

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 94/97

HELD AT MASERU

IN THE MATTER OF:

THAKI PHOBA

APPLICANT

AND

C.G.M. INDUSTRIAL (PTY) LTD.

RESPONDENT

JUDGMENT

Due to the untimely death of the learned assessor Mr. G.K. Lieta with whom we initially started this case, the matter has been disposed of in terms of rule 25(2) of the rules of the court which provide that:

“(2) When during the course of (a) hearing a vacancy arises or vacancies arise in the membership of the court, provided the remaining members constitute a majority of the original membership of the court, the decision of the remaining members shall be the decision of the court.”

The applicant herein seeks the determination of the court that his dismissal from the respondent's employment on the 7th September 1997 was unfair in as much as he was not afforded a hearing prior to such dismissal in terms of section 66(4) of the Labour Code Order 1992 (The Code). The applicant further challenges the lawfulness of the deductions that the respondent proposes to make from his terminal benefits.

The applicant's stories fundamentally differ from that of the respondent. We say stories advisedly in as much as applicant's narration of the facts in the Originating Application totally differs from the evidence applicant gave under oath. In the Originating Application applicant avers that he had been on duty as a driver on Sunday 7th September despite it not having been his turn to be on duty. After delivering staff as he was supposed to do he left the vehicle and its keys at work.

Applicant avers that on that same day i.e. 7th September, he got a message that his daughter was seriously ill in Welkom, Republic of South Africa. He had to go there. He was absent on Monday 8th September as a result, and only reported on Tuesday 9th September. He avers that he had a letter from his chief which informed his employers of his family problem but the letter was not accepted. He was instead told to come back on the 10th September. To his surprise when he reported back on the 10th he was dismissed.

Evidence tendered by a party in court substantiates that party's allegations in the pleadings. Contrary to this established rule the applicant's testimony came nowhere doing so. He told a completely new story as follows: He left the employment of the respondent on the 7th September 1997. He testified that events leading to that departure were that when he knocked off at 6.00 pm on Saturday 6th September, he was told by one Johan not to go but to wait for the 10.00 pm shift so that he could deliver them home. He alleges that according to practice that should have been another driver's turn to deliver the staff because he had just knocked off. He however, did as instructed and completed delivering staff at around 3.00 am, he testified. On Sunday morning he returned the vehicle to the transport officer who sought to send him on yet another errand in Ladybrand South Africa. He testified that he pleaded that he was tired and was duly released.

On Monday 8th, the Transport Officer told him that he was not allocating him duty because he had phoned one Shelina (Financial Manager) on Sunday 7th September and she had said that applicant is not fit for the job. He further told him that he (Transport Officer) and Shelina had decided that he (applicant) should come and collect his money on the 10th September at 2.00 pm. He duly went to Shelina's office on the 10th where he found her with Johan the Transport Manager. Shelina allegedly produced three documents, one of which was an invoice for the repair of a vehicle. The

other two documents had money totalling just over M1000.00. Shelina allegedly asked him to sign the papers.

Applicant testified that he asked Shelina if that was all the money she was paying him. Shelina said yes, because he had overturned a vehicle for which the company had to incur the costs of repair and those costs had been deducted from the money due to him. Applicant testified further that he told Shelina and Johan that he was not satisfied. He then requested them to release the documents to him so that he could consult his lawyer before signing. The documents were duly released to him and he says he promised that he would return them the following day, but he never did.

In their Answer the respondent says the applicant was never dismissed. They aver that the applicant had driven respondent's bakkie to Durban and was to return on 5th September 1997. He was expected back in Maseru on the 6th September latest. He instead arrived on Sunday 7th September saying he got lost on his way back to Maseru which resulted in him reaching Maseru through the Matatiele, Qacha's Nek road which is poles apart from the route he would have been expected to use. On his way back applicant had an accident with the vehicle somewhere between Mohale's Hoek and Mafeteng which resulted in the vehicle sustaining damages. The vehicle even had to be towed back to Maseru for which service the respondent had to pay some M500.00.

As is normal practice the applicant was required to make a written report on the matter. On the 8th September the applicant approached the Transport Manager Johan and told him that he was tired of being pressed about the damaged vehicle and added that he would rather resign. He further told Johan that he was no longer going to drive the vehicle that delivers staff home after normal hours. Johan reported this matter to Shelina, the Financial Manager who advised that applicant was free to resign but that he should do so in writing. Johan conveyed this advise to the applicant.

Applicant went to Shelina in a fighting mood and had very strong exchanges with her. Johan even had to be called in. Applicant demanded to be paid all his monies there and then but was told that the person who signs cheques had already left. Applicant was then asked to come back the following day. That day when he reported he was told that he was to be disciplinarily charged. Upon learning that, applicant got angry and snatched

his personal file which had all the details of the damages to the vehicle as well as those he had previously damaged including his previous warning letters, from Shelina and ran away with it. This incident was reported to the Thetsane police. Applicant never again came back to work thereafter. This version is confirmed by Johan in a sworn affidavit.

Shelina Teng, the Financial Manager also deposed to an affidavit and also gave oral evidence before court. It was some three years and some months after the events, when she gave evidence. She testified that she recalled applicant coming to her after official working hours and demanding to be paid his money there and then. She testified that she told him that there would be nobody to sign his cheque as everybody had already left for home. She asked him to come back the following day, which thing he did. The next morning when he arrived she tried to explain to him how she prepared the payout the applicant snatched the papers prepared for the payment from her (Shelina) and ran away. The witness says she phoned Johan to stop the applicant but he could not as he was far. She denied ever saying the applicant was not fit for the job. She also denied applicant's averment that she released the papers to him. She was asked under cross-examination why applicant left the respondent's employment. The witness did not know, except that she knew that applicant had damaged company vehicle on his way from Durban and that there had been an exchange between him and the Transport officer.

In response to the allegations that he had damaged the company's vehicle, the applicant testified that the vehicle in question was damaged on the 2nd August 1997 and not on the 7th September as alleged by the respondent. He testified further that the vehicle was repaired at Lesotho Nissan on the 14th August 1997. He was paid his salary in full at the end of August. By September when he was dismissed, the incident of the vehicle was over and the reason for his departure related to his inability to drive on Sunday 7th September due to tiredness as he had worked two straight shifts in the past twenty-four hours, he testified.

The applicant was not taken to task to explain the contradiction between his testimony under oath and the statement of case enumerated in his Originating Application. However, this is a factor that cannot be ignored, especially when considering the credibility of the witness. The only possible explanation for the two conflicting versions is that the applicant is

a deceitful person. This is further confirmed by his running away with the papers in order to destroy evidence.

His attempt to convince us that he was given the papers voluntarily by Shelina is a far cry from the truth. No sensible employer would give away the only record he had to an employee to enable that employee to consult his lawyer. We entirely agree with Shelina that she would have made applicant copies instead of giving him the original record. But to show that he took the papers as alleged, he is the only one who has the records and the employer does not.

Mr. Mohau for the applicant pointed out that to the extent that the dates of the accident given by the respondent conflict with those on the documents the court must find that the respondents are not telling the truth but the applicant is. All available facts point to one conclusion that the applicant's version is a pack of lies. The respondent may well confuse the dates because they do not have the records to refer to. This much was conceded by Shelina in her evidence. This does not necessarily make their version unreliable. Moreover, the applicant has not contradicted the respondents' evidence that she had previously damaged vehicles and that the record of those previous incidents were in the file he snatched from Shelina. There is that possibility therefore, that the records he presented pertained to that previous incident.

It follows from what has been said above that the applicant's evidence cannot possibly represent the true facts that led to his separation with the respondent. His departure is clearly as stated by the respondent namely that he opted to resign after the vehicle incident at Mohale's Hoek. However, even before formally presenting his resignation he robbed the Financial Manager of his (applicant's) personal record with a view to destroy evidence and ran away. According to Shelina this was the last they saw of him. Section 66(4) of the Code envisages a hearing where the termination of employment is at the initiative of the employer. It clearly cannot apply in casu as the applicant was not dismissed.

Applicant had sought to know whether the respondent was entitled to make the deductions it made from his terminal benefits. The applicant had admittedly damaged the respondent's vehicle. The only thing they disagree on with the respondent is the date of the accident. But that is not material

for purposes of determining this issue. Section 85(3) of the Code does authorize the employer to make deductions from an employee's wages in respect "...of loss or damage caused by the deliberate default or gross neglect of such employee to any tools, materials or other property of the employer." The section further provide that no such deduction in respect of one occurrence shall without prior approval of the Labour Commissioner exceed one-third of the employee's wages for a period of one month. This protection clearly relates to an employee who is still at work. It would appear that an employee who is no longer in employment cannot seek protection under this section. In the case of an employee who is already out of employment like the applicant, the principle of set off would apply together with its attendant rules which this court set out in detail in *Kuena Mahlakeng .v. Lesotho Bank LC41/98* (unreported). In the premises this application cannot succeed and it is accordingly dismissed.

**THUS DONE AT MASERU THIS 6TH DAY OF JANUARY,
2003.**

**L.A LETHOBANE
PRESIDENT**

M. MAKHETHA
MEMBER

I AGREE

FOR APPLICANT :
FOR RESPONDENT:

MR MOHAU
MS SEPHOMOLO