CIV/APN/18/91

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LESOTHO NATIONAL INSURANCE COMPANY (PTY) LIMITED — Applicant

and

BERNARD EDWARD DAVID JAMES — Respondent

J U D G M E N T

Delivered by the Honuourable Mr. Justice J.L. Kheola
on the 1st day of March, 1991.

In this application the applicant seeks an order in the following terms:-

1. Condoning the non-compliance of the rules pertaining to the period given to the Respondent to oppose the application;

2. Declaring that the Respondent's employment with the Applicant was lawfully terminated by Applicant on the 31st December, 1990.

3. That the Sheriff or his deputy be ordered and authorized to eject the Respondent from the premises situated at 200 Tona-Kholo Road, Maseru West, in the Maseru Urban Area.

4. That the Sheriff or his deputy be ordered and authorized to attach the Ford Sierra Motor Car registration number A 9688 and to deliver it to the Applicant.

5. Costs of suit.

It is common cause that the respondent was employed by the applicant in terms of a written agreement which is Annexure "C" to the applicant's founding affidavit. In terms of clause 3.1 the agreement was to operate for a period of twenty-four months with effect from the 9th April, 1988, unless terminated otherwise as provided therein. Clause 3.2 provided that the agreement was to be renewable for a further period of twenty-four months by mutual agreement provided that such agreement was reached by the parties at least three months before the termination of the agreement period.

Clause 4.2 provided that the agreement was to be terminable by the applicant or the respondent giving to the other three calendar months' written notice of termination of employment, provided that if such notice is given by the applicant, the applicant shall be entitled in its discretion as an alternative to requiring the respondent to work throughout the period of notice, to pay to the respondent his salary and other emoluments calculated up to the expiration of such notice period.

One of the terms of the contract was that the respondent would be provided with a motor vehicle for his use and a house for which he would pay no rent. It is common cause that the respondent would be entitled to the use and possession of the motor vehicle and the house for as long as he was still in the employment of the applicant.

On the 30th March, 1990 i.e. about nine (9) days before the expiry of the respondent's contract a meeting of the Board of Directors of the applicant was held. The Board decided to offer renewal of the respondent's contract for a further period of one year with effect from the 9th April, 1990 with a provision to consider extension for a further period of one year at the end of the first year, on a salary to be agreed by Mr. Chester and the Principal Secretary, Ministry of Finance.

In paragraph 8.1 of his opposing affidavit the respondent admits that Mr. Garden, the General Manager of the applicant, did inform him of the decision of the Board that his contract was to be renewed for a period of one year instead of twenty-four months. The respondent rejected this offer on the ground that on the 2nd January, 1990 Mr. Garden informed him that the Board's wish was that his contract should be renewed for another twenty-four months. When he asked Mr. Garden whether it was necessary to have the same confirmed in writing, the latter said it was not necessary to do so because even his (Garden's) own contract had not been renewed in writing.

In paragraph 4 of his replying affidavit Mr. Garden denies the allegations by the respondent regarding the renewal of the contract for another twenty-four months. He avers that all he said was that the meeting of the Board of Directors was to be held in March, 1990 and that it was at that meeting that the renewal of the respondent's contract would be discussed. He avers that he could not have communicated the Board's wish to the respondent before the Board had arrived at such a resolution.

Mr. Fischer, counsel for the respondent, submitted that there was a material dispute of fact as regards the period of employment after the 8th April, 1990 with the applicant averring that it was only for a further period of twelve months, terminating on the 8th April, 1991, as opposed to the respondent averring that it was for a further period of twenty-four months, submitted that the general rule is that applicant must stand or fall by its founding affidavit and the facts alleged therein. (See Pountas' Trustee v. Lahanas, 1924 W.L.D. 67 at p. 68). I entirely agree with the pronouncement of the law. He further submitted that an application will be dismissed with costs when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. (See Room Hire Company v. Jeppe Street Masions, 1949 (3) S.A. 1155 at p. 1162). I again agree with the submission. However, I am of the view that it does not matter whether the contract was renewed for one year or for two years or not renewed at all. The most important thing is whether the respondent was given proper notice in terms of his original contract or in terms of the Employment Act 1967 as amended.

For the purposes of a decision in this case I shall assume in favour of the respondent that the contract as on the 9th April, 1990 was for another period of twenty-four months terminating on the 8th April, 1992. I shall also assume in favour of the respondent that the terms and conditions of the contract were the same as those of the original contract and in particular that caluse 4.2 was applicable to this new contract. Under that clause the applicant and the respondent are entitled to terminate the contract on three months' notice and in its discretion the applicant may pay salary for three months in lieu of notice. On the 31st December, 1990 the applicant terminated the contract by writing a letter which is Annexure "F" to the founding affidavit and it reads as follows:

"31 December, 1990

Mr. B.E.D. James,
c/o L.N.I.C.
Private Bag A65,
MASERU 100

Dear Mr. James,

I refer to my letter dated 21.12.90 and in particular to Condition (4) which made our offer subject to acceptance by you within seven days of receipt of my letter.

As this period has now expired our offer is withdrawn and your services are terminated in accordance with paragraph 4.2 of your Service Contract (it being noted that your Service Agreement was renewed by the Board for a period of one year from 9th April, 1990).

As allowed for in paragraph 4.2 the Company has decided to pay you three months salary in lieu of notice and a cheque for this amount is enclosed. You will note that the Company is obliged to pay the economy air fare for yourself and your wife from Maseru to the United Kingdom. A Purchase Order for the tickets has been sent to American Express, Maseru and you are asked to make your travel arrangements with them.

If you feel that any further emoluments are due to you, up to the expiration of three Calendar months from the date of this letter, please make a claim in writing to the Company.

As you are no longer in the emply of the Company, with effect from the date of this letter, you must vacate the accommodation provided for you and return the company vehicle by no later than 16:30 hours on January 4th 1991. Please note that the company vehicle must be returned during normal business hours and the keys handed to a member of the Management Committee or the General Manager's Secretary.

Yours sincerely,

DAVID J. GARDEN
GENERAL MANAGER

cc: Labour Department
Immigration Office."

It will be seen from the letter that the applicant decided to pay the respondent salary for three months in lieu of notice in terms of clause 4.2. It also invited the respondent to make any claim for any emoluments that the respondent felt were due to him up to the expiration of three calendar months from the date of the letter. The respondent did not make any such claim until this application was launched. In his opposing affidavit the respondent indicated that the value of the use of the car and accommodation provided by the applicant was M3 000 per month. On the 3rd

February, 1991 the applicant tendered to pay M9 000 as emoluments in respect of the use of the car and accommodation at the rate of M3 000 per month as calculated by the respondent.

I am of the opinion that the applicant strictly complied with the provisions of clause 4.2 of the parties' original agreement by paying salary for three months in lieu of notice and inviting the respondent to claim any other emoluments due to him. It was reasonable of the applicant to make such an invitation because the parties had never put any value on the use of the car and the accommodation provided by the applicant. The respondent refused to do so until this application was brought to court. I think he was behaving in an unreasonable manner and cannot be heard to say that the applicant is in breach of the terms and conditions of their contract by failing to pay him all his emoluments.

The other reason why the respondent claims that his dismissal was unlawful is that he was not given a chance to be heard before he was dismissed. Mr. Fischer submitted that even if the Court finds that the notice complied with the terms of the contract, the respondent had a legitimate expectation to continue working until the termination of the contract period. That even if the Court finds that the respondent would only remain in the employ of the applicant until the 8th April, 1991, the respondent had legal rights in this regard. That such rights were of sufficient nature to have entitled the respondent to have been heard before his contract was terminated. He referred to the case Mokoena and other v. Administrator, Transvaal, 1988 (4) S.A. 912 (W.L.D.) at p. 918 where Goldstone, J. Said;

"In the present case the administrative authority to give 24 hours' notice to the applicants clearly affects their pension rights and involves legal consequences to them. That is sufficient to have entitled them to have been heard before such action was taken against them and the official concerned would have been obliged to give honest and bona fide consideration to any representations made by them. Failure to have done so would have vitiated such a decision.

It thus becomes strictly unnecessary to reconsider the applicability in our law of the legitimate expectation test. However, if I am incorrect that the decision to terminate the employment of the applicants is a decision affecting their rights or involving legal consequences to them, then I have equally no doubt that they did have a legitimate expectation that they would not be deprived of their right to qualify for a pension without good or sufficient or reasonable cause. That legitimate expectation would have entitled them to a hearing before the decision to terminate their employment was made by the official having the power to do so.

In passing, I would draw attention to my understanding that the legitimate expectation refers to the rights sought to be taken away and not to the right to a hearing."

In the case O'Reilly v. Mackman and others (1982) 3 W.L.R. 1096 at p. 1101 A -B Lord Diplock Said:

"In public law as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board, in reaching its decision, had acted without the powers conferred upon it by the legislation under which it was acting, and such grounds would include the board's failure to observe the rules of natural justice which means no more than to act fairly towards him in carrying out their decision-making process and I prefer so to put it."

On the other hand Mr. Edeling, counsel for the applicant, referred to the case of the Court of Appeal of Lesotho, C. of A. 15/86 Koatsa v. The National University of Lesotho (unreported) at p. 11 where Mahomed, J.A. said:

"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."

In the case of Malloch v. Aberdeen Corporation, 1971 (1) W.L.R. 1578 Lord Wilberforce said:

"One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what has been called "pure master and servant cases", which I take to mean 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 partes aspects the relationship may be called that of 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.

This distinction was, I think, clearly perceived in cases in this House. In Vine v. National Dock Labour Board, (1957) A.C. 488, 500, dealing with a registered dock labourer, Viscount Kilmuir, L.C. said that the situation was entirely different from the ordinary master and servant case and referred to his status as a registered worker which he was entitled to have secured. And Lord Keith said, at p. 507: 'This is not a straightforward relationship of master and servant'. The dock labour scheme gave the dock worker a status, supported by statute (1.c.pp.500 508-9)".

It is important to decide whether the applicant is a private employer or am employer performing a public function. The respondent alleges in paragraph 2.2.1 of his answering affidavit that the applicant it a parastatal organisation in which the Government of Lesotho holds a controlling interest. The remaining shares in the company are held by St. Paul's which is a company associated with the Minet Group of Companies and controlled from the United KIngdom. It is involved in the insurance business. By virtue of a management agreement entered into between St. Paul's and the Government of Lesotho, the day to day administration and management of the affairs of the applicant are undertaken on behalf of the shareholders by St. Paul's in conjunction with the applicant's Board of Directors.

The abovementioned allegations have not been denied by the applicant and I shall assume that they have been admitted. It seems to me that the applicant is not a parastatal organisation inasmuch as there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status capable of protection. The mere fact that the Government has a controlling interest because it holds the majority of the shares does not make it a parastatal organisation. The applicant is a private company in which the Government of Lesotho is a ' shareholder. The business of insurance is not a public function such as the function of a hospital owned by a province of the Republic of South Africa administered or run by the Administrator of a Province.

I am of the opinion that the two cases referred to by Mr. Fischer involved an employer who performs a public function or local authority created by stature. In Mokoena's case the employees were members of a pension scheme and to give them twenty-four hours' notice affected their pension rights and involved legal consequences to them. It was held that on the application of the maxim audi alteram partem, this was sufficient to have entitled them to have been heard before such action was taken against them and the official concerned was obliged to have given honest and bona fide consideration to the representations made by them. Failure to have done so vitiated the decision. It was held further that on the application of the legitimate expectation test, and on the understanding that the test referred to the rights sought to be taken away and not to the right to a hearing, the applicants did have a legitimate expectation that they would not be deprived of their right to qualify for pension without good or sufficient or reasonable cause.

It is quite clear that in Mokoena's Case - supra - the rights which had been acquired by the applicants were pension rights which involved legal consequence to them. In the present case the respondent has not acquired any rights which involve any legal consequences to him. His contract was for a period of twenty-four months which could be terminated by each party giving three months' notice with a proviso that the applicant could pay the respondent salary for three months in lieu of notice. This is exactly what the applicant did.

Mr. Fischer submitted that the respondent had a legitimate expectation to continue working until the termination of the contract period. How could he have such a legitimate expectation when he knew very well that his contract was terminable by each party giving three months' notice? What rights were being taken away from him? He had no right to continue employment until the expiry of the contract period becacuse it was agreed by the parties that the contract could be terminated by each party at any time on three months' notice. I do not agree that this is a case involving any element of legitimate expectation. The hope that the respondent had that he would not be dismissed before the end of the contract period was not a legitimate expectation. He knew that he was an employee of a private company and that he could be dismissed at any time as long as the employer gave him three months' notice. The employer (the applicant) is not obliged to act fairly. He can act arbitrarily, irrationally or capriciously. See Koatsa's Case - supra at p.11.

If I am wrong that the respondent had no right to be heard before his contract was terminated and that the present case is not a case of legitimate expectation, then I am of the view that he was given a chance to be heard or had an opportunity to make representations concerning his proposed dismissal. On the 13th December, 1990, the respondent had talks with applicant's Director, Mr. Supra in Johannesburg. The respondent alleges that at that meeting the following matters were discussed;

(a) Mr. Supra informed him that he was not to return to his office in Maseru as applicant was going to terminate his contract of employment as he had upset too many people;

(b) He was to be paid off for the remainder of the one year contract;

(c) There was no point in suing them in Lesotho as the case would take too long to come to Court;

(d) Mr. Supra had no doubt about his integrity and that Mr. Garden was being investigated.

The reason why he was going to be dismissed was given to the respondent by Mr. Supra but the former did not take that opportunity to make representations against the allegation. He alleges that he immediately realised that Mr. Supra had no intention whatsoever of discussing with him the problems surrounding Mr. Garden. The purpose of the meeting was to inform the respondent of the intention to terminate his contract but he wanted to discuss the problems surrounding Mr. Garden instead of discussing the problems surrounding him.

On the 17th December, 1990 the respondent telephoned Mr. Supra in an attempt to settle the dispute that had arisen and informed him that if they wanted to make an offer to determine their contract they could make him an offer in writing. He gave them an address in Ladybrand to which the letter was to be sent. He suggested that the offer must include accommodation up to and including the 31st December, 1991 and that upon receipt of the letter he would consider accepting the terms thereof. He eventually received such a letter but rejected the conditions therein. See Annexure "E" to the founding affidavit.

I am of the view that the respondent was given an opportunity to be heard and did, to some extent, exercise his right to be heard

and even made a suggestion as to what his terminal benefits should be. The applicant did not accept those suggestions because in Annexure "E" they did not include accommodation. The mere fact that there was a disagreement does not mean that the respondent was not given an opportunity to be heard before his contract was terminated. He was not summarily dismissed inasmuch as on the 13th December, 1990 he was warned that his contract was going to be terminated.

The last question is whether the respondent is still an employee of the applicant despite the fact that on the 31st December, 1990 the applicant purported to dismiss him. The applicant accepted that the contract had been terminated and the only outstanding question was the terminal benefits. Mr. Edeling submitted that in any case, even if the applicant acted unlawfully, this does not mean that the dismissal was void. It may be unlawful (which is of course denied) but it is a fact that the employment has ended. In the Privy Council case of Francis v. Municipal Councillors of Kuala Lumpur (1962) 3 All E.R. 633 the appellant was employed as a clerk by the respondent Council. He was dismissed from his employment on 1st October, 1957. The power of dismissal was exercised by the Council rather than the President thereof, in whom such power was statutorily vested. There was then a wrongful dismissal. The Court of Appeal of the Supreme Court of the Federation of Malaya held that the dismissal was void but refused to make a declaration, holding that the appellant's remedy lay in damages. Lord Morris of Borth-Gest delivered the judgment of the Judicial Committee on 3rd October, 1962. The judgment reads at p. 637:

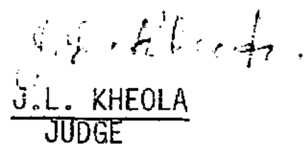
> "...... the position on Oct. 1 was that the removal of the appellant was a removal by the council and not by the president. The council were his employers, but having regard to the provisions of the ordinance their termination of his service constituted wrongful dismissal. Their Hordships consider that it is beyond doubt that on Oct. 1, 1957, there was de facto a dismissal of the appellant by his employers, the respondents. On that date he was excluded from the council's premises. Since then he has not done any work for the council. In all these circumstances it seems to their Lorships that the appellant must be treated as having been wrongly dismissed on Oct. 1, 1957, and that his remedy lies in a claim for damages. It would be wholly unreal to accede to the contention that since Oct. 1, 1957, he had continued to be and that he still continues to be in the employment of the respondent."

and further on at p. 637:

> "In their Lordhsips' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principleof law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court."

I am of the opinion that in the present case the respondent was lawfully dismissed. Even if I am wrong that there was lawful dismissal, I think there was de facto a dismissal of the respondent on the 31st December, 1990. His remedy lies in a claim for damages.

In the result the application is granted in terms of prayers 2, 3, 4 and 5.



J.L. KHEOLA
JUDGE

1st March, 1991.

For the Applicant - Mr. Edeling

For the Respondent - Mr. Redelinghuys. and Mr. Fischer.