

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 35/98

HELD AT MASERU

IN THE MATTER OF:

MAHALI MALOMA

APPLICANT

AND

LESOTHO BRAKE CLUTCH AND SPARES

RESPONDENT

JUDGMENT

The applicant herein is seeking nullification of her dismissal on the ground that her dismissal is contrary to section 66(4) of the Labour Code Order 1992 (the Code). The applicant had following a request to her employer and due permission proceeded on a two months paid leave. At the end of her first month of leave she collected her pay and returned home. On the 4th March 1998, just a few days after collecting her pay she received a letter of dismissal couched in brief terms as follows:

“Your insubordination is no longer tolerated at work and as a result your services are terminated with effect from 1st April 1998.”

In her evidence the applicant said she was at a loss what the letter was talking about. She further said that there were no complaints against her prior to her going on leave. The respondent on the other hand led four witnesses to show that the applicant was incompetent, insubordinate and dishonest. In our view, the applicant could well be guilty of those misdemeanours, but the issue is whether she was heard in terms of audi alteram partem rule as amplified by section 66(4) of the Code prior to her dismissal.

DW1 Lerato Khathatse said that he was told by **DW4** Morgan Emmanuel Moledi who is also the Managing Director of the respondent that he (Mr. Moledi) had talked to the applicant about her poor performance. **DW2's** testimony related to the M100-00 shortage which applicant had when she had been sent to the cashier with a customer's money to be rung up on the till machine. There was no testimony of what steps were taken to reprimand the applicant. Infact **DW2** said that after they told **DW4** the Managing Director about the shortage she did not recall anything else happening. **DW3** Mrs. Mathabo Moledi who happens to be the wife of **DW4**, testified about the occasion when a customer had come to buy a clutch plate and the customer, unaware of who she was, demanding to be sold the item at a lower price, which it appeared was the price he was used to. She said that she learned from that incident that it proved the complaints of **DW4** her husband, genuine when he complained about things that disappear. She was then asked "did you take any immediate steps?" Her response was "I took no steps against her but I informed my husband."

DW4 testified that the applicant would at times do things the way she had been inducted and sometimes she would just not do them. He cited an occasion when he had instructed applicant to place an order with his main supplier in Johannesburg a company known as ACI. He said at times applicant would comply and do the order, but sometimes she would refuse and say she did not know English. **DW4** could not adduce evidence of what steps he took to reprimand the applicant about this.

DW4 again testified about some two labourers whom he dismissed for insubordination. He said these two labourers later came back requesting to be re-employed because they had been ill-influenced by the applicant to disobey orders. There is no evidence of applicant having been confronted with allegations of these two labourers. Infact the applicant denied knowing that she had been implicated by the two as a bad influence. **DW4** further testified about the M100-00 shortage. He said a customer had just paid M6115-00. He gave the cash to the applicant to take it to the cashier so that it could be rung up. They had counted the money together with the applicant, but when applicant got to the cashier the money was M100-00 short. Again there is no evidence of steps taken to confront applicant about this complaint.

The witness also testified about what he was told by DW3 concerning a customer who demanded to be sold an item at a lower price than its official price. He was then asked a general question “what did you do about all these?” He responded that he called the applicant and talked to her. He testified further, “I told her what I realized she was not fulfilling and that if she did not improve her job would be on the line.” He was referred to “MM2” to the Originating Application being a letter with which applicant was dismissed. He was asked why he had talked of “insubordination” when it would appear applicant had committed more misdemeanours. He said according to him that term embraced all the other misconducts namely; refusal to take instructions, incompetence and money shortages.

Now assuming the truthfulness of DW4’s testimony so far, we still do not know what it is that led him to write “MM2”. He did not say it in chief and he did not say it under cross-examination. Neither did he plead it in the Answer. In their answer the respondent had only averred that applicant’s dismissal was not in disharmony with section 66(4) of the Code because; “.....the circumstances were such that at the time of the dismissal it was physically impossible to afford her a hearing nor was her fraudulent conduct on her employer a type of behaviour which the latter could reasonably be expected to observe the audi alteram partem rule prior to dismissal.” The respondent bears the onus to prove the circumstances which militated against the granting of the opportunity to make representations. That onus has not been discharged.

Furthermore, the respondent must also show that the behaviour was of a type that it would be unreasonable to expect the respondent to continue to employ the applicant while seeking ways of affording her a hearing. The respondent has burdened this Court with applicant’s past history and that certainly does not show her as an ideal employee to work with. As to what misconduct triggered the dismissal letter it has not been said. It was only when a member of the court asked, after the close of the cross-examination why applicant was dismissed while on leave that DW4 sought to give an explanation which constituted new evidence all together. That explanation concerned applicant’s failure to do a balance sheet. That evidence is clearly an afterthought and it cannot be admitted without causing immense prejudice to the applicant.

Mr. Mosae for the respondent sought to persuade us that our finding in this matter should be based on the credibility of the witnesses. While credibility does play some part, the overriding deciding factor however, is whether; applying the facts to the law we can say there has been compliance with the principles of audi alteram partem. From the analysis of the facts it is clear that the respondent's conduct falls short of the requirements of the rule. For these reasons we are of the view that the finding in this case must favour the applicant and it is accordingly so found. However, the respondent's witnesses' testimony has painted a clear picture that the applicant is unsuited to be reinstated. The court has also not been addressed on the steps taken by the applicant to mitigate the damage. Accordingly, the parties shall approach the Registrar for a date when they can address the Court on the question of compensation and steps taken to mitigate the loss.

**THUS DONE AT MASERU THIS 12TH DAY OF
AUGUST, 2002.**

**L.A. LETHOBANE
PRESIDENT**

**M. MAKHETHA
MEMBER**

I AGREE

**C.T. POOPA
MEMBER**

I AGREE

**FOR APPLICANT :
FOR RESPONDENT:**

**MR THAMAE
MR MOSAE**