IN THE LABOUR COURT OF LESOTHO

CASE NO LC 24/99

HELD AT MASERU

IN THE MATTER OF:

THANDIWE MOELETSI **APPLICANT**

AND

LESOTHO BANK **RESPONDENT**

JUDGMENT

The applicant herein issued an Originating Application out of the Registry of this Court on the 24th June 1999. The cause of action had arisen in 1996 when the applicant was suspended from performing the duties of her office. The disciplinary hearing was first held on the 14th October 1997. The applicant was dismissed on the 28th February 1999. In these proceedings applicant prays for reinstatement to her position on the grounds that her dismissal was unlawful in as much as she was not afforded an opportunity to defend herself. She contends further that even if she did commit any of the matters complained of against her, they were not of such a nature to justify her dismissal.

The brief background of this dispute is that following her suspension in June 1999 the applicant was committed to a disciplinary hearing in the last quarter of 1997. At the first hearing on the 14th October 1997, the applicant objected to the absence of certain documents which she says

were only availed to her in June 1998. Of importance is that the proceedings were postponed as a consequence of that objection.

The disciplinary enquiry resumed on the 5th August 1998. At that hearing some two witnesses testified in support of the charges preferred against the applicant. The first witness Makalo Theko testified in relation to the first charge namely "discourtesy to a superior or a member of the public with whom it is his duty to transact the Bank's business". The tenor of his evidence was that the applicant had abused him as well as his office on a number of occasions by saying he was corrupt. The applicant cross-examined the witness and even had occasion to put her own version in the process of which she admitted that she said "people at LSPP are corrupt."

After making this formal admission the applicant sought to put further questions to the witness which the chairperson overruled on the ground that they related to the contents of a report which the witness did not have. The witness was then released but the applicant expressed the desire to cross-examine him further on paragraph 4, presumably of the same report that it had already been shown that the witness did not know about.

The second witness testified in relation to count 2 which accused the applicant of taking or converting to her use property or money of the bank. The witness's testimony was that the applicant had approached her to help her get money through an overdraft as she was not allowed an overdraft herself as a bank employee. The applicant had then assisted the witness in applying for an overdraft which she got for an amount of M7,000-00. The witness then withdrew the said amount and handed it over to the applicant. The understanding was that the applicant would service the overdraft but she failed to do so resulting in the breakdown of the relationship. The applicant cross-examined the witness at length. Her attempt to cross-examine the witness on the report of the investigating committee was again overruled for the same reason as in the case of the first witness.

At the close of the cross-examination the applicant gave her own version which was essentially to deny the second witness's allegations.

She was also cross-examined at the end of which the hearing was "adjourned till further notice."

On the 11th September 1998, the applicant wrote a letter to the General Manager of the respondent through her lawyer asking for a record of the proceedings since the enquiry started in 1997 to date. She also required that the said record should reflect inter alia, that she was disallowed to put certain questions to Mr. Theko. The record was duly availed per letter dated 17th November 1998 reflecting some but not all the issues applicant had wanted reflected because some of the issues were said to have been "off the record" by agreement of the parties. Applicant's lawyer wrote another letter on the 2nd December 1998 in which he complained that the record was incomplete and incorrect. He then said that the applicant was prejudiced thereby, as well as by the chairperson obstructing her from properly cross-examining the witnesses. The letter concluded by stating that "you are advised that our client will not attend the disciplinary hearing set for the (10th) December 1998 and an application to the High Court of Lesotho directing you to comply with the demand set out in our aforesaid letter will be made and served on you shortly."

Nothing came of this promise until on the 9th December 1998 when the applicant was written a letter notifying her of the hearing to be held on the 10th December 1998. The applicant responded by letter dated 10th December 1998 advising the respondent that as they had already been informed by her attorney she is unable to participate further in the proceedings. There is nothing on record to suggest that the hearing did not proceed. We assume therefore, that it proceeded in applicant's absence as the respondent was indeed entitled to proceed. (See Klaus Peter Albreichtsen .v. Lesotho Electricity Corporation LC/179/95 and the cases therein cited). On the 28th February 1999 she was admittedly dismissed.

On the 9th March 1999 an urgent court order was caused to be issued by the High Court of Lesotho interdicting and restraining the respondent "….from proceeding with the disciplinary hearing against the applicant pending the outcome of the application on the ordinary relief prayed for." The said order was served on the respondent on the 10th March 1999 (see the return of service attached to the Originating Application).

There is no record of what transpired on the return day which was the 23rd March 1999. On the 24th June 1999 an Originating Application was filed in this court and no explanation was given of what the fate of the High Court application has been. On the contrary the applicant annexed the High Court papers to the Originating Application and prayed that the contents of the High Court papers be read as part and parcel of the present application.

Her cause of action in the High Court proceedings as reflected under the prayers for the ordinary relief is that the court directs:

(1) The respondent to make a copy of the full report, of the investigating committee available to all witnesses it intends to call to testify at the disciplinary hearing.
(2) That the said report be made available to witnesses at least fifteen(15) days before the hearing.
(3) The respondent allows cross-examination of witnesses by applicant on all matters referred to in the report.
(4) That the respondent be interdicted from interfering with or obstructing the applicant in the conduct of her defence against the charges.

As pointed out the applicant came to this Court without saying what the fate of that application in the High Court was. The respondent answered and the pleadings were closed in July 1999. The matter was not set down for the whole of 2000 and 2001. It was first set down in 2002 when it was scheduled to be heard on the 14th August 2002. It was postponed to 24th September when it again could not proceed due to unavailability of counsel for the applicant. Counsels ultimately agreed that they were not having any disputes on the facts as such they would file written submissions on the basis of which the court should formulate its decision. They duly complied with this undertaking.

Even though the applicant says her High Court case should be construed as one with the present case, it is a plea which cannot be acceded to due to its impracticability. Firstly, the applicant has not explained what the end of that High Court application has been. Secondly, the High Court case envisaged partly heard disciplinary proceedings which the applicant sought to have halted. On the other

hand, the Originating Application in the present matter was filed subsequent to applicant's dismissal, as such it challenged the lawfulness of that dismissal. The two situations cannot be reconciled. Firstly, it is not the applicant's case in her Originating Application that this Court grants her the reliefs she had sought in terms of the Ordinary relief paragraph in the Notice of Motion. Secondly, even if it was, this Court would not be in a position to grant that relief in as much as it has been overtaken by events in that the applicant has since been dismissed. Lastly, the dismissal cannot be faulted on the basis of being in contempt of the court order in as much as the court order was obtained subsequent to the dismissal of the applicant.

The issue which we must determine is whether the applicant's dismissal can be faulted for any of the reasons raised in the Originating Application. We specifically say the Originating Application because the applicant's Heads of Argument seek to found a totally new case from that pleaded in the Originating Application. That cannot be allowed as to do so would contravene the audi alteram partem principles in as much as the respondent has not been able to rebut those new claims and grounds raised for the first time in the heads of argument.

The applicant avers that she was not afforded the opportunity to defend herself against the allegations. This is factually incorrect because the applicant sat through the proceedings of the 5th and 6th August 1998. She cross-examined witnesses and even presented her version of the events. It seems at the close of the proceedings on the 6th August 1998, all respondent's key witnesses had testified and completed their evidence. The applicant had of course indicated that she would want to ask witness Theko some further questions. However, the applicant's questions were going to be on the report which she had already been told that the witness was not privy to as such it would not be fair to ask him questions on it. Accordingly, we cannot deduce any prejudice resulting from the applicant's inability to question witness Theko further as she had desired. We are fortified in this view by the fact that the applicant had in any event already agreed with the thrust of Mr. Theko's testimony that she had abused him by saying he and his office were corrupt. Any further questions would in that circumstances only serve a theoretically purpose.

As for the second witness, we have noted that the applicant's cross-examination did not shake her testimony in the slightest. All she (applicant) did was to say in her own version that the witness was telling a lie. That left the disciplinary panel with the task of deciding on which of the two versions it believed. It cannot, without reasons, be faulted for believing the witness and disbelieving applicant and we were furnished with no reason(s) why it should have disbelieved the witness and instead believed applicant's version.

The applicant contended further that the allegations against her were unfounded. This is a mater for evidence. Looking at the evidence of the two witnesses who testified at the disciplinary hearing, considering that in one case the applicant conceded making the remarks she was accused of, while in another she could not discredit the testimony of the witness, it can hardly be said that the allegations were unfounded. The applicant had further contended that the allegations were not of such a serious nature as to warrant her dismissal. We were referred to no basis for this submission. If the respondent's rules make the offences serious, this Court cannot be heard to say they are not serious. The fact that applicant was dismissed is proof that the charges were serious by respondent's standards.

The applicant contends further that the charges were vague and were lacking in detail. This objection, the applicant raised right at the start of the disciplinary enquiry on the 5th August 1998. The applicant was quite correctly in our view, overruled by the chairman and the hearing proceeded. It is not clear what further particulars than those already contained in the charges the applicant was seeking. In our view the charges were very clear and explicit as to what they related to.

It is further contended that the record shows that the evidence of both witnesses was incomplete. There is nothing in the record to suggest that the evidence of Boomo Makhaba was incomplete. All indications are that she had completed giving her evidence as the applicant had even gone further to give her own testimony on which she was also cross-examined. The evidence of Theko too was complete. The applicant's desire to ask that witness further questions was overruled by the

chairman; and the witness was released. There is therefore, no merit in this submission.

The applicant contends further that she was found guilty on the basis of information which is "off record". There is no evidence to this effect. She contends further that she was not allowed to proof that Government Departments were indeed corrupt as she had said to Mr. Theko. Again there is no evidence that the applicant was denied such an opportunity. If anything the applicant denied herself that chance by refusing to take any further part in the disciplinary proceedings. She cannot therefore, be heard to complain. (See the Lesotho Electricity Corporation case supra at p.8 of the typed judgment).

The applicant contends further that the panel was not impartial as it had already prejudged her. The applicant premises this contention on the averrement that she had been warned by the prosecutor to hurry up her cross-examination of Mr. Theko because he was a busy man. She contends that this shows that the evidence of the witnesses was not taken with precision. Even if it be true that the prosecutor said what it is alleged she said, that would not in the absence of direct evidence of partiality on the part of the panel back applicant's accusation that the panel was not impartial. It is furthermore, far-fetched to conclude from that remark of the prosecutor that the evidence was not being taken with precision. The fact that the witness had to be released quickly, if that was so, would not in the normal cause have a bearing on the accuracy of the recording of the proceedings, unless evidence to that effect is produced.

Finally, the applicant contends that she was not allowed to challenge her accusers. This contention is not borne by the record. According to the record the applicant had ample opportunity to cross-examine the witnesses. He was only disallowed to put certain questions which it was shown were irrelevant to the witnesses in as much as they were not related to their testimony and they were a subject of a report which those witnesses knew nothing about. There is no evidence that there were any further witnesses apart from the two referred to earlier in this judgment. Even if they were, the applicant could not be heard to complain about not being allowed to confront those witnesses when she chose not to attend the hearing herself. For these reasons we are of the

view that there is no merit in this application. It is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 18TH DAY OF NOVEMBER, 2002.

L.A LETHOBANE
PRESIDENT

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

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

FOR APPLICANT: **MR BUYS**
FOR RESPONDENT: **MR MATOOANE**