

IN THE HIGH COURT OF LESOTHO

In the matter between:-

THOMAS MAKHUPANE

Applicant

and

LESOTHO PHARMACEUTICAL CORPORATION  
MANAGING DIRECTOR (S.K. MAPETLA)

1st Respondent  
2nd Respondent

J U D G M E N T

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

The applicant is seeking an order in the following terms:

1. Declaring as null and void the termination of employment of the applicant by the second respondent.
2. Reinstating applicant in his position as pharmacy technician.
3. Directing the respondents to pay applicant his salary with effect from the 17th February, 1989 to the date of judgment plus interest at the rate of 11% per annum.

4. Directing respondents to pay costs of this application.
- OR ALTERNATIVELY
5. Directing the respondents to pay applicant terminal benefits in a form of pension which included 1st respondent's contribution.
  6. Directing the respondents to pay applicant monthly salary in lieu of notice.
  7. Directing respondents to pay costs
  8. Granting applicant further and/or alternative relief.

The material facts of this case are not in dispute.

They are as follows:

The applicant was employed by the first respondent from 1980. In January, 1989 he applied for leave as his wife was sick and she was bedridden and he had nobody to attend to her. During the period of leave his wife had a miscarriage which caused her to have a depression.

On the 16th January, 1989 the applicant went to Mr. Rene Habedi, his departmental head, to report that it was impossible for him to return to work because his wife had depression and was in danger. He applied for the extension of his leave or to be granted unpaid leave. Mr. Habedi turned down the application on the ground that there was too much work to be done. From there the applicant went to the personnel office where he met one Mr. Mulenka who promised to talk to Mr. Habedi but never did so.

Finally the matter came before the second respondent in the presence of Mr. Hebedi and Mr. Mullenka. His application was turned down by the second respondent. He was told that because there were several other people who were away at the time and the fact that the applicant had already been on leave he should rather come back to work and check his wife at intervals as they were accommodated in the premises of the first respondent very close to the applicant's work place. The applicant refused to accept that decision and unceremoniously walked out of the meeting and failed to show up for work until the 19th January, 1989 when a letter was written to him by Mr. Hebedi, NDSO Manager, suspending him from duty without pay for one month with immediate effect. He was requested to show reasonable cause in writing, within seven days why this action of suspension should not be taken against him and why his services should not be terminated at the end of his suspension period. (Annexure "A" to the founding affidavit).

In his undated letter - Annexure "B" - the applicant justified his action on a number of grounds that the illness of his wife was extraordinary to him because it needed his attention and that of a doctor. The gist of his complaint is that the decision of the management was unfair, unjust and unreasonable. It amounted to ill-treatment.

On the 16th February, 1989 the second respondent wrote a letter to the applicant - Annexure "C" - in which he stated that management had given due consideration to all circumstances surrounding his suspension from duty on the 19th January, 1989,

and his response. In terms of section 15 (3) of the Employment Act of 1967 (as amended) the applicant was summarily dismissed. The second respondent said the dismissal stemmed from wilful disobedience to lawful orders and absence from work without permission, whereby the applicant proceeded on unauthorised leave in spite of the management's directive disallowing such leave.

I am of the opinion that there is overwhelming evidence that the applicant disobeyed lawful order by his employer. He refused to go back to work when he was ordered to do so. I do not agree with the submission that the management acted in an unreasonable way and ill-treated the applicant and making him entitled to resort to the provision of section 15 (4) of the Employment Act 1967 (The Act). There is no medical evidence that the wife of the applicant suffered from any severe depression which required constant attention by her husband or a nurse. There is no evidence that after unceremoniously walking out of the meeting the applicant took his wife to a medical practitioner for a thorough examination and assessment of her condition. It was natural that she was upset by the miscarriage but that does not necessarily mean depression.

It seems to me that the management was very sympathetic to the applicant and ordered him to go back to work because there was a shortage of staff and that during working hours he could have intervals to see his wife who lived near his place of work. The applicant rejected the offer outright and walked out of the meeting without permission. I am of the opinion that the second respondent was entitled to suspend and finally to summarily dismiss the applicant in terms of section 15 (3) (b) (e) of the Act.

However, the crucial question is whether the management followed the right procedure prescribed by the Lesotho Pharmaceutical Corporation Order, 1987 (the Order) particularly section 12 (2) (c) which provides

"The Managing Director shall -

- (c) subject to the approval of the Board be responsible for the appointment of the staff of the Corporation and the determination of the salaries of such staff."

Mr. Rakuoane, Counsel for hte applicant, referred to section 34 of the Interpretation Act, 1977 which reads as follows:

- "(1) Where an Act confers a power or imposes a duty upon a person to make an appointment or to constitute or establish a board, tribunal, commission, committee, council or similar body the person having such power or duty shall also have the power -
  - (a) to remove, suspend, dismiss or revoke the appointment of, and to re-appoint or reinstate, any person appointed in exercise of such power or duty;
  - (b) to revoke the appointment, constitution or establishment of, or to dissolve, any board, tribunal, commission, committee, council or similar body appointed, constituted or established, in exercise of such power or duty, and to re-appoint, re-constitute or re-establish the same;and
  - (c) to specify the period for which any person appointed in exercise of such power or duty shall hold such appointment.

- (2) Where the power or duty conferred under sub-section (1) is only exercisable upon the recommendation, or subject to the approval or consent of some other person, then such recommendation, approval or consent is also required for the exercise of the additional power referred to in paragraphs (a), (b) and (c) of subsection (1)."

So under the Order the position is that only the second respondent has the power to appoint, suspend or to dismiss the staff of the first respondent. Now the first letter - Annexure "A" - was written by Ms. Habedi who is described as NDSO Manager. The question is whether she had the authority to do so. The answer must obviously be in the negative because there is nothing in the letter to show that the decision to suspend the applicant was taken by the proper authority - the second respondent. There is nothing to show that Ms. Habedi was merely carrying out the orders of the second respondent. She stated in no uncertain terms that:

"Under the foregoing circumstances, I am suspending you from duty without pay for one month, with immediate effect. I also want you, within seven (7) days hereof to show reasonable cause in writing why this action should not be taken against you and why your services should not be terminated at the end of your suspension period."

The letter was not signed by Ms. Habedi for the second respondent. She signed it in her own right as the NDSO Manager. In paragraph 7 of his answering affidavit the second respondent deposes that Miss Habedi had the authority to write the letter and that his action has

been confirmed by him. This allegation is not supported by the letter inasmuch as there is nothing in it to show such authority. Ms. Habedi ought to have put into the letter a phrase commonly used in such letters to the effect that "I have been instructed or authorized by the second respondent to inform you that....." Then she had to sign the letter for the Managing Director.

In the case of Seisa Nqojane v. The National University of Lesotho, C. of A. (CIV) No. 27/87 (unreported) at. pp. 29-30 Ackermann, J.A. said:

"Because respondent is an artificial person it can only form an opinion through an organ of itself constituted and authorised to do so. This organ is the council. In terms of sub-section 14 (1) of the University Act the power of dismissal in terms of Statute 28 (13) could have been delegated to "any member of or to any committee appointed by the council or to any officer or officers of the University" and, in terms of sub-section 14 (3) (b) the delegate could have formed the opinion that there was good and sufficient cause to dismiss appellant summarily. There is however no suggestion in the present case that the power to dismiss appellant was ever so delegated. The question for determination is therefore whether respondent has shown on the papers that its council formed the requisite opinion.

If the Council had in fact formed the opinion in question the simplest way of proving it would have been to prove the minutes of the meeting at which such opinion was formed or recorded or, in the absence of such minutes, a person present at the meeting could have deposed to the formation of such opinion. There is no such proof in the present case. It is, however, permissible for respondent to prove this opinion as a matter of inference from all the admitted or proven facts or unchallenged averments on the papers."

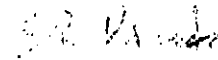
In paragraph 9 of his answering affidavit the second respondent deposes that the termination of the service of the applicant was lawful and there is no basis for applicant's allegation that this has not been done in accordance with the necessary procedures of the first respondent. He deposes further that it was incumbent upon the applicant to prove that such procedures had not been followed. I do not agree with that allegation because the applicant has proved that his dismissal was unlawful in a number of ways and at the hearing of this application Mr. Rakuoane submitted that the dismissal of the applicant was unlawful because it was not approved by the Board of the first respondent in terms of section 12 (2) (c) of the Order. As was shown in Seisa Nqojane's case-supra- the simplest way proving approval by the Board of the first respondent in the instant case would have been to prove the minutes of the meeting of the Board at which such approval was made. In the absence of such minutes, a person who was present at such meeting who have made an affidavit to that effect. There is no such evidence in the papers before me.

If the second respondent had taken action before he obtained the approval of the Board his action could still be in order if there was subsequent ratification by the Board. The second respondent has given no evidence that even if he dismissed the applicant without the approval of the Board his action was subsequently ratified by the Board. I am of the opinion that the second respondent has failed to show that his action of dismissing the applicant was taken in terms of section 12 (2) (c) of the Order.



It seems to me that action of dismissal was unlawful from the beginning when Ms. Habedi wrote the letter of suspension. She had no right to do so because the second respondent had no right in terms of the provisions of the Order to delegate his powers to any other person. The letter of dismissal was equally unlawful because it was not written in terms of section 12 (2) (c) of the Order.

In the result the application is granted in terms of prayers 1, 2, 3 and 4 of the Notice of Motion.

  
J.L. KHEOLA  
JUDGE

7th August, 1991.

For Applicant - Mr. Rakuoane  
For Respondents - Mr. Molete.