IN THE LABOUR COURT OF LESOTHO

CASE NO LC 10/96

HELD AT MASERU

IN THE MATTER OF:

NATIONAL UNION OF RETAIL

APPLICANT

AND ALLIED WORKERS

AND

FRASERS LESOTHO LTD.

RESPONDENT

JUDGMENT

The applicant union initiated these proceedings on behalf of its member a Mrs Reginah Maroba who was the manageress of the respondent's store at Mokhalinyane. The case arose out of the dismissal of Mrs Maroba for allegedly failing to look after the assets, merchandise and cash of the company. The charge sheet singled out as examples irregularities concerning the running of staff account and petty cash.

It appears from the papers and it is admitted by both parties that the complainant appeared before a disciplinary hearing on the 6th November 1995, charged with "*failure to follow standard procedures for the receipt and control of merchandise." (see annexure "A" to the originating application).* She was found quilty and given a final warning. On the 10th November she was again charged with failure to look

after the assets merchandise and cash of the company. The hearing was held on the 15th November 1995 and the complainant was again found quilty and this time dismissed. She appealed to the Industrial Relations Manager of the respondent who upheld the decision of the initial enquiry.

The union lodged the present proceedings contending that the disciplinary proceedings against their member were procedurally flawed in the following respects:

(a) the charges were ambiguous with regard to what the complainant was supposed to have done;

(b) There is inconsistency between annexure "A" and "A1" of the originating application with respect to the following:

(i) the date and time of disciplinary hearing ;
(ii) nature of alleged offence;
(iii) date of incident.

(c) Mr. Bigger who chaired the proceedings was an investigator complainant and judge all rolled in one;

(d) The appeal hearing was flawed because it was based exclusively on the defective documentation of the initial hearing;

(e) The charge against the complainant as it appears in the appeal hearing differs from that contained in Annexure "A" to the originating application.

At the hearing hereof, Mr. Ramochela on behalf of the applicant union abandoned all but one of the grounds mentioned above, namely the one relating to the chairmanship of the disciplinary proceedings. By so doing he was accepting the clarification contained in the respondent's answer about those queries. Indeed it came out that most of the grounds raised were based on lack of understanding on the part of the applicants.

The charge against the complainant was by no means ambiguous as it went on to cite specific areas in which the complainant had failed namely; staff account and petty cash. The alleged inconsistency between annexure "A" and "A1" to the originating application was caused by applicant's failure to understand that the two annexures relate to two separate charges which gave rise to two different disciplinary proceedings against the complainant for which there were different penalties imposed. This much was conceded by Mr. Ramochela at the hearing. The same goes for the complaint that the charges in the record of the appeal hearing differs from that in annexure "A". They had to be different because annexure "A"

relates to the hearing of 6th November 1995, which resulted in a final warning against the complainant. The record of the appeal on the other hand, relates to the charge in the later proceedings of the 15th November which resulted in complainant's dismissal. The charges in those two incidents were different.

We are not persuaded that the appeal hearing is flawed for the alleged reason that it is based "*on the defective documentation of the disciplinary hearing.*" There is no evidence to support this claim, neither is there an indication of how the documentation is defective.

We come now to the main contention that Mr. Bigger was a judge in his own cause. The complainant's complaint both before the industrial relations manager to whom she appealed and before this court is that Mr. Bigger investigated the case against her and also presided over the disciplinary enquiry. In support of this contention the applicant union attached annexures "A" and "A1" to show that Mr. Bigger was the chairman of both the enquiry of the 6th November and that of the 15th November. The union alleged that the forms (annexures "A" and "A1") are falsely claiming that a Mr Strydom was complainant because apart from being the chairman Mr. Bigger was also the complainant. The Union adduced no evidence to support this claim.

The respondent led oral evidence of Mr Bigger himself who conceded that he investigated the cases against the complainant. He denied however, that he chaired the disciplinary enquiry and testified instead that Mr. Strydom was the chairman of the enquiry. Asked by Mr Van Tonder to explain the discrepancy between his evidence and annexures "A" and "A1" which showed him as the chairman, he replied that, it had initially been arranged that he would chair the proceedings, but because Mr. Strydom did not carry out the investigations it was decided that he (Mr Strydom) should be the chairman and he (Mr Bigger) complainant. Asked to explain further what he meant he said they gave the complainant notice of hearing before investigations were done. When they (the investigations) were to be done "*Mr. Strydom could not do the investigations*..." So he had to investigate the cases hence he finally became complainant and Mr. Strydom chairman.

The untruthfulness of Mr. Bigger's evidence on this point became glaring when he badly crumpled under questioning by the Court. For instance when he was asked, if in both cases i.e. the case of 6th November and that of the 15th November, they issued notices of hearing before conducting investigations, his answer was *"I would not issue the notice of hearing unless I had the information on hand."* Asked further if it was now his evidence that in both cases when notices of hearing were sent out investigations were complete he said yes. This was a clear contradiction of his evidence in chief. Asked what his explanation is of the fact that, contrary to his evidence that he was not the chairman of the proceedings the two annexures to applicant's originating application show him as having been the chairman, he said

all he could say was that this was their mistake. Clearly this was no explanation of the contradiction.

In the view of this Court Mr. Bigger was clearly schooled in advance with regard to the evidence he was to give on who chaired the disciplinary hearing. His evidence was meant to cover up what was believed to have been an irregular step. Evidence shows that he was himself the chairman of the disciplinary proceedings in which the complainant was charged and initially given final warning and finally dismissed. Even a quick glance at the record of the two disciplinary proceedings (joint annexure 3 to the answer) shows clearly that Mr. Bigger was conducting the proceedings.

In the record of the proceedings of the 6th November M.B - whom we were told by Mr Bigger refers to himself i.e. Mark Bigger, starts by giving what is clearly the chairman's introductory remarks as to the purpose of the meeting. Thereafter he showers the complainant with a series of inquisitorial questions. At the end the person who is taking the minutes, who Mr. Bigger said was Mr. Strydom, and we have no reason to doubt he was not writes;

> **"*after conclusion Mr. Bigger said we will then meet at Morija on 7/11/95 at 11:15am for <u>his</u> verdict".* (emphasis added).**

We have emphasized "his" because whomever was taking the minutes was clear as to who was to make the decision. Mr. Bigger's attempt to explain this as resulting from Mr. Strydom's english not being so good is unacceptable because the minutes do not seem to have been taken by a person whose english is poor.

Again at the disciplinary enquiry of the 15th November more or less the same pattern repeats itself. M.B. who as we know is Mark Bigger starts with the customary chairman's introductory remarks regarding the purpose of the meeting. He then goes on to ask questions in a clear fashion of a person who is himself in charge of the proceedings. At the end the scriber again records Mr. Bigger's summary as follows:

> **"*in conclusion M.B said a lot went wrong, Regina misused her position as manager and staff took advantage of her mistakes."***

This much was put to Mr. Bigger by the Court, that as far as the records go he was chairing the sessions. All he could say was, this was not so. We have already said his evidence in this regard is highly contradictory to be relied on as a true version. In the view of this Court therefore Mr. Bigger was infact the chairman in the two disciplinary proceedings in question.

The next issue to inquire into is whether there was any irregularity occasioned by Mr. Bigger's presiding as he did. Mr. Ramochela for the applicant says there was

irregularity as Mr. Bigger was a judge in his own cause. Mr. Ramochela was asked by the Court to point out the part of the rules of the respondent excluding Mr. Bigger from being chairman of the enquiry. He said he relied on clause 6 of the respondent's Grievance Disciplinary and Appeal Procedures in particular sub-clause 6.7, 6.8 and 6.9. It must be stated right away that nothing contained in those clauses have the effect of expressly or impliedly excluding Mr. Bigger from being the chairman of the disciplinary enquiry.

In the case of Maisaaka Mote .V. Lesotho Flour Mills LC 59/95 (unreported) this Court had occasion to quote the words of Landman Ad. hoc member as he then was in the case of National Union of Mineworkers & Others .V. Driefontein Consolidated Ltd (1994) 5 ILJ 101 at 145 where the learned member stated as follows:

> ***"it does not lie within the competence of this Court to lay down rules of procedure which an employer should follow so that a dismissal will be fair. The performance of such a function would amount to blatant legislation."***

It suffices that the complainant has received a hearing in accordance with the provisions of the respondent's disciplinary procedure. (see Supreme Furnishers (Pty) Ltd & Another V. Letlafuoa Hlasoa Molapo C. of A (CIV) No. 13 of 1995). Indeed in terms of clause 6.1 of the respondent's disciplinary and appeal procedures it is provided that;

> ***" management will convene and chair the enquiry."***

Mr. Bigger, in his supporting affidavit has identified himself as *Group Manager* for Frasers Supermarkets and in his evidence he said the complainant was directly answerable to him. He was therefore, clearly part of respondent's management who are authorised to convene and chair disciplinary enquiries. In the circumstances we find nothing untoward in Mr. Bigger's chairmanship of the disciplinary enquiry as this was entirely in accordance with the respondent's disciplinary procedure. Accordingly this application is dismissed.

Costs shall be costs in the cause.

THUS DONE AT MASERU THIS 12TH DAY OF MAY, 1998.

L.A LETHOBANE
PRESIDENT

G. K. LIETA
MEMBER **I AGREE**

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

FOR APPLICANT : **MR RAMOCHELA**
FOR RESPONDENT: **MR VAN TONDER**