CIV/APN/165/87

IN THE HIGH COURT OF LESOTHO

In the matter between:-

BANGANI B. TSOTSI — Applicant

and

INSTITUTE OF DEVELOPMENT MANAGEMENT — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 17th day of October, 1990

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

(a) Declaring the termination of his employment by the Respondent was wrongful and unlawful.

(b) Directing the Respondent to pay to the Applicant the sum of M5,021-00 being the balance of an amount due to the Applicant in lieu of 3 calendar months notice of termination of employment; alternatively

(c) Directing the Respondent to pay to the Plaintiff the sum of M1,499-40 being the balance of an amount due to the Plaintiff in lieu of one calendar month notice of termination of employment;

(d) Directing the Respondent to pay costs of this application;

(e) Granting the Respondent such further and/or alternative relief as this Honourable Court may deem fit.

At the hearing of this application the applicant abandoned prayers (b) and (c) above and confined his argument to prayer (a) only.

It is common cause that the respondent is a private company limited by guarantee with its headquarters in Botswana and country offices duly registered in Swaziland and Lesotho. In terms of the respondent's Articles of Association the respondent is administered by a Regional Director based in Gaborone, Botswana, assisted by one Deputy or Country Director from each of the other two participating countries, namely Lesotho and Swaziland. The Regional Director and the Country Directors are appointed by the Board of Governors. On appointment the Regional Director becomes a member of the Board of Governors. He is the Chief Executive Officer of the respondent and shall appoint all employees, agents and consultants of and for the respondent, other than the Director and Deputy Directors who are appointed by the Board of Governors.

In his founding affidavit the applicant avers that on the 29th July, 1982 he accepted an appointment by the respondent as Registrar/Controller at the initial salary of P12,000 per annum plus other ancillary benefits. On the 10th October, 1983 he was promoted to the position of Country Director, Lesotho. His initial salary as Country Director was fixed at M14,000 per annum. On the 12th July, 1985 the Regional Director wrote a letter to the applicant informing him that in accordance with respondent's General Conditions of Service his job performance over the past twelve months had been reviewed and that he had been awarded an increment.

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On the 27th August, 1986 the applicant received a letter from the Regional Director headed: "Letter from the Government of Lesotho requesting your removal from the position of Country Director, Lesotho." The letter reads as follows:

"I have today received a letter from the Deputy Secretary - Ministry of Labour and Manpower Development who is also an IDM Board member informing me that "The Lesotho Government has decided to request your office to allow Mr. Tsotsi leave of the services of IDM-Lesotho with immediate effect." It is their wish to replace you with someone else to be decided upon by the IDM-Board.

I am presently contacting the Board chairman to bring to his notice the wishes of the Government of Lesotho and to have him take appropriate action. I cannot anticipate the position the Board will take, but you are aware that Government's wishes would be taken very much into account by the Board. You are also aware that it was the Government of Lesotho, through Mr. Bereng, then Secretary - Cabinet Personnel and Board Chairman of IDM, who approved your appointment into the position of Country Director. I fear the Board will most likely acede to their request and there would probably be very little the chairman and I can do. The appointment of a country director is by and large an individual country affair.

Please let me have your views about this development. Most likely the chairman and I will be in Maseru first week of September to iron out this problem with the Lesotho members of the Board and yourself. But it does appear that very little can be done to reverse the decision of the Government.

Yours sincerely,

(signed): E.L. Setshwaelo
REGIONAL DIRECTOR."

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In reply to the abovementioned letter the applicant wrote a letter to the Regional Director advising him that he knew of no reasons why the Government of Lesotho would want his services as Country Director to be terminated forthwith and asking him to furnish him with such reasons. The Regional Director failed to do so.

On the 3rd October, 1986 the Regional Director wrote a letter to the applicant (Annexure "G") in which he stated that he had been directed by the Board of Governors of the respondent to inform the applicant of their intention to terminate applicant's services with the respondent with effect from the 31st October, 1986 and to pay him one month's salary in lieu of notice.

On the 10th October, 1986 the applicant wrote to the Regional Director of the respondent a "without prejudice" letter saying that as the Regional Director was unable to furnish him with reasons for termination of his employment, he would appreciate it if he would request the Board of Governors to furnish him with same. The applicant never received any reasons.

In his opposing affidavit on behalf of the respondent Mr. E.L. Setshwaelo, the Regional Director of the respondent, avers that it is true that the applicant has not been given reasons for the termination of his employment. He has however, been paid his full entitlements in terms of the law and that in the circumstances reasons are not called for. He further avers that the letter Annexure "O" constitutes a clear conditonal tender in full and final settlement of all claims between applicant and respondent

and that if the applicant did not accept the payment of M6,438-29 in this matter, he was duty bound and legally bound to return the cheque to respondent's attorneys. Because he did not do so he is deemed to have accepted the payment in full and final settlement. The respondent's attorneys' letter reads as follows:

"Dear Sirs,

re: Institute of Development Management/B. Tsotsi

We refer to your letter dated 16th February, 1987.

Under cover hereof, and in full and final settlement of all or any claims which your client may have against our client, we enclose our client's cheque in favour of your client in the sum of M6 438,29.

If the cheque is not accepted in full and final, then it is to be returned to us forthwith.

Yours faithfully,

KIRBY, HELFER & COLLINS"

In reply to the letter above the applicant accepted the cheque and issued a "without prejudice" receipt. He accepted the money in full and final settlement of his pension fund entitlement, but not in respect of his other claims as set out in his letter of the 11th December, 1986. The claims were pension fund, M5,433 in lieu of notice and M50,000 damages for injuria (See Annexure "T").

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Mr. Mpopo, counsel for the applicant submitted that the rules of natural justice and the audi alteram partem rule are applicable in this case, and that therefore, the applicant should have been given an opportunity to be heard by the Board of Governors before his employment was terminated. He was not given that opportunity and therefore the termination of his employment was wrongful and unlawful. He referred to the recent case of Koatsa Koatsa v. The National University of Lesotho, C. of A. No.15/86 dated the 7th April, 1989 (unreported) at pp 11-12 where Mahomed, J.A. said:

> "If the appointment of an employee in the position of the Appellant was simply terminable at any time on one month's notice from the University, it could hardly "be considered permanent up to the retirement age". This conflict is, however, capable of being resolved if the right accorded to the University to terminate the contract of an employee in the position of the Appellant was qualified with a duty to exercise that right fairly. A private employer exercising a right to terminate a pure master and servant contract is not, at common law, obliged to act fairly. As long as he gives the requisite notice required in terms of the contract, he can be as unfair as he wishes. He can act arbitrarily, irrationally or capriciously. The position of an employer performing a public function is not the same. The official or officials who exercise a discretion to terminate a contract of employment by giving to the employee concerned the minimum period of notice provided for in the contract, cannot act capriciously, arbitrarily or unfairly. In particular, if the real reason for giving to an employee a notice of termination, is some perceived misconduct or wrong committed by the employee, the employee should be given a fair opportunity of being heard on the matter, especially where it appears from the circumstances that the employee had a "legitimate expectation" that he would remain in employment permanently in the ordinary course of events."

There is no doubt that on the 10th October, 1983 when the applicant was promoted to the position of Country-Director he

became a permanent employee of the respondent (See paragraph 3 of Annexure "C"). It seems to me that the applicant was entitled to be heard by the Board of Governors before his services were terminated. It has not been disputed by the respondent that the applicant was never given an opportunity to be heard. In fact in Annexure "E" the Regional Director of the respondent said that it was likely that he and the Chairman would be in Maseru during the first week of September, 1986 to iron out the problem with the Lesotho members of the Board of Governors and the applicant. This meeting never materialized until on the 3rd October, 1986 when the applicant was dismissed.

I am satisfied that the applicant was never given an opportunity to be heard by the Board of Governors of the respondent and yet as a permanent employee he ought to have been given the opportunity to be heard before his employment was terminated.

Mr. Mpopo submitted that the contract between the parties was not a pure master and servant contract. In Malloch v. Aberdeen Corporation, 1971 (1) W.L.R. 1578 pure master and servant cases were described as "cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter parties aspects the relationship may be called that a master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."

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The respondent is a public institute established in accordance with a "Memorandum of Understanding" by the Governments of the Republic of Botswana, the Kingdom of Lesotho and the Kingdom of Swaziland. I think that the public nature of the respondent is not in dispute and there will be no point to pursue this issue any further.

Mr. Mpopo submitted further that the fact that the contract empowers the respondent to give the applicant three months' notice of termination of his services or one month's pay in lieu of notice does not necessarily imply that in the exercise of that power it can dispense with the principles of natural justice. I agree with this submission because as was pointed out in Koatsa's case (supra) the officials of the respondent cannot act capriciously, arbitrarily and unfairly and then argue that that they gave the applicant notice in accordance with the terms of his contract. The applicant had a legitimate expectation that he would remain in employment permanently in the ordinary course of events. He expected that if he had to leave his employment before the retiring age, he would be given reasons for his dismissal and an opportunity to be heard. Just before he was given the sack he had been awarded an increment based on his work performance. I do not agree with Mr. Setshwaelo that the letter he wrote to the applicant informing him of the increment was not complimentary because it was a standard letter that could have been written to any member of staff,even one who had been reprimanded. The increment was awarded after a review of the applicant's performance which was obviously found to be satisfactory. If the policy of the respondent is to award increments to staff members whose job performance has been unsatisfactory and who have been reprimanded, I have no comment to make.

Mr. Fick, counsel for the respondent, submitted that there was a dispute of fact and that the applicant ought to have instituted an action. I do not agree with this submission because the issue before this Court is whether or not the applicant was given an opportunity to be heard before he was dismissed. In paragraph 14 of his affidavit the applicant makes the allegation that he was not given the opportunity to be heard. In answer to this at paragraph 14 of his answering affidavit Mr. Setshwaelo does not deny this serious allegation.

Mr. Fick submitted that the applicant has fully compromised any claim he might have against the respondent by accepting the cheque in the sum of M6,438-29 which the respondent said if it was not accepted in full and final settlement, then it was to be returned to the respondent's attorneys forthwith. The applicant refused to do this but accepted the cheque and issued a receipt saying it was full and final settlement in respect of the claim for pension but not for other claims. A compromise is defined as an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something; either diminishing his claim, or increasing his liability. (Principles of South African Law, 5th edition by Wille at page 358).

In my view there was no compromise because the parties never agreed on anything new. Parties never shifted their initial positions. The applicant's position has all the time been that he

is entitled to some damages and the respondent's position has been that the applicant is not entitled to any damages for wrongful dismissal because he was given a proper notice or paid a sum of money in lieu of notice. In Harris v. Pieters, 1920 A.D. 644 the question of whether a creditor who has cashed a cheque sent in full settlement can sue for the balance came up for decision. Innes, C.J. drew a distinction between tender as defined in Odendaal v. Du Plessis, 1918 A.D. 470 and payment with an attempt to attach a condition. In the former case the creditor who cashes the cheque has accepted the tender and therefore cannot sue for the balance. If on the other hand, the debtor's action in sending the cheque in full settlement is to be interpreted as payment with an attempt to attach a condition Innes, C.J. explained the consequences at pp.649-50:

> "But if payment is intended, then further considerations arise. For payment must be made in the exact terms and to the exact extent of the relative obligation. The debtor cannot vary the manner or the amount of his payment, nor can he engraft upon it any condition not contained in the contract or implied by law. When money is delivered to the creditor in payment of a liability which the debtor admits, accompanied by the statement that it is paid in full settlement, he is not bound to accept it as such. He may, of course, waive his rights and do so. But he is entitled to reject the condition. On the assumption that the debtor intends to pay the liability, which he admits, and delivers the money with that intention, the condition which he seeks to attach is wholly inoperative save with the creditor's assent. And if the creditor withholds his assent and and repudiates the condition, he may in my opinion retain the money and sue for the balance. For the position is this: The obligation is discharged to the extent of the payment; the debtor who pays cannot compel the creditor to donate his claim for the balance. And if the creditor refuses to do this, his right to that claim remains unaffected by the receipt of the money. He cannot be met either by a plea of estoppel or by an exceptio doli, for he has made no representation and no promise."

In the instant case I am of the view that what the respondent did was to offer payment of the debt with an attempt to attach a conditon. The applicant was entitled to accept the cheque and to reject the condition.

Mr. Fick finally submitted that as there was no prayer for reinstatement the application was for an order without any effect. In terms of section 2 (1) (c) of the High Court Act 1978 this Court has in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination. In the instant case the applicant seeks a declaratory order following which several options may be open to him.

In the result the application is granted in terms of prayers (a) and (d) of the Notice of Motion.

J.L. KHEOLA
JUDGE

17th October, 1990.

For the Applicant - Mr. Mpopo
For the Respondent - Mr. Fick.