IN THE LABOUR COURT OF LESOTHO

LC/38/05

HELD AT MASERU

IN THE MATTER BETWEEN

SEKHOBE HLAJOANE **APPLICANT**

AND

CHRISTIAN COUNCIL OF LESOTHO **RESPONDENT**

JUDGMENT

Dates: 30/08/05; 12/10/05
Surcharge – set off – jurisdiction – section 24(2)(h) of the Code – Court has power to order set off – Disciplinary penalty – Employer imposing harsher penalty than committee recommended – Audi alteram partem rule – applicable – Employer acting arbitrarily without hearing employee.
Surcharge – Regulations silent on hearing – Hearing applicable unless expressly excluded – set off – elements of – Mutual indebtedness of liquidated amounts – Common law – Section 24(2)(h) – Application to set off to be made to court if no agreement exists on indebtedness – Disagreement on indebtedness – employer can only discern disagreement if hearing given – surcharge – Employee not agreeing – Employer not affording employer hearing – Unfair – Application upheld.

Applicant filed the present application on the 21st April 2005 seeking an order that the "respondent be directed to pay back to the applicant an amount of M9,707-93". Applicant was employed by the respondent in a managerial position of justice and peace (Government Team Member). On or around 29th April 2004 he and his colleagues were assigned a duty of collecting

questionnaires that had previously been distributed to respondent's Commission's members. Each senior officer had been assigned a district where they would collect such forms and had the use of respondent's vehicles for that purpose.

It is common cause that later that day applicant had a vehicular accident involving the respondent's vehicle he was using to perform his official duties. The said accident occurred at Ha Mokhehle in the Berea district. The applicant was charged before a disciplinary committee of among others contravening clause 10 of his contract of employment which provides:

> *"10.0 TRANSPORT*
> *No one shall drive the council's vehicle unless he/she has got prior permission for doing so and unless he/she is in possession of a valid driver's license."*

There were four other counts which need not detain us as they are not immediately relevant for the purposes of these proceedings.

The disciplinary panel found that Mr. Hlajoane had committed serious misdemeanours which warrant heavy penalty. They went further to state that;

> *"(however) in the absence of any documentary evidence to any previous indictments, we may therefore only recommend as follows:*
>
> *2.1 Mr. Hlajoane should forfeit a full month's salary in terms of clause 14(a) of the service regulations.*
> *2.2 Mr. Hlajoane should be surcharged as per clause 14(b) of the same regulations an amount equal to proven value of the damage he has caused vehicle AJ090….*
> *2.3 The CCL Management is at full liberty to impose a heavier or lesser punishment than what we have recommended if in their opinion they are privy to information and circumstances not known to us."*

It is again common cause that upon receipt of the recommendations the respondent invited the applicant to resign in terms of clause 14(f) of the service regulations. It is also common cause that the applicant refused, whereupon the respondent dismissed him and further surcharged him an

amount of M9,707-93 which was the cost of the repairs of the vehicle which the applicant damaged.

The applicant lodged a complaint with the Directorate of Dispute Prevention and Resolution (DDPR). However, the DDPR dismissed the referral because the applicant had arrived late. The applicant resorted to this court for relief. No specific provision of the law was relied upon for filing the claim in this court. In the same way it had not been clear in terms of which provision a referral had been made to the DDPR in the first place.

No objection was raised to this court's jurisdiction, perhaps rightly so because the applicant's claim does not seem to fall under section 226(2) of the Labour code (Amendment) Act 2000 which empowers the DDPR to resolve disputes of right by arbitration. On the contrary it appears that the dispute concerns a set off even though in labour relations parlance they call it a surcharge. In terms of section 24(2)(h) of the code as amended, the jurisdiction to adjust and set off claims on the part of either the employer or the employee, arising out of or incidental to the employment relationship vest in this court. Accordingly this matter has rightly been filed with this court.

The applicant adduced evidence of himself in support of his claim. It is significant that he did not contest the fairness or otherwise of his dismissal. He testified that he was a manager and he headed the department of Good Governance. He testified further that on the 29th April 2004 he and other managers had been assigned to distribute internal evaluation forms. According to respondent the forms were infact being collected on that day as they had previously been distributed to selected commission members. Applicant avers that he was coming from Cana Ha Mamathe on the same mission when he had a car accident at Ha Mokhehle. He testifies further that he was subsequently charged with misconduct and found guilty and dismissed.

It is applicant's evidence that the letter of his dismissal informed him that over and above his dismissal he was being surcharged an amount equivalent to the cost of the repairs of the vehicle that he had caused the damage of. Applicant averred that he was surprised to see the letter of surcharge as he had not previously been informed that he would be surcharged. He testified further that his own contract with the respondent make no provision for

surcharge and that he was not aware of any regulations that provide for employees to be surcharged.

Asked as to what happened to the vehicle he said it was repaired at Lesotho Nissan. It is common cause that the vehicle was repaired at the cost of the insurance which the respondent has taken for its vehicles. Applicant contended as a result that respondent was making double recovery. Under cross-examination the applicant was referred to the service regulations and he insisted that he never saw them. It is highly unlikely that a person in the senior position of applicant could have worked with the respondent without knowing the regulations that governed his employment. This is more so when regard is had to the contract of employment which he signed, clause 15 of which is a declaration that applicant is "…fully aware of the terms and conditions of this contract…(and that he has) also read the service regulations of the council and agrees (with them)".

Respondent's evidence was essentially to show that the applicant had been assigned to collect questionnaires in the area of Maseru City. The furthest was Masianokeng. At 2.30 pm that day applicant came back to the office of acting Secretary General Mrs. Ntsaba to report that he had completed his work and he asked for more assignments. Mrs. Ntsaba told him that it was enough for that day they should wait until the following day when the rest of the managers who had gone to districts outside Maseru would have come back. It was respondent's evidence that applicant was not assigned to go to Cana as he alleges. Respondent's evidence was that after applicant had reported to Mrs. Ntsaba that he had completed his assignment for the day he ought to have parked the vehicle. Applicant instead took the vehicle on his own and went to Berea where he met with the accident.

On the question of surcharge DW1 Mrs. Masebolelo Ramokhele stated that it is provided for in the service regulations, clause 14(b) thereof. She averred that clause 12(4) empowers the Council to impose a surcharge where it is found that damage to the vehicle was caused by negligence. She averred further that the regulations make no provision for a further hearing prior to the surcharge. When it was put to her that the applicant says that by surcharging her as they did, the respondent was getting a double benefit, she responded that all employees know that the Council attaches so much importance to transport hence the specific provision in the regulations for a penalty of surcharge.

Evidence pertaining to the authority for the use of the vehicle on the day of the accident goes to justify the guilty verdict which the disciplinary committee returned. As we indicated the applicant is not challenging that verdict in these proceedings. His concern is on the surcharge which he challenges on three grounds. Firstly, he says he was not consulted or invited to make representations on the decision to surcharge him. Secondly, he avers that in any event the respondent has been adequately compensated by the insurance and that respondent are being double compensated. Thirdly, he contends that his own contract does not provide for surcharge.

Clause 14(b) of the regulations on which the respondent relies for acting as they did provide:

> *"The General Secretary or Head of Department may caution or reprimand an employee guilty of misconduct or impose any one or more of the following penalties:*
>
> *(a) Forfeiture of a month's salary or a part thereof.*
> *(b) Surcharge*
> *(c) …….*
> *(d) …….*
> *(e) ……*
> *(f) Dismissal or be called upon to resign on a specified date, failing which he/she shall be dismissed."*

It is common cause that the disciplinary committee had recommended penalties (a) and (b) basing themselves on the facts before them. They made a rider that if the management is privy to information and circumstances which the committee did not know they may impose a heavier penalty. It is common cause that respondent imposed a heavier penalty than that recommended by the disciplinary committee namely; dismissal.

Form that conduct i.e. imposing heavier penalty, it can be inferred that the management was privy to some other information which called for a heavier punishment. Neither applicant nor this court is aware what that information is, because applicant was not called upon to make representations on it. Clearly the management acted callously and arbitrarily in opting for a higher punishment without letting applicant know on what basis they were doing so. It is common cause however, that applicant has not challenged the

propriety of his dismissal. Accordingly we need not say anymore on this issue.

The regulation on which the respondent relied in surcharging the applicant is indeed silent on whether one should be heard before a surcharge is effected. It (the regulation) however does not exclude a hearing. As a rule a hearing is applicable unless expressly excluded. As we said a surcharge is a set off and a set off applies "where two persons are in debt to each other and the debts are due and liquidated…" (see Gibson South African Mercantile & Company Law; Juta & Co. 1992 p.109. To say that a debt is liquidated is to say that every element of uncertainty must have been removed. In other words its amount must be certain and it must be admitted by the debtor. (see Gibson supra at p.110). Even if it is disputed the amount must be of such a nature that the amount can be clearly and promptly ascertained by proof in court.

It follows that if there is no disagreement between the parties as to the indebtedness and the amount due a set off can be effected. Such is the position of the common law. However, where there is a disagreement or potential disagreement it is only the Labour Court that can order a set off pursuant to section 24(2)(h) of the Code after hearing evidence. How does one in the position of respondent get to know that there is going to be disagreement? The fastest and simplest way is to afford the person who is to be affected by the decision a chance to make representations – audi alteram partem rule. The bottom line of this rule is that no man may be condemned unheard.

If the respondent had invited the applicant to show cause why he should not be surcharged in the circumstances, they would certainly have got a mouthful. In this court applicant says the respondent has been compensated by the insurance and to surcharge him is a double recovery. He also stated that his employment contract does not provide for surcharge and that the respondent is punishing him twice. Whether these are sustainable agreements or not is presently beside the point. Applicant ought to have been heard in the first place on the propriety of imposing both a penalty of dismissal and surcharge. If disagreement had arisen as it was bound to do the respondent would be entitled to hold on to the applicant's benefits while it seeks the order of this court to effect the surcharge or set off as it were. The act of holding onto someone's benefits especially in significant amounts as is the case in casu, is no small matter. Accordingly fairness and the due

process of law must be meticulously observed. For these reasons we find that respondent acted unfairly in unilaterally clinging onto applicant's money without his involvement. In the circumstances this application succeeds as follows:

1. Respondent is hereby ordered to pay back to the applicant the amount of M9,707-93.
2. Respondent is ordered to pay costs of this application.
3. Order 1 must be complied with within thirty days of the handing down of this judgment.

THUS DONE AT MASERU THIS 3rd DAY OF NOVEMBER 2005

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI **I CONCUR**
MEMBER

M. MAKHETHA **I CONCUR**
MEMBER

FOR APPLICANT: **MR. NTESO**
FOR RESPONDENT: **MR THABANE**