IN THE LABOUR COURT OF LESOTHO

CASE NO LC 103/95

HELD AT MASERU

IN THE MATTER OF:

THANKHE SEFAKO **APPLICANT**

AND

LESOTHO PLANNED PARENTHOOD ASSOCIATION
RESPONDENT

J U D G M E N T

Applicant herein is the respondent Association's (the association) Finance and Administration Director (FAD). He was the head of the Finance Department of the Association. It is common cause that the salaries of the staff of the respondent, which are normally paid on or around the 25th of each month, were delayed for the month of April, 1995. This resulted in applicant being charged of misconduct of which he was found guilty and sentenced to one month's suspension without pay.

The applicant is challenging the validity of his suspension on the grounds that it is substantively and procedurally unfair. Substantively the applicant contends that the delay in the payment of salaries was not due to his fault. Firstly he contends that the Association's Executive Director had granted one Mrs Fako of the Finance Department a study leave contrary to his advise that her absence would affect the smooth operation of the Department. Secondly he contends that from the 20th March, 1995 to the 21st April, 1995 he was busy working with the Auditors in preparation for the Association's Annual General Meeting (AGM) on 22nd and

23rd April, 1995. He states further that he was only able to start working on the salaries on Monday the 24th April, a day before the salaries were due.

Applicant contends further that his suspension was procedurally flawed in that;

- **(a) the National Executive Committee of the association ".....gave its decision without giving (him) a hearing in its appellate status.....",**
- **(b) the composition of the disciplinary committee violated the disciplinary code because two members were coopted into the committee; and**
- **(c) contrary to the respondent's disciplinary code the committee did not give its decision within two days.**

Mr Van Tonder for the respondent admits that the committee was constituted of two coopted persons who do not appear in the list of officers who should constitute the disciplinary committee in terms of the Association's code. He however, submits that the two persons were coopted to fill the vacancies that were created by the recusal of the Executive Director and the FAD, who were complainant and the accused employee respectively. With regard to the failure to give the decision within two days in accordance with the disciplinary code, he contended that the rule had been rendered obsolete by disuse.

Quite correctly in the opinion of the Court, Mr Van Tonder did not bother to address the other alleged impropriety resulting from applicant not being given a hearing by the National Executive "in its appellate status". In the opinion of the Court, Mr Van Tonder was correct in ignoring this contention because it is baseless. The National Executive Committee of the respondent never sat in an appellate capacity in the case of the applicant. On the contrary the National Executive Committee received a report of the committee and its recommendations on the disciplinary hearing; which it endorsed. The hearing having been given by the disciplinary committee, which is the sub-committee of the National Executive Committee, the latter did not need to afford applicant any further hearing when it received and confirmed the report on the hearing.

With regard to the other two alleged improprieties, Mr Maieane contended firstly that the respondent's code did not provide for cooption of members and therefore it was irregular for the association to have purported to do so. Secondly he contended that if the rule that decisions of the committee should be delivered within two days is obsolete the association should have amended its disciplinary code accordingly. It was Mr Maieane's submission that the association is bound by its code. In the case of National Education, Health and Allied Workers Union & Others .V. Director General of Agriculture & Another (1993) 14 ILJ 1488, the Court per Landman P. and De Kock SM; acknowledged that it has been the practice of the Industrial Court to hold private employers to their unilateral or negotiated codes because, "an

employer should live up to the expectations created amongst his staff by his unilateral code". The Court went on at p. 1500 to hold that:

> **"Unfortunately this approach of the court has developed a life of its own. We are daily faced by counsel, trade union officials and consultants who laboriously and minutely (and sometimes tediously) examine the employer's code or the agreement and pounce with relish on any minute deviation from the code. This tendency is especially prevelant in regard to procedural obligations. Such an approach is in conflict with the concept of the Labour Relations Act of 1956 which requires the court to promote good labour relations practices by striking down and remedying unfair labour practices. The jurisprudence and legislative intention was that a move should be made away from strict legality to the equitable, fair and reasonable exercise of rights. We believe that our jurisprudence has strayed too far away from this path and that the time has come when we should turn our backs on a legalistic interpretation and insistence on uncompromising compliance with a code and ask the general question; was what the employer did substantially fair, reasonable and equitable? If the answer is positive that will ordinarily be the end of the matter". (emphasis added).**

The Court is in full agreement with the views expressed by the learned President and the learned Senior Member regarding the Legislative intention of establishing a Labour Court. The primary mission of this court, though established by a different legislation, namely; the Labour Code Order, 1992 is essentially the same as that of similar courts elsewhere, and that is ensuring reasonable, fair and equitable exercise of rights by parties in an employment relationship. It is not always the case that a legally correct decision in employment relations goes together with fairness and equity. Great care should always be taken therefore, to avoid strict legalism in employer/employee relationships.

It is common cause that applicant merely complains of the alleged irregularities without showing what prejudice, whether real or potential, they implied to the fair conduct of his case. If he objected to the suitability of a particular member to be a member that would be different from making what in the view of the court amounted to an academic objection. There is in our view no harm that could be caused by the respondent's filling of the vacancies caused by the recusal of the FAD and the Executive Director. We are satisfied by the explanation given by the respondent for not being able to comply with the requirement that a decision be given within two days. The explanation is that this rule had not taken into account the fact that a disciplinary committee is a sub-committee of the National Executive Committee and as such it has to submit its recommendation(s), to it before they can be adopted as official decision of the Association.

On the substantive side, Mrs Mosaase, who is the Association's Executive Director gave evidence in which she stated, inter alia, that even though applicant was working with the Auditors, his role was essentially to assist the auditors with whatever information, including documents, which might be required. Otherwise the applicant had time in between which he could use to attend to his office business. She stated further that things being normal the audit work would have been completed at least a week before the Annual General Meeting, to enable a timeous compilation of the report. Whilst the applicant might still be consulted from time to time during the writing of the report, he was no longer as pressed, therefore he should have had time to attend to the salaries, she stated.

It is the respondents' contention that applicant deliberately went slow to prove his point that the granting of a study leave to Mrs Fako would affect the smooth operation of the Finance Department. To support this contention, the respondents' averred in their answer and in Mrs Mosaase's evidence that Mrs Fako had been absent before and yet there had been no delay in payment of staff salaries. They quoted an example of when Mrs Fako had gone on maternity leave for three months. In her evidence Mrs Mosaase pointed out that on the morning of the Tuesday the salaries were due, she went to applicant's office to find out whether salaries were going to be paid as cheques had not yet been brought to her for her signature. She did not find applicant as he had not yet arrived. He arrived at around 0900 hours. When she asked him about the salaries he told her that he was about to finish. When Mrs Mosaase came back to inquire that afternoon about the progress, the applicant stated that she had misunderstood him, what he actually said was that the salaries would not be ready until the following week. He went on to say that she should recall Mrs Fako because she had granted her study leave.

The applicant denies ever saying that Mrs Mosaase should recall Mrs Fako. However, Mrs Mosaase says she did fetch Mrs Fako from the Centre for Accounting Studies and with her assistance the staff were able to be paid by Friday of that week. Mrs Fako had to work early in the morning before going for lectures and in the evenings.

We are inclined to agree with the respondent's version for the following reasons:

(a) By applicant's own admission Mrs Fako was absent on sick leave from 20th to 27th February, 1995 and yet no difficulty was experienced by the department in effecting the February salaries timeously. (See annexure "F" to the originating application).

(b) Applicant is the senior most officer of the Finance Department. In the hierarchy of the Association he is number two. He is therefore responsible for the planning of the work of the department as well as its timeous and efficient execution. Regrettably, applicant seems to have not appreciated the depth of his responsibility as he readily

contended himself with saying that since Mrs Fako had gone on study leave with the permission of the Executive Director, the latter should shoulder the responsibility for the in efficiency of his department.

(c) The Court is satisfied that if it were not for the fact that applicant wanted to prove his point and in the process put the top management of the association in bad light he could have worked on the salaries in between the times when he was not on call and during the time of the writing of the report which should have taken some days to be written. At that time he should have had ample time to attend to the salaries as he was not fully engaged with the auditors then.

(d) If there was no malice in applicant's intentions, he should have advised the Executive Director in good time that salaries would not be ready on the 25th as expected. But this he did not do, until the Executive Director herself took the trouble to find out, on the day staff were due to be paid, only to be told salaries would not be ready until the following week.

(e) We do no accept applicant's denial that he did not mislead the Executive Director by giving her the impression that he was not far from finishing. If he did mention that salaries would not be ready until the following week when the Executive Director inquired, we see no reason why the Executive Director would pretend she did not hear that and yet that day was a pay day already. Judging by the speed with which she reacted in recalling Mrs Fako, which resulted in staff being paid by Friday of that week, not the following week as applicant anticipated, one clearly sees that there is no truth in the allegation that she was informed in the morning when she inquired that the salaries of staff were not going to be ready that week. She was misled to believe that sometime during the course of the day staff would be paid .

(f) As if to add salt to a gaping wound, on the 25th applicant came to late and yet he knew that he was behind with salaries of staff. He clearly was not taking any effort to speed the processing of the cheques. On the contrary he was clearly intent on delaying their processing.

We are of the view that applicant committed a very serious offence of punishing innocent workers in order to "fix" the Executive Director for allegedly granting a member of his department study leave. He was lucky to have had his case handled by a committee which demonstrated a high degree of professionalism by recommending a linient penalty with a view to giving him a chance to mend his

ways. A harsher penalty could still have been imposed for the degree of irresponsibility that he showed coupled by the fact that he showed no remorse. In the view of the Court this application cannot succeed and it is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 17TH DAY OF JUNE, 1996.

L.A. LETHOBANE
PRESIDENT

A. KOUNG	**I CONCUR**
MEMBER	
A.T. KOLOBE	**I CONCUR**
MEMBER	
FOR APPLICANT:	**MR MAIEANE**
FOR RESPONDENT:	**ADVOCATE VAN TONDER**