

IN THE HIGH COURT OF LESOTHO

In the Application of:

PALESA MONTSI	1st Applicant
MAPUTSOA KHALEMA	2nd Applicant
FLORIE MAHAKOE	3rd Applicant

V

SCOTT HOSPITAL Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 1st day of February, 1989.

Assisted by her husband the 3rd Applicant and the two other applicants above brought an urgent application moved ex parte against the respondent.

The application was set down for 2nd April 1987 but came before court on 13th April 1987. After the court had declined to grant the order on the papers as they then stood a rule nisi was only granted on a rephrased Notice of Motion in the usual negative form. This was on 21st April 1987. There were a series of postponements thereafter.

Finally this matter came before me for hearing and arguments on 29th September, 1987.

Applicants sought an order as follows:

- (1) Directing that the forms and services provided for in the Rules of Court relating to this application be dispensed with;
- (2) Directing the Board of Management of Scott Hospital at Morija to review the summary dismissals from the employment of Scott Hospital of Florie Mahakoe (Mrs), Palesa Montsi and Maputsoa Khalema (applicants herein) and to convey whatever decision it

/arrives

arrives at together with reasons for taking such decision to the applicants within 14 days of this order being served upon the Board.

- (3) That order 2 above operates with immediate effect.
- (4) That in default of compliance with order 2 above, Respondent is called upon to show cause, if any on Monday 27th April, 1987, why it should not be held in contempt of court and its individual members imprisoned for said contempt in this regard.
- (5) That respondent shall pay the cost of this application.

In a rule nisi that followed this application the order was rephrased with the result that it consisted of three paragraphs marked one through three. The first of these consisted of subdivisions (a) (b) and (c).

In argument before this Court Mr. Addy for applicants informed me that it had been agreed with Mr. Matsau for respondent that proceedings would be confined to subdivisions 1(a) and (c) only. These correspond with paragraphs 2 and 5 in the notice of motion.

The first and second applicants in their brief affidavits support, third applicant's extensive affidavit. In it this applicant swears that since August 1978 she has been in the employ of respondent's Primary Health Care Department as a Primary Health Care Co-ordinator. Further that in March 1982 she was appointed by the Director of the Community Health Care Department as Co-ordinator of the Community Alcohol Rehabilitation Programme. In this capacity it was her function to recruit Staff for purposes of carrying out the objectives of this programme. She accordingly recruited 1st and 2nd applicants as information officer and secretary respectively, in March 1982.

The deponent, the two recruits and four others brought into being the objectives of the Community Alcohol Rehabilitation Programme (CARP).

/Having

Having formed themselves into a team these seven members sent a letter of protest to the Executive Committee of Scott Hospital on 3rd December 1986 demurring at their relationship with the Advisor to the programme one Mrs Middlekoop. This letter is on record marked "A" and in substance it calls in question Mrs Middlekoop's efficiency as an advisor to CARP. Her inefficiency is typified by her failure to show up at CARP's meetings, her inclination to do things on her own without consultation with members of the aforesaid team. The team also registered its protest against Mrs Middlekoop's tendency to buy things on her own and afterwards claim money from CARP without substantiating her claims on receipts. The team complained that acting in the assumed capacity of supervisor as against advisor Mrs Middlekoop cut off the team's contacts with Community Health Care office; further that she attends meetings on behalf of CARP without producing any reports afterwards. They complained that she changed the training schedule without consulting the staff members and the immediate Director contrary to the practice which had hitherto been observed. Further that team members' salaries were not revised yet one of the staff members' salary had been increased recently. Finally the team felt that Mrs Middlekoop's activities were disruptive of the programme and projected a wrong and suspicious image of the team to the programme's clients. The letter has been signed by members of the aforesaid team.

In paragraph 8 of her founding affidavit 3rd Applicant avers that she, the two other applicants and one Belina Lebesa received letters summarily terminating their employment contracts with respondent as of 15th December 1986. A sample letter addressed to the deponent is attached to applicants' papers signed by one H. Eugene Johnson on behalf of respondent's Chief Executive officer.

The applicants complain on papers before this Court that respondent did not before dismissing them afford them a hearing. They are aggrieved that no reasons were

/given

given for their dismissal either. Their letters of dismissal are silent on the point.

Consequently they signed a letter marked "C" in these proceedings and forwarded it to respondent's chief Executive Officer, copied to the respondent's Board, to the Private Health Association of Lesotho (PHAL) and to Mrs Middlekoop. The letter is dated 17th December 1986. It seems apart from protesting their dismissal by respondent the signatories to Annexure "C" wished to inform PHAL of what was going on.

From this point it appears that the applicants expressed their dissatisfaction with the respondent's Executive Committee's decision in a letter addressed to the Chairman of the Board of the Management of respondent also asking for some redress. This is a letter Annexure "D" dated 17th December 1986. The fourth member of the team Belina Lebesa also received a letter of her dismissal dated 2nd January 1987. This is marked E.

The respondent's Board supported the respondent's Executive Committee's decision dismissing the applicants. See Annexure F. Perplexed by this turn of events members of the team then in terms of Annexure "G" directed their plea to, and solicited the intervention of PHAL. Annexure "G" enclosed Annexure F for PHAL's ease of reference. "G" is dated 26th January 1987.

The deponent's affidavit is a catalogue of appeals for assistance from PHAL and any other charitable or religious organisation which might be disposed to take up applicants' matter with respondent with a view to redressing their grievances and perhaps reviewing the Executive Committee's decision. Indeed it appears the applicants and Lebesa were in a predicament because all this time when they were moving from Committee to Committee to have their matter settled they could not obtain employment elsewhere. Hence their resort to this Court, to seek a review of the respondent executive committee's decision; for they maintain they have exhausted domestic remedies.

/On

On behalf of respondent, and in his opposing affidavit Mr. A.B. Thoahlane the respondent's chairman of the Board of Management referred the Court to annexure "H" being a resolution authorising him to act on behalf of respondent in these proceedings.

He further referred to annexure "I" i.e. the constitution of the respondent at clause 6(g) which provides that :-

"The Board of Management shall have powers to institute or defend proceedings at law in any court in Lesotho or elsewhere."

Having cleared the decks for action as shown above Mr. Thoahlane observed and is supported by Mr. H.E. Johnson the Chairman of the respondent's Executive Committee in this regard that applicants copied their Annexure "A" to the personnel management committee which was not involved with the management of the hospital.

He further avers that having been apprised of the contents of the copy of Annexure "A" received by Mr. Johnson's committee that committee resolved to investigate the complaint by talking to the complainants one at a time. Apparently the applicants were averse to this arrangement for they failed to turn up on the appointed day and it was only when 3rd applicant who ultimately came that the Executive Committee learnt from her that the applicants preferred coming as a team and not individually before the Executive Committee.

However after some persuasion the members of the team agreed to turn up and appear individually before the said committee. Consequently the matter was proceeded with the following day. The upshot of these interviews was that the Executive Committee decided to terminate the employment contracts of these applicants. To this end respondent appears to have relied on Clause 18(b) of its conditions of service attached to respondent's counsel's heads of argument providing

"Termination of Service: (b) After the probationary
/period,

period, the period of notice of termination of the employment contract will be one calendar month on either side; but a period of at least three months is requested, whenever possible. An equivalent cash payment in lieu of notice, based on the staff member's salary in effect at the time of the notice, may be given. This notice, or cash payment in lieu thereof, will be due from either the Hospital or the staff member, whichever is the initiator of the termination."

Consequently Mr. Thoahlane avers that "applicants were paid for the whole month of December, 1986 and January, 1987."

Charging that applicants have misunderstood the action taken by the Executive Committee this deponent clarifies the position by indicating that applicants' contracts of employment were terminated in terms of Clause 18(b) of the employment contract, and that therefore applicants have not been dismissed as they allege for then they would have been dealt with under Clause 18(d) of the conditions of service which provides that :-

"Notwithstanding the above, the Hospital may dismiss by written notice, with immediate effect, at any time, (with loss of all accumulated benefits):

- (i) a staff member who is convicted of a criminal offence.
- (ii) a staff member who absents him/herself from work without permission.
- (iii) a staff member who neglects or refuses to perform his/her duty.
- (iv) a staff member who behaves intentionally and persistently contrarily to the Scott Hospital code of conduct, in spite of two written warnings.
- (v) a staff member who neglects to notify the Hospital within two weeks of confinement of the expected day of return to work.

Mr. Thoahlane reiterates that the Board on which he serves as chairman decided not to set aside the decision of the respondent's Executive Committee. See Annexure F. It seems that to the extent that the Executive Committee gave applicants a hearing contents of paragraph 9 of the 3rd Applicant's founding affidavit with which the other applicants associate themselves should fall off as baseless.

/Her

Her averment is to the effect that they were given no hearing by the executive committee. But to the extent that the relationship between the parties was governed by contract the termination of which could be effected by either party on giving a month's notice or paying an equivalent of a month's salary in lieu thereof, it seems to me that there was strictly speaking no necessity for granting the applicants that hearing either.

Mr. Thoahlane further pointed out that PHAL has no administrative or review powers over the management of the respondent. He clarified the point that respondent is an autonomous body while PHAL is merely a co-ordinating body in health matters. I endorse this view most heartily and am of the opinion that there is little surprise therefore that PHAL seems to have adopted no more than a reconciliatory stance in this matter as indicated in "RA3" where the writer says

"The PHAL Board wishes to express its willingness to sit in any such meeting because of its active involvement at the inception of the CARP."

Significantly applicants sought to beat about the bush and failed to rise or equal to the challenge raised by Mr. Thoahlane in paragraph 7 of his affidavit where he emphatically stated that:

"PHAL has no administrative authority over the Respondent and I challenge the applicants to prove that the said Association has such powers. Authoritative powers of the respondent are enshrined in its constitution."

In response to applicants' averment in paragraph 16 Mr. Thoahlane stated that the Executive Committee of the Lesotho Evangelical Church can only veto the policy decisions of the Board. (See Clause 7 of the constitution i.e. Annexure "1" last sentence).

Applicants' replying affidavits are marked by a variety of the breaches of procedural rules in applications of this nature. For example in paragraph 6 applicants for the first time raise an objection that a Dr. Middlekoop the husband of Mrs. Middlekoop against whom they raised

/a complaint

a complaint participated in the relevant Executive Committee meetings. Nowhere was this objection raised in the founding affidavits. The rule is that applicants stand or fall by their founding affidavits. I have noted that the 3rd applicant's affidavit is very prolix and argumentative.

In regard to the merits of the application I am of the view that this matter poses for determination in terms of the contract between the parties and also of the constitution to which they pledged their loyalty.

It is clear to me that the contract was terminated in terms of 18(b). The letter written to the applicants amplifies this point namely that it was the Executive Committee which terminated it and for so doing it is empowered by the Constitution.

It is not disputed that in terms of this clause the necessary salaries were paid to the applicants by respondent.

It is clear in terms of the contract that either party may give notice of termination of one month without giving reasons. Clause 18(b) stipulates that either this notice or cash payment effected by either party would suffice. Further it is beyond dispute that contract may be terminated at any time.

The contract gives a right to employer to dismiss an employee summarily in the event of the latter's misconduct. In this case respondent did not proceed by way of summary dismissal in terms of 18(d) or any other law applicable but in terms of 18(b).

The employer is only required to give reasons in the event of a dismissal. However this was not a dismissal but termination of a contract in lieu of whose notice salaries were paid to respective parties.

Were it the case that applicants were summarily dismissed, it seems to me that their remedy would lie in damages or reinstatement. But as this is contract of

/service

service it seems to me that it would be unsound to saddle an employer with employees in whom he has lost confidence. In that event they would rather be awarded damages. But this is not what they want. They want the court to order the Board to review the decision of the Executive Committee. The Board has already done that. Supposing the court gives such an order and the Board comes back with the same decision! In any event that is not provided in the terms of the contract. It is for these and other reasons that I fail to see what role in terms of the Constitution and the contract of employment between the parties, were PHAL and CARP, in the applicants' view obliged to play in this matter. I find that whatever role they are supposed to play has been invoked for purposes of clouding the issue. If that was not the purpose it skills not which for the result is the same. I accordingly make a finding that these two bodies i.e. PHAL and CARP have neither part nor lot in this matter. See Mokoena & Others vs Administrator of Transvaal 1988(4) SA. at 912.

I agree with the submission therefore that review would only come into the picture if the Court were dealing with the question of the determination of damages; for then the court would delve into the validity or otherwise of the termination.

In a sense it seems applicants seek a mandamus. But one would seek such where duty is imposed on a person against whom the proceedings lie. But what duty has the Board to review the Executive Committee's decision? Surely that is not provided in the terms of the service contract existing between the parties to it.

The terms of service provide that a party has the right of appeal only in cases of dismissal as envisaged under Clause 18(d).

Reference to Clause 13(b) shows that Matrons, Administrators, Medical officers, Assistant Matrons and Nursing sisters shall be appointed and/or dismissed by the Board of Management.


/"Other

"Other employees shall be appointed and/or dismissed by the Executive Committee of the Executive Staff."

None of the applicants falls under the first category mentioned above. They rather fall under the category prefaced by the word "other". Hence it is competent for the Executive Committee to exercise their authority and powers over this latter category of employees. One such power specified is of termination of employment. Power to employ implies power to terminate. See CIV/APN/203/85 Koatsa vs NUL (unreported).

All reference to PHAL and CARP by applicants was a worthless smoke screen indulged in on the unfortunate and mistaken presumption that this court has such abundance of time at its disposal that frittering it away in pursuit of trifles occasions no harm. This application is misconceived - based on misconception of both law and fact.

It is therefore refused with costs.



J U D G E

1st February, 1989.

For Applicants : Mr. Molete for Mr. Addy.
For Respondents : Mr. Matsa