IN THE LABOUR COURT

CASE NO. LC/47/95

HELD AT MASERU

IN THE MATTER OF:

MIKE NKUOATSANA **APPLICANT**

AND

MALUTI MOUNTAIN BREWERY **RESPONDENT**

J U D G M E N T

This is an application in which the applicant prayed the court to set aside his purported termination of employment by the respondent on 23rd March 1994 on the grounds that:

(a) The chairman of the disciplinary committee was also complainant, prosecutor and witness;

(b) the alleged offence committed by the applicant is not an offence in terms of the rules.

(c) The penalty is disproportionate to the offence allegedly committed by the applicant.

(d) The rule he allegedly contravened was not in place at time of the commission of the offence.

The facts which gave rise to the dismissal of the applicant were briefly that, the applicant went for a course in Swaziland. The applicant was given M500-00 for which he had to submit receipts of expenditure upon his return. Upon his return the applicant did submit receipts which had to be approved by his immediate supervisor, one Mr. Steenberg. There is discrepancy in applicant's version and that of the respondent as to whom the receipts were submitted.

In his statement of case the applicant says he handed the receipts to Mr. Steenberg's secretary, presumably for onward transmission to Mr. Steenberg. He further says the receipts were approved. In their answer the respondents say the applicant handed his receipts directly to the Finance Department. They were thus not approved by the Production Manager. However, it is stated in the record of disciplinary proceedings that one of the reasons why applicant was dismissed was because he *".... never made it clear to the Production Manager when he signed his expense claim that he had bought luxury items."* Clearly, the receipts had been submitted to the Production Manager and he had approved them. Whether he was aware of what he was approving is a different matter.

On the 25th January the Human Resources Manager issued two Memos to department managers advising them that:

(a) **As a matter of policy no further travel advance will in future be made to an employee who has not yet settled the previous travel advance, *"in other words, no employee can have two advances outstanding at any one time."***

(b) ***".... certain employees do not receive sufficient guidance from their managers as to what is regarded as reasonable expenditure on "extras" while travelling on company business."***

The circular went further to list those items on which cash advance given by the company for business trips may be spent and those which the employee must pay out of

his pocket. The circular concluded that, *"if there is not a noticeable decrease in spending on unreasonable items, more rigid regulations will have to be introduced."*

On the 25th March 1994, the applicant received a notice to attend a disciplinary hearing on the 28th March 1994. He was charged with *"misappropriation of allowance given whilst on training."* The disciplinary committee was composed of the Production Manager as Chairman and the Industrial Relations Manager. More specifically it was alleged that applicant had purchased luxury items such as a belt and a watch out of the allowance he had been given, whilst attending a course in Swaziland in January. He was found guilty and dismissed.

Applicant sought the intervention of the Department of Labour. It appears that he was advised to exhaust the respondent's domestic remedies. As a result he lodged an appeal which sat in November 1994 and after hearing the applicant, the appeal was dismissed and the initial decision upheld. The applicant then approached this court for relief in the terms stated above in March 1995.

At the start of the hearing Mr. Mpopo for the applicant applied for condonation of the applicant's late filing of the present application because he had sought the intervention of the Labour Commissioner and the case had subsequently been referred back so that the local remedies could be exhausted. It is common cause that the respondent did not object to the application, thus leading the court to conclude that they did not see it as unfair to them if the condonation is granted. In any event we are satisfied that the applicant had not just sat back and not pursued the claim. He lodged the complaint with the lawful structure for the settlement of labour disputes namely; the Labour Department. As a result of the appeal to the Department of Labour, the respondent reopened the enquiry for an appeal hearing in terms of the respondent's own rules of procedure, as late as November 1994. We are of the view that all these actions suspended the running of the prescription period. We thus come to the conclusion that when the case was lodged in March 1995, it had not yet prescribed. There is therefore no need for condonation.

Coming to the merits of the case, Mr. Mpopo, submitted that the disciplinary enquiry

was not fair because the chairman was a judge in his own cause as he was also the complainant, witness and prosecutor at the sametime. Miss Tente countered this argument by saying that the complainant in this case was the Finance Department which was the one that spotted the misappropriation. With respect we do not agree. If an auditor of the books of accounts spots an irregular expenditure, in consequence whereof action has to be taken against the concerned employee, that does not make such auditor the complainant in any case that follows. At best the auditor will be treated as the investigator. The duty of the investigator is to make a report to a responsible officer who will then take the necessary action. In our view this is the context in which the respondent's Finance Department must be seen. The applicant had wrongly used the funds given for a specific purpose. This fact passed without being noticed by the Production Manager. Had he noticed it, he would have taken the necessary action. The misnomer was spotted by the finance department in their routine updating and reconciling of books of accounts. Having spotted it they reported it to the person charged with maintaining discipline in the department for action and this officer could only charge the applicant, not to chair the proceedings. Some other person ought to have been found to be the chairman to enable Mr. Steenberg to charge the applicant and give evidence as the complainant.

The unwanted result of making an interested party chairman of proceedings in which he has interest is that as Mr. Steenberg did, he ends up giving evidence against the accused employee from the chair. Thus in the letter of dismissal, Mr. Steenberg further accuses the applicant of having *"....not make me aware of your purchase at the time that you asked me to sign your expense claim..."* According to the record of the proceedings this factor was taken as an aggravating factor which influenced the imposition of the penalty of dismissal. There was no way in which Mr. Steenberg could be expected to be objective and fair in handling the disciplinary proceedings in the light of his direct involvement with the events that gave rise to the disciplinary proceedings. We therefore find that applicant did not have a fair hearing.

It was Mr. Mpopo's further submission that, the offence with which the applicant was charged was not an offence in terms of the rules. He contended that the applicant had been lawfully given the money which he was later charged of misappropriating. The

Concise Oxford Dictionary defines the word *"misappropriate"* as follows: *"apply (usually another's money) to one's own use, or to a wrong use."* It is common cause that the applicant had been given the money as an advance to apply it to his own use. Accordingly therefore the charge of misappropriation which was preferred against applicant could not have been in the context of his having applied the cash advance to his own use, because that was the purpose for which it was given.

The second meaning of the word is the one which in our view would support the charge of misappropriation in that applicant applied the money to a wrong use by buying items which were classified as luxury items. Mr. Mpopo contended however, that no such offence existed in terms of the rules. From the reading of the respondent's disciplinary code, it seems no offence of the type preferred against the applicant exists in the code. The offence that exists in the code is one of *"unauthorised use of company property or funds"* and it carries the penalty of dismissal for the first offence. Applicant could not be charged with this offence in casu, because he had the authority to use the cash advance given to him.

Mr. Mpopo's contention that no such offence as misappropriation of allowance exists in the rules is confirmed by the Human Resources Manager's Memo of the 25th January. In that Memo the Human Resources Manager says in part; *"it appears that certain employees do not receive sufficient guidance from their managers as to what is regarded as reasonable expenditure on "Extras" while travelling on company business."* Further down the Human Resources Manager writes; *"if there is not a noticeable decrease in spending on unreasonable items, more rigid regulations will have to be introduced."* (emphasis added). Two important lessons can be learned from this memo. Firstly, there is no express rule on what is a reasonable expenditure on *"extras"*. It is the duty of managers to counsel and guide their subordinates on how the cash advance must be spent. Secondly should there be no improvement on unreasonable expenditure, rigid regulations will be introduced; meaning that none existed at the time, or if any existed, they were not strict. Accordingly therefore their contravention could not result in the dismissal of the employee concerned. There is therefore also merit in applicant's contention that the penalty imposed is disproportionate to the offence.

The applicant contended further that assuming that he did commit a wrong he was punished for contravention of a rule that did not exist at the time of the commission of the alleged offence. Miss Tente sought to counter this argument by saying that the Memo of the 25th January was not a new guideline, it was a reminder. There is no evidence to support this allegation. What is clear is that it is the duty of the managers to guide the junior employees on how to use the funds. Furthermore strict rules were being mooted only in the event that there was no evidence of decrease in unreasonable expenditure.

The respondent further said in its answer that the applicant had been guided on how to use the funds before he left for Swaziland.

This statement is at variance with what was said by Miss Tente in court and the apparent indifference of the disciplinary committee when the applicant pleaded before it that he was not aware of the company rules regulating expenses while on business trips. In court Miss Tente submitted that applicant had previously been involved in drafting the respondent's security rules and therefore, he ought to have known all the company rules because this exercise required him to consult other rules of the company. When the applicant claimed before the enquiry that he did not know the rules pertaining to expenses, it was never said that an explanation was made to him before he left for the Swaziland trip. Instead it is recorded in the record of proceedings that as Loss Control Manager the applicant had to be exemplary. It seems to us however, that notwithstanding respondent's conflicting versions as to whether applicant knew, or ought to have known the rules, the fact is that no explicit rule existed regarding how money given to an employee going on a business trip should be spent, at the time that applicant allegedly put the advance to wrong use. He went to Swaziland on 10th January 1994 and came back on the 16th January. A warning, which did not amount to laying a rule, but merely brought manager's attention to the fact that a rule would be introduced if no decrease is recorded in unreasonable expenditure, was made on the 25th January 1995. This was more than a week after the applicant returned from the trip.

In terms of the principles of legality and the rule of law, there are certain minimum

qualities which the laws governing public authorities and private individuals must possess. These qualities are the basis for just government. According to Professor Fuller those qualities are;

> ***".....that laws should be general, publicized, not retroactive, clear and understandable, not self contradictory, relatively constant through time, that they should not require the impossible, and that official action should be congruent with the declared rules of law."*** **(Emphasis added). (See L. Baxter, Administrative Law 1984, 3rd Impression p.78).**

In casu the applicant has said he did not know the rules. According to the Memo of the Human Resources Manager no clear rule existed to tell employees how they should spend cash advance given for business trips. Some guideline was only given on the 25th January after applicant returned from the trip. He could not be charged of having contravened a non-existent rule, neither was it necessary for him to go back to Mr. Steenberg to tell him that his expenditure was not in accordance with the guideline given on the 25th January, which was after he returned from the trip. He was entitled to expect that the guidelines would only apply after the date on which they were given. The fact that Mr. Steenberg signed and approved applicant's expenditure is a clear proof that no rule existed as to how the money should be used.

In the circumstances the court is of the view that the purported dismissal of the applicant on the 28th March 1994 is both procedurally and substantively unfair in that:

(1) Applicant did not have a fair hearing because the chairman of the enquiry was also complainant and witness at the sametime. The so-called disciplinary hearing on the 28th March 1994 is therefore declared a nullity.

(2) Applicant was charged with contravention of a non-existent or unclear rule. It is inconsistent with the principle of legality that a person be charged with contravention of an undeclared rule.

(3) No offence of the kind with which the applicant was charged exists under the respondent's disciplinary code. The offence was hatched by the complainant who also became judge in his own cause.

(4) Consequently the court makes the following award:

(i) The dismissal of the applicant by the respondent on 28/03/94 is set aside.

(ii) Miss Tente prayed that in the event that the court finds in favour of the applicant, it should note that his position has since been filled. This is possible in the light of the time lapse between now and the time when the applicant was dismissed.

The court is, however, empowered by Section 73(2) to fix and award an appropriate amount of compensation where reinstatement is not practical. In doing so we shall take into account the following factors:

(a) That whilst the applicant was dismissed in March 1994, this court only started to function in October 1994. Whatever remedy the applicant could get from this court it could only be with effect from 24th October 1994, when this court effectively started to operate.

(b) That the applicant is relatively still a young man who can still get alternative employment.

(c) That his dismissal has however been unfair in all respects.

(d) That his reputation and historical record has been marred by his unfair dismissal on unfounded grounds. He therefore needs to be compensated for these.

(e) **The respondent is ordered to compensate the applicant as follows:**

(i) **Payment of monthly salary from the 8th November 1994, which was the day of the appeal hearing to the date of judgement.**

(ii) **Payment of six months salary as compensation.**

(iii) **All payments to be calculated at the rate of pay that applicant was earning at the time of his purported dismissal.**

(iv) **The above payments are to be made within thirty (30) days of the handing down of this judgment.**

THUS DONE AT MASERU THIS 2ND DAY OF NOVEMBER 1995

L. A. LETHOBANE

PRESIDENT

A. K. KOUNG **I CONCUR**

MEMBER

S. LETELE **I CONCUR**

MEMBER