroneous labelling of the charge in exhibit "CM2" the applicant was finally charged and convicted of the correct offence of unauthorised use of the respondent's vehicle.**

Assuming that no such concession had been made, the admitted facts before us point to no other offence with which the applicant could be charged other than the stage 4 offence concerning unauthorised driving of respondent's vehicle. The stage 2/3 offence regarding misuse of plant, equipment and materials would appear to relate to other sectors of the respondent's activities. As for vehicles they are clearly classified under stage 4 offences. Notwithstanding the error in the citation of the offence therefore, the applicant would still not escape the noose in the light of the uncontested facts before the court. Accordingly we find no reason to disturb the findings of the respondent's tribunals as such the application is dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 15TH DAY OF NOVEMBER, 2000.

L.A LETHOBANE
PRESIDENT

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

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

FOR APPLICANT : **MR MOSITO**
FOR RESPONDENT: **MS SEPHOMOLO**