IN THE LABOUR COURT OF LESOTHO

CASE NO LC 119/96

HELD AT MASERU

IN THE MATTER OF:

CHRISTOPHER MOTEBANG **APPLICANT**

AND

MALUTI MOUNTAIN BREWERY **RESPONDENT**

JUDGMENT

The applicant was employed by the respondent as Quality Control Laboratory Technician. His duties involved taking periodic tests of the drinks during the production process and recording the results thereof in the Process Control Sheets. According to Mrs Likate's evidence, who testified on behalf of the respondent, in carrying out his duties the applicant is not answerable to the Production Supervisor. They can communicate with each other but none is answerable to the other. The Production Supervisor is in charge of the production staff.

On the 3rd, February 1995 applicant had been assigned to work night shift. He was the only person from quality control who was on that shift. Applicant says that that evening the Production Supervisor approached him and told him that that night they were going to do coke. He further told him that they could knock off early if they ran two lines simultaneously. This they did, and they had completed production by about 1:30 am. They knocked off at between 1:30 am and 1:45 am. They, however, falsely recorded that they had knocked off at 4:00 am. The quality control report form was falsified to reflect that production of coke ran until 3:55 am, when the applicant purportedly knocked off.

The applicant was subsequently charged of falsifying records and found guilty. He was summarily dismissed. The applicant appealed to higher management which

confirmed the earlier decision, but moderated his dismissal from summary dismissal to dismissal with notice. The applicant then filed the present application, seeking nullification of his dismissal on the following grounds:

(a) that the respondent led no evidence at the enquiry to prove the charge against applicant;

(b) that the applicant was required to prove his innocence instead of respondent leading evidence to prove his guilt;

(c) that the chairman of the enquiry was prosecutor and judge;

(d) that the penalty of dismissal was too harsh regard being had to the charge proved against applicant.

At the hearing hereof Mr Mpopo for the applicant went further to say that applicant's misconduct was not one of fraud and that no prejudice was suffered by the respondent as a result of applicant's early departure. He made much issue out of the fact that applicant was infact still at work on the day in question as opposed to being absent altogether and that being short of a shift by three hours should not lead to such harsh penalty as dismissal because even being absent for the whole shift would not call for such severe penalty.

In response Ms Tente for the respondent denied that applicant was put to task to prove his innocence. She contended that respondent had documentary proof in the form of the process control sheets, which the applicant had interferred with. She went further to say that in any event applicant had already pleaded guilty to the charge. She contended further that the chairman of the enquiry did no more than to ask questions for clarification. The Court is in agreement with Ms Tente's submissions in this regard, because applicant has not denied that he doctored the the quality control sheet and filled in information which did not correspond with the actual readings.

With regard to the seriousness of the offence she said that quality control is very important and that it is absolutely essential that tests are read and recorded accurately. She pointed out that the respondent was exposed to serious prejudice in that during the three hours that the applicant and the rest of the production staff had left, production went on without there being any tests being made. With regard to the amount of loss to the company she said the applicant was in charge of the whole shift and the loss to the company should be measured in relation to the number of workers on that shift. She stated that the company lost three hours of each of the workers on that shift. At this point the Court was of the view that the respondent's response was raising extremely serious and potentially dangerous

allegations if they can be proved. Since these allegations were being raised from the bar, the Court directed that oral evidence be called to substantiate the allegations.

Each side called only one witness. On the side of the applicant it was the applicant himself. On the side of the respondent it was Mrs Likate the Quality Control Manager and chairman of the tribunal before which the applicant was charged. In her evidence Mrs Likate confirmed the importance of quality control and the significance of recording information accurately. She, however, denied that the applicant was the person in charge of the workforce on that shift. She also denied that between 1:30 am and 4:00 am any production took place. In this regard she is corroborating the evidence of applicant who clearly stated during the disciplinary hearing that they knocked off at 1:30 am because they had completed production for that shift as they had ran two lines instead of one.

It seems to the Court that there is no dispute that applicant falsified information to reflect that he knocked off at a later hour than he actually knocked off. In the arguement of Mr Mpopo this was not so serious as to warrant dismissal because respondent suffered no prejudice. Ms Tente's contention that the prejudice resulted from the fact that production continued unmanned for about three hours is not supported by the evidence before Court. Clearly during that time no production took place.

Mrs Likate tried very hard to show that notwithstanding the fact that production lines were shut there was still potential prejudice in that if there could arise a trade query they would not be able to trace when the particular drink being queried was made. This argument is with respect not convincing because the factual position is that during the time that the applicant was purportedly at work i.e between 1:30am and 4:00 am no production took place. Whatever query may arise it will certainly relate to the drinks that were made during properly recorded times and whose tests were accurately read and recorded. There is in our view merit in Mr Mpopo's suggestion that the prejudice that the respondent would suffer would essentially be in relation to the falsified hours of work for which applicant stood to be paid when he did not deserve any payment. Indeed Annexure "A" to the originating application which is applicant's letter of dismissal says as much.

The applicant was not paid for those hours which he had falsely claimed that he was at work when he had already knocked off, because his attempt at cheating was discovered timeously. In our view the prejudice allegedly suffered by the respondent is clearly imaginary since no real prejudice was suffered and no potential one is likely in the light of the fact that no production took place during the time in issue. Mrs Likate testified that another prejudice suffered was that the applicant and the rest of the staff on that shift had worked a short shift because they ought to have knocked off at 7:00 am.

In the view of the Court if this was so, this issue would have arisen at the disciplinary enquiry. But the concern of the enquiry was not that the applicant and his colleaques had left earlier than the official knock off time. The concern was that they were trying to make the company to pay for overtime not worked. Applicant clearly stated that they left at 1:30 am because production was finished. No suggestion was made to him that they could have started to produce something else as Mrs Likate in her evidence sought to convince the Court. As already stated the letter of dismissal clearly states that he was charged and dismissed for claiming to have worked more hours than he had actually worked. We think that Mrs Likate's evidence brings in a new reason which respondent is trying to rely upon to strengthen its case against the applicant, and in terms of Section 69 (3) of the Labour Code Order, 1992 (the Code) it ought not to be accepted.

It seems to us that the offence that remains against the applicant is that of interfering with the records with a view to gaining financial advantage by being paid overtime for which he had not worked. Both misconducts combined namely; falsifying the process control sheet and seeking to gain financial advantage by falsely claiming overtime, are conducts which without doubt deserve punishment, but do not justify dismissal. The latter is too harsh. The clean record that the applicant pleaded he had, the length of service which he already had, which was just under ten years, and his age which is quite young by all standards, coupled with the fact that the quality standards of the company were not compromised, should have influenced a chairman of the enquiry who gave due weight to them to consider other forms of punishment instead of dismissal. It is the view of the Court that not only was the penalty too severe for the offence actually committed by the applicant, not the imagined offence(s), but the important personal circumstances of the applicant and mitigating factors were not considered. Even though the chairman of the appeal hearing purports to have considered some factors , we are not persuaded that due weight was given to them by him. His mind was pre-occupied with the "seriousness" of the offence, which was by all standards dramatized and blown out of proportion. In the circumstances we are of the view that the decision to dismiss applicant was disproportionate to the offence committed and the mitigating factors were either not considered or no proper weight was given to them. The dismissal was therefore unfair.

AWARD

At the start of the hearing of this matter, Mr Mpopo amended his prayer of reinstatement and substituted it with a prayer for damages. At the close of his address he asked the Court to grant applicant damages in the form of payment of salary from date of dismissal to date of judgment which is exactly two years' salary. Ms Tente did not contest this claim, she simply asked the Court to consider that applicant has already been paid notice and the fact that he has been earning income from his business of street vendoring in braaied meat.

It is trite law that an employee is under duty to mitigate his loss by searching for alternative employment. This, the applicant testified that he did and that he was called for interview at three of the places he had applied for a job. He, however, did not succeed. Street vendoring in the form that applicant is doing is a business to which a person of applicant's age would only be driven by absolute need to make ends meet. Its one form of business that this Court is not persuaded that a dismissed employee is under obligation to consider it as an option to mitigate his loss. Furthermore, to take such informal business into account when making an order for compensation unnecessarily complicates proceedings that are otherwise supposed to be kept simple, because too many factors have to be taken into account. For instance, the capital invested, the daily collection and off setting of costs incurred are but a few things that would have to be considered. Needless to emphazise in informal business, no records would be available to help the Court to come to an informed conclusion. Such mini and informal business must therefore be kept out of this Court as means of mitigating losses.

In the view of the Court the applicant has tried without success to mitigate his loss and he is entitled to his compensation as claimed. It is however worth noting that the applicant had committed a punishable offence. We are of the view that cutting his compensation by six months would adequately compensate for the misconduct he committed. As Ms Tente correctly pointed out applicant has already been paid one month salary in lieu of notice. That amount shall also be deducted from compensation due in order to avoid double payment. The respondent shall therefore pay applicant thirteen months salary as compensation calculated at the rate at which applicant would have been remunerated between the period February, 1995 and February, 1996 if he was still in employment.

THUS DONE AT MASERU THIS 14TH DAY OF FEBRUARY, 1997

L.A LETHOBANE
PRESIDENT

T. KEPA
MEMBER **I AGREE**

J.M KENA
MEMBER **I AGREE**

FOR APPLICANT: **MR MPOPO**
FOR RESPONDENT: **MS TENTE**