IN THE LABOUR COURT OF LESOTHO

CASE NO LC 14/97

HELD AT MASERU

IN THE MATTER OF:

MOKHATHALI SIMON SEKOTA APPLICANT

AND

LOTI BRICK (PTY) LTD RESPONDENT

JUDGMENT

This is a case in which the applicant is seeking relief in the following terms:

(a) Declaration that his dismissal is null and void, of no force and effect.
(b) Reinstatement to his post.
(c) Payment of his salary and benefits from the date of purported dismissal to date of judgment.

The case arises out of the dismissal of the applicant from the employ of the respondent company on the 1st July 1996. The alleged reason for dismissal was poor performance. The applicant had been employed as the Finance and Administration Manager of the respondent. According to the evidence of DW1, the former Managing Director of the respondent, the applicant was effectively the number two man in the hierarchy of the respondent. He was deputising the Managing Director in his absence and was the Corporate Secretary of the respondent as well.

The applicant avers that his dismissal was unfair in one or all of the following respects:

(a) the reason(s) advanced for applicant's dismissal were not sustainable, in other words he challenges the substantive fairness of his dismissal.
(b) Applicant was not afforded a chance to defend himself before dismissal.

(c) The respondent failed to observe the personnel regulations concerning procedure for conducting of disciplinary hearing.

(d) Applicant was dismissed by the Board of Directors in contravention of the personnel regulations which vests the power to dismiss staff in the Managing Director.

It is common cause that the respondents cite as examples of applicant's poor performance, slow process of computerisation of accounts; failure to obtain approval of request for overdraft by the Board of Directors because the current financial statement which the Board had asked for was wrong and the 1996/97 budget estimates which were rejected by the Board because the budgetary figures provided by the applicant did not truly reflect the position of the company. According to the evidence of DW2 Mr. Sam Rapapa, former Finance Director of the LNDC which is a majority shareholder of the respondent, other factors such as apparent lack of interest in learning computer skills also contributed.

With regard to computerisation DW1 said he had been advised by the LNDC's Director of Finance who had previously been respondent's Finance Manager that there was delay in the computerisation of those accounts which were not yet computerised and there was tardiness in updating of those accounts which were already computerised. The applicant for his part denied that the problem of slow pace of computerisation could be laid at his doorstep. He instead blamed it on the companies that had been contracted to install the modules which he said did not do their part of the bargain. He averred that those companies had at last to be taken to court by the respondent. Under cross-examination Mr. Teele had occasion to ask the Managing Director DW1 if there was ever any court proceedings instituted against MISER, the company contracted to install the modules, and DW1 categorically denied that there was any court action taken. Applicant's testimony about the court case it must not in our view be believed as there is nothing in the papers or in evidence to support.

Under corss-examination by Ms Sephomolo the applicant conceded that he was responsible for operation and functioning of the assets of the respondent including computers. In his evidence in chief DW1 averred that the Finance Manager i.e. applicant was responsible for the functioning of the computers of the respondent. In his evidence the then LNDC Finance Director Mr. Rapapa averred that computers at Loti Brick were introduced by him whilst he was the respondent's Finance Manager. He continued to have interest in the computerisation programme of the respondent even after he moved to LNDC, the parent company of the respondent.

He had interest because he in the final analysis was responsible for the production of the Group Financial statement. To this end he had interest in ensuring that the accounting system of the respondent was fully computerised. He testified that he discussed the programme with the applicant and his staff and they said they had

problems understanding it. As Mr. Sekota's predecessor he offered his services to train him and his staff on the programme staring at 7.00 in the morning. He testified that except for two people who he did not single out, staff did not show interest in showing up for these morning sessions. In particular the applicant was not always in attendance.

This prompted Mr. Rapapa to write a lengthy report to the Managing Director on the 9th June 1995. He highlighted the importance of the modules for reporting purposes and urged that they should be installed. He observed that the modules already installed were not being updated as necessary. He particularly chastised the applicant and the accountant for not showing the initiative to learn how the programme works and for not updating the journals which were two years behind schedule. In that letter the Finance Director lays down datelines within which the updates must be done and again urges that the applicant, the accountant and staff must change their attitude towards the programme.

On the 14th May 1996 almost a year later, the LNDC Finance Director submitted yet another report to the Managing Director of the respondent. The letter once again paints a dark picture regarding progress on the computerisation programme. He again castigates the applicant for not taking the initiative to learn the system. According to the letter the journals were still not being updated as necessary and in general there was no progress.

It is common cause between the parties that after the LNDC Finance Director's letter of 9th June 1995, DW1 arranged a meeting between applicant on the one hand and the LNDC Finance Director and the Managing Director on the other hand. The meeting was intended to discuss the alleged poor performance of applicant's division. It was held at China Garden restaurant. Whilst not denying that such a meeting took place and that non-functioning of computers was discussed, applicant however, says he regarded it as an informal discussion which would not come up with any definitive conclusions as it did not even have an agenda. Respondent for their part say this meeting was meant to advise applicant to improve his performance. In his evidence DW2 says actually applicant was given six months within which to put his house in order. However, after those six months there was still no improvement.

It seems to this court that the evidence regarding applicant's unsatisfactory performance particularly on the computerisation programme is very solid and unshakeable. Apart from oral evidence which to a large extend applicant confirms, save to try and undermine it by passing the blame to the company contracted to install the modules, there is also these lengthy reports of the LNDC Finance Director which show a pattern of poor performance and lack of interest to learn on the part of the applicant. As regards MISER which applicant seeks to blame, each time the LNDC Finance Director reported to the respondent's Managing Director he never forgot to repeat "I strongly recommend that MISER CONSULTING should be

pressured to install these modules." This recommendation is in the letter of 9th June 1995 as well as that of 14th May 1996. There is not an iota of evidence to show what action(s) applicant took to ensure that the programme succeeded. We are of the view therefore, that respondent has been able to show that the blame for the non-functioning of the computers and full computerisation of the accounts of the respondent should be shouldered by the applicant.

Mr. Teele contended that, under cross-examination DW1 abandoned his testimony of slow pace of computerisation and failure to update those accounts that were already computerised as the main source of displeasure with applicant's performance. He argued further that DW1 also abandoned the evidence regarding delay in the submission of accounts to LNDC. Indeed when Mr. Teele required DW1 to confirm under cross-examination that the above allegations were his evidence he categorically denied that those were his evidence. He was quite correct in denying as he did, because he stated both in his oral testimony and in his sworn affidavit that these are matters that he was told by the LNDC Finance Director whom he verily believed. The reports written to DW1 by the LNDC Finance Director (DW2) bear testimony to this. As regards the allegation of delays in submission of accounts to LNDC, DW1 says in his testimony that the complaint came from applicant's juniors who came to complain to him that accounts were delaying to be produced because applicant was not helping them. In paragraph 10 of his sworn affidavit DW1 says the LNDC Operations Division also raised the concern of delays in submission of accounts to LNDC. For his part applicant stated clearly in his evidence in chief that he was a mining engineer with no knowledge of accounts whatsoever. For accounts he relied entirely on the applicant. He could not therefore testify positively on accounting functions.

As it would have been expected, the LNDC finance Director (DW2) did positively testify about delays in the submission of accounts as well as the slow pace of computerisation of accounts. This is understandable because he was the one who in the end would prepare and produce the consolidated financial statement which required input from all the LNDC's subsidiaries and associated companies. It was DW2's evidence that these delays were a subject of discussion between him and DW1 on one hand and applicant on the other hand at the China Garden Restaurant. Applicant had been asked to improve on this aspect as well, within a period of six months, but as we have seen from the later report of DW2 to DW1 there was still no improvement, because the accounting system was still not fully computerised in May 1996.

Mr.Teele contended that DW2's evidence is irrelevant because he was an outsider who had nothing to do with the affairs of the respondent. Firstly DW2 clearly stated how he became of continued relevance to the respondent company. He was applicant's predecessor. He had introduced computerisation to the respondent which he continued to have interest in seeing that it succeeded. So much so that he even offered his services to help because applicant was new and not familiar with

the system. Most importantly, the successful computerisation of the accounts of the respondent would directly impact on his own work as that would ensure accurate reporting and timely submission of respondent's accounts to his office (DW2) for inclusion in the group financial statement which was the responsibility of DW2. Secondly, the applicant was the member of the Board of Directors of the respondent company. This evidence was never controverted. Surely a person in the respective positions that we outlined cannot be dismissed simply as an outsider. Applicant was effectively DW2's employee. He cannot therefore be heard to say DW2 is an outsider.

DW1 testified that as a further proof of applicant's ineptitude in accounting function, the company's application to the Board of Directors for approval of an application for an overdraft facility at the bank was rejected by the Board due to faulty accounts. Even though the application was finally granted it was through what in corporate world they call Round Robin resolution. This was explained by DW1 as meaning that, since at the end of the meeting the Board had rejected the accounts due to their inaccuracy; the company was given a second opportunity to present proper accounts by 15th March 1996. However, since the Board could not be convened again the resubmitted accounts were circulated to members to sign if they agreed with them. Having all signed as proof of their acceptance of the accounts the overdraft request was thus approved. The resolution thus adopted is called Round Robin Resolution. Clearly applicant's version that the accounts were approved was inaccurate in as much as they were approved only after they were given a further opportunity to resubmit them.

Applicant testified that the accounts in question had not been prepared by him as he had been on sick leave due to a vehicular accident. He admitted under cross-examination that the agenda item on accounts was presented by him. In his evidence DW1 said the accounts were produced by the applicant because he used to come to work to help as he had asked him to do so due to the pressure of work. This may well be so, but this was not put to the applicant whilst he was in the witness box to enable him to rebut or confirm it as the case may be.

It is not disputed that the applicant was on sick leave at the material time. Applicant however, tried to explain his presence at the Board Meeting purely in a capacity of Corporate Secretary. Now this is highly improbable. Why would he be there in one capacity only and not the other, when he holds both portfolios of Corporate Secretary and Finance Manager? The only logical conclusion that one would be led to reach would in the circumstances be that he was trying to distance himself from accounts because that agenda item had problems. By the same token the applicant was being untruthful, when in answer to a question from Ms Sephomolo under cross-examination as to whether the document he presented had inconsistencies he said it did not. He was further asked by Ms Sephomolo if the Board was happy with the document his answer was an evasive "I don't know." This could not be true because he testified in chief that DW1 told him that the

Board was not happy. At the time he was asked the question by Ms Sephomolo it was already within his knowledge that the Board was unhappy.

In his own testimony in chief the applicant said the Board had asked him to present the agenda item on accounts unaware that he had been on sick leave. This alone dispels the suggestion that the applicant was at the Board Meeting only in the capacity of Corporate Secretary. It appears, however, that the applicant did not explain to the Board that, though you are inviting me to present this agenda item, I am not familiar with it, because I have at the time of the preparation of the document been booked off sick. By so doing he assumed responsibility for the document and all its strengths and weaknesses. It appears therefore, that the Board had the basis on which to feel unhappy about him, for he did not dissociate himself from the document at that time save much later, when he learned that the Board was unhappy with it.

There is however, a further factor of inconsistency in applicant's testimony on this issue. When he was asked by Ms Sephomolo under cross-examination why he presented a document he did not prepare he said the practice was that the Managing Director would introduce the whole document and make general remarks about its contents. Thereafter each Divisional Head would present the chapter relevant to his division and their staff in different sections would provide detailed analysis where needed. This is in stark contrast with what he said in chief when he said the Board invited him to present the agenda item. The question that arises is why this inconsistency? What is applicant trying to hide? We accordingly are of the view that the applicant is well aware of the unsatisfactory accounts that were presented to the Board hence his attempt to dissociate himself from the document albeit belatedly. There was therefore merit in ascribing poor performance on this document on him.

Not long after the Board meeting which was to request an application for an overdraft facility the management of the respondent again went back to the board for the tabling of the 1996/97 budget estimates. The Board was again unhappy with the accounts presented by the applicant. "The budgetary figures provided by Mr. Sekota were not from the 1995/96 budget and therefore did not truly reflect the position of the company." (see paragraph 15 of DW1's founding affidavit). DW1 testified that after that meeting the Board asked him to remain. He was asked what he was doing about the situation. He promised that he would correct it. He then later called applicant to tell him that the Board was unhappy with his performance and that to avoid him dismissing him he would ask him to resign. Applicant asked for more time to rethink the matter. The next thing applicant wrote him annexure "C" to the Originating Application in which he stated that he was refusing DW1's offer for him to resign.

Mr. Sekota has again sought to distance himself from the inaccuracies reflected in these documents by saying he had been on sick leave. However, it came out during

DW1's cross-examination that the second meeting was to be held after applicant returned from sick leave. Even if the budget may not have been prepared by him he had the time to check if it was correct as the Finance Manager. Mr. Teele's attempts under cross-examination to get DW1 to concede that the difficulty with the budget was a result of other difficulties the company had could not succeed. He was solid in maintaining his stance that the faulty accounts were a result of applicant's poor performance. It is worth noticing that at the time that DW1 was giving evidence he was no longer employed by the respondent. He, in our view would have had no ulterior motive in maintaining that applicant was performing below standard. We accordingly are inclined to believe his version.

Mr. Teele on behalf of the applicant sought to discredit respondents' witnesses' testimony in this regard by arguing that whether the Board was happy or was not happy about the accounts can best be attested by the minutes, not an individual's recollection. He said DW1's evidence in this regard was a mere recollection. In our view the minutes are an alternative form of proof in the absence of evidence on oath. Where there is evidence on oath as was the case in casu and there is no reason to disbelief the witness's version, such evidence should suffice. Minutes may be used in this regard to disprove the witness's oral testimony, or to support it, but necessarily so. We are happy with DW1's evidence in this regard as we have no reason to disbelief him. On its own it is sufficient for our purposes.

The applicant testified that the allegation that he was not performing up to the expected standard was not bonafide in that the company had a system of annual appraisals. In May that year he had been positively appraised by the Managing Director DW1. It was therefore, a surprise that in June he was accused of poor performance. In support of this averrement he referred us to annexure "A" to the Originating Application. When he was asked whether it is true that he positively appraised applicant in May 1996, DW1 agreed, but said the applicant was a good Manager and that the positive appraisal concerned this good side. He conceded that he ought to have sated applicant's weak side, but did not do so. Indeed earlier in his testimony DW1 had mentioned this strong side of the applicant and said he had gone so far as to attempt to separate the two roles of administration and finance so that he could create a position of Human Resources Manager for applicant. This would enable applicant to exclusively deal with administration. The request was however turned by the Board. (see paragraph 11 of DW1's founding affidavit). Throughout his testimony, DW1 has struck us as an honest, fair and truthful witness whom we are of the view that his testimony regarding applicant's positive appraisal in May 1996 should be believed. That much goes for the substantive fairness of applicant's dismissal, which we are of the firm view that it has been established by evidence led before us.

Turning now to the procedural aspect, it was applicant's contention that his dismissal was unfair in as much as he was not given a hearing in terms of regulation 22.5 of the respondent's Personnel Regulations. He denies that he was ever called to

a meeting where he was reprimanded to improve his performance. He further contends that had he been given the opportunity to be heard he would have made it clear to the Board that the faulty accounts were not prepared by him but were done by the accountant. Indeed DW1 in his testimony, while insisting that he had on several occasions met with applicant to warn him about his poor performance, he however did not advise him that continued failure to improve might lead to his dismissal.

It is significant that regulation 22.5 on which reliance was made by the applicant states in clear terms that "conditions under which the convening of a disciplinary committee (sic) is discretionary." It goes further to say "the Managing Director may convene a committee when he/she judges that the situation calls for it." It follows therefore that even the China Garden restaurant meeting which applicant clearly frowns upon as not being in accordance with the provisions of the personnel regulations could well serve as a disciplinary committee meeting. This is not to suggest that it did serve that purpose for as the applicant stated it was not made clear to him that he was facing disciplinary charges. But given the wide discretion vested in the Managing Director, it could serve that purpose if the Managing Director had desired so.

What is clear is that the committee envisaged by the rules would not be practicable in the case of the applicant because such a committee has to be made of, inter alia, "the divisional head of the organisational unit for which the employee in question works." (regulation 22.3). The applicant himself was the divisional head of the organizational unit for which he worked. He could not therefore, be a judge in his own course. This is where the discretion vested in the Managing Director would have to be resorted to regarding the procedure to be followed.

In his letter of the 31st July 1996 to the applicant (annexure "D" to the Originating Application) the Managing Director states in paragraph 2 that;

> ***"I must confess your letter surprised me because I thought we had amicably resolved the issue of termination of your services at Loti Brick, having talked about it and in consequence of which I wrote you a dismissal letter."***

This statement has not been denied by the applicant. In his testimony DW1 said after the Board meeting he called applicant and informed him that he must have been aware that the Board was unhappy with his performance. He went further to say that he asked applicant to resign to avoid being dismissed. Applicant asked for more time to think over the issue which the Managing Director granted him. This was confirmed by the applicant in his testimony when he said the Managing Director called him in the afternoon to inform him of the Board's unhappiness. He stated that he asked to be given the weekend to think of the proposal. Now how much further opportunity to make representations did applicant require? He had the whole weekend to think over the matter and on Monday he had the opportunity

to make whichever representations he wished to make. It appears he did not do so. His failure to utilize the opportunity availed to him cannot and should not be blamed on the respondent. Clearly in exercise of his discretion the Managing Director decided that he should himself discuss the problem directly with the applicant as he infact was literally his number two man. We find nothing untoward in this approach and applicant should have made his representations if any to the Managing Director.

The final leg of applicant's contention was that the applicant was, contrary to the personnel regulations dismissed by the Board of Directors instead of the Managing Director. Mr. Teele tried very hard to pin DW1, the Managing Director to accede to his suggestion that it was not him who dismissed the applicant but the Board. The applicant steadfastly refused and insisted that he is the one who dismissed the applicant. He accepted that the Board expressed misgivings about applicant's performance which he took into account in deciding on the line of action to be taken. As for the decision it was his and not of the Board. Indeed even in the letter of dismissal there is not a single word or phrase which may lead one into a conclusion that the decision to dismiss was that of the Board and not the Managing Director. In the circumstance we are of the view that there is no merit in the submission. Accordingly this application is without merit as there is neither substantive nor procedural unfairness in the applicant's dismissal.
The application if therefore dismissed and there is no order as to costs.

THUS DONE AT MASERU THIS 14TH DAY OF MAY, 2001.

L.A LETHOBANE
PRESIDENT

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

G.K. LIETA
MEMBER **I AGREE**

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