

IN THE LESOTHO COURT OF APPEAL

In the Application of :

NAPO GABRIEL MOHALE Applicant

v

NATIONAL UNIVERSITY OF LESOTHO Respondent

HELD AT MASERU

Coram:

SCHUTZ, J.A.
VAN WINSEN, J.A.
SCHREINER, A.J.A.

J U D G M E N T

Van Winsen, J.A.

This appeal concerns the correctness of a ruling by the Taxing Master disallowing certain fees claimed by an Attorney's Firm, Messrs W.M.C. Maqutu & Co., under a party and party Bill of Costs and the subsequent judgment of the High Court in partly confirming on review the Taxing Master's ruling.

It appears that arising out of litigation between one Mohale (Applicant) and the National University of Lesotho (Respondent) the High Court made an order dismissing, with costs, an application for a declaration that applicant had satisfied all the requirements for the degree of B A (Law) of the respondent University and directing that the latter confer upon applicant

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the degree in question.

In this litigation the firm of W.M.C. Maqutu had acted as attorneys for the successful party. The firm drew a Bill of Costs on a party and party basis for disbursements and fees in respect of the firm's appearance as attorneys on behalf of the University. Objection was taken to the whole Bill by Mr. Sello, acting on behalf of the unsuccessful party in the litigation, on the ground that Mr. Maqutu was not entitled to charge fees in representing the University since he was an employee of the latter body. This objection was upheld by the Taxing Master.

Thereafter the Taxing Master was required by the respondent's attorneys to state a case for a review of his decision by a Judge in terms of Rule of Court No.49. This he duly did and the review came before Cotran C.J., who substantially upheld the Taxing Master's decision, ordered that the matter be remitted to the latter with an instructions to allow the disbursements claimed in the Bill as well as certain individual items claimed as fees on the Taxing Master being satisfied that on the occasions in respect to which such fees were claimed Mr. Maqutu had not been required to be lecturing or to be doing research work.

From such evidence as there is in the record before this Court concerning the contractual relationship between Mr. Maqutu and the University it appears that the former is employed by the latter as a law lecturer and is paid for lecturing and for research work at the University. In an affidavit by the Registrar of the University it is stated that if the University wished to engage

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the services of a law lecturer to represent it in a Court in Lesotho it entered into a separate agreement with him in regard thereto "..... as this (work) is outside the scope of (his) employment".

The affidavit goes on to state that:-

"In terms of Statute 24(22) members of the academic staff are not allowed to engage in the conduct of a profession which may adversely affect the normal academic duties unless the Vice-Chancellor has given them permission on behalf of Council".

It appears from the affidavit that the University instructed Mr. Maqutu to appear on its behalf in Court in the matter in question and that Mr. Maqutu was in fact authorised so to appear by the Vice-Chancellor.

To summarize, the basis on which this matter is to be decided is that Mr. Maqutu at the relevant time was a law lecturer on the staff of the University, that a contract binding upon both the University and Mr. Maqutu existed whereby the latter undertook to and did represent the University in defending an application brought against it by Mr. Mohale and that the University obtained a Court Order of costs on a party and party basis against Mr. Mohale which entitled it to recover from the latter a full indemnity for all costs reasonably incurred in defending such proceedings.

Clearly, therefore, in the normal course of events the University would have been entitled to recover an indemnity from Mr. Mohale for the fees and disbursements it was obliged to pay

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to its attorney - the reasonableness of the quantum of which is not in dispute.

On what ground then is it said that such costs cannot be recovered by the University? Solely on the ground that Mr. Maqutu is employed by the successful party as a law lecturer.

The validity of the ground for refusing to allow an indemnity for such costs must be judged without regard to the fact that reservations could legitimately be entertained as to the desirability of an employee being briefed by his employer to represent the latter in court proceedings. The value to a litigant of a legal adviser engaged to represent him in court lies, inter alia, and to an important degree, on the independence of the legal adviser vis-a-vis his client. If this independence could be inhibited by reason of the existence of a general contract of employment between them the legal adviser might well lose much of his value to his client.

However, the question in the present matter is whether this relationship would by itself constitute a good ground in law for depriving the employer with a costs order in his favour of his right to be indemnified for fees and disbursements he has contractually bound himself to pay for his employee's service in Court. No judicial precedent has been quoted to this Court which holds that such a relationship disqualifies the employer from recovering costs awarded to him. Reference was made to cases such as Texas Co. v Cape Town Municipality 1926 AD 467 at p.488; Taylor v Mackay Bros. and Ano. 1947 (4) SA 423(N) and Number Plates & Signs (Pty) Ltd. v Levin 1943 CPD 94 at p.95.

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In the Texas Co. case the court held that the qualifying expenses of two engineers employed by the successful party, in whose favour an order of costs had been made, viz., the Cape Town Municipality, could not be recovered from the unsuccessful party for the reason that such employees had not been paid for their work by the Municipality but had done their work in the course of their salaried employment for the Municipality. It was held that the Municipality could not seek to recover a portion of their salaries from the unsuccessful party. The clear implication of the judgment is that had the Municipality been obliged to pay them for work outside the terms of their salaried appointments the amount so paid would have been allowed as part of the Municipality's costs. /their

In the Taylor case the court held that witnesses' fees were payable under an order for costs despite the fact that they were employees of the firm entitled to recover the costs. The Number Plate & Signs (Pty) Ltd. case has no bearing on the present matter.

In Bester & Grové v Benson 1980 (1) 276(C) the court held that where the successful party was a firm of attorneys suing to recover professional fees it would be entitled to include in these fees amounts for the taking of instructions by a professional assistant in the firm of attorneys from a partner in that firm. The basis of the decision was that since the work had been done and was necessary work in the course of the case the costs thereof could then be legitimately recovered as part of the costs to which the successful party was entitled. Compare Knoll v Van Druten and Another 1953(4) SA 145(T). Although none /of

of these cases are directly in point they support the general principle that where the work has been done which it is necessary to do for the purpose of the case and the successful party has had to pay for such work, then the successful party is entitled to recover as part of his claim for costs such amounts as he was obliged to pay. Regard being to this principle I am of opinion that the University is entitled to recover the costs incurred by reason of the employment of Mr. Maqutu. Accordingly the appeal succeeds with costs. The Taxing Master is ordered to allow as part of the party and party costs ordered in favour of the University of Lesotho in the matter of Napo Gabriel Mohale v National University of Lesotho (CIV/APN/194/83) such costs as constitute necessary disbursements and fees by Messrs W.C.M. Maqutu & Co. incurred in connection with such matter.

Signed: L. DE. V. VAN WINSEN
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L. DE. V. VAN WINSEN
Judge of Appeal

I agree Signed. ...W.P...SCHUTZ.....
W.P. SCHUTZ
Judge of Appeal

I agree Signed: W.H.R.:...SCHREINER.....
W.H.R. SCHREINER
Acting Judge of Appeal

Delivered on this 20th day of August 1984 at MASERU.

For Applicant : Mr. Sello
For Respondent : Mr. Maqutu

Handed down in open Court by me on
this the 20th day of August 1984

Signed: B.K. Molai
Judge of High Court