

CIV/APN/16/95

IN THE HIGH COURT OF LESOTHO

In the Application of :

Edgar Tsietsi Nthunya

Applicant

v

Lesotho Tourist Board

Respondent

J U D G M E N T

Delivered by The Honourable Chief Justice,
Mr. Justice J.L. Kheola on 17/10/95

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

- (a) Dispensing with the normal periods of service as is required by the Rules.
- (b) Declaring null and void the purported termination of Applicant's employment by the Respondent and directing his reinstatement.
- (c) Granting the Applicant such further or alternative relief as this Honourable Court may seem just.
- (d) Directing the Respondent to pay the costs of this application.

It is common cause that on the 23rd July, 1991 the applicant was employed by the respondent as General Manager. On the 28th November, 1992 the applicant was placed on the permanent and pensionable establishment of the respondent. (Annexure "A" to the founding affidavit). The employment of the applicant was in terms of the respondent's Personnel Regulations.

It is again common cause that at the time of the applicant's appointment there was, in existence, the post of Managing Director which was filled by someone seconded by the civil service. The applicant alleges that after his employment, and after the incumbent of the post of Managing Director had been moved to another department, he advised the respondent's Board of Directors that there was no need for both the post of General Manager and that of Managing Director. He recommended the abolition of one or the other. His reasoning was that this was a duplication of functions and duties.

The applicant alleges that notwithstanding his advice aforesaid the respondent proceeded to fill the said post with the present Managing Director, a person from outside the Tourist Board, and only thereafter, proceeded to abolish the posts of General Manager. He suggests that the phrase in Annexure "B" on a "recommendation by Management" is a reference to his aforesaid recommendation that one of the two posts should be abolished. He made the suggestion on the ground that at the relevant time the post of Managing Director was vacant.

The applicant further submits that it is abundantly clear that the respondent's conduct in abolishing his post was not only mala fide, in that the decision to adopt it must have been taken before the incumbent Managing Director was employed or any decision to employ him taken, but that, there being nothing in a name, as the saying goes, it was his person not his position that was the target and there being no reason to get rid of him,

it was decided that the handiest, cynical as it ironically is, could not be other than the one supplied by him. He alleges that there was never any intention to find a suitable alternative position for him as required by Regulation 28 (d) (vii). He submits that this requirement is mandatory but the abolition of the post should have been caused by a change in the Board's organisation. No such change has taken place.

The respondent's opposing affidavit was sworn to by its Managing Director, Kananelo Tlebere. He alleges that it was the respondent's Board of Directors at its meeting of the 11th November, 1994 which gave the directive for the abolition of the post of General Manager on the ground of redundancy. (See Annexure "LTB1"). He submits that the former Managing Director of the respondent was recalled to the Civil Service after her contract of secondment expired and that before she departed she had recommended the abolition of the post of General Manager to the Board of Directors by a letter dated the 7th June, 1993. The letter is Annexure "LTB2" and reads as follows:

Mr. D. Mokhesi,
Chairman - Board of Directors,
Lesotho Tourist Board,
c/o MINTOUR,
P.O. Box 52,
Maseru. 100

**POSITION OF THE GENERAL MANAGER -
LESOTHO TOURIST BOARD.**

The above mentioned position was created by the directive from the then Minister of Tourism, Sports and Culture in May 1991 on the grounds that the Government has the "desire" to employ Mr. E.T. Nthunya as assistant to the Managing Director, despite the fact that there was no need to create such a position. Besides

this, no other justification whatsoever was forwarded by Government to the Board of Directors of Lesotho Tourist Board.

Regardless of the fact that there were no funds, since its inception, the post has proved very expensive for the Board to maintain taking into consideration the package entailing salary, housing allowance, ten (10) per cent pension contribution and the official car.

It has also become apparent that the incumbent's terms of reference duplicate those of the Divisional Heads of the Board, more especially those of the Finance and Administration Manager who is the prime Advisor to the Managing Director on Legal, Financial and Administrative issues for proper management of the Organisation.

In view of the aforementioned facts, there is a need to abolish the position, taking into consideration its financial backlog and unjustified terms of reference.

Yours sincerely,

C.M. Mosae (Mrs:) (Signed)
MANAGING DIRECTOR.

The Managing Director further deposes that there are studies which were undertaken by two consultants who had also recommended the abolition of the post of General Manager. The extracts from the studies are Annexures "LTB3" and "LTB4". On page 17 of Annexure "LTB3" the consultant has this to say:

"The position of Managing Director was created in 1990 apparently to replace the existing position of General Manager yet there continues to be a General Manager of the Board. Consideration needs to be given as to whether there is a need for a Managing Director and a General Manager and if so, what their respective roles are."

On page 149 of Annexure "LTB4" the consultant says:

"It is our opinion that LTB would be more effective if:

"A level of management (viz. General Manager) is abolished."

It is common cause that when the post of Managing Director was eventually advertised the applicant applied for that post. At that time he was acting as Managing Director. His application was not successful. (See Annexure "LTB5").

The Managing Director of the respondent denies that his conduct in abolishing the post of General Manager was mala fide as he made a proposal basing himself on objective and unbiased recommendations of consultants and the former Managing Director which were concerned with the post and not the incumbent thereof. He deposes that the structure of the respondent does not make room for easy deployment of staff especially when all senior posts were occupied at the time of making the decision to abolish his post. Therefore, when it transpired that no suitable alternative position could be found for applicant the Board had no choice but to pay him his terminal benefits and relieve him of his duties.

I have considered this matter and have come to the conclusion that the issues to be determined by the Court are as follows:

- (a) Was the decision of the respondent to abolish the post of General Manager made mala fide?

- (b) was the post of General Manager really redundant?
- (c) In their decision to appoint Mr. K. Tlebere, who was an outsider, as their Managing director over he applicant, who was already in the employ of the respondent as acting Managing Director, did the Board of Directors of the respondent act unfairly?

To answer (a) above one has to carefully look at the events leading to the abolition of that post in their chronological order. In paragraph 5 of his replying affidavit the applicant says:

"I respectfully call attention to the fact that it is not my case that I had the singular wisdom to notice that there was no need for the existence of both posts. Nowhere do I say that I was the only one who drew attention to this. My case is that the Respondent was not acting bona fide when it filled the then vacant post of Managing Director almost immediately after I had made the recommendation to the Chairman of the Board at my said meeting with him in his office during January, 1994 - the deponent was appointed Managing Director in July, 1994, and soon thereafter purport to abolish my post. The gravamen of my case is that this was but a strategem to get the deponent to take my place without having to give reasons which, in all probability, would conflict with the reasons appearing in the Board's minutes of my suitability for one or other post."

It is clear from the allegation in the above paragraph that it was the applicant who first made a recommendation to the Chairman of the Board of Directors of the respondent that the post of General Manager be abolished. This recommendation was made in January, 1994 and it is common cause that at that time the applicant was acting as the Managing Director and naturally hoped that he would be confirmed in that post. It is not uncommon that a person may act in a certain position for a long

time but when the actual filling of the position comes, the employer appoints a different candidate and not the one who had acted in the post for a long time. It does not necessarily mean that the employer is acting mala fide if he appoints a new candidate and gives him preference over the one who had been acting in the post.

In the present case the preference of Mr. K. Tlebere over the applicant may be due to a number of reasons. It may be that Mr. Tlebere has better qualifications than the applicant. It may be that during his acting appointment the applicant did not perform well. The applicant's application for the post of Managing Director was unsuccessful. After that the applicant reverted to his post of General Manager. It was only after the post of Managing Director was filled that the position of General Manager was abolished. The applicant avers that this was but a strategem to get Mr. Tlebere to take his place without having to give reasons which, in all probability, would conflict with the reasons appearing in the Board's minutes of his suitability for one or other post.

As I said above it may be that the respondent found that the qualifications of Mr. Tlebere were better than those of the applicant. The respondents advertised the post because the previous incumbent had vacated it. The applicant gives the impression that because at the relevant time he was acting Managing Director, the respondent ought to have appointed him to that post and ought to have abolished the post of General Manager

before Mr. Tlebere was appointed. It seems to me that the same result would still have been achieved by advertising the post of Managing Director after the abolition of the post of General Manager. Mr. Tlebere's application, if he made one, would probably still have succeeded and the applicant's application would probably still have been unsuccessful.

The events which preceded the abolition of the post of General Manager were (1) the recommendation of the former Managing Director, (2) the recommendations of two consultants whose reports have been referred to above.

I therefore come to the conclusion that the applicant has failed to prove that in abolishing the post of General Manager the respondent acted mala fide. The onus was on him to prove bad faith on the part of the respondent.

To answer (b) above I am of the view that one has to take into account that the applicant himself recommended that the post was superfluous. This view was also taken by the former Managing Director and the reports of the two consultants. The letter of the former Managing Director is criticized on the ground that when she wrote it she never informed the applicant though they were working together under the same roof yet she decided to write it without his knowledge or even after consultation with him.

It seems to me that it was difficult for the Managing Director to disclose the contents of her letter (Annexure "LTB2") to a colleague (General Manager) that she was busy making recommendations that his post be abolished. Be that as it may it was common cause that the position of General Manager be abolished. The applicant had also made such a recommendation which goes to show that the former Managing Director's letter was not nothing but a "clumsy invention of its author intended to achieve the objects of her own hidden agenda."

To answer (c) above I can only say that the applicant has failed to prove that the Board of Directors of the respondent acted unfairly when they appointed Mr. Tlebere over the applicant's head. There is practically no evidence of unfairness. The respondent was free to appoint any one he pleases as long as he followed the proper procedures prescribed by its regulations. It is not under any obligation to disclose why they found Mr. Tlebere a better candidate than the applicant. The applicant got all his terminal benefits.

In its opposing affidavit the respondent alleges that the structure of the respondent does not make room for easy deployment of staff especially when all senior posts were occupied at the time the applicant's post was abolished. The applicant denies this and avers that one C.S. Tlalajoe who occupied the post of Research and Development Manager had just resigned on the 13th October, 1994. This allegation appears in the replying affidavit when the respondent is no longer in a position to deny it. In his founding affidavit the applicant

raised this issue by saying that no attempt was made to find an alternative suitable position for him in terms of Regulation 28 (d) (vii). He ought to have mentioned at that stage that the position of Research and Development Manager was vacant. The respondent would have had a chance in his answering affidavit to deal with that issue. This is a dispute of fact which cannot be decided on the affidavits before me.

An extract from the minutes of a meeting of the Board of Directors of the respondent held on the 1st February, 1995 was filed with the Registrar on the 22nd March, 1995. It authorised Kananelo Tlebere to sign all the necessary papers to defend this application.

For the reasons stated above the application is dismissed with costs.

J.L. Rheola
CHIEF JUSTICE

17/10/95