

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

ATTORNEY-GENERAL  
PRINCIPAL SECRETARY FOR EDUCATION

1ST APPELLANT  
2ND APPELLANT

AND

HLOMOHANG MOROKOLE

RESPONDENT

HELD AT:

MASERU

CORAM

Steyn JA  
Browde JA  
et Kotzé JA

JUDGMENT

KOTZÉ JA:

The material facts in this case may be briefly stated:

On 19th October, 1992, a contract of employment was entered into between the Ministry of Education of the Government of Lesotho as employer and the respondent,

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as employee. The terms of the said contract require to be quoted *in extenso*. They are:

- "1. The Employer herein offers to the Employee employment which shall require the latter to undertake and discharge certain obligations for and on behalf of the former.
2. The Employee herein accepts the offer referred to in paragraph one above.
3. the parties herein mutually describe the nature of the aforementioned employment as follows:
  - a) assuming the position of Educational Facilities Coordinator for assistance in implementation of the Education Sector Development Project. The Educational Facilities Coordinator will report to the Deputy Principal Secretary;
  - b) accepting the terms of reference attached as Annex A.
4. The Employee shall at all times endeavour to undertake and discharge the aforementioned duties with due diligence.

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5. Save as may be herein provided this agreement of employment shall be subject *mutatis mutandis* to the provisions of the 1969 *Public Service Regulations*."
6. The parties herein mutually agree that the Employee shall be paid a net salary of Government of Lesotho salary Grade 15, notch 1 i.e. M37,908 per annum and shall progress through the scale according to Government of Lesotho regulations.
7. The parties herein further agree that in addition to the aforementioned remuneration the Employer shall, for the benefit of the Employee, put aside a certain sum of money calculated at the rate of 25 per cent of the said annual remuneration for the purposes of creating a gratuity fund in lieu of pension, payable at the effective termination date of this contract.
8. The Employer shall render the Employee all such facilities as may be reasonably required to enable the Employee to discharge his duties. Being more particular but without prejudice to the generality of the foregoing, the following shall be provided:
  - a) housing accommodation when available with standard furniture at maximum Government pool house rental with

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the said amount deducted from his monthly salary;

- b) reimbursement for transport and other related expenses from place of origin of personal effects at the commencement of assignment and for the transport and related expenses of transporting personal effects back to the place of origin at the completion of said assignment, the obligation of the Employer for such transport and related expenses shall be limited to the Employee, wife and children below the age of 18 years;
- c) provision for subsistence allowances while on duty outside Maseru, such allowance to be calculated at normal Government rates.

9. The validity of this contract shall extend over a minimum period of two years commencing on October 19, 1992. Thereafter, the contract may be extended by mutual agreement between the Employer and Employee.

- a) the Employee shall be entitled to a paid annual leave of 24 working days.

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10. Whenever the provisions of this agreement of Employment shall appear wanting and/or ambiguous, the parties herein shall seek and achieve a consensus and the same shall form part of this agreement of Employment upon it being reduced into writing and appended to this document.
  
11. Termination of contract by both parties shall be subject to three months notice or payment of salary in lieu of three months notice."

The respondent by virtue of the office which he held pursuant to the above-mentioned contract of employment had the use of a motor vehicle X6612 the property of the Government. On 20th May, 1993 a collision occurred involving vehicle X6612 whilst being driven by respondent. A pedestrian lost his life in the collision. On 2nd June, 1993 respondent was called on to "make a written report in regard to the accident". The vehicle had been submitted secretly to motor dealers for repairs. On 13th September, 1993 the appellant, the Principal Secretary for Education, wrote to respondent stating:

"on the 2nd June, 1993 you were specifically requested per a memo..... to report in relation to matters stated hereabove (i.e. the damage to X6612)... You failed, neglected and/or refused to make the required report. On the 2nd July, 1993 .... a reminder to you to make a report

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was made .... You responded to the reminder on the 7th July, 1993 by a memo... wherein you apparently disputed that there was such an accident.

Evidence of the fact that you never showed any interest to bring to light the true circumstances surrounding the sending of the said motor vehicle for repairs to the garage as aforesaid, is your hand-written report, hereto annexed for your perusal and marked "F". The tone of this report leaves much to be desired.

The manner in which you have handled this matter, as already shown above, amounts to the following acts of misconduct: insubordination, failing, disobeying, disregarding and making wilful or negligent default in carrying out an instruction given by a person having authority to do so and knowingly making false statement that the motor vehicle had not been involved in an accident, despite evidence to the contrary, as shown above.

However, before I can take a decision on the matter I deem it appropriate to grant you an opportunity, as I hereby do, to make your representations, if any, in connection with the matter concerning X.6612 referred to above. Such representations must be made in writing and submitted to the office of the Principal Secretary for Education within

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seven days of the receipt of this letter."

The respondent's response to the Principal Secretary's letter is dated 16th September, 1993 and is brief. It reads:

" To my knowledge, I complied with your instruction on the matter and as a result, I fail to understand how the acts of misconduct arise. Kindly elaborate more on the acts of misconduct.

Finally, you will wish to recall that, in your own words, you said even if I say I don't know. I wonder as to what has happened all of a sudden."

The last-mentioned letter was followed by a letter of dismissal in the following terms:

Re: TERMINATION OF YOUR CONTRACT OF EMPLOYMENT

I acknowledge receipt of your letter dated 16th September, 1993. I have carefully considered your response. It is entirely unsatisfactory. You have not cared to deal with the serious charges levelled against you concerning the vehicle X6612.

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Therefore in terms of Clause 11 of the Memorandum of Agreement of Employment I terminate your employment with effect from 1st October, 1993. You will be paid three months salary in lieu of notice."

The events outlined above led to an order in the High Court by MONAPATHI J. declaring the dismissal of the respondent null and void and directing the second appellant to pay the respondent's costs. The present is an appeal against the said order.

We have heard extensive argument on both sides. Such argument, in the main, turned on the question whether the respondent was, by reason of the provisions of Clause 11 of the contract of service, deprived of the protection of having recourse to the disciplinary procedures afforded him by the *Public Service Regulations* imported into the service contract by Clause 5 thereof.

In the view that I take, the answer to the question referred to in the preceding paragraph is that the disciplinary procedures referred to do not form part of the agreement. The *Public Service Regulations* are excluded in regard to termination (which is a concept wide enough to embrace disciplinary procedures) because termination is provided for in Clauses 9 and 11 of the agreement. Unless extended, the contract terminates after effluxion of a two-year period or by three months' notice by either party or by payment of salary by the employer in lieu of three months' notice.

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On behalf of respondent, the further contention was raised that the maxim *audi alteram partem* was not observed by the appellants. It is firmly established that this maxim should apply in a case like the present, i.e. where an employer performing a public function terminates a contract of service and that he is bound to extend to the employee a fair opportunity to be heard. (cf. *Koatsa v. National University of Lesotho*, unreported C of A/15/86; *Administrator Transvaal v. Traub* 1989(4) SA 731). That the respondent in the present case was afforded such an opportunity cannot be doubted. In the letter of 13th September, 1993 the respondent was granted "the opportunity... to make your representations". This was stated in the clearest possible terms and, save for replying "to my knowledge, I complied with your instruction", the respondent chose not to answer the allegations clearly set out in the said letter.

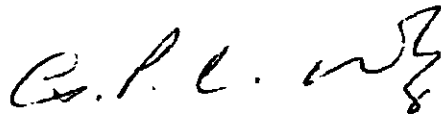
It remains to deal with a final issue which arose during argument viz., whether Clauses 9 and 11 of the employment agreement are reconcilable with each other. Clause 9 admittedly appears to guarantee the employment for "a minimum period of two years commencing on October 19, 1992" whereas Clause 11 provides for termination *inter alia* on payment of 3 months' salary. The two Clauses are not entirely consistent but clearly, in my view, Clause 9 should be read subject to the provisions of Clause 11.

In all the circumstances set out above, the appeal should succeed and the following order should be made:

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1. The appeal is upheld and the respondent is ordered to pay appellants' costs of appeal
  
2. The order of the Court *a quo* is set aside and substituted by the following:-

The application is dismissed with costs.



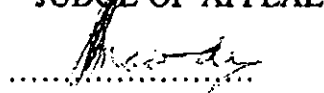
.....  
G.P.C. KOTZÉ  
JUDGE OF APPEAL

I agree



.....  
J.H. STEYN  
JUDGE OF APPEAL

I agree



.....  
J. BROWDE  
JUDGE OF APPEAL

Delivered at Maseru this <sup>27<sup>th</sup></sup>..... day of October, 1995.