

IN THE LABOUR COURT OF LESOTHO

LC 49/11

HELD AT MASERU

In the matter between:

MOEKO MABOEE

APPLICANT

AND

MALUTI MOUNTAIN BREWERY (PTY) LTD

RESPONDENT

---

## ***JUDGMENT***

---

*Date: 23/11/11*

***Disciplinary procedure - Pending disciplinary enquiry against the applicant - Applicant seeking legal representation on the basis that the complexity of the charges levelled against him warrant that he be legally represented at the enquiry - Employer refusing to grant legal representation on the basis that its disciplinary code does not give entitlement to legal representation in internal hearings - Court restricted in its interference with administrative action - Application therefore dismissed.***

1. The applicant has approached this Court on an urgent basis seeking an order granting him permission to be represented by a legal representative of his choice at an impending disciplinary hearing. He prayed for and was granted an interim relief suspending the hearing which was contemplated on 21<sup>st</sup> October, 2011 pending the finalisation of this question. A ***rule nisi*** to this effect had been issued returnable on 28<sup>th</sup> October, 2011. On the said date the rule was extended following respondent company's expression of their intention to defend the matter. By consent of both Counsel, the rule was extended to 8<sup>th</sup> November, 2011 for hearing.

2. The applicant is employed by the respondent as a National Sales Manager. It is common cause that on 17<sup>th</sup> October, 2011 he received notification of a disciplinary enquiry to be held on 21<sup>st</sup> October, 2011. The allegations levelled against him impinged on the supply of catering equipment to the respondent company

purportedly under fraudulent circumstances. He averred in his founding affidavit that upon receipt of the said notification he consulted his lawyer who advised him that the nature of the charges warranted legal presentation. He communicated this information to the respondent, and by its letter dated 19<sup>th</sup> October, 2011 it refused the request on the basis that the matter was internal and ***“will be dealt with internally, i.e... no legal representation will be allowed in the proceeding.”*** Respondent’s disciplinary procedures indeed only provided for representation by a co-worker of the employee’s choice.

3. The applicant is thus seeking this Court’s intervention to order the respondent company to allow him to bring legal representation of his choice as he feels without it he will not be subjected to a fair administrative procedure. The grounds on which he based his apprehension may be summarised as follows:-

- (i) that the disciplinary charge is fraught with legal technicalities;
- (ii) that the hearing will just be a sham as the Chief Executive Officer, one Anthony Grendon had threatened that if he does not resign, he will dismiss him like he dismissed his girlfriend;
- (iii) that the charges levelled against him were extracted from the computer by IT experts and he would not be in a position to cross - examine them; and
- (iv) that generally, the respondent company is in the habit of dismissing employees subjected to disciplinary enquiries only for such dismissals to be declared unfair by the Directorate of Dispute Prevention and Resolution (DDPR).

4. In reaction, the respondent’s Managing Director contended that it is company policy to deny an employee faced with an internal disciplinary enquiry legal representation. He or she may be represented by a co-worker of his choice. He denied the existence of any legal technicalities in the enquiry to warrant legal representation, and also threatening the applicant with a dismissal.

5. In motivating the application on behalf of the applicant, Advocate Mohapi conceded that applicant has no absolute right to legal representation at a disciplinary hearing, but there are circumstances where an employee will be entitled to legal representation, each case being determined on its own merits. The criterion, he submitted, is based on the following factors enunciated in the

case of *Hamata v Chairperson, Peninsula Technikon IDC 2002 (5) SA 449 (SCA)* -

- (i) *Nature of the charges against the applicant;*
- (ii) *The degree of factual or legal complexity;*
- (iii) *The potential seriousness of the consequences of an adverse finding; and*
- (iv) *The fact that there may be a legally trained person presenting the case on behalf of the employer at the hearing.*

He contended that in applicant's circumstances, refusal to allow representation is likely to impair the fairness of the disciplinary proceedings. He submitted that the respondent company will anyway not suffer any prejudice if legal representation were allowed. He further argued that the company's disciplinary code is but a guideline and not law and as such amenable to be departed from when circumstances so demand as in the present case.

6. Advocate Loubser argued on behalf of the respondent that the applicant keeps referring to "*legal technicalities*" but makes very vague submissions lacking in detail as to what these "*legal technicalities*" rendering it very difficult for the Court to make a determination. He emphasized that the applicant does not give the nature of the legal arguments he intends to advance at the disciplinary hearing and only talks of certain preliminary legal points he intends raising. As far he is concerned, the applicant has failed to give sufficient information why he needs legal representation. He contended that the allegations levelled against the applicant are factual and as far as he is concerned the matter is not complex as can be ascertained from the charge sheet. He also referred to the *Hamata* case (*supra*) which he submitted confirmed that the right to legal representation at internal hearings is not absolute but he pointed out that it went further to hold that it is the disciplinary panel that has a discretion to allow it.

7. He pointed out that unlike the Republic of South Africa, Lesotho has no law regulating legal representation at internal hearings and relies on the common law. He explained that flowing from Section 33 (3) of the South African Constitution, the Promotion of Administrative Justice Act 3 of 2000 was promulgated and it reaffirmed the principle that a fair administrative procedure depends on the circumstances of each case. He indicated further that Section 3

(2) thereof makes provision for legal representation only in serious or complex cases. As far as he was concerned, the enquiry against the applicant will be simple and factual in nature, and there will be no need for legal representation. He insisted that internal hearings have to be kept simple.

### ***THE COURT'S ANALYSIS***

8. The need for a fair procedure in administrative decisions is fundamental, and has its roots in one of the administrative law principles of natural justice, the ***Audi Alteram Partem Rule*** (the right to a fair hearing). In the context of disciplinary enquiries the rule requires that employees be afforded an opportunity to defend themselves against allegations made, and employers to conduct disciplinary enquiries in a fair manner. The issue then becomes whether in applicant's circumstances, a denial to legal representation at the contemplated hearing violates the tenets of a fair hearing.

9. By and large, disciplinary procedures do not permit employees the right to be represented at disciplinary hearings by external persons, including lawyers. Representation is usually limited to a co - employee. Where the employer's code is ambiguous it may be interpreted as including the possibility of representation by a lawyer or a union official - see ***Ibhayi City Council v Yantolo (1991) 12 ILJ 1005 (E)***. The rationale behind this restriction is normally that lawyers in particular would unnecessarily complicate what is supposed to be an otherwise informal process. Workplace codes may however provide otherwise.

10. There is generally no absolute right to legal representation during disciplinary hearings. It is only recognised in the context of Courts of law - the right to a fair trial. In some jurisdictions such as South Africa and the United Kingdom, courts have reiterated that there is no absolute right to legal representation at disciplinary hearing but have held that it is advisable in difficult and complex cases. South African Courts have generally adopted this approach in a number of cases including the supreme Court case of ***Lace v Diack & Others (1992) 13 ILJ 860 (W)*** and in a recent decision of ***Hamata (supra)*** the Court went further to lay down principles which have to be taken into account in exercising a discretion whether or not to allow legal representation. Applicant's Counsel alluded to them as well, and if we may reiterate them, they are; ***the degree of factual or legal complexity; the potential seriousness of the consequences of an adverse finding, the availability of suitable qualified lawyers and the fact that there is a legally trained judicial officer presenting the case against the employee.***

11. South Africa has actually legislated on the right to legal representation at internal hearings in complex cases through the Promotion of Administrative Justice Act No. 3 of 2000, thereby accommodating flexibility in the application of the common law principle restricting legal representation at internal proceedings. Its Constitution provides in Chapter 2, Article 33 that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. It also empowered the Legislature to enact national legislation to give effect to these rights which resulted in the ushering in of the Promotion of Administrative Justice Act 3 of 2000. The Act provides in Section 3 (3) (a) that in order to give effect to the right to a procedurally fair administrative action, an administrator is given a discretion to give an affected person an opportunity to obtain legal representation in serious or complex cases.

12. In Lesotho the law is silent on the issue. It is trite that in such situations resort is had to the common law, which as aforementioned provides that there is no absolute right to legal representation at internal hearings. Courts can be and are indeed agents of change but our jurisprudence and legislative intent has been not to interfere with administrative action at the administrative level. The question of representation has been left to the discretion of the employer, to be reasonably exercised, of course. Even in South Africa one observed that it is not a right that is easily inferred. The emphasis seems to be on the curbing of delays and discouraging legal technicalities in the resolution of labour disputes in the quest for a labour dispute machinery that is informal, speedy, accessible, and affordable. We unfortunately do not have a provision in our legislation analogous to the South African position. The right to legal representation at disciplinary proceedings remains the discretion of the employer.

13. The reluctance to embrace legal representation in labour disputes is evident from our statutes. Even at national level the supreme law of the land only limits the right to legal representation to criminal cases. Article 12 (1) of the Constitution of Lesotho guarantees a person charged with a criminal offence a right to be afforded a fair hearing within a reasonable time by an independent and impartial Court. It goes further to provide in Subsection (2) (d) that:

***Every person who is charged with a criminal offence-***

***shall be permitted to defend himself before the court in person  
or by a legal representative of his own choice***

Legal representation at the DDPR is also limited. In terms of Section 228 (A) of the Labour Code (Amendment) Act, 2000, legal representation is only permissible where the parties agree thereto or if the Arbitrator decides that it would be unreasonable to expect a party to deal with the dispute without legal representation. In coming to a decision in this regard, the Arbitrator must consider certain questions, namely, the nature of the question to be adjudicated; the complexity of the dispute and the comparative ability of the opposing party to deal with the arbitration of the dispute. This Court is no exception, Section 28 of the Labour Code Order, 1992 limits legal representation to cases where both parties are legally represented.

14. The spirit of the law seems to be to move away from strict legality to the equitable, informal, fair and reasonable exercise of rights. The question always being whether the employer acted in a fair, reasonable and equitable manner in the exercise of his administrative authority. Employers have a right to manage their enterprises as long as they act within the confines of the law. The learned author Baxter stated in his book on Administrative Law 3<sup>rd</sup> ed., at p. 545 that;

***Except where legislation prescribes otherwise, administrative bodies are at liberty to adopt whatever procedure is deemed appropriate, provided this does not defeat the purpose of empowering legislation and provided that it is fair.***

15. A disciplinary enquiry as the name suggests is but an enquiry and is generally factual. It is in essence concerned with establishing whether or not an employee is on a balance of probabilities guilty of the alleged misdemeanor. The general requirement is that the accused person should know the nature of the accusation and have an opportunity to state his/her case and the employer on the other hand has to act in good faith - see ***Mondi Paper Products v Tope [1997] 3 BLLR 263 (LAC)***. Disciplinary proceedings are essentially informal and should not be judged according to standards expected of courts of law.

Having considered all the papers filed of record and submissions of Counsel coupled with the legal position, we conclude that the discretion to afford legal representation at disciplinary hearings rests with the employer. We find ourselves with no alternative but to dismiss the application.

We are not persuaded to award costs against the applicant as prayed by respondent's counsel. There is therefore no order as to costs.

**THUS DONE AND DATED AT MASERU THIS 23<sup>rd</sup> DAY OF  
NOVEMBER, 2011.**

**F.M. KHABO**  
**DEPUTY PRESIDENT OF THE LABOUR COURT**

**M. MPHATS'OE**  
**MEMBER**

**I CONCUR**

**R. MOTHEPU**  
**MEMBER**

**I CONCUR**

**FOR THE APPLICANT:                      ADV., P.L. MOHAPI**

**FOR THE RESPONDENT:                    ADV., P.J. LOUBSER**