

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

THE STANDARD BANK , P.L.C. Appellant
and
LESOTHO UNION OF BANK EMPLOYEES Respondent
(LUBE)

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 17th day of August, 1984.

This is an appeal against the finding of the Unfair Labour Practices Tribunal that, in terminating the services of one Bahlakoana Moliko, an employee of the Appellant bank and a member of the Respondent union, the appellant was guilty of unfair labour practice. The appeal was also against the subsequent order framed in the following terms :

"(1) Respondent must restore the position of Mr. Moliko i.e. Mr. Moliko must be reinstated to the position he held before he was dismissed. It was made clear at the beginning of this proceedings in July last year that Mr. Moliko was still unemployed and awaiting the outcome of this case. His reinstatement is not going to force him to leave another job.

(2) Compensation : Respondent must pay Mr. Moliko the sun of M14,640-32 being loss of earning from 1st June, 1982 to 14th April, 1983.

Respondent must pay costs on the High Court scale."

The ground on which the appeal is based is that there was no evidence to support a finding of unfair labour practice and the subsequent order was, therefore, unjustified.

Before the commencement of the hearing of this appeal Mr. Harley who appeared for the appellant made an application that a record of proceedings compiled from the notes made by a

certain R.D. Bedingham who was a witness in the court a quo should be accepted and used as the official record in preference to the record compiled from the notes made by the Chairman of the Unfair Labour Practices Tribunal. The application was opposed by Mr. Sello, counsel for the Respondent.

I am not aware of any provision of the Rules which authorises that kind of procedure and I accordingly refused the application.

It was common cause that on 18th June, 1982, the respondent union addressed a letter to the Registrar of Unfair Labour Practices Tribunal in the following words :

"In terms of Section 61 of the Trade Unions and Trade Disputes Law No. 11 of the 1964, we hereby lodge a complaint against the Standard Bank Limited of Lesotho. We charge that the said bank is guilty of an unfair labour practice in terminating the services of our member, one Bahlakoana Moliko and hereby call upon you to summon the Unfair Labour Practices Tribunal to hear our case.

We annex hereunto an affidavit by the said Bahlakoana Moliko."

The appellant bank intimated its intention to oppose the matter and one Mr. Nigel Southey, the Manager of the bank, duly filed the opposing affidavit. The Respondent union in turn filed a replying affidavit again deposed to by Bahlakoana Moliko.

When the case eventually came before the Unfair Labour Practices Tribunal for hearing either of the litigants was afforded the opportunity to lead viva voce evidence.

In both its affidavits and verbal evidence, the case made out by the respondent union and not really disputed by the Appellant bank was, in a nut shell, that on 13th October, 1971, Moliko had concluded an employment contract with the Appellant. The terms of that contract were written in a document styled "Articles of Agreement"

3/ duly signed

duly signed by the contracting parties.

When he joined the bank services, Moliko also became an active member of the Respondent union.

His efficiency in the performance of his duties earned Moliko a series of rapid promotions culminating in his appointment to the position of Assistant Manager at the Maseru branch of the bank in September, 1980. On 31st May, 1982, Moliko's services with the bank were, however, terminated.

According to the Respondent union, the management of the bank had never complained that Moliko was incompetent in the performance of his bank responsibilities. Moliko's problems with the bank only started in February, 1982, against the following background: The Respondent union called a general strike for all its members from 22nd to 23rd February, 1982. Another strike was called from 23rd to 26th March, 1982. On 4th April, 1982, the Respondent Union banned all overtime work for its members. Moliko was one of the union members who participated in the strikes and the ban on overtime work.

Following Moliko's participation in the strikes and the ban on overtime work, Mr. R.D. Bedingham, the Chief Manager of the bank, called him into his office and asked him whether he was on the side of the Union or the Management. Moliko told him that the Management had already indicated that he was on the side of the Union because when they wrote letters to the members of the union threatening to expel them if they participated in the strikes, the first letter was his. After that meeting with him, Bedingham began writing to Moliko letters which showed his disapproval of the latter's having participated in the strikes and the ban on overtime work called by the Respondent Union.

The Union contended, therefore, that Moliko could not have been dismissed as a result of inefficiency in the application to his bank duties. On the contrary, the dismissal was an act of victimization for his participation

4/ in the activities

in the activities of the Union. The dismissal was for that reason an act of unfair labour practice as defined in Section 61(2), Part XI of Trade Unions and Trade Disputes Law No. 11 of 1964.

In support of its contention that Moliko's dismissal was an act of victimization for participation in the activities of the Union and, therefore, unfair labour practice, the Respondent union called, apart from Moliko himself, Francina Mohasoa, Potso Nkuebe and Linkeng Mapetla who all testified to have been shocked by the dismissal of Moliko whom they regarded as very efficient in the performance of his bank duties. They, therefore, saw his dismissal as an act of victimization.

In its affidavit and verbal evidence, the appellant bank denied the allegation that prior to February, 1982, the management had never complained about Moliko's efficient application to his bank duties and pointed out that during 1981, Moliko was pursuing part time Degree studies with the National University of Lesotho when it was noticed that on 2 or 3 afternoons a week he was leaving the office early, and while other people (including the Manager) were working overtime, in order to attend classes for his part time studies. That obviously interfered with Moliko's efficient application to his bank responsibilities in the sense that while there was work to be attended to and other people were pulling their weight to cope up, he was giving preference to his extra-mural studies. The management was unhappy with that state of affairs and in December 1981 had to advise Moliko either to make alternative arrangements that would fit in with his bank responsibilities or else cancel his course of studies where they conflicted with his responsibilities at the bank. He opted for the second alternative.

The Respondent could not gainsay Appellant's evidence that in 1981 the management complained that Moliko's private studies were adversely interfering with his bank duties and had to be advised against it. That being so,

5/ I fail to

I fail to apprehend how the allegation that prior to February, 1982 the Management had never complained about Moliko's application to his bank responsibilities could be accepted as the truth. The allegation was clearly contradictory to undisputed evidence and for that reason could not be sustained.

Although he conceded to have called Moliko into his office Bedingham denied that he had asked him whether he was on the side of the Union or the Management. All he did was to tell Moliko that in order to complete his duties satisfactorily he was required to work a certain amount of overtime.

It would appear that the Tribunal preferred the version of Moliko to that of Bedingham on this issue. As Bedingham was alone with Moliko, it seems to me it was the word of one against the other. It was perhaps, the question of credibility for which the Tribunal before which the two gentlemen appeared and testified was the best judge. One should, therefore, be rather reluctant to be too quick to interfere with the finding of the Tribunal

The evidence that Moliko's problems with the Appellant bank only started in February, 1982 was, likewise, denied by the Appellant bank in whose evidence although he had admittedly cancelled his course of studies the advice given in December 1981 regarding his private studies was apparently not well received by Moliko, for on 16th January, 1982, he addressed to the manager, a letter annexure A1 - which clearly demonstrated his change of attitude towards the management.

According to the appellant, the letter came out of the blue in as much as it was not a reply to any letter previously directed to him by the manager. It was referring to letters which the manager had addressed to some members of the staff and issues previously discussed between the manager and Moliko himself.

It may be mentioned at this juncture that the Tribunal saw no change of attitude, on the part of Moliko,

6/ in this letter.

in this letter. I have, however, also read the letter. It is unnecessary to go into all its details, suffice it to say it is clearly critical of the manager and its tone somewhat lacking in decorum if not sarcastic. It starts off in this fashion:

"Since letter writing has turned out to be a normal practice for our office, I think I may as well follow suit and write a letter.

I must point out, this, according to me is a very unfriendly way of management and a letter should be written ONLY when ABSOLUTELY NECESSARY.

One doesn't leave a member of staff to make a mistake only so that one can later write him/her a letter. You suggested on Saturday 9th January, 1982 that we let Savings Bank check clerks to leave office so that you could later write them letters.

The system is time consuming and very laborious. I feel our only typist is overloaded with unnecessary or uncalled for letters and some very important returns are being given second preference to the manager's letters (Form 140G 31.12.1981).

I have previously verbally mentioned to you that letters on your desk could be easily cut off 50% by :

1. delegation and
2. verbal discussion with responsible officers concerned"

In my view, one can make one's point without being sarcastic to one's superiors. I have serious doubts if any manager in any establishment can reasonably be expected to buy the style in which the letter has been written unless, of course, he has the patience of the Biblical Jobo which is very rare, indeed.

It was not disputed that as the Assistant Manager at the Maseru branch of the Bank, Moliko's responsibilities included inter alia, co-operation with the manager to ensure the smooth running of the branch and to that end all the departments within the branch fell under their supervision, be it directly or indirectly. However, the

letter - Annexure A1 - was followed by a stream of other letters, e.g. A2, F1-F5, F8-F14, written by the manager, the Chief Manager and Moliko himself. The majority of the letters pointed to but one thing, namely, that Moliko's application to his bank responsibilities was found, by the management, to be unsatisfactory in that he was neither properly carrying out his supervisory duties nor was he efficiently co-operating with the management in that regard. This Respondent disputed and the Tribunal was inclined to find against the Applicant on this issue.

It is significant to remember, however, that it was the Respondent Union's evidence that following its call for general strikes in February and March, 1982, and the ban on overtime work in April of that year, Moliko admittedly participated in all the strikes and the ban on overtime work. The question that immediately arises is how Moliko could have efficiently carried out his supervisory responsibilities and rendered the necessary co-operation to the management while at the same time taking part in the Union's strikes and the ban on overtime work. It seems to me that the two could not possibly go together. The Appellant bank was, in all probabilities, testifying to the truth when it said there was a deterioration in Moliko's application to his supervisory responsibilities and co-operation with the management. That being so, it could hardly be argued with any seriousness that Moliko did not infringe the conditions of his contract particularly clause 3 of the "Articles of Agreement" which provides:

"The employee shall give his unremitting attention to the duties of any office in the service of the bank to which he has been or may hereafter be, appointed, and to the general interest of the bank; and shall not become engaged, directly or indirectly in any other business without the express sanction in writing of the general management previously obtained nor in any occupation, whether of profit or otherwise, which may in the opinion of the general management preclude him from carrying out his duties with efficiency, or which may be detrimental to the interests of the bank."

8/ The appellant

The Appellant bank contended that the decision to terminate Moliko's services was taken in accordance with the provisions of Clause 9 of the "Articles of Agreement" for his lack of efficient application to his bank responsibilities and had nothing to do with his being an active member of the Respondent Union.

In support of the contention that his dismissal had nothing to do with Moliko's active membership of the Respondent Union, the Appellant adduced the evidence of one Samuel Rahlao, the Bank Manager at the Maputsoe branch of the Appellant Bank, who testified that he was one time President and still an active member of the Respondent union. That had not resulted in his dismissal. Indeed, the evidence of Mohasoa, Nkuebe and Mapetla was that they, themselves were at the relevant time active members of the Respondent union. Their contracts were, however not terminated for that reason.

Having decided that Moliko's participation in the strikes and the ban on overtime work called by the Respondent union resulted in the deterioration of his application to his bank responsibilities, the real deciding question in this matter was whether or not his participation therein was lawful. If the answer is in the affirmative then the Appellant bank could not be entitled to dismiss him. If, however, the answer is in the negative, obviously the appellant bank could lawfully dismiss him.

It is pertinent to note that in terms of the Legal Notice No. 21 of 1982 published in Gazette No. 11 of 25th March, 1982, the Essential Services Arbitration Act No. 34 of 1975 was amended by the insertion of the Banking Business Services to the schedule thereof, so that when on 4th April, 1982 the Respondent union called the ban on overtime work in which Moliko admittedly participated the bank fell within the ambit of the essential services and the legality or not of the call for the ban on overtime work fell to be governed by the Essential Services Arbitration Act, supra, of which Section 17(1) specifically

9/ provides :

provides :

"17(1) no person shall declare, instigate, counsel, procure or abet a lock-out or strike in any essential service, unless a trade dispute exists and has been reported to the Labour Commissioner in accordance with section 6(1) and twenty one days or, if a further period has been allowed by the minister under subsection 5 of the section, twenty one days and such further period have elapsed since the date of such report and the dispute has not been, during that time, settled or been referred to the Tribunal by the Minister under that section."

From the letter of 6th May, 1982 which the Labour Commissioner addressed to the Chief manager of the Appellant bank, with copy to the Secretary of the Respondent Union, it is clear that the question whether or not a trade dispute existed, as yet, between the Appellant bank and the Respondent union, entitling the latter to call the strikes or the ban on overtime work in which Moliko admittedly participated was referred to the Labour Commissioner whose decision was in the negative. That letter reads, in part :

"Dear Sir,

re: Banning of overtime : Lesotho Union
of Bank Employees.

We refer to your letters of 5th, 22nd 28th ultimo and 4th instant on the above subject.

As intimated in our letter to the Union (dated 29th April, 1982), which was copied to you, in the absence of any private agreement between yourself and your employees doing away with overtime, the Employment Act empowers you to require your employees to work overtime within the legally prescribed limits. The relevant sections of the Act also provide you with remedies which you might have recourse to in the event of disobediences to your lawful orders, generally.

Regarding the question of whether the action of the union constitutes a strike in terms of the provisions of the Essential Services Arbitration Act, 1975, we consider that their conduct does not fall within the definition of a "strike" because:

- (a) it has not been demonstrated to be "in consequence of a trade dispute," and
- (b) it has not been shown that the employees

10/ have the

have the requisite intention(s)....."
(my underlinings).

Now, the decision of the Labour Commissioner whether or not a trade dispute exists in an essential service is conclusive in terms of the Essential Services Arbitration Act, 1975 of which section 6(1) provides:

"6(1) If any trade dispute in an essential service exists or is apprehended, that dispute if not otherwise determined may be reported in writing to the Labour Commissioner by or on behalf of either party to the dispute, and the decision of the Labour Commissioner as to whether or not a dispute is or is not a trade dispute in an essential service and whether or not a dispute has been so reported to him and as to the time at which a dispute has been so reported shall be conclusive for all purposes."
(my underlinings)

Once the Labour Commissioner had decided, therefore, that no trade dispute existed between the Appellant bank and the Respondent union, the latter could not lawfully call upon its members to go on strike or ban overtime work for such move would be illegal under the provisions of section 17(1) of the Essential Services Arbitration Act, supra.

However, as we have seen, notwithstanding the decision of the Labour Commissioner that no trade dispute existed between the Appellant bank and the Respondent union, the latter continued with the ban on overtime work called for its members on 4th April, 1982. That clearly amounted to an illegal strike in which Moliko's participation was prohibited in terms of section 16(1) of the Essential Services Arbitration Act, supra. The section reads, in part :

"16(1) An employer in any essential service shall not take part in a lock-out and an employee in an essential service shall not take part in a strike, unless a trade dispute exists .."

It follows, therefore, that the question whether or not Moliko's participation in the ban on overtime work was lawful must be answered in the negative. That granted, I take the view that the appellant was entitled to dismiss

Moliko, not only in terms of the provisions of Section 15(3)(e) of the Employment Act 1967 but also Clause 9 of the "Articles of Agreement". The dismissal could not, in my opinion, justifiably be regarded as an act of victimization or unfair labour practice.

In my judgment there is, therefore, substance in the ground of appeal that there was no evidence to support a finding of unfair labour practice. It necessarily follows that the subsequent order made by the Tribunal falls away.

In the result, the appeal is allowed with costs.


B.K. MOLAI,
JUDGE.

10th August, 1984.

For Appellant : Mr. Beckly.
For Respondent: Mr. Sello.