

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

BARCLAYS BANK INTERNATIONAL, LTD Appellant
and

LESOTHO UNION OF BANK EMPLOYEESRespondent

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 appeal is, in terms of the provisions of Section 68 of the Trade Unions and Trade Disputes Law No. 11 of 1964, against the finding of the Unfair Labour Practices Tribunal, that the dismissal of one B.T. Rangoanana, a member of the Respondent union, by the Appellant bank, was an act of unfair labour practice. The appeal is also against the subsequent order that the Appellant Bank must reinstate Rangoanana to the position he held with the Appellant bank prior to his dismissal and pay him compensation for the loss of earnings.

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

The following facts were common cause : In 1968, Rangoanana joined the services of the Appellant Bank. The terms of contract were spelt out in a written document styled the "Articles of Agreement" which was signed by the contracting parties. When in 1971 the Respondent union was founded, Rangoanana became its member.

On 7th July, 1982, the Appellant bank dismissed Rangoanana from its employment. Consequently the President of the Respondent union wrote to the Registrar

2/ of the

of the Unfair Labour Practices Tribunal, a letter dated 19th August, 1982 in which he lodged a complaint against the Appellant Bank in terms of Section 61 of the Trade Unions and Trade Disputes Law, supra. He charged that in terminating the services of Rangoanana, as it did, the Appellant bank was guilty of unfair labour practice wherefore he called upon the Registrar to summon the Unfair Labour Practices Tribunal to hear the case.

In support of the charge against the Appellant bank, the Respondent Union filed a founding affidavit deposed to by Rangoanana. The Appellant bank intimated its intention to oppose this matter and duly filed its answering affidavit which was deposed to by one Peter Greenrod, its Lesotho Manager. A replying affidavit, again deposed to by Rangoanana, was filed.

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

The case made out by the Respondent Union in both its affidavits and verbal evidence was, very briefly, that following a salary dispute between the Respondent union, and the two Commercial Banks in the country namely, the Standard Bank and the Appellant Bank, the former took an industrial action. It called general strikes for its members in February and March, 1982. In April, 1982, it again called a ban on overtime work. Rangoanana and some of his fellow employees participated in all the strikes and the bank on overtime work.

On 7th July, 1982, Peter Greenrod called among others, Rangoanana and in the presence of one Kimane, the Assistant Manager asked him whether he was prepared to do overtime work as required by the Appellant Bank or continue to observe the Respondent Union's ban on overtime work. Rangoanana's reply was in effect that he was prepared to continue to observe the ban on, rather than do, overtime work. He was then served with the letter Annexure "A" -

3/ - dismissing

dismissing him in terms of S. 15(3)(b) of the Employment Act 1967. An application form for re-employment was attached to annexure "A". Rangoanana took the letter and left. He never completed the attached application form for re-employment.

On 10th July, 1982, Rangoanana reported for work on the advice of the Respondent union. On his arrival at the bank, he was served with another letter - annexure "B" - according to which he was being summarily dismissed in terms of S.15(3)(a) of the Employment Act, supra, for misconduct in manacing and threatening Greenrod with a screwdriver on 7th July, 1982. He returned home.

Later on, he received from Greenrod two letters respectively dated 12th July, 1982 and 18th August, 1982. The first letter - Annexure "C" - communicated to Rangoanana that his summary dismissal of 10th July, 1982 was being commuted to one of suspension from all bank duties for one month. The second letter advised him that after full consideration, the appellant bank had been unable to find any grounds on which he could be reinstated and his employment was, therefore, terminated in accordance with the terms of his contract of service and the Employment Act 1967.

It was contended that the termination of his services was nothing but victimization of Rangoanana for his being an active member of the Respondent union and, therefore, an act of unfair labour practice.

The Appellant bank refuted this contention and pointed out that Rangoanana was dismissed solely on the grounds disclosed in his letter of dismissal dated 10th August, 1982. That letter reads, in part :

"Dear Sir,

Termination of contract Service:

On the 7th July, you threatened violence with an offensive weapon, a large screwdriver, to a colleague, the undersigned.

4/ You were

You were subsequently suspended from your duties for one month, while the matter was under consideration.

After full consideration, we can see no grounds for re-instatement, and your services are herewith terminated, in terms of your contract of service and of the Employment Act, 1967.

One month's salary will be paid to you in lieu of notice, and any other entitlements will be calculated and credited, your dismissal taking effect from to day.

Any loan accounts you have with the Bank now become repayable. Pending repayment, they will be moved from the staff account section.

Yours faithfully,

Peter Greenrod
Lesotho Manager.

c.c. Labour Commissioner."

The reading of the second paragraph of the above quoted letter makes it clear that the Appellant bank did not dispute annexure "C" - the letter of 12th July, 1982 in which the summary dismissal of Rangoanana was commuted to one of suspension for one month - a fortiori - annexure "B" - the letter dated 10th July, 1982 by which he was dismissed. As I see it, the decision in this matter revolves on whether or not the dismissal was in fact on the grounds disclosed in the letter of 18th August, 1982.

The Appellant bank conceded that following a salary dispute between itself and the Union, the latter called the strikes and the ban on overtime work in which Rangoanana participated. However, according to the Appellant bank, the ban on overtime work was a breach of the Essential Services Arbitration Act No. 34 of 1975 and, therefore, illegal. In this regard, reference was made to Section 2 and 6(1) of the Essential Services Arbitration Act, supra.

It is to be noted that s.2 of the Essential Services Arbitration Act, supra, defines, inter alia, "Essential Services" as meaning the services rendered by any person in respect of a trade which is specified or included in the
5/ schedule

schedule to that Act. It is also worth noting that by Legal Notice No.21 of 1982 which was published in Gazette No. 11 of 25th March, 1982, the Banking Business Services were inserted in the schedule to the Act and thereby declared "Essential Services" so that when in April, 1982, the Respondent Union called the ban on overtime work, the Appellant bank, no doubt, fell within the ambit of "Essential Services." That being so, sec. 17(1) of the Essential Services Arbitration Act, 1975 clearly provides:

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

It appears from the Labour Commissioner's letter of 6th May, 1982, that the question of whether or not a trade dispute existed between the Banks and the Union, lawfully entitling the latter to resort to industrial action, as it did in February, March and April, 1982, was referred to the Labour Commissioner whose reply was in the negative. That letter was addressed to the Chief Manager of the Standard Bank and copied to the Secretary of the Respondent union. It reads, in part :

"Dear Sir,

re: Banning of Overtime : Lesotho Union 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 yourselves and your employees doing away with overtime, the Employment Act empowers you to require your employees to work overtime

6/ within the

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 disobedience of 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 have the requisite intention(s).

Lastly, we are of the opinion that there might be a potential trade dispute within the meaning accorded to the expression inter alia, by section 2(1) of the Trade Unions and Trade disputes Law 1964.

We hope that this addresses itself to all the issues raised in your letters referred to herebefore (my underlinings)

It is clear from the terms of this letter that the decision of the Labour Commissioner was that as of 6th May, 1982, no trade dispute existed between the banks and the union and the latter could not, therefore, lawfully have resorted to an industrial action in April 1982. Such decision was, in terms of the provisions of sec. 6(1) of the Essential Services Arbitration Act, 1975 conclusive. It is perhaps helpful to quote that section. It reads:

- "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 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)

7/ The evidence of

The evidence of the Appellant bank was that as a result of the strikes and the ban on overtime work called by the Respondent union and in which Rangoanana admittedly participated, the work of the bank was suffering. The bank conceded, therefore, that on 7th July, 1982, Rangoanana was one of the employees who were interviewed and asked in the presence of Kimane, whether they were prepared to work overtime or continue to observe the ban on overtime work. Rangoanana opted for the latter alternative. The decision was then taken to serve him with the above-mentioned letter of dismissal. The letter reminded Rangoanana that he had in the past been required to do overtime work. Notwithstanding that requirement he was, however, persisting in the observance of the ban on overtime work. Consequently he was being summarily dismissed from the bank's services with immediate effect in accordance with the provisions of sec. 15(3)(b) of the Employment Act, 1967 which section reads, in part :

- "(3) An employer may dismiss an employee
summarily in the following circumstances
and no other -
.....
(b) for wilful disobedience to lawful orders
given by the employer"

It seems to me that after the banking business had, on 25th March, 1982, been declared "essential services", the Respondent union could not, in terms of sec. 17(1) of the Essential Services Arbitration Act, 1975, have lawfully called a strike for its members unless a trade dispute existed and had been reported to the Labour Commissioner in accordance with the provisions of s. 6(1) of the Act. The Labour Commissioner's above quoted letter of 6th May, 1982, clearly indicates that in his decision no trade dispute existed between the Appellant bank and the Respondent union, in April, 1982, when the Union called the ban on overtime work. The ban, therefore, constituted an illegal strike of which participation was clearly prohibited under the provisions of s. 16(1) of the Act. Rangoanana's

8/ continued observance ...

continued observance of the ban on overtime work or strike was, in the circumstances illegal or wilful disobedience to lawful orders requiring him to do overtime work. That granted, there can be no doubt that the Appellant bank was entitled to summarily dismiss him, as it did, on 7th July, 1982, in terms of the provisions of sec. 15(3)(b) of the Employment Act, supra.

Michael James Cummis, the Maseru Branch Manager of the Appellant Bank testified that following their dismissal of 7th July, 1982, Rangoanana and other members of the staff did not (as indicated earlier) complete the application forms for re-employment which were attached to their letters of dismissal. They nevertheless, subsequently reported for work and their dismissals were cancelled. Rangoanana was, however, served with another letter of dismissal - annexure "B". He was being dismissed in terms of the Employment Act, 1967 sec. 15(3)(a) for his alleged misconduct in manacing and threatening Greenrod with an offensive weapon, namely a large screwdriver, on 7th July, 1982.

It is significant to note that Rangoanana denied the alleged misconduct. However, the evidence of Cummis seems to find support in Greenrod's opposing affidavit which implied that Rangoanana had been dismissed for the alleged misconduct. Thus, for example, at page 4 of the affidavit Greenrod averred, inter alia:

"Any member of staff of the Respondent who assaults another, reinforcing such assault with a dangerous and offensive weapon will be dismissed whether he may be an active member of the Lesotho Union of Bank Employees or not
....."

The evidence of Cummis and the deposition of Greenrod on the alleged misconduct were corroborated by the evidence of Kimane who told the Tribunal that he was present when Greenrod was writing Rangoanana's letter of dismissal on 7th July, 1982. While Greenrod was writing the letter, Rangoanana did suddenly threaten to attack him with a screwdriver and ordered that he drop down the

9/letter.

letter. For fear of his safety Greenrod did drop the letter which Rangoanana picked and carried away. However, Rangoanana subsequently telephoned Kimane from another office and asked him to tell Greenrod to make another letter as he (Rangoanana) had destroyed the first one. Kimane complied and Greenrod accordingly wrote another letter - Annexure "A" which was served on Rangoanana.

According to Cummis, following Rangoanana's alleged misconduct or threat of violence, Greenrod wrote Exhibit A, the letter dated 7th July, 1982, to the Maseru Charge office Police reporting the incident. The matter was, therefore, in the hands of the police. In his evidence Kimane also told the Tribunal that later on (i.e. after the 7th July, 1982) Greenrod made a statement to the police in connection with the incident.

The Tribunal attacked Appellant's evidence that Rangoanana had committed the alleged misconduct apparently on the grounds, inter alia, that Greenrod himself was not available to give evidence and as Kimane had testified that Greenrod had reported the alleged attack on him to the police only after the 7th July, 1982, the letter - Exh A - had been antedated to coincide with the date of the alleged misconduct. The Tribunal concluded, therefore, that the Appellant's evidence on the question of Rangoanana's misconduct was all a concocted story aimed at finding an excuse for his dismissal. With respect, I am unable to agree. Firstly, the fact that Greenrod was not available to give verbal evidence before the Tribunal should not, in itself, be the reason for disregarding the evidence made in his sworn affidavit. Secondly, from the record of proceedings, Kimane did not use the word "report". What he said was :

"I know that Greenrod made a statement to the police but it was not on the same day. I cannot recall whether it was on the following day. I do not remember when it was made."

(my underlining)

10/ It would

It would appear that whilst Cummis was talking about the report made per the letter - Exh.'A', Kimane was referring to a statement which Greenrod had apparently made to the police on a later date (i.e. after 7th July, 1982). I see no contradiction in this. If Greenrod had written a report to the police on 7th July, 1982, there was nothing preventing him from making a statement to the police on a later date. It would not necessarily mean that the statement was the written report antedated to coincide with the date of Rangoanana's alleged misconduct.

It seems to me that on the balance of probabilities there was sufficient evidence in support of Appellant's allegation that Rangoanana had threatened Greenrod with violence on 7th July, 1982 and the Tribunal misdirected itself in finding that he had not. I can find no evidence to support the contention that Rangoanana was dismissed as an act of victimization and the contention remains a mere speculation which should not in my opinion, have been accepted in the face of overwhelming evidence that Rangoanana threatened a colleague with violence and was for that reason dismissed.

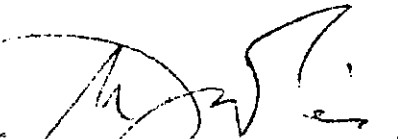
Assuming the correctness of my conclusion, it cannot seriously be argued that the action of Rangoanana did not render him guilty of misconduct. That being so, it seems to me that the Appellant bank was entitled to dismiss him in terms of the conditions of his contract of employment of which Clause 7 clearly provides in part:

"7. In the event of the Employee being guilty of any breach of the provisions of this agreement or of misconduct of any kind, whether during or out of office hours, of which the Bank shall be the sole judge it shall be lawful for the Bank to determine(terminate) this agreement at any time without notice, anything to the contrary herein contained notwithstanding, in which event the employee shall only be entitled to salary due up to the date of such dismissal."
(my underlining)

11/ In the light

In the light of all that has been said, it is obvious that I take the view that Rangoanana's dismissal was not an act of victimization or unfair labour practice. On the contrary, there was sufficient evidence in support of appellant's contention that the dismissal was based solely on the grounds disclosed in the letter of 18th August, 1982.

The appeal is allowed with costs.



B.K. MOLAI
JUDGE

17th August, 1984.

For the Appellant : Mr. Erusmus,
For the Respondent : Mr. Sello.