IN THE LABOUR COURT OF LESOTHO

CASE NO LC 101/95

HELD AT MASERU

IN THE MATTER OF:

MOEKO MABOEE APPLICANT

AND

LESOTHO AGRICULTURAL DEV. BANK RESPONDENT

J U D G M E N T

Applicant was offered employment at the respondent bank in May, 1988. Sometime in 1989 he was assigned to work as a teller. In November 1989, he served a customer whose bank record book (passbook) reflected his credit balance as M6020.00. The passbook further showed that M6 000.00 of the total credit available to the customer had been deposited at the respondent's Semonkong branch. The customer had requisitioned for M4 000.00 and was duly paid by the applicant.

It later turned out that the purported M6 000.00 deposit was fictitious. The actual credit balance of the customer when he was paid M4 000.00 was infact only M20.00. The ficticious deposit did not originate from Semonkong branch as the pass book reflected. It had been made within the TY branch of the respondent where applicant worked. On the 19th October 1990, applicant was questioned by a Panel appointed by the respondent about the customer. Afterwards he was instructed to look for the customer and ask him to return the money and to search for withdrawal voucher with which he drew the money. Applicant submitted a hand written report on the 26th October, 1990 to the effect that he had neither been able to find the withdrawal voucher nor trace the customer. The report is attached to respondent's answer as annexure II.

According to applicant's evidence he hand-delivered the report to one of the members of the panel one Mr Motseki, who read the report and thereafter said he could resume his duties. A few days later he was suspended by the Branch Manager for the alleged irregularity and after about two weeks he was called to the headquarters in Maseru, where he was given a letter of dismissal by Mr Ntsihlele, who had also been on the panel. This letter is annexure "MM2" to the originating application. A striking feature of "MM2" is that it merely regrets informing applicant of his termination without alluding, even in the faintest manner, the reason for his termination.

Applicant's attorneys subsequently entered into correspondence with the respondent asking for reasons for his dismissal. The respondent's answer was that applicant was dismissed persuant to Section 15 of the Employment Act 1967 (since repealed), which was the applicable law at the time of applicant's dismissal. Significantly however, this response still did not give the reason for dismissal; necessitating yet another correspondence. It was only after a further inquiry that the respondent provided the reason for applicant's dismissal as "..... negligence in performance of his duties....." (annexure "MM7" of the originating application refers).

On the 20th March 1992, applicant issued summons in the High Court in CIV/T/121/92 against the respondent challenging the legality of his dismissal. In their plea to applicant's declaration the respondent confirmed that applicant had been dismissed for negligence and went further to explain that;

> ***"(a) he paid a customer without checking whether there were sufficient funds to the customer's credit to enable him to pay;***
>
> ***"(b) he debited the customer and caused a loss to the bank, which if he had followed the prescribed procedures, could have been avoided".***

This plea is attached as "MM8" to applicant's originating application. After the pleadings were closed in CIV/T/121/92 the matter was set for hearing on 5th and 6th April, 1995. On the 5th April, 1995, his Lordship Mr Justice Lehohla transferred the matter to this Court by consent of Counsel for both parties and on 28th July, 1995, the applicant commenced proceedings in this Court by lodging his originating application with the Registrar.

Since the six months permitted by Section 70 of the Code had since expired when the originating application was lodged, the applicant included a prayer for condonation of late filing which the respondent sought to oppose. However, when at the hearing of this matter, Mr Mafantiri handed in "MM9" which is the Order of the High Court transferring the matter to this Court, Mr Van Tonder withdrew his opposition to the relief of condonation of late filing. Clearly the filing of the matter with the High Court, if done within the time limit permitted by Section 70 would

have broken prescription. However, a feature of this matter which eluded both counsel is that since this matter arose before the Labour Code came into operation, it is not subject to the six months time limit prescribed by the Code. There was therefore from the very beginning no need to apply for or to be granted condonation as the matter had not prescribed.

Mrs. Monnapula who was the Branch Manager of the respondent's TY branch at the time that the cause of action herein arose filed a sworn affidavit in addition to which she gave viva voce evidence in support of respondent's case. Unfortunately her oral evidence tends to a very large extent to contradict all the documentary evidence before Court as well as her own sworn affidavit. According to annexure "MM7" and "MM8" respectively, applicant was dismissed for negligence in performance of his duties and negligently paying a customer without ensuring that there were sufficient funds to pay the customer, thereby causing loss to the bank. According to paragraph 7 of Mrs. Monnapula's supporting affidavit applicant was dismissed for "wilful neglect of his duties", as a result of "the fictitious Six Thousand Maluti, encashment of Four Thousand Maluti without referral with the Enquiries Section, tempering with rubber stamps and his signature on the deposit slip". When asked in Court what charge they preferred against the applicant Mrs. Monnapula said it was payment of an amount in excess of the permitted cash withdrawal limit which she said was M2 000.00.

Applicant on the other hand testified that the permitted cash limit a the time of the transaction which was November, 1989, was M5 000.00. He went further to say the limit of M2 000.00 was introduced sometime in 1990, after the transaction giving rise to this proceedings had occurred. They, however, agreed with Mrs. Monnapula that staff were notified of the applicable cash limits verbally and by memorandums. Mrs Monnapula alleged that there was a memorandum in her files which could show that in November, 1989 the cash limit was M2 000.00. Significantly, however she could not produce such a memorandum. Her excuse that the memorandum could not be availed because the files were in TY cannot possibly be true, because in her own evidence she said the cash limit is determined from time to time by the headquarters in Maseru and that it sends memorandum of applicable cash limits to the branches.

If this be true there ought to have been a copy of such memorandum here in Maseru which could be obtained. Mr Mafantiri contended correctly in the view of the Court that Mrs Monnapula's evidence in this regard is not true and that she failed to produce the memorandum because it possibly does not exist. On the balance of probabilities we are inclined to accept Mr Mafantiri's contention.

The Court asked Mr Van Tonder to explain why there is such serious contradiction in the reasons given for applicant's dismissal. His answer was not satisfactory as he sought to explain it by imputing the difference in the use of what he termed legal terminology, saying that the description of the offence by the respondent did not

have legal terminology. However, respondent's plea in the High Court had been drawn by an attorney. Furthermore, the respondent's answer in paragraph 12 and 13 gives different reasons. Paragraph 12 supports the reason given in "MM7" namely; negligence in the performance of duties, while paragraph 13 gives the reason as incompetence and negligence. This answer has been prepared and signed for by respondent's counsel and it already gives contradictory reasons itself. Paragraph 7 of the supporting affidavit which should have also been prepared with the assistance of legal representatives of the respondent gives a different reason; from that given by paragraph 3 of the same affidavit. According to paragraph three applicant was investigated on suspicion of fraud or theft, while paragraph 7 brings in a much lighter offence of wilful neglect of duties. As already shown Mrs Monnapula added to the confusion by giving a new reason when she was giving her oral evidence namely; exceeding the cash limit.

Mr Mafantiri submitted that the Court should take into account respondent's reluctance from the beginning to disclose the reason for applicant's dismissal . He went further to say that the reaction of the respondent to the alleged irregularity did not point to the suspicion of theft or fraud by the applicant. We are in agreement with Mr Mafantiri that respondent's conduct did not show that a serious offence had been committed. They took the whole thing lightly. For instance there is no evidence that police were informed or that the respondent took steps to trace this fraudulent customer. On the contrary evidence of the applicant which is confirmed by Mrs Monnapula is that even subsequent to the fraudulent transaction, this customer still came to the bank and was served by none other than the Branch Manager herself without asking a question.

The puzzles of this case and the contradictions that go with them leave much to be desired about the real reason for applicant's dismissal . In paragraphs 3,5 and 6 of the supporting affidavit, Mrs Monnapula insinuates strongly that as at 19th October, 1990, when applicant was called before the investigating panel, the alleged irregular transaction was still very new. Thus in paragraph 5 she avers;

> ***"applicant went on to say the balance in the passbook was six thousand and twenty Maluti (M6020.00) and further said that there was a deposit in that customer's account in the amount of six thousand Maluti (M6000.00) which had been deposited at respondent's branch in Semonkong. At that juncture the panel did not make a ruling as it waited for the amount in transit from Semonkong" (emphasis added).***

In paragraph 6 she says in part; ***"this amount did arrive and was credited to the relative account and it wiped off the debt that was created. It however soon thereafter, transpired that the amount was infact fictitious".***

In her evidence in chief Mrs Monnapula alleged that to prove that the cash limit was M2 000.00 at the time that the transaction took place, they were able to detect the

following day when doing what she termed *"postings"* that there had been an irregular payment of more cash than was permitted. Asked after how long the fictitious deposit of M6 000.00 arrived from Semonkong, she said it arrived after about two weeks. The question that arises is why respondent took a whole year to take action against the applicant if the irregularities were detected so soon after they occurred? Secondly if the deposit had not originated from Semonkong but from within the TY branch why would it take two weeks to arrive as paragraph 6 of the supporting affidavit suggest? In our opinion the respondent ought to have explained these puzzles. As for the contradictions, they point to one important thing that the respondents are only now searching for a reason why they dismissed applicant.

Their failure to disclose the reason at the time that they dismissed applicant, their evasion of applicant's attorney's inquiries, are but further indications that they dismissed applicant on mere suspicion which had no backing of sustainable evidence. The fact that they delayed for a whole year before taking action against the applicant coupled with the numerous contradictions in the reasons that are given for applicant's dismissal are a further proof that respondent dismissed applicant without a reason and it is only now when pressed for justification that respondent is engaging in a fishing expedition for a sustainable reason for applicant's dismissal.

It is common cause that respondent alleged that applicant was dismissed under section 15 of Act No 22 of 1967 which has since been repealed. That section empowered an employer to terminate an employee's contract summarily for any of the reasons enumerated under Sub-section (3). It is common knowledge how much unscrupulous employers abused this section by unfairly dismissing their employees using it as a cover.

However, Sub-section (3) enumerated reasons for which an employee's contract may be terminated summarily. In the instant matter,however, the respondent is not even in a position to provide a reason for the termination. The Court cannot engage in the exercise of sifting through the rubble of respondent's own making for a real reason why applicant was dismissed. The position of the court is to disregard the entire evidence as nothing but a pack of lies specially manufactured to attempt to cover the mess that has already been caused by unfairly dismissing applicant without reasons.

Even assuming reasons had been given, applicant's dismissal in the circumstances of this case could not be sustained for one or all of the following reasons;

(a) applicant was not given a hearing prior to dismissal;

(b) too long a time had lapsed since the misconduct, that the respondent could be said to have waived its right to take action against the applicant;

(c) assuming the misconduct for which applicant was dismissed is indeed negligence as reflected in Annexures "MM7" and "MM8" the penalty of dismissal would be disproportionate to the offence committed.

Applicant stated in evidence that he was never given any specific charge, but he was questioned about the transaction in which he paid a customer M4 000.00. Even annexure II to the answer which is the report applicant gave after trying to locate the whereabouts of the customer does not show in the slightest that applicant was charged of a particular wrong doing. The alleged hearings which Mrs Monnapula attests to in her affidavit clearly did not take place because when she was asked about the hearing in cross examination she pleaded ignorance and said she neither knew who was the complainant against applicant nor who preferred the charges. She said she left everything to the Headquarters. She has therefore attested to what she has no personal knowledge of and her averments are therefore of no value in these proceedings. The respondent is a public institution whose fairness in handling the affairs of its employees must be beyond reproach. (See Koatsa .V. NUL C.of A. (CIV) No 15 of 1986).

The respondent in its answer has not ventured to state when it first came to know of the applicant's misconduct. But it is clear from the papers that the alleged misconduct occurred in November 1989 (annexure I to the supporting affidavit bears the teller's date stamp showing the date of the transaction as 18/11/89). It is the duty of the respondent to explain the delay in taking action against applicant. In her oral evidence Mrs Monnapula said the irregularity was spotted the following day namely, 19/11/89. Article 10 of the Termination of Employment Recommendation No.166 of 1982, which this Court is enjoined to use as a guide by Section 4 (c) of the Labour Code in cases where the Code itself is unclear or ambiguous provides that;

> ***" the employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of the misconduct".***

The Labour Code is silent on the question of promptness in dealing with disciplinary cases of employees. This Court will therefore invoke the aforesaid provision of Recommendation No.166 of 1982. Accordingly therefore we hold that the respondent had by delaying to take action and by its failure to explain the delay, waived its right to take disciplinary steps against the applicant.

Dismissal is the most severe penalty that can be imposed on an employee. It must therefore be used sparingly in disciplinary actions. Where like in the instant matter

the misconduct committed can be remedied through corrective action such as warnings, or exposing the employee to better training and the loss recovered through surcharging the employee concerned, the Court will hold that a dismissal, if resorted to, is too harsh and as such disproportionate to the offence. We have no hesitation to find that applicant's dismissal, given the foregoing facts was both substantively and procedurally unfair. It was also unlawful is so far as no reasons existed for his dismissal. It was never the position under Employment Act No.22 of 1967 that employees could just be dismissed without reasons. The position of the respondent as at 1990 when it dismissed applicant was already supposed to be viewed within the context of the Koatsa's case supra which laid the requirement that public institutions like the respondent are enjoined to give their employees a fair hearing before dismissal as such employees have a legitimate expectation that such hearing will take place before any prejudicial action is taken.

AWARD

Noting that the respondent has completely failed to provide reasons for applicant's dismissal and that immediately after the purported dismissal applicant pursued this matter relentlessly through his attorneys of record. Noting further that the respondent has contributed to the delay in bringing these proceedings as is evidenced by annexure "MM7" dated 10th February, 1992 which was responding to "MM6" dated 2nd January, 1991; applicant is granted the following relief:

(a) Applicant's purported dismissal on the 6th November, 1990 is declared null and void.

(b) Respondent is ordered to reinstate applicant to his substantive position without loss of remuneration or seniority.

(c) Respondent is ordered to pay applicant's salary from the date of purported dismissal to date of reinstatement.

(d) Respondent shall pay applicant his insurance policy money which was purportedly applied to offset the loss caused to the respondent.

(e) There is no order as to costs.

THUS DONE AT MASERU THIS 29TH DAY OF APRIL, 1996.

L.A LETHOBANE
PRESIDENT

A.K. KOUNG **I CONCUR**

A.T. KOLOBE **I CONCUR**

FOR APPLICANT: **ADVOCATE MAFANTIRI**
FOR RESPONDENT: **ADVOCATE VAN TONDER.**