IN THE LABOUR COURT OF LESOTHO	**LC/REV/07/17**
HELD AT MASERU	
In the matter between:	
`MATIKOE LETSIE	**1ST APPLICANT**
`MAMOTIPI RALETLALA	**2ND APPLICANT**
TOPOLLO MOSIUOA	**3RD APPLICANT**
NTSINGOANA SELEPE	**4TH APPLICANT**
`MAREITEBOHETSE MOHLATSANE	**5TH APPLICANT**
TEBOHO MOQEKELA	**6TH APPLICANT**
SEKETE PHOHLO	**7TH APPLICANT**
MOLISE RAMAILI	**8TH APPLICANT**
and	
THE CHIEF EXECUTIVE OFFICER - FIRST NATIONAL BANK	**1ST RESPONDENT**
THE CHAIRPERSON, DISCIPLINARY HEARING - FIRST NATIONAL BANK	**2ND RESPONDENT**
FIRST NATIONAL BANK	**3RD RESPONDENT**

JUDGMENT

20/04/17

- ***Practice and procedure - interdictions - Consideration by the Court of an urgent application brought ex parte by suspended bank employees requesting the interdiction of the bank from proceeding with contemplated disciplinary hearings - Employer considering this an abuse of the process of Court - Court finds action not to have been an abuse in the circumstances that were presented to it;***

- ***Legal representation in disciplinary proceedings - Court established that the determination of whether legal representation may be necessary in a particular case lies with the disciplinary tribunal unless such a discretion has been expressly excluded - The appropriate route is therefore for parties to channel their request for legal representation to the Chairperson of the employer's disciplinary panel - Court concluding that it was approached prematurely on the issue;***

- **Employees further seeking some documentation to prepare for their contemplated hearings - Court rules that the request be directed to the Chairperson of the disciplinary panel;**

- ***Costs - Respondent's Counsel seeking costs on a punitive scale on the basis that the applicants brought a vexatious application - Basic principle is that costs follow the result/event - However, in labour matters Courts should strive to strike a fair balance between not unduly discouraging workers, employers, unions and employer organisations from approaching it, and on the other hand allowing parties to bring frivolous cases to the Court - Court finds no frivolity in the claims brought by applicants, and declines to grant a costs order.***

INTRODUCTION

1. Applicants lodged an urgent ***ex parte*** application for an interim order interdicting the respondents from proceeding with disciplinary enquiries contemplated against them. Applicants moved this application on Monday, 13th February, 2017. Having read papers filed of record and their Counsel's submissions the Court granted the prayers that were sought ***ex parte*** on the basis of the urgency expressed by their Counsel and further issued a ***rule nisi*** returnable on Monday, 06th February, 2017 ***albeit*** erroneously noted as Monday, 16th February, 2017. It was because of this error which was, unfortunately, never brought to the attention of the presiding officer that the ***rule*** was only considered on 16th February, 2017 which was a Thursday instead of Monday, 06th February. The Court wishes to register its apology over this mishap.

2. Applicants' complaints may, in a nutshell, be summarised as follows:-

   a) That their suspensions be declared illegal in that they were not afforded an opportunity to make representations prior to being suspended;

   b) That they be allowed legal representation at the disciplinary hearings; and

   c) That they be provided with the forensic report that informed their suspensions before they can attend the disciplinary hearings.

3. Prayers (a) and (c) were among the prayers granted ***ex parte*** by the Court. Reacting to applicants' claims, respondents' Counsel contended that the grant of the ***ex parte*** application was both a denial of the ***audi alteram partem*** rule, and an abuse of the Court's processes. He argued further that this Court has no jurisdiction to entertain the reliefs sought as the relevant forum was either the Directorate of Disputes Prevention and Resolution or the disciplinary tribunal. In the circumstances, he prayed that the ***rule*** be discharged and the application be dismissed with an order for punitive costs.

Comment [mP1]:

Comment [mP2]:

THE EX - PARTE APPLICATION

4. This Court has power to grant interim or interlocutory reliefs in terms of ***Rule 22 (1) of the Labour Court Rules, 1994*** which and such may be granted ***ex parte***[1] depending on the circumstances of each case. As aforementioned, applicants sought ***ex parte*** reliefs interdicting the respondents from proceeding with disciplinary hearings contemplated against them until they are furnished with the forensic audit report which, they alleged, formed the basis of their suspensions. They averred that they needed the said report to prepare their defences and felt that it would be prejudicial to them for the bank to go ahead with the hearings despite their incessant requests for the report.

5. When this application was sought one of the applicants' hearing was supposed to proceed on the same day at 1000 hours. The Court was persuaded to grant the application ***ex parte*** because of the limited time. It should be noted that the Court commences operations at 0900 hours. Courts are generally reluctant to grant interdicts particularly ***ex parte*** but it felt the circumstances presented to it warranted its prompt intervention to avert the alleged prejudice to the applicants in the impending disciplinary processes. The Court was further motivated in granting the reliefs sought by the fact that they were but interim and had no final effect. The prayers that were granted ***ex parte*** were ***prayers 1(a), (b), (c), (d), (e) and (k)*** of the Notice of Motion. The net effect of these prayers was a temporary stay of the disciplinary hearings in respect of the eight applicants. It emerged that a lot of correspondence had been exchanged between the parties in the period leading to the disciplinary hearings relating to documents that would purportedly be used at their hearings.

6. Following the grant of the ***rule nisi*** referred to above, parties came to Court on the return date, 16th February, 2017, with respondents having to show cause why the ***rule*** could not be confirmed. The rule was vehemently opposed and was extended to 06th April, 2017 for submissions.

LEGALITY OF THE SUSPENSIONS

7. A suspension may be imposed either as a precautionary measure pending disciplinary action or as a form of a disciplinary penalty.[2] Applicants' suspensions can be classified as precautionary. Precautionary suspension is generally permitted for a reasonable period if the employer ***bona fide*** believes that such an action is necessary for good administration and he or she continues to pay the employees.[3] Applicants sought to challenge the legality of their suspensions on

[1] Rule 23 of the Labour Court Rules, 1994
[2] John Grogan - Workplace Law, Jutalaw, 11th ed., 2014 at p. 160
[3] supra at p. 161

the basis that they were not afforded a hearing prior thereto. In our view, the timing of their action was belated. They did not act swift enough. As it is, a precautionary suspension is imposed pending a disciplinary action. It is a precursor to a disciplinary hearing and as soon as a disciplinary action is initiated, it falls off. Thus applicants' challenge of their suspensions at this stage is futile because the bank has already initiated the process of disciplinary hearings against them. The action has therefore been overtaken by events. It is common cause that applicants were suspended around January, 2017 and served with notices of hearings on different dates with 07th and 08th applicants on 31st January, 2017 and 02nd February, 2017 on 1st to 6th applicants. This application was lodged on 13th February, 2017 with disciplinary hearings already in the pipeline. This prayer is therefore dismissed.

LEGAL REPRESENTATION

8. Applicants prayed, ***inter alia***, that the respondents be ordered to afford them an opportunity to be legally represented at the disciplinary hearings. The bank's Disciplinary Code and Procedure affords parties a right to be represented by a co - employee at the disciplinary hearing[4] and is silent on legal representation. As it is, the ***Labour Code Order, 1992*** is silent on legal representation in disciplinary proceedings. In terms of our common law, a person does not have an absolute right to be legally represented before tribunals other than courts of law. The South African Supreme Court of Appeal when considering the issue of legal representation in disciplinary proceedings in ***Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others***[5] confirmed the common law position but emphasised that although the right to legal representation is not absolute at common law, disciplinary proceedings have to be conducted fairly and in order to achieve fairness it might be necessary for an employee to be afforded legal representation. According to this judgment, a discretion to afford legal representation to employees before disciplinary tribunals is taken to have been intended unless expressly excluded. This case has been cited with approval by the Labour Appeal Court in ***Maboee Moeko v Maluti Mountain Brewery (Pty) Ltd***.[6]

9. Applicants therefore have to approach the Chairperson of the bank's disciplinary panel being the one vested with the discretion to determine whether or not the tenets of fairness would best be served by legal representation, regard being had to the circumstances of each application that comes before him or her. Courts' powers are only confined to the determination of whether a denial of legal representation was fair or reasonable. A disciplinary hearing, properly conducted,

[4] Annexure "AA 10" to the respondents' answering affidavit.
[5] 2002 (5) SA 449 (SCA)
[6] LAC/CIV/A/07/11

is but an enquiry. Relying on the above authorities, applicants' prayer for legal representation at the disciplinary enquiry has to be addressed to the Chairperson of the bank's disciplinary panel for his or her consideration. Courts cannot usurp powers of internal disciplinary mechanisms. They are reluctant to interfere with executive or administrative decisions of functionaries statutorily vested with powers to make decisions. Courts can only intervene where such decisions are found to be arbitrary, capricious, irrational, or actuated by malice.

PROVISION OF THE FORENSIC INVESTIGATION REPORT

10. By the same token, a request for any documentation that applicants feel would build their defence should be referred to the Chairperson of the respondent's disciplinary panel. Courts cannot take over the work of disciplinary panels. Power to discipline employees is a managerial prerogative. Employers have a duty to maintain discipline at the workplace. This is a duty recognised by the common law. What the law requires is that this right to discipline be exercised fairly and therefore places a duty on the employer to have disciplinary processes conducted fairly.

ATTORNEY AND CLIENT COSTS

11. Respondents' Counsel implored this Court to mulct with costs on an attorney and client scale for bringing a vexatious application. The Court has a discretion to award such costs as may seem just to it[7] in any proceedings before it. The general rule is that ***"costs follow the event"*** or the result and the successful party will normally be awarded his or her costs.[8] The order of costs on an attorney and client scale is an extra - ordinary one which should be reserved for cases where there is clearly a vexatious and reprehensible conduct on the part of a litigant.

12. An order for costs on an attorney and client scale is generally rare in the Labour Court and is a deviation from the general premise.[9] The general rule of practice that costs follow the result does not govern the making of costs orders in the Labour Court. Such orders are made in accordance with the requirements of law and fairness. Explaining the rationale behind this principle Zondo JP pointed out in the decision of the Labour Appeal Court in ***MEC for Finance: Kwazulu - Natal and Another v Dorkin NO and Another***[10] that:

> ***…[T]he norm ought to be that cost orders are not made unless those requirements*** [of law and fairness] ***are met. In making decisions on cost orders this Court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employer***

[7] Rule 56 (1) of the Labour Court Rules, 1994
[8] Khaketla v Malahleha and Others LAC (1990 -1994), 275.
[9] See Rudman v Maquassi Hills Local Municipality and Others (2014) 35 ILJ 765 (LC)
[10] [2008] 6 BLLR, 540 (LAC), (DA 16/05) [2007] ZALAC, 34 at para 19.

organisations from approaching the Labour Court and this Court to have their disputes dealt with and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, but if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes…

13. Generally, a fair balance has to be struck between the interests of both the employer and employees when making orders of costs. The requirements of law and fairness are paramount. People should feel free to approach Courts without a threat of costs hanging over their heads. We did not discern any frivolity in applicants' claims and are therefore not inclined to award costs against them as prayed by respondents' Counsel, particularly not on the attorney and client scale.

DETERMINATION

14. Having considered and analysed papers filed of record and submissions tendered by both Counsels, the Court comes to the following conclusion:-

a) That the *rule nisi* issued on 13th February, 2017 is discharged;

b) That prayers relating to legal representation and provision of the forensic audit report be dismissed; and

c) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 20TH DAY OF APRIL, 2017.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

P. MOLAPO **I**
CONCUR
ASSESSOR

S. MAKHASANE **I**
CONCUR
ASSESSOR

For the applicants - Adv., R. Setlojoane, R.Setlojoane Chambers
For the respondents - Adv., Woker, Cowan - Harper Attorneys c/o Webber Newdigate.

ANNOTATIONS

STATUTES / RULES

Labour Code Order, 1992
Rule 22 (1) of the Labour Court Rules, 1994.

CITED CASES

Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others, 2002 (5) SA 449 (SCA)
Maboee Moeko v Maluti Mountain Brewery (Pty) Ltd, LAC/CIV/A/07/11
Khaketla v Malahleha and Others LAC (1990 -1994), 275
Rudman v Maquassi Hills Local Municipality and Others (2014) 35 ILJ 765 (LC)
MEC for Finance (KZN) and Another v Dorkin [2008] 6 BLLR, 540 (LAC), (DA 16/05) [2007] ZALAC, 34.

LITERATURE

John Grogan - Workplace Law, Jutalaw, 11th ed., 2014.