

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEHLOHONOLO KHOBOKO

Applicant

and

LESOTHO BUILDING FINANCE CORPORATION

Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 22nd day of March, 1994.

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

- (a) Declaring that the termination of
Applicant's employment by the
Respondent is wrongful and
unlawful;

- (b) Directing the respondent to pay the applicant his salary from the 23rd January, 1991 to date;
- (c) Directing the Respondent to pay the costs of this application;
- (d) Granting such further and/or alternative relief as the above Honourable Court may deem fit.

The events which led to the dismissal of the applicant from the employment of the respondent seem to be common cause and are as follows:

On the 25th July, 1990 the applicant requested the Board of the respondent to permit him to attend a course in Switzerland from the 12th August, 1990 to the 2nd November, 1990. At the relevant time the applicant was the Acting Managing Director of the respondent. An extract of the minutes of the Board dealing with the applicant's attendance of the course is Annexure "B" to the answering affidavit. Annexure "B" is the resolution of the Board made on the 25th July, 1990.

The applicant left for Switzerland on the 10th August, 1990. Mr. A.L. Lichaba remained Acting Managing Director. Bills for travel and training costs reached him during late August, 1991. He tried

to recover half of costs from the Government of Lesotho in terms of Annexure "B". He found out that the Government of Lesotho had never reached any agreement with the applicant regarding payment of half of the costs.

It is significant that in his replying affidavit the applicant deposes that what he informed the Board was that the National Manpower Development Secretariat had in principle agreed to co-sponsor his program and should be approached to co-sponsor this program and even to pay for the training of the staff of the respondent in general.

When the respondent found that the applicant's course ended on the 19th October, 1990 rather than on the 2nd November, 1991, the Board decided that the applicant must return home directly at the end of the course. (Annexure "D"). The applicant did not return home at the end of the course but exercised the option which the respondent gave him in paragraph (b) of Annexure "D".

The applicant avers that on his arrival he reported to the Chairman of the Board of Directors of

the respondent, one Mr. T. Makhakhe. The Chairman informed him that there were some of the issues pertaining to his training which could be raised upon his return to the office. As he was curious to know about these issues which concerned his training he carried out some investigations. He discovered that a lot of things took place in his absence. He then wrote Annexure "5" and a reminder thereof Annexure "6".

At this time the applicant had resumed his duties as the substantive Acting Managing Director of the respondent. He then received a letter from the Chairman of the Board of Directors of the respondent informing him that Mr. Lichaba had been appointed as the Managing Director of the respondent. The applicant then wrote Annexure "LK6" in which he congratulated the Board for its decision and the appointee.

Once Mr. Lichaba took over after the 23rd November, 1990, the applicant received a letter from him which informed him that the Board had decided to give him a hearing on the 14th December, 1990 at 2.30p.m. The letter which invited the applicant is

Annexure "LK7". His reply is Annexure "LK8".

It will seem that in his reply the applicant declined the offer to be heard on the 14th December, 1990 on the ground that he would be travelling shortly after December 14, 1990 and that his schedule was rather crammed up. For convenience the entire letter is reproduced hereunder.

"Dear Sir

Your letter of December 7, 1990 refers.

As I shall be travelling shortly after December 14, 1990, my schedule is rather crammed up, the said appointment date for whatever purpose is therefore, not suitable for me. May be an alternative date mutually acceptable can be arranged in the next year.

The Board made resolutions on the above mentioned subject during my absence, these are reflected in its meetings of July 25, 1990, August 29, 1990, September 26, 1990 and October 18, 1990. In my letters of November 13, 1990 and November 24, 1990, I raised pertinent points pertaining to those resolutions and to date I have not received a reply except fro the Chairman's letter of November 27, 1990 which speaks for itself.

In the Chairman's letter of

November 27, 1990, the Chairman has said that the Board will call me for an interview regarding the said subject matter, in terms of the Board's decision of October 31, 1990. In your letter of December 7, 1990 you have said that the Board has decided to give me a hearing on December 14, 1990. Perhaps in the interim, you might care to clarify, this and/or explain the reason and/or purpose of the said hearing. Do your letters of November 27, 1990 and December 7, 1990 have the same spirit, if so, what is the spirit?

Yours faithfully,

L.M. KHOBOKO (Signed)
GENERAL MANAGER - ADMIN"

After a long exchange of letters between the applicant and Mr. Lichaba, the latter informed the former that the Board had decided to surcharge him for 50% of his training costs. See Annexures "LK9" and "LK10".

On the 31st December, 1990 Mr. Lichaba wrote a letter to the applicant recalling him from his annual leave. He did not come instead he wrote a letter and told Mr. Lichaba that at least he should have disclosed the reasons for recalling him from his annual leave. See Annexures "LK11" and "LK12".

On the 2nd January, 1991 the Administrative Manager of the respondent, one Mr. Sekhantso wrote a letter to the applicant (Annexure "LK13") in which the applicant was informed that he was being charged with misconduct according to the respondent's Service Conditions and Personnel Rules, Clause 28 (e) - failure to carry out lawful orders given by the authorised superior officer and Clause 28 (1) - insubordinate to a superior.

The applicant was informed that he would be given a hearing on the 10th January, 1991 at 10.00a.m. in the boardroom.

In his reply (Annexure "LK14") the applicant said that the charge was null and void on the ground that the Administrative Manager had no authority to charge him.

On the 11th January, 1991 the Managing Director wrote a letter to the applicant (Annexure "LK2") informing him that he was being suspended from the respondent's duties with immediate effect because of the on-going disciplinary action involving him.

Finally on the 23rd January, 1991 the services of the applicant with the respondent were terminated. See Annexure "LK1".

The respondent has annexed to its answering affidavit a letter dated the 13th December, 1990 (Annexure "F") in which the applicant was directed by the Board of Directors of the respondent to attend an extra-ordinary Board meeting on the 14th December, 1990 at 2.30p.m.

In his submissions Mr. Mphalane, attorney for the applicant, refers to Clause 29 (2) of the respondent's Service Conditions and Rules which reads as follows:

"Any employee charged with misconduct shall be given a copy of the charge before the inquiry is held and shall be entitled to be heard and may call witnesses."

It was his further submission that even the suspension must come after the applicant has been heard in terms of Clause 29 (2). It is only after the recommendations have been made by the committee to the Managing Director that applicant can be suspended.

He submitted further that the hearing which the respondent purports to have given to the applicant but which he declined was not in compliance with the provisions of Clause 29 (2) above in that the applicant was not given a charge, and that per se violates principles of natural justice. As the applicant was not given a proper charge he was entitled not to attend the meeting as by attending he would waive his rights which entitled him to a proper charge.

He referred to Administrative Law by Baxter at page 546 where the learned author says:

"In order to enjoy a proper opportunity to be heard, an individual must be properly apprised of the information and reasons which underlay the impending decision to take action against him. As it is sometimes said in case involving disciplinary action, he must have some warning of the nature of the charge against him and the circumstances upon which that charge is founded. *Ross v. Government Mining Engineer* 1920 TPD 1,5. The administrative authority should not 'keep anything up its sleeve. *Sullivan v. Wheat Industry Control Board* 1946 TPD 194,206."

In *Kanda v. Government of Malaya* (1962) A.C. 322

Lord Denning said:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

I am of the view that to say that the person concerned must have some warning of the nature of the charge against him and the circumstances upon which the charge is founded, does not mean that he must be furnished with a detailed and elaborate charge similar to a charge sheet in a court of law. 'What is essential is substantial fairness to the person adversely affect. But this may sometimes be adequately achieved by telling him the substance of the case he has to meet, without disclosing the precise evidence or the sources of information'.

Administrative Law by Wade, 4th edition page 460.

In the present case the charge is set out in Annexure "LK13" being failure to carry out lawful orders given by the authorised superior officer in contravention of Clause 28 (e) of the Lesotho Building Finance Corporation's Service Conditions and Rules; contravention of Clause 28 (h) - negligence of duties; contravention of 28 (1) - insubordinate to a superior. Reference was made to certain letters and he was informed that his reaction to those letters has led to his being charged with misconduct.

The letter of the 13th December, 1990 directed the applicant that on the 14th December, 1990 at 2.30p.m. he must attend an extraordinary meeting of the Board of Directors of the respondent. He refused to do that.

On the 31st December, 1990 the applicant was recalled from his annual leave per Annexure "LK11". He refused to come back.

I am of the view that the particulars which appeared in Annexure "LK13" adequately informed the

applicant what the charge was all about. He refused to attend the inquiry that was held on the 10th January, 1991. He ignored that letter on the ground that it was written by someone who was junior to him. This criticism was completely unjustified because an Administrative Manager who is performing the functions of a Personnel Officer can write such a letter. I do not see anything wrong with that.

Clause 19 (6) of the respondent's Service Conditions and Rules provides for the recall from leave of an officer who is already on leave. It reads as follows:

"The Corporation may recall employee on leave at anytime, should it be necessary. The Management may compensate in cash such an employee for the forfeited leave or postpone it to a later date."

There is nothing in Clause 19 (6) which suggests that when an employee of the respondent is recalled from his leave he must be given full reasons why he is being recalled. The applicant seems to confuse Clause 19 (6) with Clause 19 (3) (c) which reads as follows:

"Where the Corporation has proposed to change, reduce or deny the vacation leave requested by the employee, the Personnel Manager shall provide the employee with the reasons in writing for such change, reduction or denial of vacation leave."

Clause 19 (3) (c) deals with an application for leave and the operative words in it are "vacation leave requested". It means that if respondent wishes to change the number of days applied for, or to reduce the number of days applied or refuse the application as a whole, the employee must be furnished with reasons for such a decision.

According to Clause 19 (6) the respondent is not under any obligation to give the employee reasons why he is being recalled from leave.

In terms of Clause 29 (1) of the respondent's Service Conditions and Rules a committee of three persons was established to investigate the applicant's alleged misconduct. The applicant refused to attend the hearing on various grounds which he stated in his letters. One of such grounds is that he was not supplied with a copy of the charge. I have said that

the letter which he received clearly set out the charge and therefore served as a charge. In any case if there was something about which he was not clear he was entitled to ask for further particulars.

The Committee's report is Annexure "G" to the answering affidavit. They found that the applicant was guilty as charged. They recommended that his services with the respondent should be terminated. The Managing Director did exactly that by his letter of the 23rd January, 1991 (Annexure "LK1").

Mr. Mphalane submitted that prior to the applicant's dismissal a lot of events took place and in particular the applicant was called for a hearing on the 14th December, 1990 as per Annexure "LK7". The applicant replied as per Annexure "LK8". According to the applicant he was unable to attend the said hearing for two reasons. The first being that he was going to travel and that his schedule was rather crammed up; secondly because he wanted to be furnished with the reasons before he could attend. He submits that it is significant that the applicant was never furnished with the reasons at all and also that he did not have time. He submits that the hearing was not a

disciplinary hearing; it was a hearing which concerned the subject; Re: TRAINING - L.M. KHOBOKO.

It is quite correct that the hearing was not in respect of a disciplinary charge. It is interesting to note that in his Annexure "LK5" the applicant requested that he be given a chance to be heard. He listed six issues on which he wanted to be heard. In Annexure "LK7" the applicant is invited to a hearing on the 14th December, 1990. And reference is actually made to his Annexure "LK5".

In his Annexure "LK8" the applicant is now surprising everybody because he now pretends that he does not know what the hearing is all about and asks that he be furnished with reasons for the hearing. It seems to me that the applicant was not serious at all because the hearing was at his instance and the reasons are clearly set out in his own Annexure "LK5".

On the 13th December, 1990 the respondent's Managing Director wrote Annexure "F" which was no longer an invitation like Annexure "LK7" but an order directing the applicant to attend the extraordinary Board meeting on the 14th December, 1990 at 2.30p.m.

The applicant behaves as if the granting of his leave or the leave itself is a right which the respondent cannot change at short notice. Clause 18 (2) of the respondent's Service Conditions and Rules provides that the grant of leave shall be subject to the exigencies of the respondent. The applicant defied the order of the Managing Director of the respondent on the ground that his travel schedule was rather crammed up. It seems to me that he was under an obligation to cancel those travel arrangements.

Part of Clause 18 (2) provides that if leave is withdrawn after or before any employee has proceeded on leave, the Managing Director may reimburse him for any bona fide and proven leave expenses he may have incurred after the leave was granted. In Annexure "LK12" the applicant submitted a claim of M7,532-39 in terms of Clause 18 (2) above. What is interesting is that the applicant said that he expected payment to be made before the 10th January, 1991. How could payment be made even before he complied with the order that he must cut short his leave and report for duty on the 10th January, 1991. It was clear from the tone of his letter that he was not prepared to come back. The last words of his letter were in Sesotho and were to

the effect that:

"When a person examines the affairs of LBFC these days he may suspect that a madman\lunatic has been given a gun."

The innuendo of those words is that the Managing Director was like a madman who had been given powers which he was exercising in a dangerous manner. I think the words were abusive and insulting especially when they were addressed to the Managing Director by a junior officer. These words were repeated in Annexure "LK14".

In their report which recommended that the applicant be dismissed the members of the Committee of Inquiry found that the applicant said that he had lost trust in the Board of Directors of the respondents. I agree that in Annexure "LK10" the applicant insinuated that he had lost trust in the Board of Directors of the respondent.

The Committee came to the conclusion that since the applicant seems to be unable to take instructions from neither the Chief Executive Officer and the

highest Authority of the respondent, which is the Board of Directors, and has lost trust in it, it would not be admissible for him to remain in the employ of the respondent. They therefore recommended termination of his services. It seems to me that they were justified to come to that conclusion.

Mr. Fischer, counsel for the respondent, argued the matter from an entirely different angle. The first question he addressed was whether the declaratory relief in the form claimed by the applicant is competent. The applicant's case is that respondent acted as a public authority and that the applicant was under the circumstances entitled to a proper hearing prior to his dismissal. He submitted that it is clearly established in law that the appropriate way of setting aside any invalid administrative act is by way of a court order on review in terms of Rule 50 of the High Court Rules 1980. He referred to *University of Cape Town v. Ministers of Education and Culture and others*, 1988 (3) S.A. 203 (c) at p. 211 where Howie, J. Said:

"Before turning to the specifics of this case, I should mention that

the question was raised whether the conditions under consideration constitute subordinate legislation or administrative acts. Applicants' counsel contended for the former, respondents, counsel for the latter. There is substance in both arguments but it is unnecessary, in my opinion, to give a definitive answer. Success or failure of the applications does not depend on the conditions being subordinate legislation. The only relevance of the question pertains to the form of relief to be granted in the event

of applicant's success. Generally speaking, invalid subordinate legislation is struck down by way of a declaratory order, invalid administrative acts by way of an order on review. As the conditions were imposed on all universities, and for an indefinite period, the existence of these two characteristics of subordinate legislation made it logical and appropriate to grant a declaratory order."

Mr. Fischer submitted that save in exceptional circumstances such as those dictated by urgency review proceedings must be brought in the manner prescribed by the rules of court (See *Safcor Forwarding*

Johannesburg (Pty) Ltd v. National Transport Commission, 1982 (3) S.A.654).

He submitted that no case such is made out in the founding affidavit such as would entitle the Court to depart from the ordinary requirements for review proceedings in terms of the rules of Court.

The second submission by the Mr. Fischer is that the applicant, in seeking declaratory order, in fact seeks a discretionary relief and that the discretion of a court under the circumstances is required to be exercised judicially. He submitted that such discretion cannot be exercised judicially under the circumstances for the following reasons:

- (a) There must be some tangible advantage flowing from the grant of the order sought.

He referred to Koatsa v. NUL, C. of A 17\86 at pp25-27 which is the dissenting judgment of Cullinan, C.J. He submitted that what is quite clear in the present case is that no consequent order of reinstatement is even sought by the applicant and

under the circumstances the order actually leads to no tangible result.

I agree with the above submission. In the case of Koatsa - supra - there was a prayer consequent order of reinstatement.

I have come to the conclusion that the applicant was given a chance to be heard but he waived that chance on very unfounded and spurious reasons.

In the result the application is dismissed with costs.


J.L. KHEOLA
JUDGE

22nd March, 1994

For Applicant - Mr. Mphalane
For Respondent - Mr. Fischer.