IN THE LABOUR COURT OF LESOTHO

CASE NO LC 60/99

HELD AT MASERU

IN THE MATTER OF:

KHAUHELO MOLETSANE & ANOTHER APPLICANT

AND

FRASERS LESOTHO LTD RESPONDENT

JUDGMENT

This is an application in which the two applicants are seeking relief in the following terms:

(a) **That the respondent's decision of 5th October 1999 to dismiss applicants be reviewed corrected and declared null and void.**
(b) The purported dismissal is contrary to the provisions of the respondent's code.
(c) Payment of salary from date of dismissal.
(d) Further and/or alternative relief.

It is common cause that this court has neither review powers nor the power to declare an administrative decision a non-decision by declaring it null and void. The power vested in this court is to declare dismissals unfair if it has so found and it cannot by any stretch of the rules of interpretation be said that that is tantamount to reviewing or declaring the decision null and void. We shall therefore, proceed on the basis that the way paragraph (a) of the prayers is couched was infact a slip of the pen, what applicants meant was to pray that their dismissal be declared unfair.

The two applicants were dismissed following a disciplinary hearing in which they were charged with; unauthorised possession of company assets and not looking after the assets of the company and the merchandise of the company. At the close of the disciplinary hearing the two accused were found guilty as charged and were given a final written warning. Management appealed against the sentence on the ground

that it was not consistent with similar previous cases. The appeal was upheld and a new penalty of dismissal was imposed. It is this appeal by the management which, has given rise to the applicants' second ground for relief namely that, the dismissal was contrary to the disciplinary code.

Firstly, the dismissal is challenged on the substantive ground that there was no evidence to support the applicants' conviction. The disciplinary enquiry seem to have relied on the evidence of Peter Malitse the floor supervisor and one Mary Mofolo. Indeed even before this court the two testified as DW1 and DW2 respectively. It is therefore, imperative that we look at their evidence to establish whether it is sufficient to support the finding of guilt.

Malitse's evidence which is consistent with the statement he made before the disciplinary enquiry is that it had been Tsoeu Nthontho's (second applicant herein) turn to clean the toilets. Nthontho came to him (Malitse) and told him that the people he was supposed to be cleaning the toilets with were not doing so as such he was cleaning alone. He requested Malitse who was his supervisor not to shuffle them the next month as he would still like to be paired with them. Malitse says this surprised him because he knew that Nthontho was a generally lazy person. He then suspected that he must be up to something. He decided that from then henceforth he was going to watch if the guy was really doing his work.

Peter Malitse says he was at the time driving a forklift while applicant was using a machine to clean the floor. When applicant went to change the dirty water in the machine the witness followed with a forklift. There he found Nthontho with the machine opened and apparently taking out something. Malitse says he sent Mary Mofolo to go and ask them if they were continuing with their actions. It appears on page 5 of the record of the disciplinary hearing that for one of the applicants (the first applicant) it was not the first time he was involved in an act of pilfering. It would seem this is why the question was to find out if they are continuing with their actions.

Mary Mofolo for her part says she did go and found the two applicants sitting together, and asked them "are you continuing with these acts of yours?" The first applicant responded, "'me Mary ha e shape faatse." She testified further that she advised them to cease their misbehaviour and went to report to Malitse what had transpired. Malitse testified that thereafter he went to them personally and enquired from them if they were indeed doing those acts. Clearly the acts complained of were acts of theft.

He (Malitse) stated further that this time it was the second applicant who responded by saying that it is true it has already happened and pleaded with him not to inform one Nthoana and Management. He (Nthontho) further asked that since they were already caught Malitse should allow them to take the merchandise and not order them to return it into the store. The stolen merchandise was found hidden in the

empty crates section and it was zambuks and top gel lotion with the combined value of M1138.00.

The thrust of Mr. Putsoane's case both during cross-examination and in his written submissions is that no one saw either of the two applicants steal the things they were charged of stealing. Both witnesses conceded that they never saw any of the applicants steal. But there is clearly sufficient circumstantial evidence combined with applicants' own admission to support the finding of guilt. The statement "thupa ha e shape faatse" is clearly an expression of remorse and apology. This court disagrees with Mr. Putsoane's suggestion that it means "cool down." If the disciplinary enquiry accepted the two witnesses' evidence as it clearly did, it had more than enough evidence to support its conviction of the two applicants. Of significance in the evidence is the admissions by both applicants coupled with apologies they made to Mary and Malitse. If they had not stolen they had no reason to apologise.

Before this court only the first applicant testified. The second applicant's evidence was disallowed as he had sat in throughout the first applicant's testimony despite a warning having been issued by the court at the commencement of the proceedings that all potential witnesses should clear the courtroom. In his testimony the first applicant never denied the allegations levelled against him. This was despite him having annexed the record of the disciplinary hearing to his Originating Application which shows what the accusations levelled against him were. In the circumstances we too like the disciplinary enquiry have no reason not to believe the version of the respondents' witnesses as it stands uncontradicted before us.

The second leg of applicants' challenge of their dismissal is procedural. They contend that in terms of the disciplinary code only the employees are entitled to appeal against a decision of a disciplinary enquiry and no such opportunity is available to management. Indeed clause 6.14 of the respondent's disciplinary procedure and code provides that,

> ***"if an employee is dissatisfied with the outcome of the enquiry he may appeal against it in terms of the appeal procedure."***

It is common cause that even the appeal form has space for an employee's signature not the employer or management representative.

In our view the issue to determine is whether by appealing against the penalty as it did the respondent suffered the applicants any unfairness. It seems to us that the often quoted case of National Education Health & Allied Workers Union & Others .v. Director General of Agriculture & Another (1993) 14 ILJ 1488 at 1500 C-G lays clear principles for the determination of the issue at hand. In that case Landman P and De Kock S.M as they then were stated as follows:

> ***"It has become the practice of the court in dealing with the private sector to hold an employer to his unilateral or negotiated code including a retrenchment code. There is merit in this. An employer should live up to the expectations created amongst his staff by his unilateral code.***
> ***Unfortunately this approach of the court has developed a life of its own. We are daily faced by counsel, trade union officials and consultants who laboriously and minutely (and sometimes tediously) examine the employer's code or the agreement and pounce with relish on any and every minute deviation from the code. This tendency is especially prevelant in regard to procedural obligations. Such an approach is in conflict with the concept of the Labour Relations Act of 1956 which requires the court to promote good labour relations practices by striking down and remedying unfair labour practices. The jurisprudence and legislative intention was that a move should be made away from strict legality to the equitable, fair and reasonable exercise of rights.***
>
> ***We believe that our jurisprudence has strayed too far away from this path and that the time has come when we would turn our backs on a legalistic interpretation and insistence on uncompromising compliance with the code and ask the general question: Was what the employer did substantially fair, reasonable and equitable? If the answer is positive that will ordinarily be the end of the matter."***

Quite clearly the issue of Management appealing against the penalty was a procedural matter. In principle there is nothing wrong with an appeal as such we are of the view that it was a reasonable step to take. Mr. Wessels who lodged the appeal was the complainant and if he was unhappy with the penalty it was only fair and reasonable that he appealed. It was not like Management was having a second bite at the cherry as it were because he was a party with interest in the proceedings and the outcome thereof. For these reasons we do not think that the applicants suffered any unfairness as a result of Mr. Wessels' appeal against the sentence which he claimed was not consistent with previous similar cases and contravened the code because the penalty for the offences with which the applicants had been found guilty was a dismissal. In the circumstances we have come to the conclusion that this application ought not to succeed and it is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 26TH DAY OF JANUARY 2001.

L.A LETHOBANE
PRESIDENT

C.T. POOPA
MEMBER **I AGREE**

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

FOR APPLICANTS: MR PUTSOANE
FOR RESPONDENT: MS SEPHOMOLO