CIV/APN/271/92

IN THE HIGH COURT OF LESOTHO

In the application of:

MARINA MOKHATLA (duly assisted by her husband)	Applicant
vs	
PAAVO RUOTSALAINEN	1st Respondent
THE PROJECT CO-ORDINATOR (Mr. J.L. McCloy)	2nd Respondent
RURAL HEALTH SERVICES PROJECT	3rd Respondent
THE PRINCIPAL SECRETARY FOR THE MINISTRY OF HEALTH	4th Respondent
THE ATTORNEY GENERAL	5th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 15th day of April, 1994

The Applicant claims in her Notice of Motion the following prayers:

1. "Declaring as null and void the termination of employment of the applicant by the 1st respondent.

2. Reinstating applicant in her position as an office clerk of the 3rd respondent.

3. Directing the respondents to pay applicant her salary with

effect from 1st June, 1991 subtracting the monies already given thereafter to the date of judgment, plus interest at the rate of 11% per annum.

4. Directing respondents to pay the costs of this application.

5. Granting applicant such further and/or alternative relief.

ALTERNATIVELY:

6. Directing the respondents to pay applicant monthly salary in lieu of notice.

7. Directing the respondents to pay applicant a severance pay and leave entitlements.

8. Directing the respondents to pay costs of this application.

9. Granting applicant such further and/or alternative relief."

Mr. Mosito appeared for the Applicant and Mr. Molapo for Respondents appeared before me on the 23rd February 1994 and had a brief argument. All in all it revolved around the issues whether :

(a) The Applicant was wrongly or was not wrongly terminated on the 29th May 1992 and on the 3rd June 1992 in terms of Annexure B and C respectively.

(b) Whether the 1st Respondent was entitled to terminate the services of the Applicant by virtue of his own powers or even alternatively by virtue of powers allegedly delegated to him by the 2nd Respondent in terms of Annexure "F".

(c) Whether it is to be believed that the 1st and 2nd Respondent acting as they did that they were acting in terms of clause 3 of Annexure "A" which reads "the appointment may be terminated by either party, by giving one calender month's notice or paying cash in lieu thereof."

(d) Whether Annexure "C" actually bears out the 1st and 2nd Respondent when regard is had to Annexure "E".

(e) Whether on the strength of authorities (cases) cited the Applicant would, if a finding be made in her favour, insist on reinstatement and the benefits such as arrear salary and related benefits.

I always find it useful to make a brief statement of annexures made to the papers for ease of reference.

(a) " "A" letter dated 28th April 1988 from 1st Respondent

to Applicant being a statement of conditions of Applicant with the 3rd Respondent.

(b) "B" Letter dated 29th May 1992, allegedly on behalf of the 2nd Respondent, to the Applicant, being of dismissal "with effect from the 1st June, 1992"/

(c) "C" Letter dated 3rd June 1992, from the 2nd Respondent to the Applicant "confirming Annexure B.

(d) "D" Letter dated 29th June 1992, from Applicant's Attorneys S.M. Mphutlane & Co. to the 2nd Respondent "Re: dismissal of MARINA NYABELA.

(e) "E" Letter dated 15th July 1992 from the 3rd Respondent to S.M. Mphutlane & Co. - being a reply to Annexure D.

(f) "F" dated 20th May, 1992 from 2nd Respondent to all staff in alleged delegation of duties to the 2nd Respondent.

The Founding Affidavit of the Applicant was accompanied by the seven annexures stated above. The Respondents duly opposed and filed their Answering Affidavits per JAMES MCCLOY and was

supported by PAAVO RUOTSLAINEN (1st Respondent) and one LETAPATA MAKHAOLA the Principal Secretary at all material times. The Applicant in turn filed her Replying Affidavit to the above Answering Affidavits.

The Applicant was employed by the 2nd Respondent on the 28th April 1988 where the 1st Respondent was his superior but under the 2nd Respondent who is the Project Manager. He is a successor to the person who made the appointment of the Applicant. Applicant says that on the day of her dismissal she was asked by the 1st Respondent to take some letters to a place near the Industrial Area, Maseru. Applicant apparently protested that the place was too far if she is asked to go on foot. She asked to be allowed the project's vehicle to ferry the letters. The 1st Respondent "became very annoyed saying that I was refusing to obey her instructions". The 1st Respondent replied in his papers that he asked that the letters be carried by public transport and not by Applicant on foot. But the 1st Respondent does not explain as to what the Applicant's reaction was. I find this most unsatisfactory.

After the events in the preceding paragraph in this judgment Applicant says the 1st Respondent then proceeded to his office and wrote annexure B thus terminating her employment. This was done in the absence of the 2nd Respondent who was abroad. Hence

2nd Respondent had written the letter of delegation (as alleged by Respondents). Applicant says that the 1st Respondent had not been authorized by the 1st Respondent to terminate the said appointment of the Applicant. The Respondents in reply say that the 1st Respondent was empowered to terminate the contract. I do not agree that the effect of Annexure F was to empower the 1st Respondent to terminate the Applicant's appointment. This is negated by the principle *delegatus non potest delegant* (see LTC vs RASEKILA C of A (CIV) No. 24/91. This means that the 2nd Respondent could not delegate the powers delegated to him. This fact must have been clearly observed by the 2nd Respondent when, then, he came back from his visit abroad. That is why he proceeded to issue out Annexure C. Annexure "C" gives a lie to Annexure B. I will show why in the next paragraph.

One cannot avoid reading annexure C with Annexure E. Annexure C says "I confirm that the letter RHSP/31/920356 of May 29, 1992 is in accordance with a decision taken in conjunction with P.S. Ministry of Health and the Chief Planning Officer, Ministry of Health on the 20th May, 1992". Annexure E says "We hold that the manner of Miss Nyabela's dismissal was strictly correct in terms of her contract and the laws of Lesotho. Although not a contractual requirement Miss Nyabela had been given several warnings before being finally dismissed." I must confess that I have had problems in reconciling the following

things:

(a) If it is not correct that the Applicant was dismissed and the circumstances that she describes (those of the undelivered letter), why does the 2nd Respondent speak of the meeting of the 20th May 1992.

(b) What was the role of the Principal Secretary, the Chief Planning Officer the Ministry of Health in the termination of Applicant's appointment? Are they a Committee with the 2nd Respondent. If so for what? Where have they derived the powers from? If so what powers are left with regard to termination or dismissal as far as the 2nd Respondent is concerned.

(c) Why did the 2nd Respondent wait until the 3rd June 1992 in order to communicate the decision of the Committee and the 2nd Respondent? What is the significance of this delay? Could it not be that the 2nd was unsure what to make of the events of the 29th May 1992? Was not the Applicant already doomed? If she was already terminated on 20th May 1992 what of the termination of the 30th June 1992?

(d) If the Applicant was terminated as against dismissal

for unlawful conduct why, speak about several warnings in Annexure E?

(e) Why did the 1st Respondent not speak about the several warnings (in Annexure E) in Annexure "A"?

There are several questions that could be asked to demonstrate the manifest conflicts in the whole Respondents' case that makes the case hard to defend. This can only suggest unfairness. Mr. Molapo did not fare well.

In the face of above it is not helpful for the Respondents to hide behind the protection afforded by clause 3 of the contract of appointment. It is obvious that the 1st Respondent rash as he was in taking action against the Applicant resorted to clause 3 when he had in mind a punishment to the Applicant - in response to her attitude to letters to be sent to Industrial Area. May be on further investigation and inquiry which would inevitably entail a hearing, the 2nd Respondent would have found that there was insubordination or misconduct on the part of the Applicant. I say may be. With the sort of questions against the Respondents, one is left with an impression that Respondents or some of them contrived documents against the Applicant as time went along at times being an after thought. This only gives the impression that they were bent on exacting punishment without

cause or unreasonably as bullies would do. Knowing that the flak will fall on the politicians it is well known how bigger Civil Servants have had their way on the smaller Civil Servants. That is unjustified and unfair.

I need to mention that I am persuaded that one can only dismiss for good grounds and on proof of unlawful conduct in terms of the then section 15 of the Employers Act 1967. I am persuaded further that one can dismiss who has authority to do so. (See LESOTHO TELECOMMUNICATION CORPORATION vs THAHAMANE RASEKILA (C of A (CIV) No.24/91). I have already made a finding that I found the reasons for termination of the Applicant unconvincing and not fair. I do not think that I need to address the question that there was or there was no need for the Respondent to exercise the right to terminate fairly any more than to add my observation that the Third Respondent is parastetal Government Organisation in which "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." (See NUL v KOATSA C of A (CIV) 15 of 1986). I remain satisfied that in no way would the third Respondent be precluded to exercise his rights in terms of clause 3 of the agreement at any time provided it gave notice and acted properly. (See also VENTER v LEONI 1950 (1) SA 524 at 528)

I now must come to the kind of relief that I must give to the Applicant. I am not satisfied that the Applicant was on a permanent establishment. I have already stated that the Third Respondent was a Government Parastatal Project. I am persuaded that the Applicant can hold the third Respondent to the contract provided that it has acted properly in terms of the clause 3 (See Venter vs Leoni supra). It has been held that the remedy of damages to the wrongfully dismissed employee has never been "elevated to a rule of law to the effect that such contracts can be unilaterally terminated so that under no circumstances can be unilaterally terminated so that under no circumstances can they be specifically enforced (see NATIONAL UNION OF TEXTILE WORKERS vs STAG PACKINGS 1982(4) 151(T) at 157 at A-C. I observe that that case has given a fair comment about the necessary considerations in regard to where an employee insists on specific performance and the Court's discretion in that regard. It remains a discretion. Thisi is so in answer to whether on

finding that a termination has been unlawful an employee's re-instatement is automatic and the remedy of specific performance is open to a servant as a general rule. This includes the Courts "being obliged to the aggrieved party's choice to the specific performance". (See PHOMOLO SEBOKA vs LESOTHO BANK CIV/APN.227/91 - 17th December 1993 - per W.C.M. Maqutu AJ at pages 12 to 14) I have found the case most instructive.

It is clear that the Applicant was dismissed on the 20th May 1991 which was about fourteen months to the date when summons were filed (on the 26th October 1992) and which is thirty four months to the date of judgment. I have not been informed as to what the Applicant has been doing by way of being engaged in another job if that is so. If the Applicant has since been employed this would affect the orders that I am to give now. In that event the concerned Respondents will be free to come to Court for a necessary declaration or order which would seek to put right any aspects having a bearing on the orders. I have also been made to believe that it is the law that once there was no dismissal there was no question of reinstatement.

For the above reasons I would grant the Orders :

1. Declaring as null and void the termination of employment of the applicant by the 1st respondent.

2. Reinstating applicant in her position as an office clerk of the 3rd respondent.

3. Directing the respondents to pay applicant her salary with effect from 1st June 1991 subtracting the monies already given thereafter to the date of judgment, plus interest at the rate of 11% per annum.

4. Directing respondents to pay the costs of the Applicant's notice of motion.

T. MONAPATHI
Acting Judge

15th April, 1994

For the Applicant Mr. Mosito

For the Respondents : Mr. Molapo