

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 115/00

HELD AT MASERU

IN THE MATTER OF:

MATEE PHATELA

APPLICANT

AND

**LESOTHO HIGHLANDS DEVELOPMENT
AUTHORITY(LHDA)**

RESPONDENT

JUDGMENT

This judgment is signed by only two of the original panel of three. This is purely for reasons of convenience because the learned member Mr. Lieta, has been unwell for quite a while and there is no indication that he will be well soon. We felt that we should not delay the litigants any further in knowing the final outcome of this case. To this end, we resolved to take full responsibility for this judgment in terms of rule 25(2) of the Labour Court Rules 1994. The learned member who has not appended his signature is, however, to all intents and purposes part of this judgment in as much as he took part in its deliberations.

The applicant was employed by the respondent corporation in its Procurement Department. He was responsible for making purchases on behalf of the respondent. It is alleged that between April 1998 and October 1998 the applicant entered into a deal with a South African company called M.E.T. Med. Supplies owned by one Pretorius. In terms of the deal the applicant ordered supplies from M.E.T. without following LHDA procurement rules such as obtaining three quotations, and buying from the least quote. Purchases were made on M.E.T. quotation alone.

Where three quotations had allegedly been obtained it turned out that they were infact from one supplier namely M.E.T. This again was contrary to the procurement rules as the quotations have to come from different suppliers. These purchases were for substantial amounts, but in some instances deliveries were not made, or where they had been made it was not complete delivery. As a result of this scam the

respondent was defrauded of money to the tune of M310528-00, while the applicant in turn was enriched by M19500-00 by way of bribes he received from Pretorius for his part in the deal.

Respondent commissioned an investigation by a reputable firm of investigators, Pricewater House Coopers. Following the report of the investigators the applicant was charged with several misconducts relating to his acceptance of bribes; and irregular purchases. He was found guilty and dismissed on the 20th March 2000. On the 15th September 2000 he launched the present proceedings challenging both the procedural and substantive fairness of his dismissal. Pleadings were closed and the case was scheduled for hearing on the 24th October 2001.

At the start of the hearing counsels indicated that they had agreed not to go into the substantive fairness of the case as yet. They had agreed that they address the point of law which though not appearing in the papers was being taken as such by the applicant as a point in limine, which if successful would rest the case. The point concerned the composition of the committee which conducted the applicant's disciplinary hearing.

Mr. Phafane for the applicant argued that the committee was not properly constituted because contrary to the rules the person chairing it was not the Branch chairman and the Human Resources Manager had not been in attendance but had purported to delegate a Mr. Lebona. He submitted that the respondent's Personnel Regulations constitute delegated legislation in as much as they owe their existence to an Act of Parliament namely, the Lesotho Highlands Authority Order 1986. He contended therefore that persons delegated to exercise certain powers under the rules cannot as a rule further delegate. He argued that the disciplinary proceedings were therefore null and void and that they should be set aside. He referred us to the case of Mpho Qhobela .v. Attorney General and PS Agriculture CIV/APN/229/85.

Ms Matshikiza for the respondent argued that the applicant suffered no prejudice as a consequence of the composition of the committee as indeed none was shown. He contended that on the contrary the respondent would have been prejudiced if it were to delay the holding of the inquiry until Mr. Russell the Human resources Manager was able to attend as he indicated that on that particular day (date of hearing) he already had interviews scheduled for that day. She contended further that it is infact not the personality that is important but the office so that if the office is represented that should suffice. Finally, she averred that the applicant never in any event objected to the composition of the committee at the hearing. It is however, evident at page 2 of the record of the disciplinary proceedings that applicant's representative questioned the chairmanship of the meeting.

With the consent of both counsels an agreed copy of the personnel regulations of the respondent was handed in. It was agreed by both counsels that the applicant is governed by clause 13.2.2.3 of the regulations which says the committee to

investigate the employees of applicant's category namely; section head and below shall be composed as follows: Chairperson, Branch Manager; Members, Human Resources Manager; Secretary, Section Head Industrial Relations or his representative and the representative of Legal Branch.

It is common cause between the Parties that the relevant Branch Manager was a Mrs. Kao. It is further common cause that the Human resources Manager at the material time was a Mr. Russell. The committee was chaired by one Mr. Mapetja instead of Mrs. Kao and no explanation was advanced for this. Mr. Russell specifically noted on the letter inviting him to attend the disciplinary hearing that he would like Mr. Lebona to stand in for him as he was attending an interview. Quite clearly therefore, the committee was improperly constituted in as much as it was not in compliance with the Personnel Regulations. The issue is whether that impropriety can be excused for any of the reasons that Ms Matshikiza presented before the court.

The view that we hold is that the question of prejudice whether to the applicant or the respondent is irrelevant. There is nothing in the regulations either direct or implied suggesting that depending on the prejudice likely to be suffered the rules may be abridged. In the same manner if regulations required the participation of the office as opposed to the incumbent occupying the position, they would have made that clear as they have indeed done in the cases of Industrial Relations and the Legal Branch. There the regulations clearly state that it will be the head of the Industrial Relations or his representative. In the case of the Legal Branch no incumbent is specified meaning anybody from that branch would be suitable. But in the case of the chairperson and the Human Resources the regulations have singled out officers who would participate in the disciplinary hearing and these are the Branch Manager and the Human Resources Manager respectively. The regulations make no provision for delegation in the case of these two.

In the case of Mpho Qhobela supra to which we were referred by Mr. Phafane, the High Court held the interdiction of the applicant to be invalid because she had been interdicted by a person other than the officer authorised by the Public Service Commission Rules 1970 to interdict public officers. It was further found that even that officer who is authorised by the rules to interdict could not lawfully delegate that power because there was nothing in the enabling legislation empowering him to delegate his powers to others.

In the often quoted case of National Education Health & Allied Workers' Union & Others .v. Director General of Agriculture & Another (1993) 14 ILJ 1488 at 1500 C-G Landman P and De Kock S.M. as they then were laid the following principle:

"It has become the practice of the court in dealing with the private sector to hold an employer to his unilateral or negotiated code including a retrenchment

code. There is merit in this. An employer should live up to the expectations created amongst his staff by his unilateral code.”

This court has in the past basing itself on this passage held employers to their rules. Even in casu we believe the respondent must be held to these regulations.

For these reasons we are of the view that the impropriety cannot be excused. The applicant's dismissal was accordingly unfair in the circumstances, having come about as a result of disciplinary proceedings conducted by an improperly constituted committee. Counsels agreed that the applicant will no longer be seeking reinstatement and that the question of quantum be left open for them to negotiate. When agreement is reached such agreement will be made an order of court. In the circumstances the question of quantum is left for the negotiation of the parties as agreed. There is no order as to costs.

THUS DONE AT MASERU THIS 23RD DAY OF
NOVEMBER, 2001.

L.A LETHOBANE
PRESIDENT

G.K. LIETA
MEMBER

I AGREE

M. MAKHETHA
MEMBER

I AGREE

FOR APPLICANT : MR PHAFANE
FOR RESPONDENT: MS MATSHIKIZA