IN THE LABOUR COURT OF LESOTHO

CASE NO LC 93/00

HELD AT MASERU

IN THE MATTER OF:

PATRICIA MAAPESA **APPLICANT**

AND

ELLERINES HOLDINGS LTD **RESPONDENT**

JUDGMENT

The present judgment is the result of our unanimous decision on this case. However, the learned labour panel member Mr. Makhasane has left Lesotho for training in Namibia before the finalisation of the written judgment. Accordingly, even if he has not appended his signature to the judgment, as is infact the case, we attest to the fact that he associates himself with the judgment and the reasons therefor. If, however, this were not to be so, we the remaining two members assume full responsibility for this judgment in terms of rule 25(2) of the rules of this court which provides that;

> ***"(2) Where during the course of such hearing a vacancy arises or vacancies arise in the membership of the Court, provided the remaining members constitute a majority of the original membership of the Court, the decision of the remaining members shall be the decision of the Court."***

The applicant herein seeks relief from the respondent company in the following terms;

(i) An order directing the respondent to re-instate applicant to her job and position without loss of remuneration;
(ii) granting the applicant further and or alternative relief;
(iii) granting the applicant the costs of this application.

The applicant was employed by the respondent at one of its furnisher stores called Furn City. She was dismissed in June 2000 following a disciplinary hearing in which applicant was charged with poor work performance. Applicant was confronted with five charges all of which arose out of an alleged poor work performance.

At the hearing hereof counsels availed a record of the disciplinary proceedings and agreed not to lead any oral evidence, but to confine themselves to the record of the proceedings. They further agreed to ask the court to determine whether the proceedings were fair and to dispose of this case on that basis.

Mr. Sello on behalf of the applicant argued that the prosecutor was acting as both prosecutor and witness as such it was not possible for him to be cross-examined. Ms Sephomolo for the respondents denied that this was so. She argued, correctly in our view, that the prosecutor was relying on documentary evidence which he read out and presented to the enquiry. As regards cross-examination, the record is testimony to the fact that each time after the prosecutor presented his case the chairman would ask the applicant and her representative if they had questions. There would not in our view have been any more chance than that for the applicant and her representative to put questions to her accusers.

Mr. Sello contended further that the applicant was not given chance to testify and that her representative acted as both representative and witness. If by saying applicant was not allowed chance to testify it is suggested that her witnesses were refused chance to testify, that would be totally incorrect as there is no evidence to support this. If however, it is meant that a chance was not availed for her and/or her witnesses to testify, it seems to us that that would fly in the face of the chairman's last question under charge 1 where he asks, "Are you fine with charge 1?" Everybody including applicant answered "yes". If applicant had wanted to call any witnesses she could have indicated at that stage at least, that she had some witnesses to call.

Regarding the allegation that the representative acted also as a witness, there is nothing in the record that was shown to us that bears testimony to this claim. Assuming however, that this was so, it seems to us that there would be nothing untoward in the procedure. If the representative could attest to some facts in favour of the applicant that would be entirely in order. Infact that would then contradict the earlier submission that the applicant was not allowed a chance to testify or to lead her witnesses.

Mr. Sello contended further that the hearing was no more than going through notions in as much as applicant's conviction was a forgone conclusion. He contended that there was a conspiracy to dismiss applicant on the basis of false and non-existent charges. Now the issue of conspiracy as well as that of false charges are

maters of evidence which we have not had the benefit of hearing. Accordingly we cannot make a finding on them.

As regards a claim that the applicant's conviction was a forgone conclusion he referred us to the lengthy explanations that the applicant gave under each of the charges. He pointed out that in arriving at his conclusions the presiding officer ignored completely the applicant's explanations. This much is evident from the rulings of the chairman under each of the charges. There is not the slightest indication that he considered applicant's defences and disagreed with same as it was within his power to do so. In answer to a question from a panel member of the court Ms Sephomolo did concede that the chairman failed to consider in his rulings whether applicant's explanations were plausible.

Finally Mr. Sello contended that in virtually all the charges the chairman's findings are not based on the evidence led at the enquiry. Indeed under charge 1 "Failure to capture report back entries to the computer and archive it," the chairman does not say that the evidence led has established the charge or that the applicant did fail as alleged to capture information on the computer. He instead makes his own analysis of what the consequences of failure to capture information on the computer are to the company. But this does not mean that the applicant failed to capture information as alleged or that the prosecutor has proved the charge as required. The chairman goes further to say that there was a final warning issued to the applicant on the same charge. However, nowhere was this warning put to the applicant during the disciplinary proceedings to enable her to comment. Reliance on it was therefore unfair in the sameway that reliance on evidence that was not led at the enquiry is unfair.

On charges 2 and 3 the same irregularity of not relying on evidence led, but giving the chairman's analysis and personal knowledge of the consequences of not meeting certain standards repeats itself. In charge 3 there is again reference to a final warning which applicant was not afforded the chance to rebut during the disciplinary proceedings. The same mistake is repeated in charge 4. However, in the last sentence the chairman remarks as follows: "Here there was no prove that Credit Manager worked on the Minutes therefore she is guilty." The charge here was "Failure to follow up and carry out instruction minutes issued on monthly MBO review minutes." When the chairman says there is no prove that the Credit Manager (applicant) worked on the minutes, he was clearly putting the burden of proof on the applicant. It is trite law that he who alleges must prove. The applicant could not therefore be expected to prove her innocence. It seems to us therefore that the disciplinary enquiry on the charges that resulted in applicant's dismissal was fraught with irregularities of both a procedural and substantive nature resulting in applicant's dismissal amounting to an unfair dismissal.

The relief sought by applicant is reinstatement. In their Answer the respondents have not addressed this paragraph. At the end of her argument Ms Sephomolo

applied to be allowed to lead viva voce evidence on this point. This application met with stern opposition by Mr. Sello. As it has been held in SA Society of Bank Officials .v. First National Bank of Southern Africa (1996) 17 ILJ 135 Labour Court proceedings are not pleadings strictu sensu as understood in ordinary courts. It is also not in accordance with Labour law jurisprudence or fair labour relations practices to place undue technical hurdles before litigants in Labour Court proceedings. However, an issue such as a claim for reinstatement towers tall for all to see and notice. The respondent cannot claim oversight of an issue as significant as a prayer for reinstatement.

Assuming there was an oversight, which is highly unlikely, the respondent had the opportunity of applying for an amendment to rectify that anomaly. That not having been done, we are faced with a situation where the respondent seeks to amend the pleadings by oral evidence. We are inclined to believe that the respondent's attempt to oppose the prayer for reinstatement is an afterthought. Their position seems to have all along been not to oppose it. Accordingly, respondent's application to lead oral evidence to oppose the prayer for reinstatement is refused. The prayer therefore stands unopposed as such it is granted as prayed.

In granting the prayer for reinstatement the following factors have been taken into consideration: that the applicant has been out of employment for less than a year. In other words she acted promptly soon after her dismissal. The respondent was infact late in filing its answer in about two months, thereby contributing to the delay in finalising this matter. We further take into account that the respondent is a big company, operating both locally and in South Africa. Infact we observe from the record that applicant was initially recruited in S.A. and was later relocated to one of the branches of the respondent in Lesotho. Consequently it is possible for the applicant to be relocated away from the people she may have clashed with thus making the possibility of daily personal contact avoidable. Finally we have taken into account that the respondent has not opposed the prayer for reinstatement. There is no order as to costs.

THUS DONE AT MASERU THIS 3RD DAY OF APRIL, 2001.

L.A LETHOBANE
PRESIDENT

S. MAKHASANE
MEMBER **I AGREE**

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

FOR APPLICANT : **MR SELLO**
FOR RESPONDENT: **MS SEPHOMOLO**