IN THE LABOUR COURT OF LESOTHO

CASE NO LC 116/96

HELD AT MASERU

IN THE MATTER OF:

THABISO RAMOKOENA **APPLICANT**

AND

STANDARD CHARTERED BANK **RESPONDENT**

JUDGMENT

The applicant filed the present application against the then Standard Chartered Bank which has since been taken over by Nedbank Lesotho which is to all intends and purposes the respondent in the present Matter. The applicant was challenging his demotion by rank and salary as a penalty for an alleged misconduct. The present application was filed on the 22nd October 1996 and the applicant was challenging the fairness of his demotion on both the procedural and the substantive grounds.

By agreement of counsels the court was addressed on the procedural aspect of the case on the 10th July 1997. The court was by agreement required to make a ruling on that aspect of the case before proceeding to the merits. Infact the merits were only going to be proceeded into in the event of the applicant's case on the alleged procedural improprieties not being upheld. The procedural case was dismissed on 23rd July 1997. Thereafter, the matter was set down for hearing several times (about eight times in all)

but each time it was not able to proceed. It was finally heard on the 31st August, 1999 when the applicant gave his testimony in chief.

The matter was only able to be heard again on the 17th October, 2001 when the applicant was inconclusively cross-examined. It was not until another year later, 15th October 2002, that the matter was able to be heard with the applicant still in the witness box. On that day however, the applicant was able to conclude his evidence. Needless to emphasize this is most unfair on the witness and it can very well result in the miscarriage of justice as the witness cannot be expected to recall the events as clearly as he would, had the case been heard and disposed of while his memory of the events was still clear.

On the substantive side the applicant's case is that he did not commit any of the acts of misconduct he was accused of. In his heads of arguments however, Mr. Phafane for the applicant sought to once again raise a procedural argument. He contended in paragraph 2 of the heads that the applicant was demoted on the basis of a report of an investigator who did not testify at the tribunal. This is a completely new case which is surfacing for the first time in arguments. The nearest he came to suggesting it before the submission stage, is when he asked the applicant in re-examination if Mr. Ford (the investigator) was called before the disciplinary committee so that he (applicant) could challenge him. The question was clearly improper inasmuch as it was introducing a new case which the respondents have not had the opportunity to answer. It cannot therefore advance the applicant's case any further. Furthermore, the procedural aspect of the case was long disposed of and the court is now seized with the substantive fairness of the demotion.

Applicant was a Branch Manager of the respondent's Maputsoe Branch. On the 21st November, 1995 he appeared before a disciplinary enquiry where he was charged of knowingly, wrongfully and without authorisation.

1. paying against uncleared effects cheques drawn on Volskas Bank, Ficksburg Branch contrary to bank policy, rules and directives;
2. allowing "Kite Flying" which is specifically prohibited;
3. granting unauthorised overdraft to a customer.

Applicant's plea to the charges was that he was not guilty. In evidence before this court he repeated that he was not guilty of any of those acts with which he was charged. It is not for this court to reconstitute itself as the employer's disciplinary tribunal, and rehear the case which was before the tribunal. We fully associates ourselves with the remarks of Kroon J.A. in County Fair Foods (Pty) Ltd .V. Commission For Conciliation, Mediation and Arbitration and Others (1999) 20 ILJ 1701 at 1709 G-H where the learned judge stated;

> *"It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference therewith is only justified in the case of unreasonableness and unfairness."*

The question to decide is whether this court can deduce an unreasonableness and/or unfairness in the treatment of the applicant by the respondent. In doing this function the court will have regard to all the facts presented before the enquiry and assess whether in the light thereof the employer can be said to have acted unfairly, unreasonably, arbitrarily or capriciously.

It is common cause that as Branch Manager for Maputsoe Branch, the applicant was directly answerable to the Executive Director Personal Banking, Mrs. Emelyn Mapetla. It is also common cause that on the 29th September, 1995, Mrs. Mapetla wrote a letter to the applicant in which she inter alia, warned applicant about his practice of paying cheques against uncleared effects. A list of twelve high value cheques which had been paid despite not having been cleared was cited and applicant was required to confirm if they had since been paid. The applicant was in addition given an express instruction that "*with immediate effect, no cheques should be paid against uncleared effects and you are to confirm compliance"*

The applicant's response was that he personally clears cheques with the drawee banks to ensure that there were funds available. An investigation by Mr. Richard Ford, the respondent's Group Manager established that the applicant admitted that he did not have;

> *"……any authority to make payment against uncleared effects. He readily acknowledged the clearing period of 21 days as set by Standard Chartered Bank Lesotho for South African cheques and agreed that payment should not normally be effected until the "effect not cleared" date had expired. However, in respect of payment against "uncleared effects" he explained that provided he obtained an assurance from the drawee bank that funds were available to meet a cheque he would authorize payment on the understanding that by doing so he was not putting the bank at risk."*

At the disciplinary hearing the applicant insisted that he did not pay against uncleared effects because he personally cleared the cheques with the drawee bank before honouring them. The applicant stuck to that position even before this court. In answer to a question from Mr. Makeka in cross-examiantion, he said the rule against payment of uncleared cheques applied to junior officers below signing officer. He said from signing officer and those above, himself included, they had a discretion.

DW1 Mrs. Emelyn Mapetla's testimony was that despite her instructing applicant to stop paying against uncleared effects he had continued to do so. This in a way was confirmed by applicant whose evidence was that he paid cheques if the drawee bank had confirmed the availability of funds. He also admitted at the enquiry that that was not conclusive clearance because there was no undertaking that funds would be retained to meet the cheque on receipt by the drawee bank. Accordingly, the risk was not eliminated by the so-called clearance. The respondent's Standing Instruction To Officers are very clear. Instruction 4.3.4. an extract of which was handed to the court by the applicant (annexure "TR1") provides as follows:

> *"4.3.4. <u>Uncleared Effects</u>*
> *Do not pay against the deposit of a cheque which has not yet been cleared without reference to a Signing Officer. Always check the 'cleared' balance."*

Applicant on the other hand paid uncleared cheques without reference to the Signing Officer. When asked about this clear breach, under cross-examination, the applicant answered that as a Manager he can exercise his discretion. The rule however, is clearly prohibitive and it makes no room for discretion. Mrs. Mapetla's instruction in the letter of 29th September

1995 also left no room for discretion. In our view there is abundant evidence of breach of Company Rules and policy in respect of the issue of payment against uncleared effects.

The applicant was further charged with allowing what in banking is known as "kite –flying" or "cross-firing". The Standing Instruction in this regard is that officers must always be alert to kite flying. The Executive Director's letter of 29/09/1995 warned the applicant of a particular customer who was practicing kite-flying. In his response the applicant admitted as much and said he had called the customer and warned her against the practice. At the hearing he (applicant) admitted further that the customer did not stop the practice even after he warned her. He went on to say that he then decided to consult the customer's Ficksburg based banker Volskas which informed him that the customer's account is trouble free. He was then asked a direct question: "so did you then abandon any effort of stopping the kite-flying after visiting Volskas?" He answered "I did". (See page 6 of the text of disciplinary proceedings).

In his testimony before this court the applicant denied allowing kite-flying. His reason for denying was that according to the Standing Instruction definition, kite-flying is a practice of a one customer who operates accounts in two separate banks and uses one account to fund the other. In casu the accounts in the Ficksburg bank and the Maputsoe branch of the respondent were operated by different customers. Clearly, this testimony is an after thought, because that is not the reason why the applicant had allowed the practice to continue. In his own evidence he had allowed it because he had been told that the account was trouble-free. As for him he was clear that the customer was kite-flying.

Moreover, in his testimony at the enquiry he disclosed that the signatories to the Maputsoe and Ficksburg accounts were husband and wife. He admitted that he was aware that the two accounts were funding each other. (Page 4 of the text of disciplinary record). On the same page he explains that when he had called the customer to ask her about the account's operations she had told him that she was funding the account in Ficksburg and he went on to state at p.5 of the record.

> *"Being husband and wife you assume she would know about operations on the account (Ficksburg account).*

> *I then explained to her as to how to do it, that is, she should be bringing all the cash into Maputsoe account and then perhaps once a week sign one cheque to fund the Ficksburg account."*

The applicant was himself clear all along that the practice of the customer was incorrect. He however, permitted it in breach of the rules because he had an assurance that the customer's account was trouble –free. It appears from the rules that he could not escape liability on this basis. He had to have stopped that practice, but by his own admission he did not.

The applicant was further accused of allowing unauthorised overdrafts. On the 21st July 1995, the applicant was warned by the Executive Director of a customer's account that was overdrawn to the extent of M71 008.08 despite Loan Administration advising him (the Branch Manager) that the overdraft must be cleared. He was accused of allowing the overdraft to escalate instead. The letter emphasized that *"it is important that you observe the laid down bank regulation, as you simply cannot act outside your authority."* In the letter of 29th September, 1995, the Executive Director had to again raise the issue of an overdrawn account. She sought an explanation on who had authorised him (applicant) to grant the overdraft. The applicant's response was very defiant to say the least. This is what he said;

> *"As the manager (whether confirmed or otherwise), I feel I am placed in this position to see (monitor) the operations, to judge and make decisions. I find it unfair to be questioned as to who authorized an overnight overdraft. Again it must be borne in mind that here we deal with someone well known to the bank. As the manager I know this customer and his ability to pay. If it was someone else who does not frequent the bank or with no financial background, I would have <u>UNPAID</u> the cheques without reference."*

At the disciplinary hearing the applicant started by denying that he had granted unauthorised overdraft. When he was shown the overdrawn status of an account about which the Executive Director had to write him a letter on the 29th September, 1995 he conceded granting an overdraft which was not authorised. He sought to seek cover under the excuse that the overdraft was an overnight situation.

He argued that there are no standing instructions regarding the handling of such situations (overnight overdrafts). He was asked, "*did you ever enquire what you should do in such cases?" "I assumed that I was expected to use my discretion depending on the circumstances."* He answered. His assumption flies in the face of an instruction given inter alia, to him personally by the Head of Corporate and Institutional Banking by letter dated 18th April, 1995 as follows;

> *"…… it is appropriate to remind you all that, there are no lending authorities/discretionary powers in respect of credit to corporate or other business relationships currently given to any manager or officer apart from the Head of Corporate and Institutional Banking, and, of course, the Managing Director."*

In evidence before this court he continued to rely on that argument that he had a discretion. When he was asked under cross-examination where he got the discretion from, he said it goes with the position. Clearly this is clutching at straws. The letter of the 18th April, 1995 categorically takes away any discretionary power in respect of credit. In her evidence Mrs. Mapetla also said as much that the applicant had not discretionary powers. It is difficult to understand where he could have got the impression that he had a discretion from when the instructions are so clear. He evidently was acting beyond his authority and the management was justified in taking disciplinary action against him.

At page 2 of his heads of arguments Mr. Makeka correctly stated that "*the courts must uphold the determination of management unless the applicant can show that the determination was unreasonable, arbitrary or capricious."* The applicant had clearly committed the transgressions he was charged with. He admitted same before the disciplinary enquiry. His attempts to justify his actions before this court have failed to exenorate him from blame. We have not been able to discern any unreasonableness let alone arbitrariness in respondent's conduct. For these reasons the management's decision to demote the applicant cannot be disturbed. Indeed the applicant did not question the demotion itself. Accordingly there is no reason to interfere with it if the reasons for it are, as is the case, found to be justifiable. The application is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 10th DAY OF DECEMBER, 2002.

L.A LETHOBANE
PRESIDENT

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

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

FOR APPLICANT : **MR PHAFANE**
FOR RESPONDENT: **MR MAKEKA**