IN THE LABOUR COURT OF LESOTHO

CASE NO.LC/6/94

HELD AT MASERU

IN THE MATTER OF:

PASCALIS MOLAPI — APPLICANT

AND

GENERAL MANAGER — RESPONDENT

METCASH LTD. MASERU

JUDGMENT

This matter was heard over a number of days. During the hearing several technical objections and special pleas were raised. Of particular importance for the purpose of this judgment is:

(a) prescription and

(b) the special plea of res judicata.

It is common cause that the cause of action herein arose in November, 1990. It was not until 7th November, 1994 that this matter was launched in this court. In terms of Section 70 (1) of the Code a claim for unfair dismissal must be presented to the court within six months of the termination of the contract of employment. It is common cause that the applicant herein is challenging the fairness of the termination of his contract of employment on the grounds that he was not afforded a proper hearing. The court however, ruled that this matter is properly before the court, because it is not governed by the Labour Code Order 1994 which prescribes the time limit of six months, but rather by the Employment Act 1967, as amended, under which, prescription was governed by the Prescription Act No.6 of 1861.

It is further common cause that this matter was first launched in the High Court of Lesotho sometime in 1992. Pleadings were closed and the matter was set down on several occasions, but was not heard. On the 1st September, 1994 the applicant who was the plaintiff in the High Court, withdrew the matter without any conditions. It was on the basis of this withdrawal that the respondent contended that the matter was res judicata, because it had been settled. In their letter dated 19/08/1994 addressed to their clients, the respondents wrote as follows:

> ***"we confirm that we are advising the other side that the matter be settled on the basis that the claim be withdrawn and that each party pays its own costs."***

It is surprising where the respondents got the word *"settle"* from, because in their earlier letter to the respondents, the applicant had not used that word. They had said that they were intending to withdraw the matter and they wanted to know respondents attitude towards costs. (see applicant's letter of 15/07/94).

It seems to the court that if the matter had been settled as alleged by the respondents the plea of res judicata would be well taken. There is, however, no evidence of a settlement. What is clear is that the matter has been withdrawn, consequently the plea of res judicata does not arise, because the matter is not finalised. Accordingly therefore the court dismissed the special plea.

The brief facts of this matter are that the applicant was a Manager of Maputsoe branch of Frasers Cash and Carry. Frasers Cash and Carry was one of four subsidiaries of Frasers Ltd. Each subsidiary had its own administrative structure headed by a Managing Director who was responsible for controlling the affairs of that company.

Sometime in the 1980's, Metro Cash and Carry took over Frasers Ltd, resulting in the former company (METCASH in short) becoming the holding company for the four subsidiary companies. This change in ownership did not affect the administrative structure of the subsidiary companies, which still remained separate entities. The applicant therefore remained an employee of Frasers Cash and Carry based at the Maputsoe branch.

On the 25th October, 1990, the Regional Manager, Mr. Lambrechts, together with the applicant conducted a hearing against one of the cashiers in connection with a *"Refer to Drawer"* cheque which was improperly banked in order to balance the day's takings, which had been short, because one of the purchasers had not had enough cash to pay for the goods he had bought. In the course of answering the questions relating to the incident the cashier implicated the applicant by saying that it was the applicant who instructed her to bank the cheque. Much as the applicant denied ever giving such instructions, a suspicion, however, arose that the applicant was infact authorising credit contrary to company rules and regulations.

This suspicion resulted in the applicant being called to appear before an enquiry conducted by the General Manager Mr. Bekker, who was based in Maseru on the 30/10/90. The focus of the enquiry was the alleged unauthorised credit which the applicant gave to the customers. During the course of the enquiry, the applicant whilst denying that he gave unauthorised credit conceded to three important points namely:

(a) **that he used to allow customers to buy with cheques from Wednesdays to Fridays which were not deposited into the bank, but were given back to the drawers the following Monday when they brought cash;**

(b) **that he took M3,000-00 from the respondent's funeral fund in order to borrow his friend so that he could pay for his cheque;**

(c) **that he was aware of the company rule that no manager may give unauthorised credit.**

When asked why he disobeyed the company rules, the applicant said;

> ***"because some of these customers are on the Refer to Drawer record and their cheques cannot be accepted, that is why I have done this."***

He was asked further if any of the staff under him ever objected to his giving credit in

this way, he answered that they approved. Asked to comment further he said he was not robbing the company, because if he was doing so he could have destroyed the cheques or could have hidden the credit roll.

Two other employees were interviewed by Mr. Bekker. They confirmed that from Wednesdays to Fridays customers were allowed to pay with cheques, which were not deposited into the bank and that these cheques were returned to their owners the following Monday when they brought cash. They further confirmed that these cheques were authorised by the applicant. They further stated that at the end of the day the till was balanced with only that cash that had been collected. Asked about the improperly banked cheques the cashier who banked it said she was told by the applicant to bank it in place of cheques from two other customers so that those cheques could not go to the bank.

The two employees stated further that they had previously warned the applicant against the practise of advancing customers with goods but he had replied that he was boosting the sales. It is common cause that in August that year the applicant had been called to an enquiry by Mr. Lambrechts in connection with a negative audit report which reflected *"serious deviations from the system and numerous cases of negligence."* Following this enquiry, the applicant was given a written warning dated 15/08/90 for the *"total breakdown of impress(sic) system, which resulted in a sold out situation of merchandise."* The warning was valid for nine months. It is common cause that at the time that the applicant was called before another enquiry this warning was only two months old. The applicant had requested at the time to be given a chance to enable him to correct the problem.

It seems to the Court that on the strength of the foregoing facts, the dismissal of the applicant is justified. The applicant, however, contended that he was not given a proper hearing. It is significant that the applicant says he was not given a proper hearing, thereby impliedly acknowledging that some hearing was given. It is true that there is no evidence that the applicant was given a prior notice that the enquiry was going to be held. It is also true that the applicant was not given chance to cross-examine the witnesses who implicated him. It is, however, important that the applicant had known

some five days prior to the hearing that he had been implicated by one of the cashiers in the controversy involving unauthorised credits. He even denied the allegations. When Mr. Bekker called him to an enquiry on the 30th October, he was not being confronted with new allegations that were unknown to him. It seems to the court therefore that the applicant did not suffer any prejudice because of the failure to give him prior notice of the hearing.

It appears however, that the respondent conducted an investigation. The accused person was given a chance to answer. He, however, was not afforded the opportunity to cross-examine the witnesses who implicated him in a material way. In particular the witnesses did not only stop at confirming the irregularity with regard to unauthorised credit. They went further to make allegations that on two occasions the applicant appropriated company funds for private use. This information was clearly prejudicial to the applicant and he should have had the opportunity to rebut it either by cross-examining the witnesses or by calling his own witnesses. Counsel for the respondents sought to explain this anomaly by saying that the funds that applicant allegedly appropriated for private use are not the basis for applicant's dismissal and therefore not the reason for these proceedings. This explanation is not supported by respondent's conduct of these proceedings. For instance, in the bundle of documents which were handed in court by the respondents in support of the decision to dismiss applicant, they have also attached the statements in which the allegations of misappropriation were made by the witnesses. They have also attached notice reports to Senior Management about the misappropriated funds. (pages 17-19 of the bundle refer). At the bottom of the *"Notifiable Incident Report"* at page 19, the reporting officer has ticked the action taken against the culprit as *"dismissal"*. In our view therefore, the statements were attached to this bundle of documents which was supporting applicant's dismissal because the allegations contained therein were relevant to applicant's dismissal. The report to the head office also showed that the culprit had been dismissed. We are therefore convinced that the hearing was flawed and therefore the dismissal based thereon was unfair.

Mr. Mare argued that the applicant had cited the wrong respondent as his employer was Frasers Cash and Carry. We have accepted the evidence of Mr. Bekker, the retired

Managing Director of Frasers Cash and Carry that METCASH was a holding company for four subsidiary companies one of which was Frasers Cash and Carry. We have also taken the evidence that in practice these four companies were separate entities with each running its own affairs and having its own staff. It is common cause that in the High Court proceedings to which we referred earlier on, the applicant had sued Frasers Cash and Carry. When he initiated the proceedings before this court, he sued Metro Cash and Carry. One of the very first questions which the applicant was asked in cross-examination was why he sued Frasers Cash and Carry in the High Court proceedings and yet in this proceedings he has sued METCASH? His answer was that it is because he was working for Frasers Cash and Carry.

The court enquired at one stage whether the entity METCASH was a registered company in Lesotho. Nobody knew. All that Mr. Mare could say was that in an application he made on behalf of that organisation in the past he had cited all the four subsidiary companies individually. It seems to the court there is confusion as to who the right respondent in this matter is, which is compounded by applicant's citing of different respondents in the High Court and in this court without explaining the changes. It is the duty of the applicant to know who he is instituting proceedings against. The applicant seems to be on a fishing expedition for respondents and he has not made up his mind. He has not explained why he has cited the present respondent and not the defendant in the High Court or why he has not cited both. In the circumstances the court is unable to make any order as it is not clear against whom the order will be made.

Thus being an unfair dismissal case, it is governed by the provisions of Section 74 of the Code with regard to costs. There is therefore no order as to costs.

THUS DONE AT MASERU THIS 4TH DAY OF AUGUST, 1995.

L. A. LETHOBANE

PRESIDENT

A. T. KOLOBE **I CONCUR**

MEMBER

M. KANE **I CONCUR**

MEMBER

FOR APPLICANT : MR. HLAOLI

FOR RESPONDENT : MR. MARE