IN THE LABOUR COURT CASE NO.LC/59/95

HELD AT MASERU

IN THE MATTER OF:

MAISAAKA 'MOTE APPLICANT

AND

LESOTHO FLOUR MILLS RESPONDENT

J U D G M E N T

Applicant was employed by the respondent as an accounts clerk. On the 24th November 1993, a registered letter which had been collected from the post office that day disappeared. Investigations revealed that the mail bag was opened by the applicant on that day. On the 18th January 1994 the applicant was suspended on full pay pending further investigations into the disappearance of the letter. On the 10th March 1994, applicant appeared before a disciplinary enquiry charged with the disappearance of the said letter.

On the 16th March applicant was dismissed for having *"... lost or misplaced or caused the loss or misplacement of this registered letter."* On the 25th March 1994, applicant lodged an application in the High Court seeking nullification of her dismissal on the grounds that she was not given a fair hearing, because she was not given a written charge before the hearing and she was refused legal representation at the enquiry.

On the 4th April 1995, the High Court transferred the application to this court. It was heard on the 20th September 1995. At the start of the hearing respondent raised a point in limine to the effect that the application is time barred, because it has been filed in this court after the lapse of the six months prescribed by Section 70 of the Code. The court reserved its decision on this point and proceeded to hear the merits of the case.

It is common cause that at the time that the applicant was dismissed this court was not yet established. However, the time limit for presentation of claims for unfair dismissal was already six months which is prescribed by Section 70 of the Code. Within one week of her dismissal applicant had lodged an application in the High Court challenging her dismissal as unfair. The case could not be heard until a year later, when it was referred to this court. The institution of the case in the High Court clearly broke the period of prescription. We are therefore satisfied that the case has not been filed out of time.

When addressing the merits, Mr. Phoofolo for the applicant relied only on one ground for seeking nullification of applicant's dismissal namely, respondent's refusal to permit applicant to be represented by an attorney. It can therefore, safely be deduced that he abandoned the other ground relating to failure to give applicant written charges. Mr. Phoofolo submitted that since the rules of the respondent are silent on the issue of representation it cannot be assumed against the applicant that legal representation is excluded. He pointed out that the right to legal representation can only be excluded expressly. We shall return to this argument later.

He referred to ILO Recommendation 166 on the Termination of Employment, in particular Article 9 which provides in part that *"a worker should be entitled to be assisted by another person when defending himself."* He contended that in terms of Section 4(b) of the Code provisions of the Code are not to be interpreted in a way that will derogate from the provisions of any International Labour Conventions which

Note 11

have entered into force for the Kingdom of Lesotho. It is common cause that Lesotho is not a party to the Termination of Employment Convention 158 of 1982. The provisions of Section 4(b) of the Code are therefore not applicable in this case.

Mr. Phoofolo submitted further that Section 12(8) of the Constitution of Lesotho entrenches the right to a fair hearing and that if a person is refused representation by a person of his choice he is denied a fair hearing. We shall treat this argument together with the first argument because they only differ in premises, but lead to the same conclusion.

It is significant that ILO Recommendation 166 of 1982 does not specify the type of representation that an employee appearing before a disciplinary enquiry should have. It merely says that such an employee must be entitled to be assisted by another person. It seems to the court that while an employee charged before a disciplinary enquiry can claim right to representation, he cannot equally claim as a right, the type of representation that he wants to represent him, unless the rules of the organisation, or the collective bargaining agreement between the employer and a representative trade union, or a statute accord him that right.

Mr. Phoofolo put the emphasis at the wrong place when he said if the rules are silent, it must be assumed in favour of the employee that legal representation is not excluded. There is a plethora of authorities to show that legal representation in a disciplinary enquiry is not a right unless expressly given. (See Ntsabiseng Moshebesha v. Lesotho Bank, Case No. LC/20/94 (unreported) and the authorities cited therein). Baxter in his Administrative Law (1984) at p.542 says the following:

> *"fair hearing need not necessarily meet all the formal standards of the proceedings adopted by the courts of law."*

And at p.543,

> *"The courts have refused to impose upon the administration the duty to hold trial-type hearings where these are not prescribed by statute."* (emphasis added).

Section 12(8) of the Constitution to which we were referred by Mr. Phoofolo deals with hearings conducted by courts of law or adjudicating authority prescribed by law. It is trite law that the disciplinary enquiry before which the applicant appeared is neither a court of law nor a body established by statute. It is equally trite law that notwithstanding the fact that it is not a court or a body established by statute, the committee is enjoined to act fairly in conducting applicant's disciplinary hearing. As Baxter supra puts it at p595 *"the duty to act fairly is nothing other than the duty to observe the principles of natural justice expressed in more fundamental terms."*

The principles of natural justice are inherently flexible and have no fixed content. The fairness or otherwise of the procedure followed in any particular case will depend on the circumstances of that case. Thus in National Union of Mineworkers & Others .v. Driefontein Consolidated Ltd (1984) 5 ILJ 101 at 145 Landman Ad hoc Member as he then was held that *"it does not lie within the competence of this court to lay down rules of procedure which an employer should follow so that a dismissal will be fair. The performance of such a function would amount to blatant legislation."* Cameroon in his article, The Right To A Hearing Before Dismissal, Part 1 (1986) 7 ILJ 183 at 185 says that:

> *"the whole field of proper labour relations is characterised by an inherent flexibility, and natural justice should not be led into the trap of strict legalism."*

Baxter supra at p.545 submits:

> *"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 the empowering legislation and provided that is fair."*

Disciplinary proceedings are an internal administrative process at which outside representation, in particular by a legal practitioner is seldom permitted. As it was pointed out in Van Lill .v. Basil Read Holdings (1993) 4 SALLR 4(10) (unreported), outside representation is often in conflict with the employer's disciplinary code. Often lawyers' involvement result in long drawn out proceedings and according to Baxter it over-judicializes the proceedings. —In line with Baxter's submission, it was decided in Dlali and Others .v. Railit (Pty) Ltd (1989) 10 ILJ 353 that the type of representation permitted the employee at the disciplinary hearing is at the discretion of the employer. The employee's right to some representation is however, in terms of the guidelines provided in ILO Recommendation 166 of 1982 incontestable. — As to what form the representation takes, is unless prescribed by statute, rules of the organisation concerned, or Collective Bargaining Agreement, subject to what the employer says it will take, provided the employee is given the liberty to choose. In other words the employer must not appoint a representative for the employee. We are not persuaded that the fact that applicant was denied representation by a lawyer has affected the hearing that he was given. Accordingly the application is dismissed.

THUS DONE AT MASERU THIS 9TH DAY OF NOVEMBER 1995.

L. A. LETHOBANE

PRESIDENT

S. LETELE I CONCUR
MEMBER

A. KOUNG I CONCUR
MEMBER

FOR APPLICANT : MR. PHOOFOLO
FOR RESPONDENT : MR. MAKEKA