

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 29/01

HELD AT MASERU

IN THE MATTER OF:

MOLEFI TOTSENG

APPLICANT

AND

PEP STORES

RESPONDENT

## JUDGMENT

This is quite a short matter. But due to the busy schedule of the court it was heard over two days. On the second day of hearing it turned out that it had been postponed to that day while there were already six other matters enrolled to be heard on that day. It was therefore, imperative that we heard it early so that it did not unduly disrupt that day's schedule. When it became apparent that Mr. Kolobe would not make it in time for an early start due to the pressing needs at his work as it was month end and they had to prepare for payment of thousands of their employees, counsels agreed that the two available members should proceed and dispose of this matter in terms of rule 25(2) of the rules. This explains why only two members have signed this judgment instead of the customary three.

The applicant herein is challenging the decision of the respondent company to dismiss him on the grounds that the disciplinary proceedings which led to his dismissal were based on a criminal conviction which was later overturned on appeal. It is his contention that once the criminal conviction had been overturned the decision to dismiss him automatically became ineffective and he should accordingly have been reinstated.

The background facts are briefly as follows: On the 13<sup>th</sup> December 2000 the applicant who was an employee of the respondent appeared before the Thaba-Tseka Local Court charged with theft of the merchandise of the respondent. He was found guilty and was fined M200-00 or six months imprisonment. The applicant paid the

fine but subsequently appealed against the conviction to the Central Court. The decision of the Local Court was subsequently overturned on appeal.

In the meantime, following applicant's conviction in the Local Court, the respondent had suspended him on the 14<sup>th</sup> December 2000 and proceeded against him disciplinarily on the 15<sup>th</sup> December 2000. In the disciplinary enquiry applicant had been charged with "Result in financial loss of the company and attempted theft or theft, refer to the criminal case of Lesotho." The applicant was found guilty and dismissed.

In evidence before the court he testified that in the internal disciplinary proceedings the same witnesses who testified before the Thaba-Tseka Local Court testified. An additional witness who was one of the members of staff of the respondent also testified. The attitude of Mr. Thamae who represented the applicant was that because the applicant had been criminally prosecuted he could not again be subjected to disciplinary proceedings on the same issue.

This is a total misconception. It is entirely within the employer's rights to proceed disciplinarily against an employee who has previously been before a criminal court on the same issue that he may have been discharged on or found guilty of as the case may be. Even if he may have been discharged it is not surprising if the employer's disciplinary tribunal finds him or her guilty. The reason is simple, each of the presiding officers relies on the evidence before him or her. If the evidence is such that the criminal court discharges the accused or convicts him the presiding officer will decide according to the weight of evidence before him. Similarly, the chairman of the disciplinary tribunal's decision will be determined by the weight of evidence before him.

In his testimony the applicant has rightly said that the disciplinary tribunal did not just rely on the conviction of the local court. It called witnesses and examined them. In addition to the two who testified in the Local Court the disciplinary enquiry also heard the testimony of an additional witness who did not testify in the Local Court proceedings. That could well bring about a big difference in the testimony heard by the two courts and the decisions they will arrive at.

What should not have happened is what the applicant claims in his papers happened namely; reliance on the Local Court conviction without hearing the applicant. (See *Randburg Town Council .v. National Union of Public Service Workers & Others* (1994) 15 ILJ 129 (LAC). In that case a member of the respondent union who was an employee of the appellant had been charged and found guilty of the theft of 10kg of copper wire and bunch of keys, the property of the town council from an electricity substation of the town council, by the magistrate court. He was sentenced to pay R1000-00 or undergo six months imprisonment. He paid the fine.

He was subsequently committed to a disciplinary enquiry by the town council in which he faced charges arising from the theft of the copper wire which he had already been found guilty of by the Magistrate Court. At the hearing, the representative of the town council led no evidence. She merely handed in the Magistrate's Court charge-sheet and a document reflecting that the accused employee had been convicted. Despite protests by the representative of the accused employee that the town council must lead evidence, the representative of the council declined to do so and relied entirely on the Magistrate Court's records. On the basis of those records the presiding officer found the employee guilty and dismissed him.

The dismissal was reversed by the Industrial Court and the Industrial Court's decision was subsequently confirmed by the Labour Appeal Court. The reason for this decision was that the disciplinary inquiry failed to hear evidence; at least that of the dismissed employee in his own defence. The conviction in the Magistrate Court was not an end in itself. The presiding officer in the disciplinary enquiry still needed to hear evidence of applicant's culpability and on the basis thereof form an opinion whether applicant was guilty as charged or not. Failure to do so contravened the employee's fundamental right to be heard.

As we have seen in hoc casu, the respondent's approach was clinical. It did not just rely on the conviction as suggested in the Originating Application. A formal hearing was conducted where witnesses were called and testified. Nothing turns on whether the same witnesses who testified in the criminal proceedings also testified in the internal inquiry. The applicant was accorded his full rights including the right of appeal. Accordingly no unfairness was visited on the applicant.

The applicant was of the view that once the Central Court upheld his appeal even his conviction by the employer's disciplinary inquiry should have fallen away. This misunderstanding must be arising out of the erroneous belief that the disciplinary enquiry's conviction was based on the criminal conviction by the Local Court. As we have seen this was not so. Accordingly the successful outcome of the criminal appeal had no bearing on the conviction of the disciplinary tribunal. The decision of that tribunal could only be changed by the successful out come of internal appeal to overturn it. It is common cause that the applicant's appeal against the determination of the disciplinary tribunal was not successful. In the premises that decision remains undisturbed. Accordingly, we find no merit in this application and it is therefore, dismissed. There is no order as to costs.

**THUS DONE AT MASERU THIS 4TH DAY OF FEBRUARY,  
2002.**

**L.A LETHOBANE**  
**PRESIDENT**

**S. MAKHASANE**  
**MEMBER**

**I AGREE**

**FOR APPLICANT :**  
**FOR RESPONDENT:**

**MR THAMAE**  
**MR. MOLETE**