

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 51/2013

In the matter between:

MALUTI MOUNTAIN BREWERY (PTY) LTD

APPELLANT

and

MOEKO MABOEE

RESPONDENT

CORAM: SCOTT, AP
LOUW, AJA
CLEAVER, AJA

HEARD : 8 APRIL 2014
DELIVERED : 17 APRIL 2014

SUMMARY

Appeal from decision of Labour Appeal Court – Right to Legal representation at disciplinary enquiry in the discretion of the tribunal – disciplinary proceedings nullified.

JUDGMENT

LOUW, AJA:

[1] The respondent in this appeal from a decision of the Labour Appeal Court is the former sales manager of the appellant company, who was dismissed from his employment pursuant to the decision of a disciplinary enquiry held by the appellant.

[2] The appellant appeals against the order of the Labour Appeal Court nullifying the disciplinary proceedings which led to the dismissal of the respondent.

[3] On 17 October 2011 the appellant gave formal notice to the respondent that a disciplinary enquiry would be held on 21 October 2011 to investigate the alleged fraudulent supply of catering equipment to the appellant and, arising therefrom, serious charges against the respondent of misusing the appellant's name in sourcing equipment, gross dishonesty in the misuse of the appellant's email for personal purposes and collusion with former employees to defraud the appellant over the period from 1 November 2010 to 24 February 2011.

[4] The respondent was further informed that he would be entitled to be represented at the enquiry by a co-worker of his choice, to cross-examine witnesses who may testify against him and to call witnesses.

[5] When the respondent on 18 October 2011 enquired whether he would be allowed legal representation, the appellant responded on 19 October 2011 that the enquiry was an internal

matter and that no legal representation would be allowed in the proceedings.

[6] The respondent thereupon, on 20 October 2011, sought and obtained an urgent interim interdict in the Labour Court, staying the disciplinary enquiry and a rule nisi calling upon the appellant to show cause why the respondent should not be granted permission to be represented at the enquiry by a legal representative of his choice. The application was founded on the contention that from the nature of the charges it was clear that technical legal points might arise at the enquiry and that since documents to be used at the enquiry had been processed from computers by information technology experts the respondent would have difficulty in dealing with the legal issues and in cross-examining the experts.

[7] The appellant opposed the application on the basis that it was the policy of the appellant not to allow legal representation at an internal enquiry and that there would, in any event, be no legal technicalities involved in the enquiry.

[8] On 23 November 2011 the Labour Court dismissed the respondent's application for an order entitling him to employ a legal representative at the enquiry, holding that the discretion to allow legal representation at a disciplinary enquiry rested with the employer and that the court could not interfere with the exercise of the appellant's discretion in this case. The interim interdict staying the disciplinary proceedings was also discharged. The

respondent immediately noted an appeal to the Labour Appeal Court against the decision of the Labour Court. An application by the respondent to further stay the disciplinary enquiry pending the outcome of the appeal was dismissed by the Labour Court and the disciplinary enquiry went ahead.

[9] In a judgment delivered on 28 June, 2013 the Labour Appeal Court held, correctly in my view, that it was for the disciplinary tribunal to exercise its discretion whether to allow legal representation at the enquiry. It was not for the employer to refuse such representation on the basis of a policy that no legal representation is allowed. Having come to this conclusion, namely that it was for the disciplinary tribunal to exercise a discretion, the Labour Appeal Court held that it should set aside the disciplinary proceedings, thus enabling the disciplinary tribunal to exercise its discretion whether or not to permit legal representation, if the employer should decide to institute such proceedings de novo.

[10] The Labour Appeal Court therefore upheld the appeal with costs and set aside the decision of the Labour Court, replacing its order with an order that ‘the applicant’s application is granted in terms of prayers 2 (b) and 3’. In addition, flowing from the aforementioned orders, the Labour Appeal Court, under the prayer for alternative relief, ordered that the disciplinary proceedings against the respondent, be nullified.

[11] Prayer 2 (b) which was granted by the Labour Appeal Court included an order granting the respondent permission to be represented by a legal representative of his choice at the disciplinary enquiry. To this extent, the order is in direct conflict with the finding in the body of the judgment of the Labour Appeal Court that it is for the tribunal itself to decide in the exercise of its discretion, whether legal representation should be allowed to the respondent. This part of the order of the Labour Appeal Court was clearly erroneous and falls to be set aside.

[12] The record of the proceedings before the tribunal was not part of the record before the Labour Appeal Court and was also not before us. In the light of the finding of the Labour Court that it could not interfere with the employer's discretion and decision not to allow legal representation and the Labour Court's refusal to order that the respondent was entitled to legal representation at the enquiry, the overwhelming probability is that those proceedings then went ahead without legal representation for the respondent and without the tribunal considering whether it should allow legal representation for him. This in my view renders the disciplinary proceedings a nullity and the order made by the Labour Appeal Court to that effect should stand.

[13] The appellant has consequently had no success on appeal and there is no reason why the costs should not follow the result of the appeal. It is, however, necessary to amend the order of the Labour Appeal Court in order to correct the error referred to in paragraph 11 above.

[14] The outcome of this appeal is that

1. The appeal is dismissed, with costs.
2. The order of the Labour Appeal Court is amended so as to read as follows:

“(a) The appeal succeeds with costs.

(b) The decision of the Labour Court is set aside and is replaced with the following order:

- (i) It is declared that the issue of whether the applicant should be allowed legal representation at the disciplinary enquiry against him is a matter which must be decided in the discretion of the disciplinary tribunal.
- (ii) The respondent is ordered to pay the costs of the application.

(a) The proceedings against the respondent in the disciplinary tribunal are set aside.”

W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree

D.G. SCOTT
ACTING PRESIDENT

I agree

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For the Appellant : Adv. P.J, Loubser

For the Respondents : Adv. P.L. Mohapi