CIV/APN/280/97

IN THE HIGH COURT OF LESOTHO

In the matter between

BERENG MOLAPO **Applicant**

and

LEWIS STORES, LESOTHO (PTY) LIMITED **Respondent**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

on the 20th day of November 1998

The Applicant has approached this Court on a basis of urgency for an order declaring that his dismissal by the Respondent on the 23rd April 1997 is unfair. He also seeks an order that the Respondent pays him arrears of salary from the date of the dismissal to the date of judgment as well as costs.

It will be observed at the outset that unlike in most cases of this nature the Applicant does not seek an order of reinstatement. As I see it, his interest is merely confined to a declaration that his dismissal is unfair. Once that is done he would simply be happy with payment of arrears of salary from the date of his dismissal to the date of judgment. The question of reinstatement

therefore does not arise and this, I suspect, is by design. I shall return to this aspect later.

The relevant facts which are either common cause or are not strictly denied are briefly as follows:-

The Applicant was employed by the Respondent in July 1994 as a Training Manager. The following year he was promoted to the position of Branch Manager. In 1996 he was promoted twice, first into the position of Branch Inspector and later as Assistant Regional Controller.

On the 21st April 1997 the Applicant appeared before Respondent's disciplinary hearing on the following two (2) charges:

(1) Giving instructions to Branch Personnel not in accordance with Company policy by using credit balances on customers' accounts to reduce the Bad Debt Write-Off.

(2) Misappropriation of customers' monies to reduce Bad Debt Write-Off by using customers' Credit Balances to do so.

The disciplinary hearing in question was chaired by one Mr. Johan Enslin who was the Respondent's Regional Controller, Goldfields region and who was a more senior employee than the Applicant.

It is perhaps pertinent to mention that at the disciplinary hearing in question the Applicant does not seem to have seriously challenged the allegations levelled against him. He simply took up the position that the practice he was charged with was common at Respondent's branches and that it had in fact been taught to him by his senior one Mr. Molato Matasane.

After hearing several witnesses the chairperson of the disciplinary hearing Mr. John Enslin duly found the Applicant guilty on the charges set out above as well as using stock overages inappropriately. Having considered mitigating factors on behalf of the Applicant the chairperson then dismissed the Applicant with effect from the 23rd April 1997.

The Applicant duly appealed against this decision in terms of Respondent's Disciplinary Code and procedure. The appeal was heard on the 23rd May 1997 and was presided over by one Mr. G.S. van der Walt who was Respondent's Regional Controller, Lesotho Border. He too was an employee more senior to the Applicant.

It is common cause that the proceedings in the appeal hearing in question were mechanically recorded and a transcript of same has been attached as Annexture "HGC4". More about this later.

Now against this background the Applicant has raised only three (3) complaints in this application namely:-

(1) that at the appeal the Applicant was denied documents that he had asked for on the ground that the Respondent company was "now admitting the use of credit balances to clear the write-off list" (paragraph 5(e) of the founding affidavit of Bereng Molapo).

(2) that the Applicant was dismissed for conduct which cannot properly be termed misconduct warranting dismissal in terms of Respondent's Disciplinary Code and Procedure (paragraph 7 of the founding affidavit of Bereng Molapo).

(3) that the Applicant's dismissal was "clearly outweighed by the weight of the nature and facts presented" and that consequently it was "substantively unfair" (paragraph 9 of the founding affidavit of Bereng Molapo).

I turn now to examine each of the three complaints by the Applicant as set out above.

THE APPLICANT'S FIRST COMPLAINT

The Respondent deals with the Applicant's allegation that he was denied access to documents in paragraphs 42 and 53 of the Answering Affidavit of Hugh G. Clarke who was the Respondent's General Manager, Human Resources at the material time.

In paragraph 42 of his Answering Affidavit Hugh G. Clarke makes the telling point that at the appeal hearing in question the Applicant as well as his representative accepted the presiding officer's assurance that he would accept as a fact for the purposes of the appeal that the practice of utilising credits on one account to off-set debits in another account had been widespread an common practice in previous years and that it was agreed by the parties concerned therefore that it would not be necessary to furnish the documents sought hence the appeal proceeded. Indeed Hugh G. Clarke repeats this averment in paragraph 53 of his Answering Affidavit.

It is significant that the contents of both paragraphs 42 and 53 of the Answering Affidavit of Hugh G. Clarke as set out above have remained completely uncontroverted in the replying affidavit of the Applicant Bereng Molapo. Accordingly I consider that this is a fit case where the version of the facts deposed to by the respondent should be accepted as correct.

See **Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) S.A. 623A at 634 - 635.**

In this regard I would also respectfully wish to associate myself with the remarks of Steyn JA (as he then was) in **Supreme Furnitures and Another v Letlafuoa Molapo 1991-1996 LLR 1476 at 1477** in which the Learned Judge of Appeal succinctly stated the principle as follows:-

> ".....it is clear that in the ordinary course of events, and in the absence of facts or circumstances which cast doubt on the acceptability of a Respondent's version, where an applicant institutes procedures by way of notice of motion the version of the facts deposed to by a Respondent should be accepted as correct."

On this principle therefore I find it as a fact that the Applicant significantly agreed to dispense with the need to produce the documents sought at the appeal hearing in question. Accordingly there is no substance in Applicant's first complaint and in my view no irregularity has taken place.

THE APPLICANT'S SECOND AND THIRD COMPLAINTS.

I should like to point out at once that it is readily conceded by the Respondent that there is no specific disciplinary offence of the nature with which the Applicant was charged referred to in the Respondents Disciplinary Code and Procedure (see paragraph 57 of the Answering Affidavit of Hugh G. Clarke). It is submitted on behalf of the Respondent, however, that the Code does not contain an all-inclusive list of offences with which an employee can be charged.

In order to fully appreciate the Respondent's contention in this regard it proves convenient to quote Section 3.5 of the Respondent's Disciplinary Code and Procedure. This section deals with Summary Dismissal and it provides as follows:-

"3.5.1 An employee may be summarily dismissed (eg without notice pay) only where the offence is serious enough to warrant summary dismissal, whether or not the employee has received previous warnings. Such action may be taken in the case of the following offences:

Theft, assault, possession of firearms or dangerous weapons without the permission of management, forgery, fraud, driving motor vehicles under the influence of intoxicating liquor or drugs, wilful damage of company property, negligence to a serious degree, refusal to carry out lawful requests, revealing trade secrets to a competitor, unauthorised use of company vehicles.

The above list is not exhaustive and summary dismissal may be imposed for other conduct which, in the opinion of the Chairperson, is appropriate in the circumstances." (My underlining).

As I read this section there can be no doubt in my mind that it was not the intention of the law maker to make the list of offences tabulated in the Code exhaustive. It is specifically stated in so many words that the list is "not exhaustive" and that summary dismissal may be imposed for other conduct which, in the opinion of the chairperson, is appropriate in the circumstances. Nothing can be clearer.

It remains then to determine whether the facts of the matter justified the opinion which the chairperson formed namely that the Applicant knew very well both from his experience as a senior employee of Respondent and from

personal warnings and or instructions from the Respondent's Divisional General Manager and Applicant's immediate superior one Mr. Young that the practice with which the Applicant was charged, which for that matter he admitted, was unacceptable to the Respondent company and was not allowed and that accordingly the trust relationship between the Applicant and his seniors as representing the Respondent Company had been "totally destroyed."

I should like to say at once that the story that has unfolded against the Applicant both in the disciplinary hearing and in the affidavits before me is a story of dishonesty in the extreme. It is indeed a story reminiscent of the proverbial case of robbing Peter to pay Paul. In this regard and on the authority of **Plascon-Evans Paints v Van Riebeeck Paints** (supra) I accept the unchallenged version of the Respondent expressed in paragraphs 13, 16 - 20 of the Answering Affidavit of Hugh G. Clarke to the following effect:-

"13

.....What the Applicant either authorised or himself did, through the use of the Respondent's computer system, was to "refund" the credit balance on the one account and then take that "money" and make a "cash instalment payment" into the other account. This latter account would obviously be the one with the debit balance. In fact no money was ever refunded and no cash instalment payment was ever made by either account holder. Instead the "cash refund" which was taken from one customer's account and

used to make a "cash instalment payment" into the other account was all done through the computer system.

16

The effect of utilizing the credit balance in one customer's account to reduce or extinguish the debit in another customer's account is to activate the account and clear or reduce the debt owed to the Respondent by the account holder. It creates the impression in the Respondent's books of account that the account is active and that the account holder is reliable, trustworthy and a good risk. In fact in many instances this is not the case. The account holders who had their debts cleared as a result of Applicant's conduct were very bad customers and not the kind of people that the Respondent likes to do business with. By clearing their debts the Applicant created the impression that they were better customers than they in fact are.

17

At the same time those customers who had their credit balances utilised to reduce or clear the debit lost the benefit of that credit. In effect their money was being stolen. This practice was prejudicial to the interests of the Respondent in that the Respondent would have to restore the credit and return the customers' money. It would also discourage good customers from

doing business with the Respondent because their money was being stolen.

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It will be seen from the aforegoing that the effect of the practice was that the Applicant was allowing good customers to be prejudiced and bad customers to be benefited (sic). In addition the financial soundness of the Respondent was being distorted. A false financial picture was being painted.

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There is a further dimension to this practice. The Applicant personally benefits thereby. As stated the effect of the practice was to substantially reduce the extent of the Respondent's bad debts on its books. This was achieved by using the monies standing to the credit of good customers. On the Respondent's books of account then the picture is painted of a financially sound set of stores in Lesotho under the management of the Applicant. The impression is thereby created that the stores are being well-managed and that the business is flourishing. In fact this is not so at all. The true position is very different. However, an Assistant Regional Controller is entitled to bonuses which are related to the performance of the stores under his control. In the Applicant's case he stood to be paid a bonus on the profitability of the three stores under him. This could be anything up to M20,000.00 a

year. Furthermore the better the performance of the Applicant's three stores the better his chances of promotion.

20

It follows from all the aforegoing that the Applicant was allowing and encouraging a business practice to be followed which benefitted him and which was potentially disastrous to the Respondent."

Significantly the Applicant does not deny the contents of paragraph 21 of the Answering Affidavit of Hugh G. Clarke to the effect that the Operations General Manager one Mr. C.H. Markhan had in fact communicated to the Applicant that the dishonest practice referred to above was contrary to the Respondent company policy. Accordingly I accept the Respondent's version in this regard. Indeed I observe that Mr. C.H. Markhan had written a letter Annexture "HGC1" on the 6th January 1997 addressed to "All Branch Managers/Manageresses" including the Applicant and had said, ***inter alia***:

"Please note that <u>one full instalment</u> is required to remove a balance from this list and that this must be a payment received and not reversals or credit notes for allowance etc. Please also remember that two full instalments have to be collected on accounts older than 3 years eg those opened prior to March 1994."

It is further more significant that the Applicant has not denied the contents of paragraphs 33 and 44 of the Answering Affidavit of Hugh G. Clarke to the effect that at the disciplinary hearing in question the Applicant admitted his guilt to the charges and that he, however, sought to justify his conduct by arguing that what he did was widespread and had been practised for a long time.

As I have stated above the practice forming the subject matter of Applicant's disciplinary charge is clearly struck through with dishonesty. That the Applicant would in effect steal money from good customers and use it to make accounts of bad customers look better with the obvious intention of creating the good financial impression of the stores under his control must indeed amount to misconduct of the worst kind. I cannot fault the chairperson of the disciplinary hearing in question for having treated the Applicant's conduct in the manner that he did.

There is no evidence that the Respondent acted unfairly. In any event even if there was such evidence I consider that this is a fit case where the employer would not strictly be obliged to act fairly in dismissing the Applicant as long as it observed the Disciplinary Code and Procedure as it surely did. In this regard I respectfully associate myself with the following remarks of Mahomed JA (as he then was) in **Koatsa v National University of Lesotho 1991-92 LLR 163 at 169** (Also reported in 1985-89 LAC 335 at 340):

"A private employer exercising a right to terminate a pure master

and servant contract is not, at common law, obliged to act fairly. As long as he gives the requisite notice required in terms of the contract, he can be as unfair as he wishes. He can act arbitrarily, irrationally or capriciously."

Indeed I accept that the employer/employee relationship is a relationship of trust requiring, as it must, utmost good faith and honesty. It follows therefore that dishonesty destroys that trust.

In this regard I respectfully associate myself with the following remarks of De Klerk J in **Central News Agency (Pty) Ltd. v Commercial Catering and Allied Workers Union of South Africa and Another (1991) 12 ILJ 340 LAC at 344:-**

"In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely upon the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee.

If the so-called extenuating circumstances are taken into account they are not such that dismissal as a fair and proper consequence of theft by an employee could be questioned. I

repeat, an employer unquestionably is entitled to expect from his employees that they would not steal from him and if an employee does steal from the employer that is such a breach of the relationship and of the contract between them and such a gross and criminal dereliction of duty that dismissal undoubtedly would be justified and fair."

These remarks apply with equal force to the present matter.

In my judgment the conduct of the Applicant as fully set out above clearly warranted summary dismissal as it fell within the letter and spirit of Section 3.5.1 of the Respondent's Disciplinary Code and Procedure namely "conduct which, in the opinion of the chairperson, is appropriate in the circumstances."

In all the circumstances of the case I am unable to find any gross irregularity that has led to a miscarriage of justice in the instant matter. Indeed none has been alleged in the papers before me for that matter. Accordingly the Applicant's second and third complaints have no substance and must therefore fail.

To the extent that the Applicant seeks a declaratory order that his dismissal by the Respondent is unfair it follows from the aforegoing that the

Applicant has failed to establish a clear right to remain in Respondent's employment. Hence I find that the Applicant has failed to discharge one of the essential requirements in order for the Court to judicially exercise its discretion whether to grant a declaration of rights.

See **Family Benefit Friendly Society v Commissioner For Inland Revenue 1995 (4) S.A. 120 at 124.**

As I have stated at the beginning of this judgment the Applicant has not sought an order of reinstatement. I consider therefore that the declaratory order sought to the extent that the Applicant's dismissal is unfair would merely be academic and serve no real purpose in the circumstances. Indeed declaratory orders being discretionary as they are, a court will readily not exercise its discretion and grant a declaratory order if no tangible relief will flow therefrom. This is so because courts are disinterested in hypothetical or academic situations. It is not the function of courts to give legal advice.

Moreover, in all the circumstances of the case as fully set out above, I consider that this is not a proper case for the exercise of the court's discretion in favour of the declaratory order sought.

Notwithstanding the fact that he has not applied for reinstatement the Applicant seeks an order for payment of "arrears of salary from the date of the purported dismissal to the date of judgment." While it is trite that this Court is vested with a discretion to order specific performance in fitting cases the

instant matter is in my view not a proper one for such an order. This is so because, ***inter alia,***:

(1) There is no prayer for reinstatement. It can reasonably be inferred therefore that the Applicant does not intend to work for Respondent anymore. Nor has he tendered his services at the material time.

(2) The Applicant has obviously not worked for Respondent at all material times since his dismissal.

(3) There is no evidence that the Applicant has mitigated his loss in respect of any salary he may have earned elsewhere since his dismissal. An order for payment of arrears of salary that in effect amounts to a double salary would no doubt be inequitable and therefore not proper.

See **Lesotho Telecommunications Corporation v Thamahane Rasekila C of A (CIV) NO.24 of 1991** (unreported).

The conclusion at which I have arrived in this matter renders it strictly unnecessary for me to deal with all the points raised by both Counsel in their heads of argument. There is however one last comment I should like to make. It is this:

Adv Mosito submits that Annexture "HGC4" is not the "record of disciplinary as well as appeal proceedings." Yet as I read paragraph 41 of the Answering Affidavit of Hugh G. Clarke a specific allegation is made that Annexture "HGC4" is in fact a transcript of the mechanical recording of the disciplinary appeal hearing in question. This allegation is not challenged in paragraph 4.22 of the replying affidavit of the Applicant Bereng Molapo. On the contrary the latter deponent merely challenges the accuracy of Annexture "HGC4" not that it is not the record of proceedings altogether. As I quote him this is what he says in full:

"4.22

AD PARA 4.1 THEREOF

I deny that Annexture "HGC4" is an accurate rendition of what transpired at the hearing. It does not make sense in most cases."

It seems clear to me therefore that what Adv Mosito is now attempting to do is to shift the goal posts somewhat. That I cannot accept.

On the authority of **Plascon-Evans Paints v Van Riebeeck Paints** (supra) I accept the version of the Respondent that Annexture "HGC4" is in fact a transcript of the mechanical recording of the disciplinary appeal hearing in question. This, I observe, is in keeping with Clause 2.17 of the Respondent's Disciplinary Code and Procedure which provides as follows:

"Clause 2.17 All appeal hearings must be recorded.

Comment: Normal hearings must be recorded in writing by the Chairperson. In the case of appeal hearings because criticism has been made that Chairpersons of disciplinary hearings made inaccurate and biased minutes of appeal hearings, tape record the enquiry, then there can be no dispute as to what was said."

In all the circumstances of the case therefore I am satisfied that there is no merit in this application.

Accordingly the Rule is discharged and the application dismissed with costs.

M.M. Ramodibedi
JUDGE
20th November 1998

For the Applicant: **Adv. Mosito**

For the respondent: **Adv. Woker**