IN THE LABOUR COURT OF LESOTHO **LC/PS/A/01/11**

HELD AT MASERU

In the matter between:

THABISO KHAHLA **APPLICANT**

and

CHAIRMAN - PUBLIC SERVICE TRIBUNAL **1ST RESPONDENT**
PRINCIPAL SECRETARY-MINISTRY OF FINANCE & DEVELOPMENT PLANNING (THEN) **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

Date: 12 /12/12

. Appeal against decision of the Public Service Tribunal - On a number of grounds including bias - Principles regulating recusal considered - Court finds inference of bias cannot be drawn merely because an employee has previously been reprimanded.

. The discovery of the computer stolen at the employee's workplace at the employee's friend's house deduces a reasonable inference that the employee played a part in the theft of the computer.

. Appeal dismissed

1. The appellant had been engaged by the then Ministry of Finance and Development Planning as a Statistics Clerk. He is herein appealing against the decision of the Public Service Tribunal brought in terms of Section 11 of the Public Service Act 2005 as amended by the Public Service (Amendment) Act of 2007. The dispute emanates from an incident in which one of the offices belonging to the Bureau of Statistics in Mohale's Hoek was broken into and a computer stolen. The appellant had been associated with the said theft and dismissed from

employment on 30th March, 2009. The Bureau of Statistics had recommended the dismissal following a disciplinary hearing. Dissatisfied with the finding, the appellant lodged an appeal with the Principal Secretary of the then Ministry of Finance and Development Planning who confirmed the dismissal.

2. Having lost, the appellant noted a further appeal to the Public Service Tribunal and raised a number of objections to the Principal Secretary's findings. These were;

(i) That the information he gave the police had been elicited through torture;

(ii) that the computer was not found in his possession;

(iii) that Mr Mpeka, the chairperson of the disciplinary panel at the departmental level (the Bureau of Statistics) was likely to have been biased;

(iv) that it was irregular for the Principal Secretary to have led fresh evidence at the appeal stage.

The Tribunal dismissed this appeal on two grounds. Firstly, that there seemed to have been no bias on the part of Mr Mpeka. Secondly, that on a balance of probabilities the appellant committed the alleged misconduct. The computer had been identified through its serial number. The appellant has now approached this Court appealing this decision.

GROUNDS OF APPEAL

3. From the papers filed of record and submissions of Counsel for the parties, the questions confronting this Court may be summarised as follows;

(i) Whether the Tribunal was correct in concluding that there was no likelihood of bias on the part of Mr Mpeka who presided at the departmental level;

(ii) Whether the Tribunal relied on inadmissible/illicitly obtained evidence; and

(iii) Whether there was any evidence connecting the appellant to the alleged theft of the computer.

THE ALLEGED BIAS

4. The first ground of appeal was that the learned chairperson of the Tribunal erred in law by applying a wrong test of bias, to wit, that from the record of proceedings, the Tribunal found nothing to suggest that Mr Mpeka was influenced by the hostile relations between himself and the aggrieved party. Appellant's Counsel argued that this was a wrong application of the test against bias which is not whether there has been actual bias but whether there is a real likelihood of bias or whether a reasonable man in the circumstances might suppose that there was an interference with the course of justice.

5. The appellant pointed out that there was a reasonable likelihood of bias on the part of Mr Mpeka. He contended that he had a reasonable fear/belief that the latter was biased against him following an earlier altercation they had had over transport arrangements relating to his transfer from Mohale's Hoek. He averred that Mr Mpeka took offence at the altercation and lodged a complaint with the management of the Bureau of Statistics which culminated in his reprimand. He stated that on that occasion, he had apologised to Mr Mpeka but he could not forgive him. He indicated that it was only reasonable for him to fear that Mr Mpeka was likely to be biased against him. In the circumstances, he felt that he ought to have recused himself from chairing the disciplinary proceedings against him. Relying on **C. F Forsyth on Constitutional Law, 7th ed., Claredon Press, Oxford, 1994 at p. 471**, appellant's Counsel submitted that the decision of the Tribunal must be reversed because "***the rule against bias is that a man is disqualified from determining a case in which he may be, or may fairly be suspected to be biased."***

In reaction, respondents' Counsel submitted that the apprehension had no basis and backed his argument with a lot of authorities to which the Court is highly indebted.

6. As a general rule, a presiding officer has to recuse himself/herself where there is a reasonable suspicion or apprehension of bias. In determining whether a judicial officer should recuse himself/herself the following requirements stipulated in the case of ***S v Roberts 1999 (4) SA 915 (SCA)*** at 924 para 32 apply. These are that:-

(1) ***There must be a suspicion that the judicial officer might, not would, be biased;***

(2) The suspicion must be that of a reasonable person in the position of the accused or litigant; [and]

(3) The suspicion must be based on reasonable grounds.

This judgment was cited with approval in the Court of Appeal decision of ***R v Manyeli 2007- 2008 LAC 377*** and also in `***Maholomo Mpali v The Learned Magistrate Mrs Nthunya & Ors C of A (CRI) No. 13/2011 (www.lesotholii.org)***, one of its latest decision on the issue.

7. The test for recusal is an objective one, namely, whether in the eyes of a reasonable man in the circumstances of the accused there is a reasonable perception of bias. In ***The President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC)*** at para. 45, the test was succinctly laid down as follows:

> ***The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.***

8. The above principles equally apply to administrative processes such as disciplinary hearings. Fairness is a prerequisite in both judicial and administrative decisions that affect people's rights. Courts will set aside an administrative action which is tainted by bias.

An apprehension of bias may arise:-

> ***either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from***

the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself.

See ***Bernet v ABSA Ltd [2010] ZACC 28*** (www.saflii.org)

9. It is trite that every person who undertakes to administer justice, whether he or she is a legal official or is engaged in the work of deciding the rights of others, is disqualified if he or she has a bias which interferes with his impartiality, or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial. Coming to the case before us, the first question is where did the perceived bias emanate from? According to the papers filed of record and appellant's Counsel's submissions it arises from an alleged quarrel between Mr Mpeka and the appellant on an issue relating to the transfer. Contents of the said conversation has however not been disclosed. Transfer of staff is an administrative function and if we had the benefit of the purported unpleasant exchange we would perhaps have been in a position to ascertain whether the exercise of this administrative function was tainted with bias or malice. Or was the perceived bias based on the exchange ***per se***?

10. As aforementioned, the record does not reflect what actually insinuated the perception of a hostile relationship between the two. The appellant simply referred to a hostile relationship. The Court finds nothing in the record and submissions of Counsel from which it could deduce an inference of bias. There is nothing to suggest that the Tribunal misconstrued the test for bias. We therefore find nothing untoward with its finding that there was nothing on record to suggest that Mr Mpeka was influenced by the hostile relations between himself and the appellant in the decision that he arrived at. Moreover, the appellant did not say what prompted him to conclude that Mr Mpeka never forgave him for the squabble that they had over issues surrounding his transfer. As it is, it does not necessarily follow that when an employer reprimands an employee there is bad blood between the two.

11. The test for bias remains whether there is a likelihood/apprehension of bias not whether there was actual bias, but such apprehension must be reasonable. As aforementioned, an apprehension of bias may arise from the conduct or utterances by a presiding officer prior to or during the proceedings. Perusing through the record, the Chairperson, Mr Mpeka does not seem to have said much. Appellant's immediate supervisor, Mr Ramonene, who was the complainant, did most of the talking in the proceedings. We cannot discern any questions which could taint the proceedings. We therefore find the perception of bias to be unfounded and not

reasonable. We conclude on this issue that the likelihood or apprehension of bias was not established.

12. The issue of bias was raised for the first time at the Tribunal stage. At no stage prior thereto did the appellant object to Mr Mpeka's chairmanship. Appellant's Counsel argued that the appellant could not raise the issue as he is a layperson. The argument is not compelling and the Court is therefore not persuaded by it. This objection appears to have been an afterthought. The Court finds no reasonable inference of a likelihood of bias.

RELIANCE ON INCONCLUSIVE AND ILLGOTTEN EVIDENCE

13. The appellant's Counsel further raised an objection to the finding of the Public Service Tribunal on the basis that the finding that the appellant probably stole the computer was based on inconclusive evidence. In his opinion, there was no substantive connection between the alleged theft and the appellant. He further argued that the evidence of Mr Makara, appellant's co-employee who testified that he saw the appellant around Seven 0' clock in the evening that he was supposed to have left at Mohale's Hoek was inadmissible as it was led at the appeal stage chaired by the Principal Secretary. Appellant's Counsel contended that it was improper to have led fresh evidence at that stage.

14. It is common cause that the computer was recovered after the applicant himself had taken the police to his friend's house at Ha `Majane, not very far from Matsieng, applicant's home. It was also undisputed that the computer got stolen on the day that appellant's transfer was effected from Mohale'shoek to his new duty station in Maseru. He was apparently dropped off at his home in Matsieng during the day.

15. The applicant averred in the papers filed of record that he lied about the whereabouts of the computer in order to free himself from brutal police interrogation. It is very interesting that he directed the police to the right place. The computer was indeed found in someone else's possession and not the appellant. This begs the question:- who was this someone? It turned out that this was a person not only known to the appellant but a friend!! What a coincidence!! A reasonable inference could only be that the appellant had a hand in the stealing of the computer. Logic dictates that the appellant somehow knew about the disappearance of the computer. Besides giving the police direct evidence on the whereabouts of the computer, circumstantial evidence connected its theft to him. This was a friend the appellant alleged to have left at his house in Mohale's Hoek when he left. What would link his friend who did not work with him to a computer

at his workplace? A rat surely smells here. It must also be noted that all these occurred in circumstances in which the appellant was said not to have been happy with the transfer.

16. The standard of proof adopted in a disciplinary case cannot be equated with the one in a criminal case. The degree of proof required is on a balance (preponderance) of probabilities and not beyond reasonable doubt as in criminal cases. It must just carry a degree of probability. From the chain of events it is probable that the appellant committed the offence with which he was charged. He was charged ***inter alia*** with dishonesty.

17. One of the paramount functions of labour law is to preserve jobs (guarantee job security), hence protection of workers against unfair dismissals. However, on the other hand, employers too have a legitimate interest in maintaining a workforce that is not prone to misconduct (e.g. theft of goods, insubordination, absenteeism, and poor work performance).

18. As a general rule, improperly obtained evidence is inadmissible. There are exceptions to this rule. In exercising a discretion to either include or exclude relevant but illicitly obtained evidence, two competing interests must be considered. These two conflicting interests were described in ***Lawrie v Muir 1959 Scots LT 37 39-40*** as;

> ***(a) the interest of the citizen to be protected from illegal or irregular invasion of his liberties by the authorities;*** [and]
>
> ***(b***) [that] ***the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical grounds.***

19. The determining factor seems to be maintenance of fairness in a trial. In ***Thanda & Others v S No. 538/06*** the Supreme Court of Appeal of South Africa pointed out at para. 116 that;

> ***Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged.***

> ***Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair.***

The Court went further to state at para. 117 that;

> ***In determining whether the trial is rendered unfair, Courts must take into account competing social interests.***

This statement echoes what the Court pointed out in the ***Lowrie*** case (***supra***). Applying the aforementioned test to the case before us, for one, there was no proof that the evidence of pointing out the location of the computer had been extracted through torture. Secondly, assuming it was, we feel this was a case in which the interests of justice demanded that it be admitted.

20. Surrounding circumstances in each case always dictate whether information was freely given or not. An admission made under police interrogation is not necessarily inadmissible. It will be excluded only if on the facts it appears that it was induced by a threat or a promise - See P.J Schwikkard & Others - Principles of Evidence, Juta & Co, 1997 at p. 196.

21. It is common cause that the Principal Secretary had decided to call further evidence to arrive at a fair hearing. In terms of the Public Service Regulations, 2008 it is the Head of Department who has power to dismiss a public officer for misconduct. A head of Department is defined as the Chief accounting officer. Reference to a chief accounting officer is to the Principal Secretary of the relevant Ministry or Department. The Head of Section merely recommends a dismissal. To this end, Section 8(6) of the Codes of Good Practice Notice, 2008 provides that;

> ***Where a dismissal of a public officer is being contemplated, the Head of Section shall recommend*** (emphasis mine) ***such dismissal to the Head of Department who shall after adequate investigation*** (emphasis mine***) confirm the dismissal.***

The words ***"adequate investigation"*** envisage that the Principal Secretary as the Head of Department could deem it fit to conduct a further investigation which could involve leading additional evidence. The Head of Section at the Bureau of Statistics merely recommended appellant's dismissal, and the Principal Secretary as the Head of Department confirmed the dismissal. ***In casu***, even if we were to drop the evidence led before the Principal Secretary as irregular, in our

observation, it just served to corroborate police findings. The irregularity is not sufficient to vitiate the whole proceedings.

On the basis of the above analysis, the appeal is dismissed.

COSTS

In proceedings of unfair dismissal, costs in the Labour Court are only awarded if the Court decides that the party against whom costs are sought has behaved in a wholly unreasonable manner. The Court is not persuaded to mulct the appellant with costs in this case. There is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 12TH DAY OF DECEMBER, 2012.

F. M. KHABO
DEPUTY PRESIDENT

M. MPHATS'OE **I CONCUR**
MEMBER

M. MALOISANE **I CONCUR**
MEMBER

FOR THE APPLICANT : ADV., M. NTABE
FOR THE RESPONDENTS : ADV., M. MOSHOESHOE