

IN THE LESOTHO COURT OF APPEAL

In the matter between :

TSEUCA TSEKOA	1st Appellant
SEUTLOALI MATSABA	2nd Appellant
'MATISETSO GREEN	3rd Appellant
'MAKHOTSO MOCHESANE	4th Appellant

v

THE GENERAL MANAGER - LESOTHO FLOUR MILLS	1st Respondent
CHAIRMAN OF THE BOARD OF GOVERNORS LESOTHO FLOUR MILLS	2nd Respondent
LESOTHO FLOUR MILLS	3rd Respondent
MINISTER OF AGRICULTURE AND MARKETING	4th Respondent
ATTORNEY-GENERAL	5th Respondent

HELD AT MASERU

Coram :

Mahomed, J.A.
Aaron, J.A.
Plewman, J.A.

J U D G M E N T

Aaron J.A.

In or about 1979, the Government of Lesotho set up an enterprise called Lesotho Flour Mills in the Industrial Area of Maseru. This was established as a trading account in terms of the Finance Act 1978. It was common cause in these proceedings that "Lesotho Flour Mills" is not a company, or a body corporate, and has no separate legal personality of its own. The most accurate description

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that can be given of it is that it is the Government of Lesotho trading as "Lesotho Flour Mills." It falls within the Ministerial responsibility of the Ministry of Agriculture.

In order to conduct the activities of this enterprise (I shall refer to it hereafter as "Lesotho Flour Mills," but that phrase must be understood in the context of the above remarks), the Government has to employ staff. The four appellants in this matter were amongst the large body of persons so employed. In October, 1988, staff members received letters advising them of the salary increments decided upon for the coming year. The measure of increments caused dissatisfaction amongst the employees, because these were not in line with the review of salaries in the civil service which had been made in April, 1988, and with the review in "other para-statal organization."

This dissatisfaction led to a written protest which was signed by a large number of employees, and delivered to the management of Lesotho Flour Mills late in the afternoon of Friday, 30th September 1988. This document, after expressing the grievance of the signatories, ended with the sentence:

"We decide therefore that until we shall have received a satisfactory answer, we will suspend out day to day work."

Because of certain holidays, the next working day was Wednesday 5 October. There is a dispute of fact about exactly what took place on the three days 5 - 7 October to which I shall revert at a later stage in this judgment. But it is common cause that on 10 October, Lesotho Flour Mills sent letters to 318 employees summarily dismissing them from their employment. Included amongst these were the four appellants.

The ground given for the dismissal was that the recipients of the letters had wilfully disobeyed a lawful instruction from management to report to work and resume their normal duties.

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On 18 October 1988 the present appellants launched an application in the High Court, as a matter of urgency, citing as respondents the General Manager of Lesotho Flour Mills, the Chairman of its Board of Governors, Lesotho Flour Mills, The Minister of Agriculture, Co-operatives & Marketing, and the Attorney-General in his capacity as the principal legal advisor to the Government.

The substantive relief claimed was

- (i) that the decision of the First Respondent to dismiss them summarily be set aside;
- (ii) that they and other employees who were summarily dismissed be re-instated and/or re-engaged in the employment of the Third Respondent;

and

- (iii) that the trade dispute between the employees and Lesotho Flour Mills be referred for settlement in terms of sections 54 to 57 of the Trade Unions and Trade Disputes Law, 1964.

The case made out in the founding affidavits was

- (i) that the dissatisfaction with the salary increments and the consequent presentation of a written document by the employees had led to a trade dispute;
- (ii) that although the employees had initially not presented themselves for work on 5 October, they had later gone back to work on that day;
- (iii) that when they presented themselves for work on 6 October, they found that the gates had been locked, and that they were not allowed to enter the premises of Lesotho Flour Mills;
- (iv) that on 7 October, management had indicated that only those employees who signed a document in which they agreed to return to work on the existing terms and condition of payment and work, would be allowed back on the premises, whilst those employees who refused to sign the document would render themselves expelled from work.

It was contended that this action by Lesotho Flour Mills constituted a lock-out with the intention of compelling or inducing employees to agree to the terms dictated by the management, and as the necessary procedural steps prescribed in Part X of the Trade Unions and Trade Disputes Law of 1964 had not been followed,

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the lock-out was illegal. From this it followed that the instruction to the employees to return to work on the existing terms and conditions was itself wrongful, and failure to comply therewith could not be a valid ground for summary dismissal.

The Respondents contested these assertions. They claimed that as from 5th October, the employees had gone on strike, and that as the necessary procedural steps had not been followed, the strike was illegal. They denied that the employees had been willing to go back to work, but stated on the contrary that they had determined to prevent the normal functioning of the operations of the mill, and had on the afternoon of 5 October threatened and menaced the crew of a bakery vehicle who had called at the mill to pick up supplies of flour. They denied that the employees had been locked out with the intent of trying to coerce them to accept the demands of management, and asserted that the true reason was that they had a genuine apprehension that if the striking workmen were left at large within the mill premises, the situation might degenerate into acts of violence causing danger to life and property.

The application was heard in the High Court by Mr. Justice Lehohla, who dismissed the application, save for the first prayer, which had asked for leave to proceed as a matter of urgency and dispense with the forms and service provided by the Rules.

Appeal was then noted to this Court on a number of grounds; but when the matter was called, counsel for appellant indicated that as there were a number of disputed facts raised on the papers, he was confining himself to arguing only two points, namely :-

- (a) that it was common cause on the affidavits that the employees had gone back to work on 5 October, and accordingly the strike had ceased, and therefore the subsequent action taken by the management constituted a "lock-out".
The consequence of this was that, on the basis of the common facts, the order to the employees to resume work would not have wilfully been disobeyed;

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and (b) that as Lesotho Flour Mills was really the Government of Lesotho trading under that name, the Appellants were subject to the provisions of the Public Service Order, 1970, section 19(1) of which provided that the power to remove persons holding "public office" from such office could be exercised only after consultation with the Public Service Commission.

Was it common cause that there was an unlawful lockout, and was the order to return to work wilfully disobeyed?

It was accepted by Appellants' counsel that in order to determine what facts are common cause, for purposes of his argument, the Court must accept as correct the averments made in the affidavits filed by the 5 Respondents together with such facts in the applicants' affidavits as have not been controverted.

Once this basis is accepted, then it is clear that the first submission is untenable. The affidavits filed by Respondents leave no room for doubt that they were asserting that the employees were refusing to go back to work on 5 and 6 October, and that they were locked out on 6 and 7 October because of a perceived threat to the safety of the premises. These allegations are contained in paragraph 20 of the affidavit of Mr. Benford, and when confronted by them, Appellants' counsel was not able to persist in the contention that the contrary was "common cause".

Were the employees subject to the provisions of the Public Service Order, 1970?

As has already been indicated, the Lesotho Flour Mills is really the Government carrying on business under that name. It is the real employer of the Appellants. But does it necessarily follow that the Appellants and their fellow employees are "public officers" within the meaning of the Public Service Order?

"Public Officer" is defined in sec. 2(1) of the Public Service Order as meaning "a person holding or

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acting in any public office", and "public office" is in turn defined as meaning "any office of emolument in the public service."

To ascertain what is an "office of emolument" one must turn to the Public Service Regulations, 1969, which deal comprehensively with the public service, including such matters as appointment, promotion, posting, termination of appointment, salary, increments, retiring benefits, annual holidays, sick leave, housing, medical attention and allowances. The matter of "emoluments" is dealt with in reg. 401, which refers to the emoluments "that have been prescribed in the establishment list in respect of that office...."

It is however common cause that the employees of Lesotho Flour Mills are not paid, in respect of their services, amounts which have been prescribed in any establishment list. They were all engaged under conditions of employment which are set out in a written document, and are paid salaries. The conditions of employment deal with matters such as discipline, maternity and sports leave, pension scheme, leave provisions, termination and so on. These are not the same provisions as apply to the public service, but are specific to Lesotho Flour Mills. According to the affidavit of Mr. Banford, the employees of Lesotho Flour Mills have been the recipients of several perks not available to public officers, and at no point during the existence of Lesotho Flour Mills was any account taken of the salary structures of the public service in fixing their salaries.

It is not necessary for us to consider to what extent the Government may employ persons to perform duties in the furtherance of government activities without appointing them to the public service. It would in any event be inappropriate to do so on the present papers as this point has not been raised or canvassed in the affidavits. suffice it to say that whether or not the Government should have appointed the employees of Lesotho Flour Mills to the public service establishment, it has not been established

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that it did so, and for some years now, such employees have been serving the Government under conditions of employment different from those which apply in the public service. In some respects, they may have been better off than their counterparts in the public service, in other respects they may have been worse off. But they are not the holders of any office of emolument, and are therefore not entitled to the benefit of sec. 19(1) of the Public Service Order.

Application of the "audi alteram" rule.

At the suggestion of the court, counsel considered whether - inasmuch as the appellants, even though not officers in the public service, worked for the Government and had certain pension rights and legitimate expectations - they had before being dismissed, been given adequate notice that management was considering taking such a step against them, and an adequate opportunity of being heard as to why such step should not be taken (cf. Mokoena and Others v. Administrator, Transvaal, 1988(4) SA. 912 (W)).

What is adequate in these respects must always depend on the circumstances. It is basically a question of fairness. In this case the workers outside the gates of the Mill on 7 October were - according to the Bandford's affidavit - warned on more than one occasion that if they did not return to work, they would be dismissed, and were afforded the opportunity to return to work. They wanted to negotiate fresh terms of employment; but did not seek to advance any reasons why, if they continued in their refusal to return to work on the conditions prescribed by management, they should not be dismissed. Counsel for the Appellants was invited to suggest what they could possibly have said in this regard but was unable to suggest anything. In the circumstances, I consider that appellants and the other employees were given adequate notice of the intended action against them, and had a fair opportunity to make representation of management if they wished.

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In the result the appeal fails, and appellants are ordered to pay the costs thereof.

Signed

S. Aaron
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Judge of Appeal

I agree

Signed

I. Mahomed
.....
Judge of Appeal

I agree

Signed

C. Plewman
.....
Judge of Appeal

Delivered at MASERU this 26th day of January, 1989.

For the Appellants : Mr. Matsau

For the Respondents : Mr. Tampi.