

IN THE HIGH COURT OF LESOTHO

In the Application of :

THAMAHANE RASEKILA                      Plaintiff

v

LESOTHO TELECOMMUNICATION              Defendant  
CORPORATION

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola  
on the 7th day of August, 1991.

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

- (a) Declaring Applicant's dismissal by Respondent null and void;
- (b) Directing Respondent to re-instate Applicant forthwith;
- (c) Directing Respondent to pay Applicant's emoluments with effect from the date of dismissal to the date of re-instatement;
- (d) Directing Respondent to pay the costs hereby;
- (e) Granting Applicant such further and/or alternative relief;

The applicant was employed by the respondent on the 1st March, 1982 as Head of the Finance Division. He was on probation for twelve months and on the 14th January he satisfactorily completed his probation

2/ period. ....

period. He was admitted to the permanent and pensionable establishment of the respondent. He joint the Pension Fund of the respondent and his contribution to the Fund was deducted from his salary on monthly basis. The respondent contributed a certain amount stated in the Personnel Regulations.

The applicant deposes that on the 21st April, 1989 he received a letter of termination of his services with the respondent. The purported dismissal was based on clause 29-3-1 of the Personnel Regulations. He says that before he was dismissed by the Respondent he was never given any hearing pursuant to Regulation 28 of the Personnel Regulations.

The respondent alleges that the dismissal was unlawful in the following respects:

- (a) it was not taken in compliance with the provisions of Clause 28 in as much as I was not given any hearing pursuant thereto and the fact that, I was on pensionable service;
- (b) it deprived me of my legitimate expectation to work for Respondent till retirement or till I resign or my services were terminated for a lawful purpose pursuant to law;
- (c) it is contrary to natural justice in view of the public nature of Respondent;
- (d) it was allegedly taken by the Board of Directors of Respondent in contravention of the clear provisions of the Personnel Regulations which form the basis of the terms and conditions of my employment;

- (c) it wrongfully, unlawfully and unilaterally changed the said terms and conditions of my employment without my knowledge and consent;

He deposes that upon the purported dismissal he accepted the terminal benefits without prejudice.

Mr. A.K. Makara is the Managing Director of the respondent. In his opposing affidavit he deposes that the applicant had been delegated by him to represent him and the respondent at a conference in Maseru. He had instructed the Applicant to attend, prepare minutes and to report to him on the conference which was held in Maseru at the beginning of 1989. Despite repeated requests to him to produce the minutes for his perusal, the respondent failed, refused and/or neglected to produce the minutes. On the 28th March, 1989 Mr. Makara alleges that he telephoned the respondent in connexion with this matter and his response was rude, insulting and disobedient. The conversation ended on the basis that he, the applicant, would produce the minutes in his own time. The deponent felt that the behaviour of the applicant constituted disobedience, insolence and wilful neglect of his duty. He took the matter in the gravest light which eventually ended up with his dismissal on the 28th March, 1989.

The deponent alleges that the applicant had demonstrated unwillingness to carry out orders, refusal to work under him in a satisfactory manner and had neglected his duties on a regular basis, a more serious of which

4/ was the ....

was the fact that he had failed to pay a creditor which had resulted in severe embarrassment to the respondent and affected the respondent's credibility with a donor country. This matter was also discussed with the applicant on the occasion, per telephone, and regrettably, the deponent says that he received the same defiance from the applicant to either carry out his duties or to make a reasonable explanation as head of finance division to see to it that invoices were paid timeously. He wrote a letter (Annexure "B") in which he asked the applicant to resign.

On the 29th March, 1989 Mr. Makara placed the entire problem regarding the applicant before the Board of Directors who voted to dismiss the applicant. The letter of the 19th April, 1989 was written by the deponent to the applicant confirming the termination of applicant's services on notice on 28th March, 1989 as confirmed by the Board of Directors on the next day.

On the 28th March, 1989 Mr. Makara conducted a hearing between the applicant, himself and the personnel manager. As a result of this meeting the applicant wrote a letter (Annexure "B") in which he unconditionally apologized and pleaded that the matter should not be referred to the Board level.

It will be convenient at this stage to produce a few of the letters exchanged between the applicant and the respondent's Managing Director in

5/ order to .....

order to decide

- (a) who dismissed the applicant between the Managing Director and the respondent and when the dismissal was made.
- (b) whether the applicant was given a chance to be heard before he was dismissed.

The letter of the 28th March, 1989 (Annexure "B") reads as follows:

"Mr. Clark Rasekila,  
c/o L.T.C.,  
P.O. Box 1037,  
MASERU. 100

Dear Sir,

It is with regret that you are advised to hand in your resignation immediately today.

This follows my memo referring to Ericsson's unpaid invoices and your latest unbecoming attitudes towards me, when I was trying to assist you in what appears to be your failure in producing the minutes of the Working Group on tariffs held in Maseru at the beginning of 1989.

I must admit I have tried all I could to make you understand the importance of working as a team, but you never bothered to take my advice.

It is my strong belief that you will find a better place somewhere where you will also find a peace of mind. Could you please make arrangements with the Lesotho Bank concerning your car and if you feel it is necessary you may give our Personnel Manager copies of all correspondences you make with the bank concerning the car that you now possess under LTC guarantee. The other loans you can settle with the CA.

With best regards.

Yours sincerely,

A.K. MAKARA (Sgd)  
MANAGING DIRECTOR"

The letter of the 28th March, 1989 (Annexure

"D") reads as follows:

"The Managing Director  
LTC

Dear Sir,

YOUR LETTER OF 28/03/1989 -  
REF EN - 401.

As discussed with you in our meeting of this morning on the above in the presence of the Personnel Manager, I wish to repeat that I sincerely and honestly apologise for all the things that have led to the writing of the letter under reference inclusive of the mishap of Wednesday last week.

I hope this plea will meet with your kind and favourable consideration as I can only promise to work much harder to patch up whatever loopholes you will bring to my attention regarding what you said my weakest area is in the relationship with other people in L.T.C.

Since I do not intend to even make any arguments (appeal to higher authorities) or making counter-claims for fear of aggravative matters; my genuine request is that if it be acceptable to you Sir, please treat this matter as confidential while perhaps giving me the last chance. I request that it does not reach Board level.

Yours sincerely,

(Sgd) THAMAHANE C.F.D. RASEKILA "

The letter of the 19th April, 1989 (Annexure

"TRI") reads as follows:

"Mr. T C F D Rasekila  
P O Box 1037  
MASERU 100

Dear Mr. Rasekila,

RE : TERMINATION OF YOUR SERVICES

7/ On ..

On the 28th day of March, 1989, I addressed a letter to you requesting your resignation as a result of certain unsatisfactory circumstances which were conveyed to you by myself.

On the 28th day of March, 1989, you responded to this letter tendering your apologies for your behaviour and making a plea for the favourable re-consideration of your employment. This matter has received my full consideration and was placed before the Board of Directors for their final decision. On the 29th day of March, 1989, the Board of Directors duly considered your position and it is my duty to inform you that their decision was to terminate your services with this Corporation.

In the result, your services with this Corporation have been terminated in terms of Article 29 of the Lesotho Telecommunications Corporation Personnel Regulations, currently in force. In terms of Clause 29.3.1 thereof the Corporation is obliged to give you one month's notice. The Corporation shall pay you cash in lieu of one month's notice of termination of your services.

You are respectfully requested to call at this office in order that you may be paid your accrued benefits, leave pay, pension and other entitlements to which you may be the beneficiary, less usual deductions.

Yours faithfully,

A.K. MAKARA (Sgd)  
MANAGING DIRECTOR

Regulation 28.4.6 provides that dismissal of an employee of the respondent is to be decided by the Managing Director.

Regulation 29.2 provides that the decision regarding termination of services of an employee of the respondent shall be taken by the Managing Director. It seems to me the two Regulations mentioned above mean the same thing. The power to dismiss or to terminate services is delegated to the Managing Director by the respondent.

Annexure "B" is not a letter of dismissal but a letter of advice to the applicant by the Managing Director that he must resign and he gives reason why the applicant should do so. This letter cannot be regarded as a letter of dismissal because it was a kind advice to the applicant because resignation is not as bad as a dismissal when one is looking for another job.

In Annexure "D" the applicant apologized for the mistakes he had made and promised to work very hard if given the chance. By implication the applicant admitted the allegations made by the Managing Director in Annexure "B" that he had not paid certain invoices timeously and his failure to produce the minutes of the Working Group on tariffs held in Maseru at the beginning of 1989. The most important thing in the applicant's letter is that he did not accept the advice that he should resign and the Managing Director cannot be heard to say that he dismissed the applicant by that letter dated the 28th March, 1989. If the applicant did not come to work on the 29th March, 1989 it was not because he had been dismissed on the previous day but it must have been for other reasons.

The letter which actually dismissed the applicant is Annexure TR"I". In paragraph 3 of that letter, <sup>it</sup> was made clear that the applicant's services had been terminated and he was invited to come to the respondent's office in order that he might be paid his

9/ accrued .....



accrued benefits, leave pay, pension and other entitlements to which he might be the beneficiary less the usual deductions. What the letter is purporting to do is to make the termination of applicant's services to be retrospective to the 28th March, 1989 when the Board of Directors decided to terminate applicant's services with the respondent. I am of the opinion that the Managing Director had no power to make the dismissal retrospective. He ought to have written the letter on the same day that the dismissal was made. The dismissal ought to have taken effect from the date of the writing of the letter. All what the Board of Directors decided on the 28th March, 1989 is that the services of the applicant be terminated. There is nothing to show that they were to be terminated with immediate effect.

I therefore come to the conclusion that the services of the applicant were terminated on the 19th April, 1989 when the Managing Director of the respondent communicated the fact to him that the Board of Directors had decided that he be dismissed. In paragraph 3 he was accordingly dismissed. It seems to me that the decision to dismiss the applicant was reached by the Board of Directors of the respondent and the Managing Director merely communicated that decision to the applicant. The question is whether the Board of Directors had the power to do so in the light of Regulations 28.4.6 and 29.2 which delegate this power to the Managing Director. I am of the opinion that the answer must be in the

positive because section 20 (1) of the empowering Act -" Telecommunication Act 1979 - provides that the affairs of the Corporation shall be managed and controlled by a Board of Directors which shall consist of -". The power to manage and control must include the power to appoint and dismiss the officers of the Corporation.

If I am right that the Board of Directors had the power to dismiss the applicant then the next question is whether they gave the applicant a chance to be heard before they came to the conclusion that he must be dismissed. I think the answer must be in the negative because the minutes of the meeting of the Board at which a decision was made that the applicant be dismissed read as follows:

"Termination of Mr. T.C.F.D. Rasekila's Service (Finance Manager). The Managing Director reported that his office has found it difficult to continue working with Mr. T.C.F. D. Rasekila (Finance Manager) as he was failing to satisfactorily perform his duties and was refusing to take orders from his person. The Board directed that his services be terminated."

I am of the opinion that if the Board decided to take upon themselves to give a directive that the applicant should be dismissed they were under an obligation to hear the applicant before they decided to dismiss him. They apparently took the word of the Managing Director without questioning it. At least if the Board had received a written <sup>report by the Personnel</sup> Manager or Head of Division in terms of Regulations 28.1 and 28.2 it would have been clear to the Board that a proper investigation was made and that the applicant had presented his case. The Managing Director did not present any written report before the Board before a decision was taken to dismiss the applicant.

To reinforce my finding that the applicant was dismissed by the Board of Directors of the respondent reference can be made to Annexure "TR4" to the replying affidavit in paragraph 2 of which the Managing Director said "His services with LTC have been terminated by Board of Directors in its last meeting on the 29th March, 1989."

I am of the opinion that the audi alteram partem rule applied in this case and that the Board seriously violated it. Their action was therefore null and void.

The Managing Director seems to have been not quite sure as to who dismissed the applicant. In paragraph 7 of his opposing affidavit he says:

"I admit that I dismissed the Applicant on the 28th of April 1989 and this was confirmed as has been indicated by my letter to him on the 19th of April 1989. However, in order not to prejudice the Applicant and to remove any doubt as to the attitude of the Board of Directors, I placed this entire problem before the Board as I have indicated on the 29th of March and the Board confirmed my actions and did not see fit to amend or change the decision in any way."

I do not agree with him that the Board merely confirmed his actions. The minutes of the Board do not support him and clearly indicate that it was the Board that directed that the applicant be dismissed. They did not confirm the actions of the Managing Director because he had not dismissed the applicant.

If the applicant was dismissed by the Managing Director that was equally unlawful on a number of grounds. The most important of which is that on the 28th March, 1989 the Managing Director purported to conduct a hearing in terms of Regulation 28.2 which in part states that to establish facts, a hearing will normally be conducted by the Personnel Manager, Head of Division and other staff called in to give evidence. It was submitted on behalf of the applicant that the Managing Director cannot be complainant, prosecutor and judge in his own cause. That because he was a witness in the case the Personnel Manager or a Head of Division ought to have presided at the hearing. On the other hand it was submitted on behalf of the respondent that a proper hearing was conducted by the Managing Director himself (certainly a more senior position than the head of division) and the personnel manager. It was submitted that that constitutes full compliance with Regulation 28.

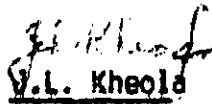
Regulation 28 is very clear that a hearing in order to establish the facts must be done by the Personnel Manager or a Head of Division. The Managing Director is excluded for obvious reasons because he is the person who has to take the final decision - dismissal - when all the facts have been established. Because he was the complainant in the instant case I am of the opinion that he ought to appear in the inquiry only as a witness. In a court of law the procedure is that when a person appearing before it commits contempt of court, such as insulting the court itself, the presiding judicial officer may summarily deal with the

matter and sentence the culprit there and then. But if he decides that an inquiry (a trial) be conducted, he cannot preside at such trial because he is a witness. I am of the view that once the Managing Director decided that a hearing should be done, he ought to have appeared as a witness and not as the officer conducting the hearing. According to Regulation 28 he is not supposed to conduct any hearing when a member of staff of the respondent is to face a disciplinary action. I think the submission that the Managing Director cannot be a complainant, prosecutor and judge in his own cause has some substance. More so because the Managing Director is a member of the Board which directed that the applicant's service be terminated. There is nothing to show that when the decision was taken the Managing Director did not take part. He ought not to have taken part because he is the complainant.

The submission that Regulation 28 did not apply in the instant case of summary dismissal should be rejected inasmuch as the respondent itself purported to conduct a hearing in terms of Regulation 28. Moreover, I am of the opinion that in the case of any misconduct, even under 29.1.1, the facts must be established and the only procedure prescribed for the inquiry to establish the facts is that under Regulations 28.1 and 28.2.

14/In the result.....

In the result the application is granted in terms of prayers (a), (b), (c) and (d).

  
V.L. Kheola  
Judge.

7th August, 1991.

For Applicant - Mr. Pheko  
For Respondent - Mr. Fick.