

IN THE HIGH COURT OF LESOTHO

In the matter between:

Simon Mahase Makape

Applicant

and

Metropolitan Homes Trust Life (PTY) LTD

Respondent

J U D G M E N T

Delivered by the Honourable Mr Justice J.L. Kheola
on the 30th day of June, 1989

This is an application for an order in the following terms:

1. (a) Setting aside Respondent's summary dismissal of the Applicant;
- (b) Directing Respondent to reinstate the Applicant with all his rights and benefits;
- (c) Directing Respondent to pay the costs of this application;
- (d) Directing Respondent to pay to the Plaintiff the sum of M203.54 being in respect of monies unlawfully deducted by the Respondent from the Applicant's remuneration during the months of March, April, May, June and July;
- (e) Directing Respondent to desist from making any further unlawful deductions from Applicant's remuneration; OR

ALTERNATIVELY

2. (a) Directing Respondent to pay to the Applicant the sum of M1,639.24 being notice pay;
- (b) Directing Respondent to release to the Applicant the sum of M1,215.01 being Applicant's remuneration for the month of August, 1988.
- (c) Directing Respondent to pay to the Applicant the sum of M7,010.85 being in respect of commission reserve accruing to the Applicant;
- (d) directing Respondent to pay to the Applicant the sum of M3,303.69 being Applicant's contributions to the Metropolitan Homes Trust Outdoor Staff Pensions Fund or pension;
- (e) Granting the Applicant the relief sought in 1 (d) above;
- (f) Directing Respondent to pay the costs of this application;
- (g) Granting Applicant such further and/or alternative relief; and that Applicant's Affidavit annexed hereto will be used in support of this application.

The applicant was employed by the respondent from the 1st May, 1985 to the 18th July, 1988 when he was dismissed by the respondent. The applicant has annexed a copy of a contract of service which he signed when he took up employment with the respondent.

In his founding affidavit the applicant deposes that in March, 1988 the manager of the respondent's Maseru branch convened a meeting of all insurance agents or representatives of the Maseru South Branch. According to the manager the purpose of the meeting was to inform the insurance agents/representatives of the introduction of a sponsorship account whose funds would be 3% deductions from each

insurance agent/representative. It was pointed out to the manager that the known and normal practice of the respondent is to communicate in writing to the employees any policy change affecting their contracts of service. A written proof was sought from the manager but in vain. Despite his failure to produce documentary proof from the respondent the manager started effecting 3% deductions from the agents'/representatives' remunerations/commissions.

On the 5th April, 1988 the representatives wrote a letter to the respondent asking for an explanation about the 5% deductions from their remunerations.

On the 14th July, 1988 the applicant wrote a letter to the branch manager of the respondent (Annexure "C") in which he requested him to desist from making any further deductions from his remuneration and to refund the money already deducted.

On the 15th July, 1988 the applicant received a letter of dismissal which reads as follows:

"1988-07-15th

Mr. Simon Mahase Makape,
MASERU
LESOTHO

Mr. Makape,

Please take notice that your services with Metropolitan Life will be terminated with effect from 31st July 1988.

We would like to refer you to verbal warnings given to you on several occasions regarding your insubordination and refusal to carry out company instructions.

You are further requested to submit all company belongings, to your sales manager as soon as you receive this letter.

Thanking you,

Yours faithfully,

A.M. PETLANE (Sgd)
BRANCH MANAGER (MASERU SOUTH)".

The applicant deposes further that on the 25th July, 1988 he reported for duty as usual but the branch manager physically evicted him from the office, indicating that he had been dismissed by the letter of the 15th July, 1988.

At the time of his dismissal the applicant was earning a monthly commission of M1 590-06. He alleges that the respondent has not paid him his remuneration in respect of August, 1988 being commission for insurance proposals already submitted. The sum of M7 010-85 had accrued to him as commission reserve. He had contributed the sum of M3 303-69 to the respondent's Outdoor Staff Pension Fund.

In its answering affidavit deposed to by Mr. Petlane, the respondent's Maseru branch manager, the respondent admits almost everything alleged by the applicant but says that he was summarily dismissed in terms of clause 5 of the contract of service. That he had neglected his duties and was guilty of disobedience. He refused to give the respondent the pay point number in respect of a policy holder Liketso Malebo whom he alleged was a teacher employed by the Ministry of Education. He could not supply the particulars of Mr. K. Litsela whom he alleged in the stop-order form to be Liketso Malebo's Headteacher despite many demands. As a query from the

head office had come, it was imperative that there should be immediate compliance with orders concerning this insurance with orders concerning this insurance policy of Liketso Malebo.

Investigations revealed that Liketso Malebo was an instructor at Lesotho Opportunities Industrialisation Centre. K. Litsela was never found. The respondent deposes that this conduct made it highly suspicious that the applicant was involved in fraud and dishonesty.

At the hearing of this application the applicant abandoned the main prayers under 1 and asked the Court to give judgment in the alternative prayers. There was no appearance for the respondent on the day the application was argued.

The main issue in this application is whether the applicant was dismissed summarily or whether he was given notice in accordance with clause 5 of the contract of service which appears to me to be the same with the provisions of section 13 of The Employment Act No. 22 of 1967.

Clause 5 reads as follows:

"the engagement of the Employee under this Agreement may be terminated by either party giving one calendar month's notice (such notice to commence only on the first day of a month) in writing of the intention to terminate it, or may be terminated by the Company without notice should the Employee amongst other things commit or attempt any crime or fraud or dishonesty or neglect his duties, act in breach of his undertakings herein or be guilty of disobedience or such unseemly conduct as in the opinion of the Management of the Company shall justify his dismissal without notice."

Section 13 (1) (a) reads as follows:-

"Every contract, not being a contract for one period of fixed duration nor a contract to perform some specific work or undertake a journey, without reference to time shall be deemed in a case where:-

- (a) the contract is to pay wages at a monthly rate or by reference to any other fixed period not expressly covered by a provision of this subsection to be a contract from month to month, determinable by either party at any time on not less than one month's notice."

It is important to interpret the letter of dismissal shown above whether it was a summary dismissal or a dismissal on one month's notice. The letter was written on the 15th July, 1988 and informed the applicant that his service with the respondent would be terminated with effect from the 31st July, 1988. Summary dismissal is usually with immediate effect. If an employer informs an employee that his services shall be terminated on any future date, he is actually giving notice to that employee and he is bound by law to give notice in terms of section 13 of The Employment Act 1967 (The Act).

In the present case the applicant was paid remuneration at a monthly rate and was therefore entitled to one month's notice. He was given only sixteen (16) days notice, i.e. from the 16th July to the 31st July. This was short notice which was in breach of section 13 (1) (a) of the Act. The respondent did not dismiss the applicant summarily but at the same time it evicted him from the office before the 31st July, 1988. At the end of July it paid him his full remuneration. It seems to me that the respondent intended to make payment in lieu of notice, because it did not want him to continue with his work until the 31st of July, 1988. Unfortunately he was paid remuneration for 16 days instead of thirty (30) days.

Section 14 (1) of The Act provides that notice to terminate a contract may be given at any time but the day on which it is given shall not be included in the period of notice. This section overrides clause 5 of the contract of service between the applicant and the respondent which required that notice be given on the first day of a month. The notice given by the respondent had to expire on the 15th of August, 1988. And because the respondent did not want the respondent to continue working until the 15th August, 1988 he had to pay him a full month's remuneration in lieu of notice in terms of section 13 (4) (b) of The Act.

The respondent owes the applicant notice pay from the 1st August, to the 15th August, 1988. The other half was included in the July remuneration.

Section 16 (1) of The Act provides that the termination of any contract under the provisions of this Part shall be without prejudice to any accrued rights or liabilities of either party under the said contract at the date of termination. It is common cause that at the time of termination of the contract the sum of M7 010-85 had accrued to the applicant as commission reserve and the sum of M3 303-69 as his pension contributions to the respondent's Outdoor Staff Pension Fund.

Clause 13 of the contract of service which purports to say accrued rights of an employee shall be forfeited to the company on termination of the contract must be declared null and void because it contravenes the provisions of The Act. Commission reserve is money for which the applicant has already worked and must be paid to

him even if he is summarily dismissed. In terms of section 16 of The Act it does not matter that the dismissal is a summary one or on notice accrued rights shall not be a prejudiced in any way.

If the applicant had been dismissed for a lawful purpose, i.e. his insubordination and refusal to carry out company instructions he should have been dismissed summarily without pay. The termination of the contract would have been with effect from the 15th July, 1988 when the letter of dismissal was given to him. The respondent elected to give notice and must give notice prescribed by law and its own contract of service form. I do not think that it will be necessary for me to decide whether the applicant was dismissed because he was insubordinate and refused to carry out respondent's instructions. By its conduct the respondent decided to dismiss the applicant on notice and it is bound to give proper notice or payment in lieu of notice. It decided to follow the latter. The applicant may have been insubordinate but the respondent decided to dismiss him on notice in terms of section 13 (1) (a) read with 13 (4) (b) of the Act and not under section 15 (2) (a) read with 15 (3) of The Act.

The applicant has also claimed the refund of the money which was deducted from his remuneration under the sponsorship fund launched by the respondent. In its opposing affidavit the respondent deposes that the directive was presumably made under clause 19 of the contract which provides that the company reserves the right to alter the basis of the Employee's remuneration and the condition of his appointment from time to time, by notification in writing. There

is a dispute of fact as to whether the notification was made in writing. The branch manager of the respondent says that he read the letter of the representatives. The applicant denies this. I shall accept what the respondent says and refuse to give judgment in applicant's favour as regards this amount.

For the foregoing reasons I make the following order:

- (a) The respondent shall pay the applicant notice pay in the sum equal to half of his remuneration for August, 1988;
- (b) The respondent shall pay to the applicant the other half of his August remuneration as a right which had accrued to him before his dismissal;
- (c) The respondent shall pay to the applicant the sum of M7 010-85 being in respect of commission reserve accruing to the applicant;
- (d) The respondent shall pay to the applicant the sum of M3 303-69 being applicant's contributions to the respondent's *Outdoor Staff Pension Fund*; and
- (e) The respondent shall pay costs of suit.

J.L. KHEOLA

JUDGE

30th June, 1989.

For the Applicant - Mr. Mahlakeng
For the Respondent - Mr. Maqutu.