

CIV\APN\14\94

IN THE HIGH COURT OF LESOTHO

In the matter between:

TSELISO TSEHLANA

APPELLANT

and

ATTORNEY GENERAL

1ST RESPONDENT

MINISTER OF AGRICULTURE

2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Acting Justice Mrs J.K. Guni  
 On the 14th day of August, 1995

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This is an application by way of Notice of Motion for an order in the following terms:-

- (b) Directing Second Respondent and/or officers subordinate to him to pay Applicant's dependence allowance in respect of the period from February 1992 to December 1992;
- (c) Directing Second Respondent and/or officers subordinate to him to pay interest on such allowance at the rate of 25% a tempore morae;

This applicant wanted the 2nd respondent to pay to him a sum in excess of ten thousand maluti (M10,000.00) plus interest at the rate of 25% tempore morae. This is claimed on the basis that 2nd respondent refused, neglected or failed to pay dependents

allowances to this applicant during the period when this applicant was on study leave. Applicant claimed he "was granted study leave by the Ministry". (My underlining) This is said in paragraph 3.5 of his founding affidavit. Even then it is only on the replying affidavit that the copy of the application for that study leave is attached. Application is a request. It does not follow that because he applied he therefore obtained the leave applied for.

The Ministry which so granted him the said study leave is not specified. That is the significance of my underlining of those words in the applicant's averments. There is no documentary proof annexed to this founding affidavit to support the averments that such leave was in fact, granted. It is to the replying affidavit that the copy of the application for study leave is attached - marked Annexure TT2.

This application is opposed. An opposing affidavit was filed on behalf of 2nd respondent. In that opposing affidavit the allegation that this applicant was granted the study leave is denied. The opposing affidavit went on to state the reason why the application for study leave by this applicant was refused. Attached to the opposing affidavit to support the 2nd respondent's denial that study leave was granted to this applicant is Annexure CNM1. In addition there is further documentary proof by way of an affidavit by one Mrs LISELE MATETE who in her supporting affidavit confirms that she, being the personnel officer, in the Division of Forestry in the Ministry

of Agriculture, where this applicant was employed at the time of the alleged study leave informed the applicant personally, of the decision, of the Ministry, regarding its refusal of the applicant's application for study leave.

The question of whether or not this applicant was granted a study leave was in dispute. It therefore became undesirable to endeavour to settle the dispute of this fact upon the affidavits alone: *Frank v Ohlssons Cape Breweries LTD* 1924 AD 289 and 289. As INNES C.J. pointed out in this case,

"It is more satisfactory that evidence should be led and that the court should have an opportunity of seeing and hearing witnesses before coming to a conclusion".

In terms of Rule 8.(14) HIGH COURT RULES: Legal Notice No.9 of 1980 an order was made for viva voce evidence to be led by the parties to resolve this issue. Two witnesses were called by 2nd respondent. Applicant indicated that he was calling witnesses but needed time as one of them was out of the country but would return on the date to be arranged. The matter was adjourned to give the applicant an opportunity to secure the attendance of that witness. On the appointed date applicant declined to call witness.

The first witness to be subjected to examination in chief and cross-examination was the applicant himself. Applicant was asked by his Counsel to describe the procedure to be followed before proceeding to study leave. The applicant's answer was to the effect that after he was nominated, he was given a ticket to

travel. Presumably this applicant meant an air travel ticket was given to him to travel to a place where he was to pursue his studies for which he claimed he had been granted study leave. When pressed further on this issue to show if indeed he was granted study leave this applicant went on to say that after he had been nominated by Forestry Division, he applied for study leave. When his Counsel ultimately asked him a leading question; whether such application was approved the applicant answered in the affirmative. He added, as asked, that the approval was made by his immediate superior one Mr. Senekane who was the Chief Forestry Officer at that time. This Mr. Senekane is the witness this applicant requested an adjournment for the purposes of securing his attendance. This adjournment was granted. But on the appointed date the applicant declined to call this witness.

The approval of the applicant's application for study leave by his immediate superior, the chief Forestry officer, one Mr. Senekane, according to this applicant became known to him on his return from such leave. Applicant told this court that at the time of his departure or immediately before he departed for the study leave, he had no knowledge of the result of his application for that study leave. When asked why he proceeded to go on study leave before he had ascertained that he had actually been granted such leave, applicant replied, that he had arrived at the conclusion that he had been granted the study leave, by making deductions from certain events such as being given a travel ticket and not being prevented from leaving. We shall look at these aspects one at the time.

Who gave the applicant an air travel ticket? According to the applicant he was given that ticket by one Mr. Tapane who was the co-ordinator of the project. This was an independent project within the Division of Forestry of the Ministry of Agriculture. The funds for the project were provided by the Government of Finland under the Technical Assistance from Scandinavian countries to the member countries of SADC. The funding for the applicant's education and training did not come from the Lesotho Government. It came from this project. The Co-ordinator of the Project dealt with the applicant directly not through any government department or Ministry.

The ultimate authority and the only authority to grant leave of any kind to the civil servant is the public service commission. The applicant claimed that he was given an air travel ticket by the Coordinator of the project Mr. Tapane who must have known that this applicant's application for study leave has been granted. The applicants application for study leave has, in fact, been refused. Under cross examination this applicant had great difficulties to run away from the fact that it was his responsibility: First, to ascertain that his application for study leave has been granted and secondly, to inform the financiers of his training project that he is able to take up and utilise the opportunity offered and not vise visa. This applicant in his evidence under cross examination, endeavoured to shift the responsibility to ascertain the result of his application for study leave to someone else - the coordinator of the project - Mr. Tapane. This applicant appeared

to be suggesting that if a man is given such a responsible job as a coordinator, he should be able to know that the candidates, who obtain financial assistance from that project, have secured study leave from their employers. Eventually it was put to him that it was his responsibility to secure study leave, that is why he applied for such leave himself not the project coordinator.

Mr. Clement Monyane described the procedure to be followed before the civil servant proceeded for study leave. The applicant for study leave makes such an application to his Ministry that is to say the Ministry under which he works, in this case being the Ministry of Agriculture. His Ministry should then apply on behalf of the applicant to the Public Service Commission with recommendations for the granting of the leave applied for. According to Mr. Monyane the Ministry of Agriculture was unable to apply for study leave to the Public Service Commission for this applicant because there was recommendation made as a result of this applicant's poor health that he should not be allowed to study for three years or ever. For applying for study leave this applicant confirmed the fact that there was a need to obtain permission before he left his position where he performed his duties. I accept that the procedure to be followed was as told by Mr. Monyane. It was irresponsible to depart for study leave after being told that his application for study leave has been refused. The funders of his studies by giving him money and air travel ticket to go for that training were not in any way indicating that the applicant had been granted leave. When this applicant was informed by Mrs.

Matete that his study leave has not been approved and as a result he should not proceed to go on that leave, this was a preventative measure taken to stop him from leaving. Mrs. Matete told the Court that she informed the applicant that she was instructed to stop him from leaving. That is why she telephoned Butha-Buthe immediately she received those instructions, in order to stop him. But at Butha-Buthe she was informed that this applicant has left Butha-Buthe and is in Maseru. It was that afternoon that this applicant entered Mrs. Matete's office and was informed. It was then that this applicant pointed out to Mrs. Matete that because he is holding an air travel ticket, he is going despite being refused permission to go on study leave.

The demeanour of the applicant as a witness was most unsatisfactory. The applicant was so evasive in answering questions that all the material questions put to him remained unanswered or partly answered. He made the procedure adopted before the Civil Servant proceeded on study leave incredibly simple. Nomination by his department to be a candidate for the course and obtaining the scholarship was all that was needed. Clearly that was not the position. The man who was the acting Principal Secretary for the Ministry of Agriculture described the usual red tape to be followed. This applicant was not as stupid or ignorant as he appeared to be. His previous experience as a Civil Servant since 1977 coupled with experience of going on study leave on two previous occasions should have been further enrichment of his knowledge. I am afraid, he gave me the impression that he was not being honest when answering questions

on what should have happened before he went on that study leave. In contrast Mr. Monyane was more straight forward. Mr. Monyane displayed honesty and frankness. He answered questions without hesitation. He gave concession where and when necessary. He conceded that he had made personal endeavour to secure the granting of study leave by Public Service Commission to this applicant but had failed. He also conceded that he urged the Ministry to effect payment of the allowances claimed by this applicant but failed.

This applicant had been granted study leave previously on two other occasions. The first occasion was in 1987 when he went to study at the University of Bangor, Wales in U.K. for a degree of Bachelor of science in Forestry. In 1990 he again proceeded on study leave to the same University this time for M.sc in Forestry. Applicant claimed it has never been the practice of the Public Service Commission and his Ministry of Agriculture to respond to his application for study leave. He was just given an air ticket and he left for U.K. on both previous occasions. The Public Service Commission is the Lesotho Government's Ministry, responsible amongst other things for : the recruitment, leave and discharge of the members of the civil service. The position with regard to leave should be as described by Mr. Monyane. It is most probable that is the procedure followed, as it sounds more orderly. It was during this second spell of study leave that this applicant became ill and was as a result of that illness repatriated from the University of Bangor, Wales in U.K. back to Lesotho. The



applicant admitted that a medical certificate by a qualified medical practitioner was issued. He also admitted that the said medical certificate indicated that he was unhealthy and therefore not fit to continue pursuing his studies. He also agreed that this medical certificate and recommendations were faxed to the Ministry by the British Council. However the applicant denied that he was ever ill. He claimed that he never even took the tablets which were given to him by the medical officer in Wales.

He went on to say that those tablets which he should have taken at the airport on his departure back to Lesotho, he placed them in his pocket instead of swallowing them as instructed by the officer who had taken him to the airport. Those which he should have continued to take whilst back here in Lesotho are also still in his possession as he never took any of them. During 1990 study leave applicant was resident at the University of Bangor. He claimed that the fellow student whose room was next to his, had some kind of device which he had placed facing towards the applicant's room. He told this court that he discovered that one day when he was in that student's room and he turned that device to face towards that same fellow student who immediately objected very strongly. The applicant seemed to be suggesting that he was deliberately being made to appear ill by that device. It sounded mysterious. Be that as it may.

Despite having failed to administer to himself the treatment prescribed by the medical officer in U.K., the applicant never suffered any illness or showed any symptoms which had brought

about the medical certificate from U.K. and its recommendations. The applicant went on to claim that at the time he was nominated to take up the course of study he pursued at the technical and vocation Teachers college in the Republic of Zambia, he underwent a further medical examination at Queen Elizabeth II Hospital. Following this examination another medical certificate which certified him fit to go to school was issued.

The applicant pointed out in his evidence that while he was at the University of Bangor Wales, U.K. he challenged the medical report that indicated that he was so unhealthy that he was unfit to continue to pursue his course of study. He was unsuccessful because he was repatriated as the result of that medical report. In addition there was a message sent by fax to the Ministry of Agriculture. This was to the effect that this applicant: "Should on no account come back to study for the next three years. Best if not at all. EVER". This is said in Annexure CNMT1 attached to the opposing affidavit. This message influenced the course of action taken by the Ministry of Agriculture in regard to the applicant's application for study leave in 1992. It was in the face of this recommendation that they, at the Ministry of Agriculture, found themselves unable to apply to the Public Service Commission for this applicant to go on study leave in 1992.

The medical report sent at the time this applicant was repatriated, from U.K. to Lesotho plus the recommendations made in such strong and unambiguous words were the sole basis on which

the refusal to grant the applicant the study leave applied for was anchored.

In 1992 the applicant took study leave with or without permission. He pursued a course of study for a period of 12 months. He successfully completed that course. He returned to Lesotho after completion of that course and assumed his duties at the Ministry of Agriculture. There was a vacancy at the Agricultural college where he was appointed on promotion as a Lecturer.

At the time he applied for that study leave presumably beginning of 1992 or end of 1991 as Annexure TT2 is not dated it was still within the prohibited period to go to school according to the medical report from U.K. and the accompanying recommendations. To add more difficulties to this problem this applicant did not only manage to go away to study during that period, but he successfully completed the training he undertook. The Ministry of Agriculture recommended his appointment to the lectureship at the Agricultural college where he is, to this present date. The U.K. doctor who recommended that the applicant should not go to school in those three years or ever because of his poor health was very wrong or at least has been proved wrong. The applicant did not only go to school but he successfully completed the training he undertook at that college and within the period of prohibition.

It was argued on behalf of this applicant by Mr. Mafantiri

that: Firstly the Ministry did not take any disciplinary action against the applicant when he returned from that study leave. This conduct by the Ministry was a condonation of the applicant's action of taking French leave. To confirm that the Ministry has granted him study leave, the applicant was promoted on the basis of his newly acquired qualifications while on what the Ministry regards as French leave.

The Ministry had explanations concerning its conduct in this fair. According to the viva voce evidence by Mr. Clement Monyane, no disciplinary action was taken against the applicant because it had already been decided that the refusal to pay his dependents allowances, during the time he was on that unauthorised study leave, was sufficient punishment. This punishment was meted out to the applicant without his knowledge and before he was given an opportunity to defend himself according to the applicant's Counsel's argument. There are problems with this argument because according to Mrs. Matete in her supporting affidavit and also in her viva voce evidence, the applicant was personally informed that his application for leave has been refused and that he should not proceed to go on study leave. According to Mrs Matete, when she informed the applicant that she received urgent specific instructions to advise him not to proceed to go on study leave, this applicant insisted that he was going and he did go. Mrs Matete said the applicant was aware or should have been aware of the natural consequences of his absconsion from duty. Prior to his date of departure for that study leave, a savingram had been written to the applicant's

immediate superior Mr. Senekane who was notified of the Ministry's decision - Refusal to grant study leave to the applicant.

In order to determine whether or not the applicant was in fact granted study leave it is necessary to establish:

- (1) who has the authority to grant such leave?

According to the applicant the "top man" at the Ministry and one or two others have that authority. It emerged during his cross-examination that he meant the Principal Secretary for the Ministry of Agriculture and two other officials of the Ministry of Agriculture.... Although he had insisted in his evidence in chief that he had been granted study leave, under cross-examination he conceded that he realises he proceeded on leave solemnly on the basis of his immediate boss's approval and not on the Ministry's approval. This he found out on his return from that leave. Considering the evidence of the applicant alone, the "top man" who according to him should approve had not done so.

The Public Service Commission is the only and ultimate authority to grant leave. I have observed earlier on that the Ministry of Agriculture did not even bother to apply on the applicant's behalf to Public Service Commission for study leave in the face of the adverse medical report and its recommendations.

This brings me back to consider why reliance was placed on

the adverse medical certificate from U.K. when there was a favourable medical report from the local Hospital. It appears that at the time the applicant submitted his application for study leave, he did not attach that latest medical report. Even at the time he was informed that the Ministry has refused his application for study leave on the basis of that bad medical report from U.K. the applicant did not bother to draw the attention of the Ministry to the recent medical report.

Another strange feature is that, that recent medical report was not filed with the Ministry. The report was seen for the first time when its copy was attached to the savingram by one of the Ministry's officials Mr. B. Leleka who was recommending payment of the applicant's dependents allowances in February 1993. This was after a period of over one year since the application for study leave by this applicant had been refused. Where it was all this time and why it was not attached to the application for such leave is a factor not disclosed before the court as no-one appears to know where it was because this applicant did not make any mention of it at all.

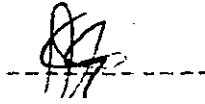
It is the finding of this court that the application by the applicant for study leave for a period of twelve months for this applicant to pursue a training at the Technical and Vocational Teacher Training College in the Republic of Zambia, was not granted. The medical officer who certified this applicant ill and not fit to go to school may have been wrong. The recommendations which came with that medical certificate have

been shown to be very wrong. That does not remove the existence of that medical certificate and its recommendations. For placing a complete confidence and reliance on that certificate the Ministry of Agriculture was misled. What is at issue is not the correctness of the Ministry of Agriculture's refusal to grant the applicant the study leave. It is whether or not the study leave was granted. As mentioned earliest the study leave not granted.

Another point which this court must commend on is the abuse of process. This application was moved as an urgent application for the following reasons: (paragraph 5.1 founding affidavit)

"I have a wife and three children to maintain. I have also my old parents to support. I need money for my own support as well". At the time the applicant left for the purposes of going to study in Zambia, he already had the wife, children and those old parents as all these are shown in his application for study leave Annexure TT2. For the period he was in Zambia they must have needed his support and maintains. They did not receive it as he is only now suing the Ministry to pay their allowances. The applicant pointed out that he became aware of none payment of the dependents allowance before he returned to Lesotho from Zambia. His wife informed him that she received his salary from the Ministry only for one month. The applicant then found no urgency to instruct his legal representative to bring this application. At the time the papers in his application were filed this applicant had resumed his duties and must have been then receiving his salary. There was therefore no urgency. claimed at paragraph 5.1 of his founding affidavit.

This application, for the reasons mentioned herein, is dismissed with costs.

A handwritten signature in black ink, appearing to be 'K.J. Guni', is written over a horizontal dashed line.

K.J. GUNI

ACTING JUDGE

For Appellant : Mr. Mafantiri  
For Respondent : Mr. Mapetla