C. of A.(CIV) NO.21\92

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

SEISA NQOJANE APPELLANT

and

THE NATIONAL UNIVERSITY OF LESOTHO RESPONDENT

HELD AT MASERU

Coram:

BROWDE J.A.
KOTZE' J.A.
LEON J.A.

JUDGMENT

LEON J.A.

Following upon the bringing of an urgent application the Respondent obtained a rule nisi calling upon the appellant to show cause why the following order should not be granted:

a) Declaring the Respondent's employment with the appellant to have been lawfully terminated on 31 May 1991;

b) declaring the respondent is not entitled in law to any salary, emoluments or other entitlements arising out of the employment with the appellant save for those received as at the date of the issue of this rule;

c) declaring the Respondent's occupation of the house on the campus of the appellant in terms of his contract of employment, House no. SRR 0063, either by himself personally or by others authorised or permitted by him, to be unlawful with effect from 1 June 1991.

d) The Respondent be ordered to vacate the said house and restore possession thereof to the applicant with immediate effect;

e) The Respondent pay the costs of this application.

Although the order was sought and granted in the name of the applicant I have, as a matter of convenience, referred throughout to the applicant as the respondent.

After argument on the return day the rule nisi was confirmed by KHEOLA J who subsequently furnished his reasons for judgment. It is against that order that this appeal is brought.

The facts in this matter may be briefly stated as follows. The appellant was initially employed by the respondent as an assistant cost accountant with effect from 1 July 1975. He was posted to the Department of Refectory accounts under the Bursary Department. - Some years later he was appointed Senior Cost Accountant in circumstances to which I shall refer later herein. It is not disputed by the appellant that he was employed in the Bursary.

After certain disciplinary charges were brought against the

appellant the respondent purported to dismiss him on 9 November 1984. That purported dismissal was set aside by this Court on 11 October 1989 in C. of A. (CIV) No. 27 of 1987. Paragraph 2 of the Order in that case is relevant to this appeal and reads thus :

> "Respondent is ordered to re-instate the appellant in his position as Senior Cost Accountant which he held prior to his purported dismissal on 9th November 1984 such re-instatement to be with effect from 9th November 1984."

It is with the subsequent history of the appellant's employment and what the Respondent did in connection therewith that this case is mainly concerned.

According to the evidence of the respondent after this Court had set aside the respondent's purported dismissal of the appellant the Council of the respondent met on 23 November 1989 and the judgment was discussed. According to Item 2.6. of the Minutes of the meeting it was decided that the University should comply immediately with the Court orders.

The following day the Registrar wrote to the Bursar in which he informed him that the Council had decided that the decision

of the Court of Appeal was mandatory and that the respondent was bound to give effect to it. The last paragraph of his letter reads as follows :-

> "Mr. Nqojane is to be re-absorbed and re-imbursed salary arrears. As soon as the Bursary has made necessary arrangements for Nqojane's return to work, the appointments office should be advised for them to inform Mr. Nqojane"

On 28 November 1989 the Busar in reply wrote to the Registrar as follows :

> "We refer to your memorandum dated 24th November 1989 concerning the reabsorbtion of Mr. Nqojane into the Bursary Department and have the following comments to make:
>
> 1. On examination of Mr. Nqojane's personal file shows that he was employed as Assistant Cost Accountant by the Refectory. This position no longer exists.
>
> 2. No work is available in the Bursary at the present time which could be allocated to Mr. Nqojane on a short-term or long-term basis.
>
> 3. Currently the Bursary is over-manned by three

persons and the work load has been recently re-allocated in order to have it move evenly spread, in particular to the three under-employed employees. Accordingly there is no work justification to acquiring the services of another individual and it would be detrimental to the efforts being made to improve the efficiency and effectiveness of the Bursary".

It was suggested by the Bursar that the appellant be absorbed into another department but the Registrar pointed out to him that it was the obligation of the respondent to give effect to the Court's Order.

Despite the lack of work in the Bursar's office the then acting Registrar Mr. Buku advised the appellant on 18 December 1989 that, in compliance with the Court Order, he was being re-absorbed in the Bursar's office. However sometime around the beginning of January 1990 the Senior Assistant Registrar (Appointments) verbally advised the appellant that he was being granted indefinite leave of absence while the respondent was endeavouring to comply with the Court Order. This was accepted by the appellant who asked Mr. Liphoto (The Senior Assistant Registrar (Appointments)) to confirm that in writing which the latter did .

On 29 June 1990 the position of the appellant was discussed at a bi-annual Council Meeting as a result of which the Bursar sent a memorandum to Council which was couched in the same terms as that which he had sent to the Registrar six months earlier. As a result of this the Registrar, on 7 January 1991, placed before the Council a recommendation that the Council consider terminating the appellant's appointment by reason of redundancy.

On 24 January 1991 the Council met to consider the Registrar's recommendation. It was decided to accept that recommendation and to offer the appellant early retirement. The relevant part of the minutes of the meeting reads as follows :-

> "It was reported that Mr. Nqojane was presently on indefinite leave. The Bursar had further indicated that there was no work available in the Bursary which could be allocated to him and that the position of Assistant Cost Accountant no longer existed in the establishment. Legal opinion on the possibility of declaring Mr. Nqojane redundant was received. It was noted that the University could terminate his appointment by giving the required period of notice. Council was informed that Mr. Nqojane did not obtain permission from the University to take part in the work of the National Constituent Assembly - that was

a contravention of University regulations. It was finally agreed that Mr. Nqojane be offered early retirement. He would be required to respond within two weeks. It was further agreed that in the event that he declined the offer, his appointment be terminated in accordance with the terms and conditions of service with the University"

The appellant declined the offer of early retirement after which the respondent, by letter dated 22 April 1991, terminated the appellant's appointment with effect from 31 May 1991. Despite subsequent demand the appellant failed to vacate the house which he occupied in terms of his employment.

In his answering affidavit the appellant in paragraph 10 deals with the respondent's allegations concerning redundancy in this way

"The real reason was, however, the hearsay evidence contained in deponent's paragraph 8.2 in these proceedings and which formed part of the witch-hunt against me in the so-called disciplinary proceedings which result in my purported dismissal on November 9, 1984. Later the Court of Appeal ordered my re-instatement after a careful examination of

> circumstances that led to my said purported dismissal. I aver further that the question of redundancy which (is) now being put forward as the reason for the purported termination of my employment in May, 1992 is an old smokescreen which the appellant and the deponent in particular have used in order to deflect the order of the Court of Appeal. It was never the intention of the applicant to re-instate me. The alleged compliance with the order of Court was once again accompanied by the so-called paid indefinite leave".

The appellant makes a further point in his affidavit. He alleges that the respondent has always maintained that he held the post of assistant cost accountant and that his fate depended upon the fate of the Refectory. However in 1978 he was promoted to the position of Senior Cost Accountant in the Bursary (this is common cause) and that it is not alleged that that post has become redundant.

In reply Mr. Buku denies the appellant's allegations relating to a so-called witch-hunt." He repeats that the appellant has in fact become redundant and that there is no question of this being a smokescreen for the purposes of terminating the appellant's employment. He adds that it was the

respondent's intention to reinstate the appellant but it was unable to do so.

With regard to the appellant's allegations concerning his position of Senior Cost Accountant Mr. Buku says the following

> "In 1979 all gradings of non-academic posts at the University were upgraded in order for them to be brought in line with salaries for comparable positions in the public service. This appears from Annexure "AC". This did not amount to promotion.... It is correct that there is no reference to the respondent's post becoming redundant. That only came about several years later".

It is also suggested by the appellant in his affidavit that part of the respondent's case is based upon hearsay evidence but for the reasons given by the learned Judge in the Court a quo at pages 9-11 of his Judgment I am satisfied that there is nothing in this point.

The learned Judge a quo found that there was direct evidence from the Bursar that the appellant's post had in fact become redundant. That was a fact and not an attempt to circumvent the

order of this Court.

The learned Judge also referred to the said decision in this Court where it was held that the Council has the power in terms of Statute 28(3) to dismiss a member of the non-academic staff or terminate his employment where in the opinion of the Council there has been good and sufficient cause.

The view of the lower Court was that the redundancy of the post of the appellant was a good and sufficient cause, that the Council had not acted mala fide or from any ulterior notive, and that it had accordingly lawfully terminated the appellant's employment.

The grounds of appeal attack the granting of the order of ejectment on the grounds that that was a matter in which the subordinate counts have jurisdiction and that the matter was lis pendens in such a court. It is also claimed that the proceedings in the High Court were irregularly brought in that they were brought by "Notice of Application" instead of "Notice of Motion"

Finally it is claimed that the Court a quo erred on the merits in holding that the appellant's contract was lawfully terminated, and that the appellant was not in law entitled to any salary or other entitlements arising out of his employment, save

those received as at the date of the Court Order.

This is a curious case for the main points made by the appellant in his affidavit in the Court a quo were abandoned or not argued by his counsel on appeal while a number of matters not raised at all in the Court a quo nor in some instances in the grounds of appeal were raised or sought to be raised in argument before us.

With regard to the merits it was conceded that there was no question of a 'witch-hunt" and that the respondent's post had indeed become redundant. This concession was correctly made in the light of the affidavits which I have referred to in some detail above. It was also correctly conceded that where a post becomes redundant that would constitute good and sufficient cause entitling the Council to terminate the appellant's employment. It was suggested that the Council had not done so but the Registrar had. There is nothing in this point as it is clear from the affidavits referred to above and from the minutes of the Council meeting that the Council had resolved that if the appellant did not accept early retirement as set out in the Council Minute that his appointment would be terminated. He did not accept the offer and the Registrar, acting as the agent of the Council then terminated his appointment. It was suggested by counsel for the appellant that his appointment may have been

terminated because of his political activities as there is a reference in the minutes to that. But the uncontradicted evidence is that the Council met to discuss the redundancy question and it was for that reason that the Council took its decision. The whole history of this matter proves that.

Counsel for the appellant sought to argue, on the ground of public policy, that the Court erred in granting a declaratory order. That point was not taken in the papers or in the grounds of appeal and as the respondent would have been prejudiced by an amendment to the grounds of appeal we refused that application.

Counsel for the appellant then proceeded to argue a number of technical points. He contended that the proceedings were out of order because the respondent had proceeded by way of "Notice of Application" instead of "Notice of Motion". Not only was this point not taken in the Court a quo but there is no merit in it. An application is a motion and when "Notice of Application" was given everyone knew precisely what was intended.

Then it was argued that the Subordinate Courts have jurisdiction in any action for ejectment against the occupier of any house, land or premises within the district. (Section 17(1)(c) of the Subordinate Courts Order, 1988). That being so, so the argument ran, the High Court could not and ought not to

have entertained prayers 2(c) and (d). The point in this form was not raised in the papers and not taken at all in the Court a quo.

Section 6 of the High Court Act reads:-

"6. No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court save -

(a) by a judge of the High Court acting on his own motion

(b) with the leave of a judge upon application to him in Chambers, and after notice to the other party"

I shall assume in favour of the appellant that it is open to him to take this point and it is common cause that the leave of the judge or a judge was neither sought nor granted. But the appellant entered into the litigation and argued the case without at any time taking this point before the Court a quo. I have not the slightest doubt that, had the point been taken, leave would have been granted because prayers 2(c) and (d) are

ancillary to the main relief sought. It would result in a monstrous injustice if we were to dismiss these claims on a point taken for the first time on appeal. In my view we should proceed upon the basis that, as such leave would inevitably have been granted, it can be taken, for the purposes of this appeal, to have been granted,.

It was further submitted that as the ejectment proceedings against the appellant in the subordinate court had not been withdrawn by the respondent that the defence of LIS PENDENS should operate to defeat the claim under prayers (c) and (d).

It is common cause that the defence of lis pendens was never raised before the Court a quo and that is why the matter is not referred to in the judgment. It must be open to question as to whether this defence should be dealt with on appeal. In any event the Court has a discretion with regard to such a defence which does not operate automatically to defeat a claim. In my view it cannot defeat prayers (c) and (d) because :-

(i) they are ancillary to the main claim, and
(ii) the appellant is not living in the house in question but in some other house at some other place and
(iii)he himself offers no objection on the papers to

leaving the house. What he seeks is payment until the age of 65. The Court cannot assist him in that respect.

Finally it was suggested that prayer (b) should not have been granted as it might operate unfairly against the appellant in the event that he was owed any arrear monies. However it is common cause on the affidavits that he was not, his only claim being that he was entitled to his salary until the age of 65.

I should add that the point taken about the appellant being a senior cost accountant was not pursued on appeal. Counsel exercised a wise discretion in this regard for there was no work for the appellant whatever his title.

In my view the learned Judge a quo was correct in confirming the rule.

The appeal must be dismissed with costs.

Delivered in Maseru on 22nd day of January, 1994.

R. N. LEON

JUDGE OF APPEAL

I agree

J. BROWDE

JUDGE OF APPEAL

I agree

G.P.C. KOTZE'

JUDGE OF APPEAL