IN THE LABOUR COURT OF LESOTHO

CASE NO LC 99/00

HELD AT MASERU

IN THE MATTER OF:

DAVID TSEKO TAASO **APPLICANT**

AND

SUPREME FURNISHERS (PTY) LTD. **RESPONDENT**

JUDGMENT

This matter was launched on the 23rd August 2000. It was a sequel to the dismissal of the applicant herein on the 15th June 2000, which was confirmed by an appeal tribunal on the 11th July 2000. The applicant had been charged at the trial tribunal with:

> *"Breach of company rules and regulations in that on the 4th-1-2000 you cashed 2 cheques, one for R1000-00 another for R950.00. The R950.00 cheque which was returned by the bank marked 'refer to drawer'. Refer to audit trail.*
> *Alternatively dishonesty in that you cashed R1000.00 and R950.00 cheques at branch 119, such cheques having been returned marked 'Refer to Drawer' as there were no funds in your account."*

The applicant had pleaded "not guilty to both charges." Evidence was adduced that on the 4th January 2000, the applicant had cashed two personal cheques from the company's cash float. One cheque was for M1000.00 and another for M950.00. The cashier then deposited the two cheques together with other cheques of the customers of the respondent. It later turned out

that the M950.00 cheque was returned by the bank marked "Refer to drawer."

Evidence further showed that applicant was the Branch Manager of the store where he had directed the cashier to cash his personal cheques. It was further shown that after the return of the cheque the applicant directed the cashier to debit one of his accounts with the store. The cashier did as directed and debited applicant's staff account for the purchase of furniture. The applicant in turn filled stop order forms and therein undertook to repay the amount by four monthly installments of M254.59 which would be deducted directly from his salary. It was the concern of the complainant in that case as well as in casu, that the applicant had by so doing loaned himself company funds contrary to the policy of the company.

A concern was raised by applicant's representative at the hearing whether the so-called policy is documented or not. Annexure J to the bundle of documents presented to the court by respondent's counsel, (page 45 of the bundle) was produced. It is significant to reproduce it in full.

MEMORANDUM

TO: SUPREME BARNETTS MANAGERS
FROM: M. MACHELI
SUBJECT: PERSONAL CHEQUES
DATE: 09/06/99

It has come to my notice that some branches are cashing staff personal cheques from the company's treasury (cashier), this is not allowed. Any branch found guilty of this malpractice will be dealt with very severely.

Yours,

M. MACHELI
RESIDENT DIRECTOR

CC 1. Marvin Steward
2. Brian Foulkes
3. Andrew Cox

The cashier who cashed applicant's cheques was called in and she confirmed that she had been directed by the applicant to debit his account. She said she duly made a debit note and took the debit book to applicant to sign, but it later turned out that he did not sign. On the basis of that evidence the applicant was found guilty of breach of the rules by cashing his M950.00 cheque, thereby giving himself an unauthorised loan of company funds to the tune of M950.00. The penalty that was imposed was summary dismissal. The applicant appealed against the decision, but the finding of the original enquiry was confirmed on appeal.

The applicant then approached this court seeking relief as follows:

(a) Declaring that applicant's dismissal from the respondent's employment was unfair.
(b) Directing that applicant be reinstated to his substantive post with full benefits.
(c) Directing that applicant be paid his arrear salary.
(d) Directing the respondent to pay costs hereof.
(e) Granting applicant such further and alternative relief as this Honourable Court deem fit.

On the 11th July 2002 Mr. Mohau for the applicant moved an application for amendment of the Originating Application which was not opposed by Mr. Kennedy for the respondent. The amendment sought to amend paragraphs (b) and (c) of the prayers because the applicant had since obtained alternative employment. He is thus now seeking payment of benefits as opposed to reinstatement and payment of salary for the period that he has remained out of employment only, and not the entire period since he was dismissed by the respondent. This amendment was granted unopposed.

In his Originating Application the applicant admitted cashing his personal cheque at his place of work. He stated that the cheque was a "cash" cheque which the cashier deposited along with other cheques instead of cashing. In evidence he said he had instructed the cashier to cash the cheque and then deposit the cash. He averred further that when the cheque became dishonoured the cashier did not inform him immediately. She "instead debited applicant's account in the amount of M950.00 and as a result the amount was recovered in installments from the applicant's salary." He stated that applicant was only made aware of this, presumably the return of

the cheque marked "RD" and the raising of the debit note, when his account had already been debited.

At the hearing hereof, the parties agreed to follow an unusual procedure to the courts of this Kingdom which is otherwise an established procedure in the Republic of South Africa in labour cases. This procedure was that the respondent went into the witness box first to prove the validity of the dismissal. Our normal procedure in this Kingdom is that we usually presume the validity of the reason and he who alleges the invalidity bears the onus to prove the allegations he makes. It is only if the dismissal does not fall under section 66(1)(a), (b) and (c) that the Labour Code Order 1992 (the code) places the onus on the employer to prove that the dismissal is fair.

The respondent then called Mr. Annandale who was chairman of the initial enquiry which found the applicant guilty and Mrs. Molapo, the cashier who cashed the applicant's cheques and raised a debit note after applicant's cheque for M950.00 had bounced. In short Mr. Annandale's testimony was to the effect that he had on the basis of evidence presented before him found applicant guilty of both contravention of the rules and dishonesty. Mrs. Molapo's testimony was essentially that she had cashed applicant's cheque at applicant's instruction and that the applicant had in turn given her the cheques to go and deposit them. She testified further that after the M950.00 cheque was returned "RD" by the bank she informed applicant about it and applicant said she should debit one of his accounts. She did so and raised a debit note which she took to the applicant for authorisation. She categorically denied that the applicant had said she should encash the cheques at the counter and deposit the cash. She also denied that the stop order arrangement was made after applicant discovered on his own that his account had been debited without his knowledge. Her evidence was that the staff account was debited at applicant's instruction.

The applicant for his part testified that, he had cashed his cheque at the store because he was in urgent need of money. He however, could not recall the reason for the urgency. He had given the cashier the cheques so that when she got to the bank she would first cash the cheques and deposit the cash along with other customers cheques. The cashier on the other hand had deposited the cheques instead of cashing them. Three weeks to a month later, he learned from head office in Gauteng that one of his cheques had

been returned “RD”. The head office subsequently sent him the list of all “RD” cheques numbers and the amounts due. His cheque number was sent along with all other customers’ cheques numbers and the procedure was that he would note the cheques and ensure that owners’ accounts are debited. After debiting the accounts they would supply head office with debit numbers of all debit notes raised.

He was then asked a direct question, “how was the debit note in your case raised?” His response was “as the cheque was already debited into my account I asked for a stop order form to fill.” Quite clearly, this statement did not answer the question asked. However, in the other aspects of his testimony the applicant stated that the debit note was raised by the cashier without his knowledge. Asked about the rule preventing encashment of personal cheques at the store he said the rule did not apply to him as a manager. The rule according to him prevented staff from cashing their personal cheques, and managers had to make sure that staff did not breach that rule.

He went further to say, that managers had a right to cash their cheques at the store, but employees below manager could put a request to the manager. He averred further that he could cash his cheque against company’s cash, but what he was not allowed to do was to repay that debt with a cheque. He could only return that money by way of cash he testified. This it would appear, explains why he said he had told the cashier not to deposit the cheques but to cash them and deposit the cash. He testified further that in any event the respondent’s rules do not have a rule that prohibits encashment of personal cheques at the store. He was referred to the 1992 incident where the Resident Director, Mr. Macheli, had written the following memo to one Mr. Foukes:

MEMORANDUM

P.O. Box 279
Maputsoe
08/07/92

From: M. Macheli
To: B. Foukes

Re: PERSONAL CHEQUES CASHED ON COMPANY FUND

SIR,

I HAVE THIS MORNING TALKED VERY SERIOUSLY TO DAVID ABOUT HIS R.D. CHEQUES CASHED ON COMPNAY FUND AND I CAN ASSURE YOU SIR THAT THIS WILL NEVER HAPPEN AGAIN. I HAVE MADE HIM TO PAY R650.00 WHICH WAS OWING DUE TO THIS (SIC) RD CHEQUES. I HEREIN ENCLOSE DEPOSIT SLIP AS PROOF THIS MONEY IS PAID.

YOURS FAITHFULLY,
MOHOPOLO MACHELI

CC DAVID TAASO

ENCL.

The applicant's response was that he never received the copy of this letter, but he recalls discussing the cheque issue with Mr. Macheli.

It is common cause that the evidence as summarised herein, is by and large the evidence that the enquiry chaired by Mr. Annandale heard. The only slight difference being that the 1992 memorandum referred to above was not discussed in the hearing. It was only referred to during sentencing as perhaps an aggravating factor that the applicant had already known even before 1996 that cashing of personal cheques from company funds was prohibited.

In his testimony Mr. Annandale averred that he was satisfied as chairman of the enquiry that the applicant had breached a rule against cashing of personal cheques from company funds. He dismissed applicant's contention that the rule did not apply to him. He also found him to have been dishonest

by directing the cashier to activate his dormant staff account so as to enable him to repay the M950.00 owing to the company by installments. Indeed at the hearing the applicant did not challenge the cashier's evidence that she raised the debit note at his instruction and he (the applicant) in turn said he would sign a stop order. The version that the applicant had instructed the cashier to cash the cheques and deposit the cash never featured at the disciplinary hearing. It is thus a new defence before this court. Even then it is a very weak defence if any at all. If that was the instruction given to the cashier the applicant would have recalled it much more clearly at the enquiry because it was still recent then. His failure to raise it there is clear proof that it is a fabrication. In any event nothing turns on whether the cheque was cashed at the bank or it was deposited. What is at issue is the cashing of that cheque at the store.

Applicant's testimony for its part was full of contradictions, evasiveness, fabrications and downright lies. A few examples will suffice. He says it was permissible to cash personal cheques as long as one did not repay by cheque. Applicant was being deliberately untruthful in this regard because he knows that he could not point to a single rule/regulation of the respondent which either expressly or impliedly permits such a conduct. On the issue of the memorandum he started off by saying it does not apply to him as a manager. Pressed to distinguish between himself and the staff he said the memo was addressed to managers to make them aware that staff must not cash their personal cheques against company funds.

He went on to say managers had a right to cash their personal cheques. Asked about other employees below managers he said they could with the permission of the branch manager encash their personal cheques. This is clearly contradictory with what he said about the memo putting managers as watchdogs to ensure that staff do not cash their personal cheques. Furthermore, it is outright fabrication as there is nothing that can be relied upon which gives managers the right that he claims they have namely, to cash their personal cheques against company funds. As regards the memo (Annexure J) it is a very clear and unambiguous instruction. It makes no exceptions of the kind the applicant would want us believe it makes. It cannot be denied that the word "staff" is all inclusive, while "manager" is exclusive. Accordingly, a valid general statement can be thus formulated "managers are members of staff but not all members of staff are managers."

To demonstrate his evasiveness, the applicant was questioned at length as to why he did not give the cashier his cheque so that she could cash it for him at the bank as she did banking daily. His response was that he should have needed money urgently. He could not however, come out as to the nature of the urgency. This also demonstrates the applicant's cavalier attitude towards the rules. In one breath he cashes his cheque because it is a right and the existing rules do not apply to him, and in another breath he must have needed the money urgently, and in yet another he says he cashed the cheque because he ought to be so entitled as a manager who is looking after the wealth of the company. These are clear contradictions and applicant ought to come out clear why he had to cash his cheque against company funds in the light of the clear company rule to the contrary.

As a clear evidence that he was a man on a fishing expedition applicant sought to raise a defence that the respondent's regulations do not have a rule against cashing of personal cheques in the company's treasury. While this may be so, it does not render Annexure J a useless piece of paper. It is a clear rule which must be read together with the main body of the regulations of the respondent. To make it worse it is clear from the evidence and papers before the court that this rule has been in existence since at least 1992 when applicant specifically was seriously reprimanded for cashing his personal cheques against company funds. His defence that he did not receive the copy of the letter written to Mr. Foulkes does not advance his case further because, he at least acknowledges the oral discussion they had with Mr. Macheli on this issue. Annexure J which he acknowledges before this court that he did receive and read to his staff was in effect a supplementation of that rule which he personally was made aware of in 1992. For these reasons we are of the view that the respondent's domestic tribunal's finding on the substantive fairness of applicant's dismissal was not an unreasonable one accordingly it must be allowed to stand.

Before this court the applicant also challenged the procedural fairness of his dismissal on two grounds. Firstly, he contended that it was wrong for the disciplinary enquiry to have found him guilty of both the main charge and the alternative charge. Secondly, he argued that the respondent's domestic tribunal relied on the 1992 incident without having made the applicant aware at the hearing that that incident would be relied upon.

This court has on divers occasions warned against litigants' equating of employers internal disciplinary proceedings with criminal proceedings. (See Seboloki Leleka .v. LTA Group 5 (Mohale Joint Venture LC131/96 (unreported) at p.6 and cases therein cited. Sebolai Senaoana .v. Christian Council of Lesotho LC45/96 (unreported) at p.4. NURAW .v. PEP STORES LC25/98 (unreported) at p.3). In answer to a question from Mr. Kennedy as to what his comment would be on this concern of the applicant, Mr. Annandale answered correctly, in our view that, the evidence before him supported the finding of guilt in both charges. It is significant that at the very beginning of the proceedings applicant's plea was "not guilty to both charges." In our view this is a clear indication that he appreciated that despite the use of the word "alternatively" he was being called upon to answer both charges. This inference is borne out by the respondent's disciplinary code at p.92 of the bundle which lists "very serious" offences and the commensurate penalty for the first offence. The offence is stated as "breach of company regulations – dishonesty." The penalty for the first offence is "dismissal."

Furthermore in the case of Sebolai Senaoana .v. Christian Council of Lesotho supra this court after quoting from a number of South African authorities stated, at p.5 of the typed judgment:

> *"The duty of the court goes beyond mere labelling of the offence for which the applicant was dismissed. The task is to go further and determine whether evidence before the court establishes a misconduct for which the applicant could be punished with dismissal."*

This remark was quoted with approval in the case of Clement Mothebe .v. Lesotho Flour Mills LC6/00 (unreported) at p.5. The court went on to quote from an article by Professor Brassey The dismissal of Strikes (1990) 11 ILJ 213. We feel that that quotation is relevant in casu and we reproduce it:

> *"The enquiry is into the facts, not what the employer in dismissing believed the facts to be. In matters of dismissal mistakes are easy to make; few employers are legally trained and the information they are given is often wrong or incomplete."* (emphasis added).

The underlined phrase clearly supports Mr. Annandale's evidence that his decision was based on the evidence and that the use of the word alternatively may just have been an innocent mistake.

He (Mr. Annandale) was clear in his evidence before this court that he is not legally trained but the finding he made was supported by the evidence. In this regard we are of the view that he cannot be faulted. It is clear to this court that after his cheque was dishonoured, the applicant instructed the cashier Mrs. Molapo to raise a debit note so that he could repay the amount in installments. The very fact that he tried to deny it and put the blame on the cashier is good basis on which to conclude that the applicant acted dishonestly. Mrs. Molapo's evidence in this regard was firm and she could not be shaken by intense cross-examination by Mr. Mohau. Actually, at the disciplinary hearing applicant could not contradict Mrs. Molapo's testimony that she was instructed by him (applicant) to raise the debit note. The tribunal's finding of applicant's conduct as dishonest cannot be faulted and this court is satisfied that the respondent have made a good case in this regard.

Finally, the applicant contended that the trial tribunal relied on the 1992 incident without making him aware of it. He further contended that the 1992 incident did not constitute a rule. If we were to start with this latter contention, it is quite clearly once again that tactic of the applicant to deny an existence of a rule if only to justify his wayward conduct. Under intense cross-examination by Mr. Kennedy the applicant started by saying he did not remember if Mr. Macheli told him in 1992 never to cash his personal cheques against company funds. He changed that position and evasively said he was "warned" for cashing his personal cheques, which really amounts to the same thing as being told never to cash the cheques and being given a warning for the act. He later conceded that the warning was infact an instruction which he admitted had no time frame, but added that he needed to have been reminded about it. These concessions put applicant's attack of the 1992 incident as not constituting a rule to rest.

Coming now to the issue that he was not made aware that reliance would be made on the 1992 incident. Mr. Kennedy for the respondent submitted that the tribunal's reliance on the 1992 incident was merely to underpin the point that the rule against encashment of cheques had become known to the

applicant as far back as 1992. This submission is borne out by the record of sanction imposed on the applicant where Mr. Annandale remarks:

> *"Mr. Taaso's personal file also reflects that he had been taken to task as early as 1992 for the cashing of personal cheques at branch level. He clearly knew that what he was doing was wrong but persisted.* (own emphasis).

This was a reaffirmation of the rule which as it turned out in applicant's testimony before this court was peculiarly within his knowledge. To show that this did not bother the applicant, he did not even take it up in his appeal in terms of the internal procedures of the respondent. We accordingly do not find any impropriety in this regard.

Applicant had also sought to show that he was being treated discriminately in that one manager in Teyateyaneng who had committed the same misconduct as himself was not disciplined. Now this was clutching at straws because it was specifically held by Mr. Annandale in his findings that since there was no evidence from both sides the matter should be investigated and if necessary action be taken. (p.9 of the record). It was reported in the evidence of Mr. Annandale that after investigation of the case no impropriety was found. The applicant did not challenge this testimony. In this court Mr. Taaso repeated the same unsubstantiated allegations as those he made before the enquiry. At the hearing (p.17 of the record) reference was made to a lady at branch 121 who committed a similar misconduct and who was disciplined. Applicant does not want to talk about that lady whose case was well known. He instead seeks cover under the mythical Teyateyaneng case, the facts of which seem to be peculiar to him alone. It is for these reasons that we are of the view that this case must not succeed and it is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 21ST DAY OF AUGUST, 2002.

L.A LETHOBANE
PRESIDENT

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

M. MAKHETHA
MEMBER **I AGREE**

FOR APPLICANT : **MR MOHAU**
FOR RESPONDENT: **MR KENNEDY**