IN THE LABOUR COURT OF LESOTHO

CASE NO LC 129/96

HELD AT MASERU
IN THE MATTER OF:

LIKELELI MATSOHA **APPLICANT**

AND

STANDARD CHARTERED BANK LESOTHO
(NOW NEDBANK) **RESPONDENT**

JUDGMENT

Even though the applicant herein gave oral evidence, the thrust of Mr. Mosito's contentions has been both on the procedural aspects as opposed to the substantive aspect. This cases arises out of the demotion of the applicant in rank and salary in August 1993.

The applicant was demoted following an inquiry into her part in the opening of a business current account which was later used to defraud the respondent. The applicant's role had been that she was the officer who interviewed the customer. She assigned the customer a number from the master list of accounts and filled his details in the master list and the Index card, which she also got him to sign before the customer could gave her all the necessary documents.

The applicant held the finalisation of the opening of the account in abeyance while the customer alleged to fetch the required documents in the car. The customer never came back. When the applicant next met him in the bank he was presenting a M60.00 cheque for payment which could not be processed because the teller serving

him could not find his index card. Indeed the card could not be found because it was still being kept in the applicant's pending file awaiting the submission of the documents she had asked for.

To applicant's suprise, the account was fully operational in the same names and the number that she allocated to the customer. The customer also had a cheque book which showed he had an account with the bank. The applicant called him to find out who gave him the cheque book and the customer only told her that he got it at the bank. She asked if he submitted the documents she had asked for and it was only then he went to the car to fetch them. Despite all these anomalies and suprises applicant took no steps to follow up exactly how this account was opened. Instead she went on to authorise payment of the M60.00 the customer was asking for, after satisfying herself that the account had sufficient funds to pay.

The disciplinary inquiry found that the applicant had "*..... totally disregarded laid down procedures and handled the opening of the Account in the most negligent manner.*" It found further that "*despite her suspicions that something was wrong she did not report to anybody or even take steps to ensure that the computer would not transact the Account without suitable authority level.*" The committee of inquiry then recommended that she be demoted and by letter dated 21st September 1993, she was informed that she had been demoted to grade B NOTCH 1 Scale.

Mr. Mosito contended that the disciplinary inquiry into the applicant's misconduct did not comply with Rule 57 paragraphs (1) - (4) of the respondent's Standing Staff Instructions to staff manual. In particular he contended that rule 57 (2) states that the Branch Manager must interview separately the individual associated with the incident. It was his contention that the Branch Manager never separately interviewed the applicant as such the respondent breached its own code.

He contended further that in terms of the regulations the concerned employee is to be informed of the outcome of the inquiry under the signature of the chief Manager or his nominated deputy. Mr. Mosito contended that contrary to this rule the applicant was advised of the outcome of the enquiry by the Personnel Manager. Mr. Mosito's final point was that applicant was not afforded a chance to be heard on the issue of whether she should be demoted.

In response Mr. Van Tonder contended that a valid reason existed for applicant's demotion and that was gross negligence. He went further to say that several interviews were held with the applicant in the presence of the Branch Manager. He submitted that the word " separately" is ambiguous because it's not clear whether it means the Branch Manager will separately interview the applicant or whether it means that the applicant will be interviewed separately. Regarding the rules he

argued that they are obsolete and that they have fallen into disuse. He pleaded with the court to disregard them and hold that the procedure provided by the code has infact been complied with. With regard to a hearing he contended that the finding of a disciplinary hearing is not subject to a further hearing. He concluded by saying that it is perhaps mitigation that the applicant is seeking.

Even though Mr. Mosito sought to deny it in his reply to Mr. Van Tonder, it seems to us on the evidence before us that, the applicant was infact grossly negligent in her handling of the opening of this account. It is incorrect that because the Branch Manager did not interview the applicant to determine the severity of the incident, then this Court is not able to make such a finding even on the evidence before it.

Mr. Van Tonder's argument that the word "*separately*" in rule 57 (2) is ambiguous does not hold water. Clearly the rule says the Branch Manager must separately interview the applicant i.e. in the absence of all other persons. The argument that the rules are obsolete must also be overruled because if that is the case they should have been repealed. Since they are not repealed they form the contractual relationship between the applicant and the respondent and unless they are contrary to the law, they cannot be overruled by this court.

Whilst it is clear that the Branch Manager did not interview the applicant, it seems, however, that the applicant was interviewed by the Operations Manager. We draw this inference from paragraph 4(vii) of applicant's originating application. Indeed in answer to that paragraph, the respondent in its answer also confirms that the applicant was interviewed. This court is not able to draw any relationship between the Operations Manager and the Branch Manager because the applicant has annexed only the portion of the rules that support her claim. The Court has not been availed with a full text to see for itself whether it is not possible under the rules for the Operations Manager to fill in for the Branch Manager as he did. Faced with that omission the Court deems it fair to accept that the applicant was in any case interviewed separately, although not by the Branch Manager.

Rule 57 (4) of the regulations provides that the outcome of the disciplinary inquiry "*.....will be advised direct to the officer(s) concerned under the signature of the Chief Manager (or his nominated deputy) with a copy to the relative Branch Manager for his files."* In the view of the Court this provision is self-sufficient. While we have no knowledge whether the Chief Manager is the Senior most Manager, however, the word "*Chief*" does indicate that he is above all other managers. Furthermore, the rules provide a qualification that if not him then his designated deputy shall communicate the outcome.

If we can allow a bit of some speculation it does seem like the intention was to ensure that any disciplinary inquiry must not only be known, but its outcome must also have the approval of the most senior management level. If this cardinal rule is not observed it follows that a disciplinary action following from such faulty procedure would not only be irregular, but it would be in breach of the contract with applicant because the regulations form the basis of applicant's contractual relationship with the respondent (see LTC V. Thahamane Rasekila C. of A (CIV) No. 24 of 1991).

In the view of the court, for the communication to demote applicant to have been lawfully made, the Personnel Manager must have been the Chief Manager's nominated deputy at that time. Not only is there no evidence that this was the case, but even the Personnel Manager has signed himself as such, not as the deputy Chief Manager. (see Thomas Makhupane V. LPC & Anor. CIV/APN/82/96) Nothing in the letter may lead to the inference that infact at that time the Personnel Manager was acting as Deputy Chief Manager. In the circumstances we are of the view that applicant's demotion was done in breach of the respondent's regulations and as such irregular. In the light of this finding there is no point of going further to address the applicant's other contention regarding a hearing.

AWARD

1. **In the light of the finding of the court applicant's purported demotion on or around 21ST September 1993 is declared as irregular and unlawful and as such is set aside.**

2. **In the light of the award in one above, the question of payment of arrears of salary representing the difference in applicant's earnings before and after the demotion follows automatically in the same way as sunrise follows night fall.**

2.1 **However, Mr Van Tonder for the respondent submitted that the Court must take into account the lapse of time since 1993, when the demotion was made to the time when the judgment is made. Secondly, he contended that this court has the discretion whether to award or not to award applicant's full loss. He referred the court to numerous South African Authorities in support of the above propositions.**

2.2 **As concerned with dismissal. The principle enunciated by these cases is however still applicable to this case. That principle is that an unfairly dismissed employee must be compensated for the financial loss caused by the decision to dismiss Mr. Mosito submitted the cases relied upon by Mr. Van Tonder were him. In the same vain the applicant herein must be**

compensated for the financial loss occasioned by the wrongful demotion. The above principle was established in the case of Ferodo (Pty) Ltd. V. De Ruiter (1993) 14 ILJ 974. It was followed in the case of SA Quilt Manufacturers (Pty) Ltd. V. Radebe (1994) 15 ILJ 115.

2.3 There is no dispute that the applicant suffered a loss in the form of the difference in salary which was occasioned by the dismissal. This is the loss which must be paid back to the applicant. We however, entirely agree with Mr. Van Tonder that this Court has the discretion in certain circumstances not to award a full loss. Needless to emphasize this discretion must be exercised judicially.

2.4 It is common cause that the applicant was demoted in September 1993. She only lodged the present application in November 1996, more than three years since her demotion. Although not pleaded by the respondent, in terms of section 5(c) and (d) of the Prescription Act No. 6 of 1861 no action for the recovery of salary or wages is capable of being brought at any time after the expiration of three years from the time when the cause of action first accrued. In the view of the court, therefore, the only difference in salary occasioned by the demotion which the applicant is entitled to be paid by the respondent is from the date of the lodging of the Originating Application namely; 19th November 1996, and it is accordingly so ordered.

3. This not being a case of unfair dismissal section 74(2) restricting imposition of costs does not apply. In the circumstances the respondent is ordered to pay the costs of this application.

THUS DONE AT MASERU THIS 14TH DAY OF APRIL 1997

L.A. LETHOBANE
PRESIDENT

J.M. KENA **I AGREE**
MEMBER

T. KEPA **I AGREE**

MEMBER

FOR APPLICANT : MR. MOSITO

FOR RESPONDENT: MR. VAN TONDER