IN THE LABOUR COURT OF LESOTHO

CASE NO LC 29/95

HELD AT MASERU

IN THE MATTER OF:

TEFETSO SELEBALO APPLICANT

AND

INSTITUTE OF DEVELOPMENT MANAGEMENT RESPONDENT

JUDGMENT

This is an application in which the applicant challenges his dismissal on three grounds namely;

(a) That he was dismissed by the Regional Director contrary to the respondent's policy No.2 (14.4);

(b) That he was dismissed without being given three notices as is required by respondent's policy No.2; 12.1B read with 12.1F;

(c) That he was not afforded a hearing.

The applicant was dismissed on the 31st August 1993. The present application was lodged on the 27th February 1995. It is common cause that the main application was not accompanied by an application for condonation of the late filing, notwithstanding that it was filed long after the lapse of six months.

It is also common cause that the respondent in its answer did not pick up this point. At the close of Mr. Nathane's address the court invited him to address it on the question of the late filing for which there was no application for condonation. Mr. Nathane conceded that the application had been filed out of time, but stated that this was due to inadvertance on the part of applicant's counsel. He argued that this court has a discretion in terms of section 70 (2) to condone the late filing of an application. He contended further that although its desirable that formal

application be made, it will not be in the interests of justice to punish the applicant because of inadvertence on the part of his lawyer. He concluded by stating that in exercising its discretion the court should be guided by whether the applicant has an arguable case.

Mr. Molete for the respondent opposed applicant's prayer that the court exercises its discretion to condone his late filing. He contended that the court could only be able to exercise its discretion on the basis of an explanation furnished by the defaulting party, which application should be made in accordance with the Rules of the Court.

In terms of section 70 (1) of the Labour Code Order 1992, all claims for unfair dismissal must be presented to court within six months of the termination of the contract of employment. Sub-section (2) however, empowers the court to allow presentation of claims outside the period prescribed in sub-section (1) if it is satisfied that the interests of justice so demand. This court has had numerous cases where it considered whether the interests of justice demand that the late filing be condoned.

The leading case on which this court has always relied is the Appellate Division case of Melane V. Santam Insurance Co. Ltd. 1962 (4) SA 531 (AD) where Holmes J.A. held that;

> **"*in deciding whether sufficient cause has been shown the basic principle is that the court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation."***

Applying the above ratio, this court held in the case of Khotso Sonopo V. Lesotho Telecommunications Corporation case No. LC 67/95 that to enable the court to satisfy itself as to whether justice demands that late filing be condoned, the defaulting party must show good cause. The above extract from the judgment of Holmes J.A. has always been relied upon by this court in cases of this nature as encompassing the definition of good cause which the defaulting party bears the evidentiary burden to show to the court.

<u>The Degree of Lateness</u>

The applicant was dismissed on the 31st August 1993. This application was lodged on the 27th February 1995. Section 70 (1) provides that cases of unfair dismissal be presented to court within six months. The present application was filed one year and four months after the dismissal. There is no doubt that this was an unreasonably long delay on the part of the applicant.

Explanation for the delay.

The applicant having made no formal application for condonation, there was no explanation either in papers or orally why there has been a delay. In some cases e.g. Mphausa V. Multi Cleaning Services (1994) 5 (10) SALLR60, the court went so far as to say that where there is no satisfactory explanation for the delay that should be the end of the matter and the court need not bother to consider other factors like prospects. In the view of this court there is merit in this argument, because if the court is to temper with the time limits prescribed by the Law, it should really be because the party which failed to comply has furnished satisfactory explanation. In the absence of an explanation the law should take its course.

Prospects of Success.

Looking at applicant's case from the submissions made by Mr. Nathane and also considering the papers before court, applicant has got not the slightest prospect of success. For instance on the claim that the dismissal was contrary to section 66(4) of the Code, in that applicant was not given a hearing, the papers filed of record do not bear this out. The correspondence attached to the papers filed of record show that applicant was written numerous letters in which he was charged of insubordination and warned to mend his ways. The papers further show applicant's responses thereto which in essence was to dispute the authority of the Regional Director to write to him as he did.

It must be borne in mind that section 66 (4) does not prescribe what form a hearing should take. The respondent's disciplinary procedure does not either. But as it has repeatedly been stated natural justice has no fixed content. Accordingly therefore, a hearing need not follow a particular form, unless dictated by statute, the regulations or a contract of employment. In the circumstances of this case the letters written to the applicant discharged respondent's obligation under section 66 (4) of the Code.

With regard to the warnings, the regulations are clear that, whilst ideally an employee will be given three warnings, prior to dismissal, this is not mandatory. Regulation 5.2 provides that;

> **" *IDM reserves the right, however, in cases of serious breaches of discipline to impose a stricter penalty, including immediate discharge, notwithstanding the***

> ***fact that the staff member has not received any previous warning." (emphasis added).***

Regulation 12.1 (c) States that IDM at its sole discretion shall have the right of imposing any one of the penalties listed thereunder. In paragraph C it states;

> **"** ***Final written warning (normally issued when a staff member is already on second written warning but may be issued directly for a particularly serious offence)" (emphasis added).***

Clearly therefore, there was no obligation that the applicant be issued with three warnings before final action could be taken.

Applicant's contention that the Regional Director had no authority to discipline him while he was Acting Country Director is also not an argument that can be taken seriously. Regulation 14.4 on which reliance was put clearly refer to country Director or Regional Director as the officers for whom the Board of Directors is the appointing and disciplinary authority. It does not include Acting Directors and we have no basis to infer that it does. After all in his letter of 8th October, 1992 (annexure "TS6") by which he advised applicant of the outcome of the IDM Board meeting in relation to his (applicant's) acting appointment, the Regional Director clearly informed the applicant that, the Board of Governors resolved that applicant's acting appointment was irregularly done and that;

> **"***.... the Regional Director should have been the one to make interim acting arrangements"*

The applicant has not refuted this decision of the Board, which in no uncertain terms show that the proper way of making an acting appointment was to have been done by the Regional Director. If the Regional Director was the appointing authority it is trite law that even the power to terminate the appointment vest in him.

In the view of this court, the applicant has not only failed to show good cause for his inordinate delay, but even the prospects are lacking. No purpose will be served by considering the importance of this case as the applicant has failed the two major tests namely explanation for the delay and whether he has prospects of success. In the premises we have come to the conclusion that this matter is time barred and as such it is dismissed.

THUS DONE AT MASERU THIS 5TH DAY OF FEBRUARY, 1998.

L.A LETHOBANE
PRESIDENT

P.K. LEROTHOLI
MEMBER **I AGREE**

A.T. KOLOBE
MEMBER **I AGREE**

FOR APPLICANT : **MR NATHANE**
FOR RESPONDENT: **MR MOLETE**