IN THE LABOUR COURT OF LESOTHO

CASE NO LC 34/00

HELD AT MASERU

IN THE MATTER OF:

MAMPOLOKENG EVODIA MAKHUBE APPLICANT

AND

CASHBUILD LESOTHO (PTY) LTD RESPONDENT

JUDGMENT

This is an application in which the applicant is seeking a declaration of her dismissal as unfair and consequential relief of reinstatement without loss of remuneration, benefits or any other entitlements. Alternatively the applicant seeks compensation in lieu of reinstatement and costs of suit. The ground on which these reliefs are being sought is that the disciplinary hearing was unfair in as much as it was fraught with the following irregularities:

(a) Applicant was not given the opportunity to cross-examine the manager who was the chief witness in the said proceedings.
(b) Applicant was denied the right of being represented by a fellow employee, inspite of her express wish to be so represented.
(c) Applicant's mitigating circumstances were not considered.
(d) The disciplinary action of dismissal was too harsh, severe and unfair in the circumstances.
(e) The appeal procedure was not adequately explained to applicant in as much as she was not asked whether she wished to appeal.

It is common cause that this application was brought after expiry of the six months within which a claim for an unfair dismissal has to be presented to court. Consequently the applicant made a separate application for condonation of her late filing of the application which was moved on the day of hearing of the

main application. The respondents for their part raised two points in limine namely that;

(a) The applicant has not exhausted the local remedies in as much as the applicant did not use the appeal procedure in terms of the respondent's disciplinary code.
(b) The application is prescribed.

This Court has difficulty entertaining these points in limine because they concern issues which the applicant has already pleaded. The respondent must answer the applicant's case as contemplated in the rules and not circumvent that obligation by raising in limine issues already before the court.

It is now trite law that in a condonation application some of the issues to be considered are; the explanation for the delay, the length of the delay, the prospects of success and the importance of the case. (See Melane .v. Santam Insurance Co. Ltd. 1962(4) SA531(A). Section 70(2) of the Labour Code Order 1992 empowers the Court to condone failure to comply with the prescribed time limit if it is satisfied that the interests of justice so demand. In Khotso Sonopo .v. LTC LC67/95 (unreported) this Court held that in order for it to be able to satisfy itself as to the demands of justice in each case, the defaulting party must show good cause why there has been a delay. The principles set out in Melane case supra provide useful guidelines for the Court to determine whether good cause has been shown. The applicant's explanation is that she had briefed attorneys B. Sooknanan and Associates on the 10th October – she had been dismissed on the 2nd September 1999. When she came to check on the 18th March 2000 she discovered that the Court process had not been issued. She then approached her present attorneys who caused the Originating Application to be issued on the 24th March 2000.

Mr. Letsika for the respondent stated correctly in our view that, by her timeous approach to lawyers after her dismissal one can infer that the applicant is someone who is pretty informed about her rights. This however, does not correspond with her apparent relaxation after briefing counsel until the six months time period prescribed by the law has lapsed. She has not explained why this happened. Accordingly, we conclude that her explanation is not satisfactory.

The length of the delay is not unreasonable. It was approximately one month's delay. No special issues come up to be decided as to make this case of any special importance. It is an ordinary case like any others that this Court usually deal with. In our view the three issues considered thus far tilt the scale against granting the condonation sought. The main deciding factor therefore, shall be whether the applicant has the prospects of success on the merits. This Court permitted counsel for the parties to traverse the merits in full so that should the condonation application succeed the Court would straight away determine the application on its

merits. This approach has simplified the work of this Court with regard to deciding whether the applicant has prospects of success.

We should point out from the onset that the applicant does not dispute the substantive fairness of his dismissal. She is challenging what she sees as procedural irregularities. However, looking at those alleged irregularities as outlined in paragraph 5 of the Originating Application none of them goes to the root of this case as to justify the grant of the relief sought namely; reinstatement.

Looking at the record of the disciplinary proceedings and considering the address by Mr. Mda on behalf of the applicant it is clear that the procedural irregularities complained of are nothing but a fishing expedition. The claim that the applicant was not allowed to cross-examine the manager is clearly not sustainable because in the record of proceedings which applicant annexed to her Originating Application as Annexure "MEM1" the Manager is not listed as one of the witnesses. There were two witnesses on behalf of management namely, Posholi and Lekhooana and these the applicant cross-examined. (See p.29 of Annexure "MEM1").

The right to representation is the very first right among the thirteen listed rights of the applicant on p28 of Annexure "MEM1." Nowhere is it recorded in that annexure that applicant requested for representation and it was refused. She, however, have signed each of the pages of that record of the disciplinary proceedings as correct, including the page entitling her to the right to representation. She cannot now be heard to claim despite her confirmation to the contrary, that she was refused right to representation.

It is again recorded on page 31 of the record (Annexure "MEM1") under paragraph 51(d) that the applicant was "not prepared to plead for mitigation." Again the applicant has signed this page as representing the true record of events. How then can she claim that her mitigating circumstances were not considered? In paragraph 3(c) of the Opposing Affidavit the Branch Manager avers that the respondent had to on its own initiative take the trouble of considering certain mitigating circumstances which were privy to them before pronouncing on the guilt of the applicant. This was really bending over backwards to accommodate the applicant.

According to the opposing affidavit of the Branch Manager paragraph 3(e) thereof the appeal procedure was explained to the applicant. It was up to her to pursue the appeal if she wished to do so, he stated. This deposition is confirmed on page 32 of Annexure "MEM1" under paragraph 54 where the following question is posed; "has the appeal procedure been explained to the employee?" The answer "yes" is ticked. Again the applicant has signed this page as a true reflection of what transpired. These show why we say the alleged procedural impropriety are a fishing expedition as they are far from being sustainable.

The question of what type of action ought to be taken in respect of a particular breach of discipline is governed by the employer's disciplinary code. It is not for the Court to interfere and pronounce what action should be taken. The severity of disciplinary action alone cannot be a ground on which the proceedings of a well conducted disciplinary enquiry would be nullified. In the premises we find that the applicant herein has no prospects of success and there is therefore no reason to condone this late filing. The application is therefore dismissed on the ground that it is time barred. There is no order to costs.

THUS DONE AT MASERU THIS 18TH DAY OF AUGUST, 2000.

L.A LETHOBANE
PRESIDENT

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

M. MAKHETHA
MEMBER **I AGREE**

FOR APPLICANT : MR MDA
FOR RESPONDENT: MR LETSIKA