CIV/APN/80/86

IN THE HIGH COURT OF LESOTHO

In the Application of :

THABISO MABOTHILE Applicant

V

CO.OP LESOTHO (PTY) LTD Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M.L. Lehohla
on the 13th day of July, 1989.

This application was brought before this Court by way of motion.

The applicant sought an order :-

1. Reviewing and setting aside the decision of respondent's management to demote and reduce applicant's salary (sic);

2. directing that applicant be re-instated to the position and status held prior to such demotion and reduction in salary;

3. directing respondent to pay to applicant arrears of salary from the date of such demotion and reduction in salary up to the time of applicant's reinstatement;

4. directing the respondent to pay to applicant per diem allowance per night that applicant should have received on transfer from Mohale's Hoek to Maseru;

5. directing the respondent to pay the costs of this application; and

6. granting the applicant such further and/or alternative relief as this court may deem fit.

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The application was dismissed with costs on party and party scale for the following reasons:-

It is common cause that the applicant is an employee of the respondent, and that the respondent is a statutory body duly incorporated and registered in accordance with the laws of Lesotho, and that the applicant has been working at the respondent's company as a Depot Manager "B" stationed at Mohale's Hoek earning an annual salary of M4428. It is also common cause that the applicant's appointment became permanent and that he became pensionable with effect from the 1st January 1984. See copy of confirmation of appointment to the permanent staff marked "A".

P.M. Khanyane on whose opposing affidavit the respondent relies avers that he is the respondent's Sales and Distribution Manager. He avers further that the records relating to the applicant's demotion are under his control.

Khanyane admits that he recommended the demotion of the applicant. He justifies this recommendation on the fact that the applicant's performance of duty and the results of an audit carried out at the applicant's depot were bad and unsatisfactory. This was made known to the Managing Director in terms of a letter addressed to the applicant dated 20th June 1985 and attached to the applicant's affidavit marked "B".

Having intimated in that letter that the applicant was not only grossly negligent but that an element of dishonesty was an obvious factor in the performance of his duties Khanyane recommended to the Managing Director that the applicant be demoted to the vacant position of a storeman at Maseru. Apparently this position had been vacated by one Molongoana on or around the 1st June, 1985.

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The decision of the management endorsing the sales and Distribution Manager's recommendations was intimated to the applicant in terms of annexure "C" on 10th July 1985. It is important to note that this decision of the management was forwarded and intimated to the applicant by Khanyane who at the time was effecting these things in his capacity as Acting Personnel and Administration Manager. It is important to note that he was at the time discharging his functions on behalf of the overall management of the respondent. It is thus unacceptable for the applicant to aver in para 6 of his founding affidavit that

> "On or about the 10th July, 1985 the said Khanyane now apparently in his capacity as Acting Personnel and Administration Manager ... purported to demote me and reduce my salary ....."

because in discharging these functions he was not purporting to be a holder of the office to which he had been appointed. Therefore if he was duly appointed no way could he purport to discharge functions germane to his office. He discharges those functions on behalf of the management and does not purport to do so. Khanyane in his opposing affidavit buttresses this position by indicating that he was in his new capacity and circumstances entrusted with the responsibility of informing the applicant of the decision to demote him as the regular incumbent of the position had gone to Malawi for some reason or other.

Khanyane admits that when the applicant was temporarily transferred from Mohale's Hoek to Maseru it was because investigations were being conducted following negative audit reports concerning the applicant's handling of the business entrusted to him, but is quick to explain that the transfer was in part to afford the applicant an opportunity to explain what are called "the obvious discrepencies in his depot." In answer to the applicant's complaint that he was never informed of the results of the investigation

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Khanyane explains that the applicant failed to give a satisfactory explanation of the discrepencies hence an action was accordingly taken against him. Khanyane absolves himself of the duty to inform the applicant of the results of the investigations because the latter knew that audit reports were unfavourable and that he was the one to explain the discrepancies. I don't think that it would have cost the respondents anything to inform the applicant of the results of the investigations especially when it was on the basis of such results that the applicant s interests were adversely affected.

I do not deem it my function at this point to delve into the intimate circumstances of this case in the light of the procedural defects which characterise it.

The applicant complains that he was not given an opportunity to be heard before being given what appears to be short shrift by the respondent.

But the respondent shows that the applicant was in fact given such an opportunity. See Respondent's opposing affidavit at paragraph 12. Thus now comes into surface what amounts to dispute of fact.

In paragraph 16 the applicant says he approached this court having exhuasted whatever remedies were available to him. Perhaps his avoidance of the phrase all available remedies may have fed his self-delusion that it was not therefore necessary to avail himself of all remedies provided for in the grievances handling machinery under section 51(1) L of the Cooperative Societies Proclamation 47 of 1948. This section says a dispute shall be referred to the Registrar for decision. Presently the position of the Registrar is substituted by that of the Commissioner of Cooperative Societies.

It is significant that the applicant has not pointed out what bodies he approached with a view to

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settlement of his grievance.

It was submitted that the applicant being an officer of the cooperative societies within the meaning of the Proclamation falls to be treated under the rules pertinent thereto. Interpretation section 2 of the Proclamation says "officer" includes a chairman, Secretary, treasurer, member of committee or other person empowered under the rules or by-laws to give directions in regard to the business of the registered society.

Reliance on L.E.C. vs Nyabela CIV/APN/150/80 cannot be of any avail to the applicant because in Nyabela local remedies had been exhuasted.

The applicant cannot be heard to say that he feared that the malice he apprehended in Khanyane's handling of his matter would be perpetuated by other bodies charged with the addressing of employees' grievances. The law cannot assume bias. See Judicial Review of Administration Tribunals in South Africa 1963 Ed. at page 82 where Rose Innes says :-

> "Until a final decision has been given to an application before the domestic or statutory body and its appellate organs, it cannot be said that an irregularity which may have occurred will not be set right nor justice done. This justification loses its force where the appellate body has prejudged the matter and was itself the body which in the first instance committed the irregularity."

I am of the view that respondent has shown substantial compliance with the respondent's policy manual. Though it was fundamental to the applicant's case to adhere to the respondent's policy manual, the applicant has failed to do so.

It is not accurate to say Khanyane implemented his recommendation. The letter in question clearly says "the management has decided to demote" the applicant.

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It is quite another thing if in the applicant's view Khanyane's person is inseparably identifiable with the management. If so, then that's too bad.

Indeed the submission rings true that if in the new capacity Khanyane refused to implement the decision reached by the management on his recommendation while acting under another but proper capacity, he would do so on peril of his own dismissal by the management. Thus because nothing in the papers shows that Khanyane was acting in his personal capacity nor that he actually implemented the recommendation made by him to the management despite its decision to the contrary, it is inescapable that at that stage Khanyane was just relaying on what was decided by the management.

I thus can hardly find merit in the accusations levelled against Khanyane that he acted as judge in his own cause or that he manifested bad faith. See R vs. Lewes (1973) A C 388 at 402 where Lord Reid said

> "Natural justice requires that the board should act in good faith and that they should ..... tell him the gist of any grounds on which they propose to refuse his application so that he may show it to be unfounded in fact. But the board must be trusted to do that : We have been referred to their practice in the matter and I see nothing wrong with it."

It is difficult to see how the grievances handling machinery can be faulted for being likely to act mala fide in respect of the business they must be trusted to perform even before they have performed it, or any of them has been shown to have falsely attributed the failure of the business to the applicant's negligence. Nowhere has it been shown that the Commissioner of Cooperative Societies has had anything to do with this matter that would be prejudicial to the applicant's interests.

The applicant is aggrieved that he was not given an oral hearing. But Judicial Review of Administrative Tribunals in South Africa at p. 158 shows that even if

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an applicant is entitled to a hearing that does not necessarily entitle him to an oral hearing, nor does it have to include a right to oral argument or to examine witnesses. See also Peterson vs Cutbert & Co. Ltd. 1945 AD 420 at 421. I have already indicated that in terms of Rule 8(14) an assertion by the applicant that he was given no opportunity to be heard and the denial by the respondent of such an assertion can scarcely redound to the applicant's benefit.

Mr. Molete made much of the fact that officers of the respondent were acting in an administrative as against quaci-judicial capacity. But a word of caution here : In R vs Commission for Racial Equality (1980) ALL E.R. 265 Lord Lane C.J. said;

> "It does not profit one to try to pigeon-hole the particular set of circumstances either into the administrative pigeon-hole or the judicial pigeon-hole. Each case will inevitably differ, and one must ask oneself what is the basic nature of the proceeding which was going on here."

Furthermore in R vs Ganing Board of Great Britain (1970) 2 ALL E.R. 528 we are told by Foulks at 233-234, referring to Lord Denning, that

> "his Lordship categorised as a heresy the view that the principles of natural justice apply only to judicial and not to administrative proceedings".

Finally I am enamoured of the words of Lord Parker C.J. in Re (H) K (an infant) 1967 ALL E.R. 266 where Foulks above said at 234 of his book.

> (Lord Parker C.J.)
>
> "after saying that he thought that the officer was not acting in a judicial or quasi-judicial capacity said that even if he were not he still had to act fairly."

Further commenting on the decision immediately above the learned author says :

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> "We find in that bold decision both a refusal to be strait-jacketed in the judicial-administrative dichotomy and the introduction (or re-introduction) (of) or (emphasis on) the idea of fairness. In Schmidt vs Secretary of State for Home Affairs (1969) ALL E.R. 904 S, a U.S. citizen had been allowed into the U.K. for a limited period to study at the College of Scientology. He applied to the Home Secretary for an extension of his stay. His application was rejected without giving him a hearing. Lord Denning said that the former distinction between acting adminstratively and acting judicially was no longer valid."

For my part I cast my lot with Lord Lane above and think that the proper question to be asked at the end of the day is "what is the basic nature of the proceeding which was going on here". See CIV/APN/318/88 Tsepoa Tsekoa & 3 Others vs The General Manager Lesotho Flour Mills & 4 Others (unreported) at pp. 8 and 24.

It was argued for the respondent that if it is felt that the applicant has exhuasted all the domestic remedies and thus entitled to institute these proceedings in this court the respondent's action in that event is not wrongful or unlawful for as borne out in the applicant's own replying affidavit the respondent's document called 'Policy' marked "J" the procedure is set out in the event of failure on the part of an employee to live up to the standard expected of him in the performance of his duties as follows:-

> "2.2.1 Division Head may propose in writing to the Personnel & Administration Manager, for reference to the Central Manager, the removal of an employee from office or his reduction in rank or salary on one or more of the following grounds:-
>
> (a) .....
>
> (b) That he is incapable of carrying out his duties efficiently (after all efforts to up-grade him/her have been exhausted).
>
> 2.2.2 The Division Head shall supply information in support of his proposal to Personnel & Administrative Manager, for reference to the General Manager.

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2.2.3 The General Manager may after thorough investigation advise that :-

(a) .....

(b) The employees's salary or rank or both his salary and rank be reduced to an extent specified."

In argument Mr. Mphutlane for the applicant laid much store by his uncertainty whether Co-op Lesotho is a cooperative society as opposed to a statutory body. He submitted that as there is no constitution it is impossible to show that Co-op Lesotho is a cooperative society within the meaning of the Proclamation.

The essence of this argument truly escapes me. In my view, and while it is essential to note that what is uppermost for the dermination of this matter is the question whether domestic remedies have been exhuasted, it seems that the argument raised is merely illusory - first because it makes no difference whether a body is statutory or a society within the meaning of the Proclamation, for in either case a grievance handling machinery is or should be provided. In the case of a cooperative society, which as in this matter it is common cause that it was registered, there must have been a constitution which would indicate what procedures are to be followed in an endeavour to redress grievances. It was thus the applicant's responsibility to render the constitution available before Court. He cannot be heard to make a merit of his failure to furnish it because the onus is in any case on him to establish his case on a balance of probabilities. Next because if the body is a statutory one then the Act would provide means of creating rules, which determine procedures to be followed for purposes of settling disputes so that at the end of the day there would be organs specified for purposes of handling such disputes before approaching this court.

I do not however, view with favour the fact that it seems, the reduction in salary was effected retrospectively. But that is a matter that the relevant tribunal

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would have been asked to deal with if the applicant had been patient to avail himself of all the domestic remedies at hand before rushing post haste to this Court. However I do not think all is lost even at this stage.

I am not inclined to pursue the respondent's self-righteousness in making a merit of the fact that while it could have dismissed the applicant in terms of the Employment Act No. 22 of 1967 section 15(3)(c) and (d) it was charitable enough to only reduce his salary and rank. I confine myself in making a determination that the application must fail on the grounds that it has been brought before this court prematurely.

Costs are awarded to respondent on party and party basis.

J U D G E

13th July, 1989.

For Applicant : Mr. Mphutlane
For Respondent : Mr. Molete.