

CIV\T\185\94IN THE HIGH COURT OF LESOTHO

In the matter between:

THAMAHANE RASEKILA

Plaintiff

and

L.T.C.

Defendant

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 3rd day of February, 1995.

The plaintiff has sued the defendant for payment of M53,612-64 being in respect of accommodation plus interest at the rate of 18.5% plus costs of suit.

In his declaration the plaintiff alleges that at all material times starting from the 1st March, 1982 he (plaintiff) was employed as the Head of Finance Division of the defendant. He was dismissed by the defendant on the 1st April, 1989. However he was reinstated as a result of a Court Order in C. of A. (CIV) No.24 of 1991.

In terms of the defendant's Revised Personal Regulations -

Regulation 6.1 - employees of the defendant at the level of Divisional Heads are entitled to accommodation in a detached, three bedroomed house with a garage. It is common cause that even though the plaintiff was given a post of director of Internal Audit when reinstated, by agreement between the parties he still maintained all the rights and benefits of a Divisional Head.

The plaintiff alleges that from the 1st day of April, 1989 to the 30th day of September, 1992 the defendant unlawfully and wrongfully refused to abide by Regulation 6.1 of its Revised Personnel Regulations by failing to give plaintiff accommodation or paying him rent as at market price of a similar house as provided for in the regulations.

In his further particulars the plaintiff alleges that the amount claimed in summons is equivalent to rental of a house provided for in the defendant's Personnel Regulations.

The defendant has taken an exception to the plaintiff's summons as amplified by further particulars on the ground that:

"The plaintiff's claim discloses no cause of action in that the plaintiff's entitlement to a house provided by the defendant in

terms of the Personnel Regulations is neither emoluments nor damages which the plaintiff would be entitled to recover upon reinstatement to the defendant's establishment."

The defendant has also pleaded over. It alleges that the defendant, without admission of liability and without prejudice to its defence that the plaintiff was not entitled to payment of housing allowance during the plaintiff's period of dismissal as an emolument per se, paid the plaintiff housing allowance at M400-00 per month from May, 1989 to July, 1992.

The first question to be decided by the Court is the defendant's exception. In *Venter v. Livni* 1950 (1) S.A. 524 (T) at pp. 582-529 Ramsbottom, J. said:

"If, without good cause, he seeks to terminate a contract of service the servant may accept that termination and bring the contract to an end or he may refuse to accept the termination and keep the contract alive until the end of its term; but in the latter case the servant's right is to claim wages as and when they fall due, or at the

end of the term claim damages for wrongful dismissal. The servant has not the right to remain in possession of his employer's property and in occupation of his employer's premises. Whether or not the dismissal of the respondent's manager, Mrs Venter, was justified or not, it is clear that, having dismissed her, he was entitled to require her to leave his farm and restore to him the possession of the vehicles and other equipment on the farm and also of the farm itself and the dwelling house. There was, therefore, no answer to the claim for ejectment and the order for ejectment with costs was correctly made."

In the present case the defendant was entitled to order the plaintiff to vacate its house at Maseru West when it dismissed him. He was not entitled to remain in the occupation of that house during the period of his wrongful dismissal to the date of his reinstatement because that is a benefit or privilege which he enjoyed when he was in the employ of the defendant.

It will be necessary to set out the order in C. of A (CIV) No.24 of 1991 because the plaintiff's case is apparently based

in that order. It reads as follows:

"(i) The appeal, in so far as it relates to the reinstatement of the respondent, is dismissed;

(ii) In order to ascertain what emoluments, if any, are payable to the respondent for the period from the date of his dismissal to the date of his reinstatement, the Court a quo should be furnished with affidavits from both parties regarding the emoluments which have been earned by the respondent in the period since his dismissal. If there is a dispute of fact which cannot be decided on the affidavits that the Court a quo will order that viva voce evidence be given by the parties and will in due course make such order regarding the quantum of emoluments, if any, to which the respondent is, in the opinion of the Court, entitled.

(iii) The costs of this appeal must be borne by the appellant."

The order was dealing with emoluments or salary which the plaintiff ought to have earned during the period he was dismissed and the date he was reinstated. From that amount must be deducted the emoluments or salary which the plaintiff received from another or other employers if during the above period he obtained another employment. In other words the question was whether the plaintiff tried to mitigate his damages by seeking another employment. It was common cause that he did so and worked for the Lesotho National Insurance Company.

It is clear that that case dealt with emoluments only and not with damages. However it is relevant to the present case because it was decided that the dismissal of the plaintiff was unlawful and therefore whatever damages he suffered as a direct result of that unlawful dismissal might be recoverable from the defendant unless they are too remote.

Mr. Matsau, attorney for the defendant submitted that the housing provided by the defendant in terms of Regulation 6.1 of its Personnel Regulation is not an emolument but a benefit which he enjoyed when he was still under the employ of the defendant. He referred to section 3 of the Employment Act No.22 of 1967 where the definition of wages is as follows:

"Wages means remuneration or earnings,

however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law which are payable by virtue of a written or unwritten contract of employment to an employed person for work done or to be done or for service rendered or to be rendered."

There is no doubt that according to the definition given above accommodation provided by the employer to his employees is not regarded as a wage or remuneration.

It is significant that in section 81 (1) of the new Labour Code Order No.24 of 1992 which came into effect on the 1st April, 1993 provides that it shall not be illegal to enter into an agreement or contract which an employer to provide the employee, as partial remuneration for his services in addition to money wages, with food, a boarding place and/or such other allowances or privileges as may be customary in a trade or occupation concerned.

Section 81(2)(d) of the labour Code Order 1992 provides that where the employee is provided with accommodation, the statutory minimum wage applicable to that employee may be reduced by such amount as may be determined by the relevant wages order. It is

clear that in terms of the new Labour Code Order by agreement of the parties accommodation may be used as partial payment of the emoluments. It is common cause that the Labour Code Order of 1992 does not apply to the present proceedings because the events leading to the present proceedings took place long before the Labour Code Order came into operation. It is also clear that according to the Employment Act of 1967 which was in force at the relevant time accommodation provided by the employer to the employee was not regarded as wages or emoluments.

It seems to me that the only relevance of C. of A (CIV) No.24 of 1991 to the present proceedings is that it determined that the dismissal of the plaintiff was unlawful. As I pointed out earlier in this judgment, all the damages suffered by the plaintiff as a direct result of his unlawful dismissal by the defendant might be recoverable from the defendant unless they are too remote. The plaintiff is not claiming the sum of M53,612-64 as damages he suffered during the period of his dismissal until his reinstatement in 1992. He is claiming that large amount of money as if it were his emoluments in terms of the Appeal Court judgment. He says that in terms of the Personnel Regulations 'I was entitled to a specified kind of a house; during the period of my dismissal to my reinstatement. I was deprived of that benefit or privilege therefore I am entitled to payment of rental of a house of the same standard.' I think there is something

wrong in this reasoning. If during the period of his dismissal to his reinstatement the plaintiff rented a house of a similar standard as provided for by Regulation 6.1 he could probably be heard to say that as a result of my unlawful dismissal I suffered damages in the amount of M53,612-64 in the form of rent which I paid for a house.

In that case the plaintiff would have to prove his damages by producing receipts of the rental he paid during that period.

I was referred to the case of Evangelical Lutheran Church in Southern Africa (Western Diocese) v. Sepeng and another 1988 (3) S.A. 958 in which the Constitution of the church provided that "At her discretion ELCSA shall provide free housing for all her fulltime workers." A pastor of the church refused to accept a transfer to another station. He was dismissed and ejection proceedings were instituted to force him out of the church's house. It was held that in view of the fact that the free housing was a benefit or privilege, and that the first respondent was not entitled thereto as a matter of right, that it followed that the church could at any time withdraw the said benefit or privilege, purely on demand.

In the above case the words "at her discretion" were used. In the present no such words are used. Regulation 26 reads as

follows:

62.1 LTC does not provide accommodation free of charge for its staff. Available LTC staff houses owned by LTC will be allocated and leased to staff in accordance with the following priority.

- Management
- Sectional Heads, responsible for areas within LTC where easy availability after working hours is beneficial to LTC's operations.

26.1.1 -----

26.2 Housing allowance is payable to pensionable and non-pensionable staff of salary grade 9 through 14 who do not have benefits of an allocated house. See Annex 4/6.1.

26.3 Housing allowances, for staff attending courses lasting more than a year, shall be reduced in line with dependants' allowance. The reduction in housing allowance shall, however, be applied immediately after the employee's departure.

Regulation 6.1 reads as follows:

"With reference to Article 26 of the Personnel Regulations, the following rates for housing allowance shall be effective as from 1989.04.01.

Salary Grade	Allowance for month
13 - 14	M400.00
11 - 12	M300.00
9 - 10	M150.00

shall be paid to pensionable staff only.

- staff on grade 8 who already receive housing allowance shall retain the benefit of M100.00/month and new comers into the grades shall not receive any housing allowance.

- Divisional Heads shall be accommodated in a detached, three bedroomed house with a garage."

It is clear that according to the defendant's Personnel Regulations the accommodation of the staff of the defendant in the defendant's houses depends entirely on the availability of such houses. If the houses are not available the defendant has undertaken to pay housing allowance. The matter does not seem to be discretionary. It may be a benefit but does not seem to be discretionary because if the house is not available the defendant must pay a housing allowance.

I have come to the conclusion that the plaintiff's summons and declaration as amplified by further particulars disclose no cause of action.

In the result the defendant's exception is upheld and the plaintiff's action is dismissed with costs.

J/L. KHEOLA
CHIEF JUSTICE

3rd February, 1995.

For Plaintiff - Mr. Mafantiri
For Defendants - Mr. Matsau.