IN THE LABOUR COURT OF LESOTHO

CASE NO LC 30/99

HELD AT MASERU

IN THE MATTER OF:

ROSA SELLO (duly assisted by her husband) APPLICANT

AND

LESOTHO ELECTRICITY CORPORATION RESPONDENT

JUDGMENT

This is a case in which the applicant is contesting the fairness of her dismissal on the grounds that:

(a) Evidence submitted and entirely relied upon was hearsay.
(b) No witnesses were called except one Mr. Mohapi who was the investigator in the case and also relied on statements extracted from applicant by force and through duress while she was in police custody.
(c) Onus of proof was unlawfully placed on applicant to prove her innocence.
(d) Applicant was called to testify before the complainants and this rendered the hearing procedurally unfair.
(e) Applicant was dismissed without having been paid her bonus for end of 1998 and for 37 days leave worked for.

The applicant accordingly prays that her dismissal should be found to have been both substantially and procedurally unfair and that she should be reinstated with payment of all her emoluments and benefits.

We must put on record from the start that after it was shown to her under cross examination that her outstanding 37 days leave were used by the respondent to reduce her indebtedness to the Lesotho Bank the applicant abandoned the claim and said she would verify with the bank. As regards the 1998 bonus she also

abandoned it after being closely cross-examined by Woker showing that she never earned her bonus because she was suspended for good reasons because of the trouble she got herself into. All she could say was "I hear what you are saying, but I am not sure what to say about it." (see p.44 of the typed record). Grounds (c) and (d) above were neither persued in evidence nor in Mr. Matooane's heads of argument. We accordingly treated them as abandoned as well.

Both sides adduced evidence before us to substantiate their respective versions. Applicant herself testified to support her case. We must however, start by giving a brief history of the background to this case. It is common cause that in or around August 1998, it came to the attention of the respondent corporation that there was a scam to defraud it. The scam was devised to corrupt the procedure for the connection and supply of electricity to households in the Mabote Project area in Maseru. A connection fee for a house in the Mabote Project area was M3,500-00. This resulted in money which ought to have been paid to the respondent (M3,500 a house) finding its way into private hands. An investigation was launched by LEC and the Police. The investigations led in the arrest of some seven employees, applicant included. The seven were disciplined and dismissed by the respondent, but the criminal case is still pending. It is that dismissal which the applicant is presently challenging before this court.

Applicant's testimony before this court is that sometime in August or September 1998 she was suspended from work. While she was on suspension she was called for a hearing where she was asked questions about other people. She was asked by her lawyer if before the hearing she was ever arrested? She answered that before the suspension she was told by her supervisor to report to the Police because Mr. Thibeli had been looking for her.

She testified that she went to the Police as instructed. When she got there, she averred, Mr. Thibeli told her allegations that were being made against her by the Management of the respondent. She testified further that; "he told me to write what he was saying. He told me using abusive language because I was reluctant to write and he promised to lock me up in the cell. He threatened me to an extent that I agreed to write." (see p6/10 of the typed record of the court proceedings). She testified further that Mr. Thibeli "...promised to lock me up in the cell and he told me that he was going to tell my husband that I had some relationship with some other .....(intervention) illicit affair. Okay. He told me that I was using political affairs at the place of work which I did not do and he told me that I was the child of a National BNP.....That is it."(Ibid).

The witness testified that she obliged and wrote what she was being told to write. She said that she however, wrote very briefly not taking everything that she was being told to write. She actually said she made a short summary. The following day, she testified, Mr. Thibeli came back and told her supervisor to tell her to again report to the police. When she arrived she was again abusively told to write another

statement in which she was told to implicate other people. She testified that she wrote that second statement but only to obtain her freedom.

The applicant testified further that at the disciplinary hearing no witnesses were called except for Mr. Mohapi. She stated that the gist of Mr. Mohapi,s testimony was what he said he was told by Mr. Thibeli which Mr. Thibeli said he got from her (the applicant). As for the other people who she was alleged to have helped to obtain electricity supply unlawfully, they were never called, she testified. More on this testimony of the applicant later.

The respondent's version was that the applicant was involved in the scam. To prove this allegation at the disciplinary hearing, they relied on the evidence of two of the respondent's employees namely Mr. Mohapi who chaired the respondent's internal investigation committee and Mrs. Monaheng who is the Revenue Section supervisor. The respondent further relied on the two statements of admission made by the applicant at the police station on the 27th and 30th October 1998 respectively. We will revert to this aspect of the case in due course.

Before this court the respondent adduced the evidence of four witnesses. The first one was Mr. Samuel Sefefo of Mapholaneng in the Mokhotlong District. He is one of the LEC customers whom the applicant is alleged to have assisted to be connected to the electricity supply fraudulently. Mr. Sefefo's testimony (DW1) was that he never had any dealing with the applicant to have his house connected. He stated that he was helped by one Cecelia Phate to pay for the connection fee. The said Cecelia took the papers (presumably connection application forms) and the money from him and said he would pay to the applicant i.e. Rosa. Thereafter he left everything with Cecelia. When he was asked if he knows Rosa he said he knows her because they paid to her at the window. It must be recorded that it is not in dispute that at the material time applicant was a cashier. DW1 finally testified that he never knew that there was any fraud involved until after he was questioned by the police and instructed to pay yet another M3,500-00 to the LEC so that he could be lawfully connected.

DW2 was Detective Inspector Thibeli who interviewed the applicant. DW2 testified that he is the investigating officer in Maseru RCI150/8/98 in which the applicant is one of the suspects. He averred that the respondent made a report to the Police regarding a suspected misappropriation of funds. As a result of the report some two employees of the respondent were arrested by the Police. These were the lady called Cecelia Phate and the gentleman called Thato Thene. When they were questioned by the Police they gave explanations which led the Police to the applicant. When the Police went to look for her at work they found that she had gone on leave. The Police left the message with the authorities to inform her to report to the Police when she came back to work.

On the 27th October 1998, without any prior knowledge on the part of DW2 the applicant arrived to report accompanied by her husband. DW2 says he interviewed the applicant in the presence of his (DW2) juniors. The applicant gave an explanation which, he told her to write down on a peace of paper. This explanation is the statement of admission of involvement which forms page 33 of exhibit "A" which was handed up by Mr. Matooane for the applicant with the concurrence of Mr. Woker for the respondent. DW2 vehemently denied dictating to the applicant what to write or in any way through improper means inducing her to make the statement. He said however, that he cautioned her before she made the statement.

He testified that thereafter they released the applicant with the warning that she should report again on the 30th October 1998. On the 30th the applicant made yet another statement still admitting involvement in the scam. This second statement appears on page 36 of exhibit "A". He again denies threatening the applicant or promising her anything or doing or saying anything to unduly influence her to make the statement.

DW3 was Ms 'Majubile Ntsoereng. She testified that she resides in the Mabote Project area. She applied to LEC for connection around 1996. Upon follow up, of her application, her file could not be found. After seeing her going to LEC several times, the applicant offered to help her. She searched for her file and was able to find it. After finding it, applicant told her how much she had to pay. She averred further that since she is an airhostess she could not find time to go to LEC to go and pay. The applicant went to her place of work to collect the money from her so that she could pay for her. She gave her M2,000-00 and she was later connected. Approximately eighteen months after connection she was contacted by the LEC which advised her to go and pay M3,500-00 connection fee as the previous one was fraudulent. She like DW1 had to pay twice.

Respondent's last witness was Mr. Mohapi who was a member of the respondent's internal investigation team. His evidence was that during investigations he called the applicant to question her about the scam. He particularly asked her about the fraudulent receipts of DW1 and DW3. He testified that the applicant admitted that she knew about the scam and how it operated. She was the one who was putting the LEC rubber stamp on the fictitious receipts after they had been fraudulently generated outside LEC. She further informed him that she was the one who was communicating genuine duplicate receipts of customers kept by her section to one Pulane who would print those numbers on blank receipt paper, also stolen from the respondent's storeroom. Pulane was using her employer's computer to do this. The receipts so generated would then be taken back to applicant who would affix the respondent cashier's rubber stamp to give authenticity to the receipt.

Reverting to the applicant's testimony, it was to a large extent substantiating her grounds for relief as outlined in her Originating Application. It struck us that from the start, applicant's testimony lacked the chronology and exactitude that one would

expect from a litigant who has approached a court for relief. The rather confused and unorganised fashion in which her testimony has been summarised in this judgment is precisely the way she presented it before us. From the very beginning, she talks of suspension and the hearing. She estimates that these could have occured around August or September. Now the suspension and the hearing were infact the last two things to happen. Why start with them?

It is apparent that the applicant was only suspended after she had been to the Police for questioning. We make this inference because according to overwhelming evidence which is not denied, when investigations were started applicant either took leave or she was already on leave. During investigations her name cropped up. When Police went to look for her she was on leave. Police left the message that when she returned to work she should report to them (the Police). She reported to the Police on the 27th October 1998, after she was told by her supervisors at work that Police were looking for her. This is applicant's own testimony and it is corroborated by DW2 Inspector Thibeli. Clearly therefore, she was still at work on the 27th October 1998 and the suspension could only have come after that date. Why then is there such a wide gap between applicant's estimate of her suspension date and the actual date of suspension which by her own admission could only have been after the 30th October 1998, because even on that date she reported to the Police coming from work? Similarly, her actual date of hearing as shown on the record of her disciplinary proceedings (Exhibit "A") was 19th January 1999, but again her estimate is August/September. This in one view lends credence to our observation that applicant's testimony is characterised by inexactitudes, regard being had to the fact that as the applicant she owes it to the court to be as close to the actual thing as possible in order to help the court.

The second striking feature of applicant's testimony is its hollowness in terms of content. The applicant was ignorant of virtually everything pertaining to procedures leading to the connection of electricity supply to an individual's house. She was questioned at length by Mr. Woker for the respondent about the procedure that an individual homeowner would follow before the house can be connected up to the point of payment and ultimately connection. Applicant's answers were all "I do not know." It was suggested to her what procedure has to be followed after payment of connection fee to actual connection, she still did not know anything. This ignorance of the applicant must be contrasted with the fact that she had nearly a decade of work experience as respondent's cashier in which position she was central to the giving of directions to people who had paid the connection fees as to which next step they had to take. It is highly unlikely that the applicant could be as ignorant about the respondent service connection procedures as she would want us to believe.

The third striking feature of applicant's testimony was its glaring untruthfulness, when measured against other witnesses' testimonies. For instance, when she was asked whether she knew DW1 Mr. Sefefo, she said she knew Mr. Sefefo. When

asked further from where she knew him she said, "just being in town, I just know that this is Mr. Sefefo." The evasiveness in her answer is a clear indication that she was being untruthful. Furthermore, on page 6 of exhibit "A" (the record of disciplinary proceedings) when the applicant was asked if she knew B.S. Sefefo she said, "I know many people by that name but I don't know their first names." She was asked further "can you tell us how you know them?" Her answer was a curt, "like I know you. In fact I know two people by that name." Not only are applicant's versions contradictory but it is also clear that both at the enquiry and in this court the applicant was hiding something about her knowledge of Mr. Sefefo. Only herself knows what that was, but that attitude of hers can only paint a very dark picture of herself in terms of credibility rating.

Applicant was asked if she ever had any dealing with Mr. Sefefo and Ms Ntsoereng regarding the connection of electricity to their houses. As has been characteristic of her evidence, her answer was a categoric denial. However, in his testimony Mr. Sefefo (DW1) implicated the applicant, albeit indirectly, when he said he gave money to Cecelia Phate who said he was going to pay for him with Rosa (the applicant) when she is free at her counter. Rosa herself testified that she was not the only cashier, but this particular payment was going to be made to her specifically. This happens to be the very fraudulent payment which never reached LEC account. Common sense dictates that Cecelia and Rosa know where it went. Her denial of assisting Ms Ntsoereng has also been proved to be devoid of truth by Ms Ntsoereng's testimony who chronicled how applicant offered to assist her even without her asking for such assistance. Applicant helped Ms Ntsoereng find her forms which could not be found. After finding them she informed her how much she was supposed to pay. Since Ms Ntsoereng was always flying, the applicant offered to pay for her and to that end she went to Ms Ntsoereng's place of work and collected M2,000-00. Again this is the amount that never landed in the respondent's account. Once again logic dictates that it is the applicant who ought to be asked where it went and why it was never paid into appropriate LEC account. Her denial of having dealings with these two witnesses are clearly untruths.

Another glaring example of applicant's untruthfulness is her narration of her experience in the hands of the Police. In chief she said as she was being told what to write by Inspector Thibeli she was reluctant to write, but because of the threats she wrote but only in summary form. She was grilled by Advocate Woker under cross-examination to say if all what appears in the statement of 27th October 1998 is what she was told to write she agreed. Then she was asked;

"Can I understand you correctly, is it your evidence that Mr. Thibeli actually dictated what he wanted you to write and then you wrote down his words?"

Rosa: "Yes, he told me what to write and I wrote down <u>everything</u> that he told me to write.

"Word for word?

Rosa : "I am not sure if I took word for word, because he was talking quickly and insulting me." (At p.26). (emphasis added).

We have emphasized "everything" because that directly contradicts applicant's evidence in chief that she was so reluctant to write that she infact only summarised. We have also highlighted the claim that Mr. Thibeli was talking fast thereby denying applicant chance to take down every word simply to show how innovative applicant can be. In one breath she took down everything word for word and in another breath the speaker was too fast to enable her to take down everything. On the same page 26 of the record the court sought clarity on her evidence that she was taking down everything being said by Mr. Thibeli who she said was also insulting her in the process. The court asked:

"Why did you not write down the insults as well, why did you leave them out?"

Rosa : "Where I had written what he did not agree with he used to tear them."

Common sense tells you that this is a lie. If ever it was so, it warranted special mention in her evidence in chief.

In her evidence in chief the applicant catalogued the chilling threats that were made against her, as well as insults. Not once did she mention an actual assault, a tube or a black blanket. But when she was asked under cross-examination if she was assaulted she blew hot and cold and in her typical innovative style she was able to box herself out of the corner in this manner;

"He assaulted me. He did not assault me but he had all the rubber to cover my face and he wanted me to lie down over there."

She was asked further; "what exactly did you see there, there was rubber? Yes there was rubber and a black blanket. He was threatening to cover my head with those and lock me in the cell." (See p.32 of the typed record). This is all new evidence which surfaces for the first time under cross-examination. It cannot in any way help applicant's case as it is clearly all fabricated stories.

Because she has been so outrightly untruthful, the applicant's testimony cannot be accepted as a more probable version even where all the indications are such that it should be so treated. For example, in her evidence applicant says that the following day after she made the first statement Mr. Thibeli went to fetch her to come and make another statement. This would mean she was fetched on the 28th October 1998. Mr. Thibeli on the other hand says when he released her on the 27th October he warned her to report again on the 30th October. This version was not put to the applicant to enabler her to rebut it. But because applicant has struck us as the

most untruthful witness, we are not prepared to accept her version as more probable. On the contrary we think Mr. Thibeli's is more probable because he has been honest with the court and his version corroborates the date on which the statement was taken. For these reasons we rule that applicant's testimony must be thrown out in its entirety.

On the otherhand we are satisfied that the respondent's witnesses especially DW1 and DW3 whom applicant helped to have their houses connected to the electricity supply fraudulently, adequately implicate the applicant. We are prepared to believe them as it would appear, they had no ulterior motive in implicating the applicant. Indeed none was suggested to us. Similarly, we are not convinced that DW2 used the alleged threats to induce the applicant to make the two statements that she made before the Police. Indeed DW2 struck us as an honest, straightforward and consistent witness. We have no reason not to believe his testimony.

Coming now to the submissions of counsel, it was contended on behalf of the applicant that the disciplinary committee did not have evidence to support the finding of guilt it made against the applicant. It was argued that DW1, DW2 and DW3 were never called at the disciplinary hearing. Only DW4 was called who it was contended relied on the statement of applicant to the Police which had been extracted from her by force and through duress.

The respondent never disputed that the three witnesses who testified before us never testified at the enquiry. Annexure "A" confirms that time and again the applicant sought to have Mr. Sefefo and Ms Ntsoereng to be produced by the disciplinary committee, but in vain. As for Mr. Thibeli the committee did attempt to call him to testify but he declined. Even before us he stated that he declined the invitation because it is their policy (the Police) not to participate in the domestic enquiries conducted by the employer. In our view the Police cannot be faulted on the approach they have adopted. As for DW1 and DW3 the pertinent issue to be addressed is; if ever they had to be called, as claimed, what value would their testimony have to the enquiry? The respondent mounted its own internal investigations which led them to the people whom applicant had helped with irregular service connection. These were Sefefo and Ntsoereng who were cited as examples of the existence of the scam. By no means did this mean that they were the respondent's essential witnesses to establish applicant's culpability. They may well have testified for the applicant if she so desired, that they were not connected fraudulently, for that matter with applicant's assistance. But as we have seen they would not do so as the direct opposite was the case.

On the contention that Mr. Mohapi's evidence could not be admissible in as much as it relied on the statements made by the applicant to the Police which statements amounted to hearsay, we are of the view that this submission cannot be correct. It must be recalled that Mr. Mohapi was the member of the respondent's internal investigation team. He could therefore, testify directly about his team's findings

which included applicant's two statements. As regards the two statements they are informal admissions which according to S.E. Van der Merwe, DW Mokel, A.P. Paizes & A. st Skeen on Evidence, Juta's Legal Guide Series, Juta & Co. Ltd 1983; are admissible against the applicant as their author. We wish to quote in extenso what the learned authors say about this subject of admissions at page 216 of their invaluable work:

> ***"An admission is a statement or conduct adverse to the person from whom it emanates. A distinction must be drawn between "formal" admissions and "informal" admissions: the former category relates to admissions made either orally in court or in the pleadings with a view to reducing the issues before the court by placing the fact admitted out of contention, whereas the latter category...concerns admissions, usually made out of court, which are tendered in evidence against their maker. Confessions which are particular types of admissions and which apply only in regard to criminal cases are dealt with separately.***
>
> ***Informal admissions constitute an exception to the rule against hearsay in that they constitute statements, generally made out of court; which are admissible to prove the truth of what they assert."***

This is clearly the case in casu unless sufficient and reliable evidence can be adduced proving the contrary.

Mr. Matooane contended further that the statements were not made freely and voluntarily. He cited as examples the fact that the applicant spent five hours at the Police station before giving the statement. This question was put to Mr. Thibeli why it was only at five minutes before six 0'clock that the applicant made the statement? He answered it freely and without any apparent attempt to hide anything and said they were not dealing with applicant alone. There were many other people they had to interview. This explanation of his was never contradicted. Mr. Matooane submitted further that the applicant may have been induced to make the statement because of the intimidating atmosphere of the Police station and the fact that she was confronted by three "guys" who interrogated her coupled with the fact that she was kept many hours at the Police station.

According to Inspector Thibeli applicant arrived at the Police station at around 14h30. It is common cause that her statement is recorded to have been made at 17h55, some two and half hours later. We are not persuaded that this is an incredibly long time to have intimidated applicant into making a statement regard being had to the Inspector's evidence that there were times when they left her alone to attend to other matters. As regards the contention that police station atmosphere and the element of three "guys" confronting applicant were also intimidating, we are not prepared to make such an inference. The applicant testified at length about threats and other intimidations she was subjected to. She chose not to mention these

two. It would in our view be improper for us to rely on inferences in the presence of direct evidence, albeit fabricated and outrightly untruthful.

Even assuming that Mr. Matooane's argument that the applicant's statements are hearsay and as such inadmissible was to be upheld, the applicant's conviction at the disciplinary hearing would still be well supported by another aspect of Mr. Mohapi's evidence. That is that the applicant admitted involvement in the scam to Mr. Mohapi. It is true that Mr. Matooane fiercely cross-examined Mr. Mohapi on the consistency of his testimony before the court and before the disciplinary panel. In particular he was arguing that Mr. Mohapi's testimony that applicant admitted guilt to him is not corroborated by the record of the disciplinary proceedings, i.e. Annexure "A".

In paragraph 4 of its Answer the respondent made the following concession, "in so far as any criticism can be levelled against the disciplinary hearing as it appears from the record of proceedings put before the court by the applicant, the respondent intends curing any shortcomings by means of oral evidence before this Honourable Court." The applicants never objected to this procedure and hence Mr. Mohapi's testimony which may on the face of it appear to amend the record and is as such liable to be attacked as contradictory. The applicant herself was asked under cross-examination if it is correct that the record is not a verbatim record, but only a summary she agreed. The same question was put to Mr. Mohapi in chief and he agreed.

A summary cannot reflect every word that was said at the hearing as would a verbatim record. This is evident in the apparent contradiction between Mr. Mohapi's testimony and the recorded summary of the proceedings on the alleged admission of involvement by the applicant to Mr. Mohapi. Nowhere is it specifically recorded in Mr. Mohapi's evidence that he testified directly that applicant admitted involvement to him. It only becomes clear that Mr. Mohapi had at some stage testified so at page 15 of the record (exhibit "A") where the committee put the following question to the applicant:

> **"Committee: Evidence is that you worked at the cash desk at that time, even your files can show this. Furthermore, the evidence of Mr. Mohapi showed that you agreed to having received money from Mr. Sefefo, this evidence was led in your presence and you failed to rebut it. Do you have anything to say?"**
>
> **"Mrs. Sello: No, I don't have anything to say."**

In the circumstances we discern no contradiction in Mr. Mohapi's testimony and the summary of the proceedings of the disciplinary enquiry. Our finding is that applicant was properly found guilty of involvement in the scam and indeed evidence

before this court has so established. The application is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 7TH DAY OF AUGUST, 2001.

L.A LETHOBANE
PRESIDENT

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

C.T. POOPA
MEMBER **I AGREE**

FOR APPLICANT : MR. MATOOANE
FOR RESPONDENT: MR. WOKER