CIV\APN\445\93

IN THE HIGH COURT OF LESOTHO

In the matter between :

HLOMOHANG MOROKOLE — Applicant

and

ATTORNEY GENERAL — 1st Respondent
PRINCIPAL SECRETARY FOR EDUCATION — 2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 26th day of April 1995

Mr. Khati is the Principal Secretary of the Ministry of Education and he was also in that capacity the administrative head and superior of the Applicant who was the Educational Facilities Co-ordinator. The Applicant's employment was terminated by the Principal Secretary on the 30th September 1993 by this letter annexed as HM2 to the proceedings. This gave rise to this proceedings in which the Applicant claims for the following orders:

(a) Declaring Applicant's dismissal by Second

Respondent herein as null and void.

(b) Directing Respondent to pay the costs thereof.

(c) Granting Applicant such further and or alternative relief.

Following on an agreement between the Government of Lesotho, Ministry of Education and the Applicant whose memorandum of agreement was annexed as HM1 to this proceedings the Applicant was employed as an Educational Facilities Co-ordinator "in the service of the Government of Lesotho." Of particular importance to this judgment is what is provided in clause 5 of that agreement which reads: "Save as may be herein provided this agreement of employment shall be subject mutatis mutandis to the provisions of the 1969 Public Service Regulations."

I did not think that the provisions of clause 10 of the written agreement were such as to provide an avenue or a way of solving disciplinary infractions. I have understood it to mean that for good cause and by mutual agreement the written agreement may be amended from time to time. The clause reads:

Whenever the provisions of the 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 being reduced into writing and appended to this document."

Before deciding the main points, the resolution of which should lead to the decision of this proceedings, it is necessary to recite the facts leading to the Applicant's dismissal. A collision occurred on the 20th May 1993 involving a government vehicle registration No. X 6612 driven by the Applicant and a pedestrian, resulting in the death of the pedestrian. It appears that on information received of the collision, the Applicant was asked to make a written report and to fill a form G.P. 102 all which the Applicant apparently delayed in executing, as shown by the memo dated the 2nd July 1993 at page 49 of the record. Despite all it seems that a report about the accident had already been made by one MOSITO RAPAPA in relation to the circumstances surrounding the sending of the motor vehicle to a garage for repairs. It was not disputed that this Applicant sent the damaged vehicle for repairs. I sensed that the extent of the damage to the vehicle was not common cause but that is not an important issue. It seemed that the Applicant was perceived to have surreptitiously sent the vehicle for repairs. It was accordingly felt by the Principal Secretary of Finance in his

letter to the Applicant (annexed as HM 5 at page 56 of the record) that the Applicant never showed interest in making the report. The attitude of the Principal Secretary of Finance was therefore that : "For reasons of the aforegoing it appears to me by reasons of your neglect or fault at the time you were a public officer, the public revenue and the public stores sustained loss and damage. The of loss suffered by the public revenue is the sum of two thousand eight hundred and fifty one Maloti (M2,852.00), and if within 21 days an explanation satisfactory to me is not furnished by you with regard to the apparent neglect or fault as aforesaid, I may, with the approval of the Minister of Finance, surcharging against you to two thousand eight hundred and fifty one Maloti (M2,851.00) being the amount suffered by Lesotho." (my underlining) The Principal Secretary of Education felt that: "you responded to the reminder on the 7th July 1993 by a memo, a copy of which is hereto annexed and marked "E" wherein you apparently disputed that there was such an accident." (see annexure HM3 at page 10 of the record) I have looked at this annexure E the last statement of which reads "I am not too sure whether repairs of this nature are considered as accident as alleged." I may also add by way of observation that annexure E at page 50 being a memo from the Applicant to Mr. Mafitoe of the Second Respondent's office) is also remarkable for its reticence. It reads : "What is all about the alleged accident Could you kindly tell me more about it How and where did the

accident happen? It is clear therefore that nowhere does one see any form of report or reply addressed by this Applicant either to the Principal Secretary of Education or the Principal Secretary of Finance. What comes out by way of a reason for the attitude by the Applicant can be gathered from the paragraph 5 of his replying affidavit which reads as follows:

"5

Ad paragraph 13 and 14

The annexure referred to herein have nothing to do with the misuse of any vehicle by me. At the time I was written a letter by the Deponent I was facing a criminal charge in connection with the use of the said vehicle. The charge of Culpable Homicide based on my alleged driving of the said vehicle. Mr. Khati was forcing me to give a report which the police had intended to use against me in that case. I told Mr. Khati that if I were to give a report, it might prejudice my case. In fact, it was confirmed at my trial that my report was demanded to assist the police. I deny that Mr. Khati gave sufficient opportunity to make representation. All he wanted was to get information from me in order to pass to the police." (My underlining)

My purpose for highlighting the above portions is that it is notable that in all the responses made by the Applicant as a result of the demands from reports made either by the Second Respondent or the Principal Secretary of Fiance the Applicant is not forthcoming in disclosing the above reason of the impending criminal case and the likely prejudice in making a full report This is so, if not on all occasions but in response to the letter HM of 13th September 1993 in which the increasing urgency of the

matter was made clear by the Second Respondent. This is clear where it is said:

> " The manner in which you have handled the matter, as already shown above amounts to the following acts of misconduct wilful or negligent default in carrying out instructions 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." (my underlining)

I was not addressed on whether the matter of the substance or the reason for not disclosing the reasons for avoiding to make a report should have been made in the founding papers. Neither was I addressed on the wish if any on the part of the Respondent to contest statement in paragraph 5 of the Applicant's replying affidavit by filing of an additional affidavit. To that extent I would have no reason for not accepting the truth of the statement. I need not comment on the validity of the Applicant's apprehension that prejudice would result in the true and full statement getting into the hands of the police. But it was a felt apprehension. Apparently the Applicant seems to have given priority to the criminal case that was looming as more of a jeopardy as compared to the investigation conducted by the Second Respondent. In the absence of a debate in that regard I was not able to decide whether the effect of Public Service Rule 5.4 (2) would be that in a situation such as where a Public Servant was charged with Culpable Homicide the disciplinary charge would have to await the disposal of the criminal charge. In a normal case

that would depend on the directions of the Attorney General. But the matter was not canvassed nor were there such a direction even where it appears that the Attorney General would still have to be consulted in any prosecution involving a Civil Servant.

It seems therefore that the Applicant's attitude was such that the Second Respondent's entreaty in his letter to the Applicant of the 13th September 1992 would receive no positive response. The Second Respondent says in the letter:

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

While the argument that this Applicant is a public servant was forcefully pursued I was also asked to consider that there was legitimate expectation on the part of the Applicant of the following. Firstly that before being dismissed he would be given adequate notice that it was considered by his superior that such a prejudicial step against him would be taken and secondly an adequate opportunity of being heard would be granted to him. That would amount to the Applicant having been given a fair hearing. I would agree with the principle. (see Tseuoa Tsekoa & 4 Others vs the General Manager Lesotho Flour Mills and 4 Others C of A CIV No. 23\88 (Tsekoa and Flour Mills case) at page 7 in approval of Mokoena & Others vs Administrator Transvaal 1988

(4) 912 W The learned judge of Appeal Aaron JA considered the application of the *audi alteram* rule in page 7 of Tsekoa and Floor Mills case and concluded that " ..... What is adequate in these respects must always depend on the circumstances. It is basically a question of fairness. ..... In the circumstances I consider that Appellant and other employees were given adequate notice of intended action against them and had a fair opportunity to make representation of management if they wished." I would have had no doubt that the Applicant would appear to have been given such a fair notice subject to his attitude of reluctance to make a statement for fear that the comments would be made available to the police, had the situation not been more complicated

The Applicant says that the Second Respondent had no power to dismiss him for alleged misconduct even "presumably" on the strength of clause 11 of the agreement. As a matter of fact this is the clause which the Second Respondent invokes in the letter of dismissal of the 30th September 1993. The clause 11 reads as follows:

> "Termination of contract by both parties shall be subject to three months' notice or payment of salary in lieu of three months."

I am attracted by the reasoning of the learned judge of appeal Mahommed P. in the case of MALIPUO MAKARA vs O.K. BAZAARS C of A (CIV) No. 18 of 1990 where he said at page 9:

"The *audi alteram partem* rule is a rule of flexible content. Its fundamental object is to ensure that the procedure is adopted before any action is taken against any person affecting his legitimate interest is really fair. What will be fair in a particular case will depend on the circumstances of that case .....". The learned judge adopted the comments of Colman J in HEATHERDALE FARMS PTY LTD vs DEPUTY MINISTER 1980 (3) SA 476 at 486 and continued thus:

"Fundamental however, to the proper application of the rule are two requirements: First notice of intended action to the party affected and secondly proper opportunity for him to present his case". See also R v NOMVETI 1960 (2) SA 108(E) 117 where a removal Order issued without proper notice was set aside even though the offender was warned on previous occasions that action would be taken against him.

The Applicant says furthermore that the Second Respondent had no power to dismiss him for alleged misconduct even presumably on the strength of clause 11 of the agreement of employment. I would agree that the Second Respondent would normally invoke this clause in the absence of an allegation or reason of alleged misconduct. This Clause II seems to be consistent with the provision of Section 14 (4)(b) of the Employment Act of 1967 but is certainly not consistent with Section 15(2) and (3) of that Act. What I want to underline is that once an employer alleges misconduct he cannot allege that and then seek to terminate in terms consonant with section 14 (4) (b). Misconduct is premised upon a procedure for breach of discipline having been brought into play. This is so whether or not that is explicitly provided for in the contract. So that it is the proper contention of the Applicant that : "Much as I am

to be treated as a public servant in terms of clause 5 of the agreement of employment so must I be treated like one in all other respects including in this situation where I am alleged to have committed an act of misconduct." Clause 5 reads: "Save as may be herein provided the agreement of employment shall be subject mutatis mutandis, to the provision of the 1969 Public Service Regulations." So that the vital distinction is not whether the Applicant is a public Servant as the Respondents even referred to him as one but whether he must be treated as one for certain purposes, bearing in mind the Clause 5 and the Public Service Regulations. I conclude that the Regulations have been incorporated by reference in the agreement as signed by the parties.

My above conclusion means that for all other purposes for which termination is considered the Public Service Regulations are to be invoked with the exception of matters which properly belong to the provisions of Clause 11. What the Applicant in effect says is that: "If a breach of discipline is suspected against an officer, the sectional head in the Department must complete a dossier i.e. a record of information about the events set of documents about the event. He must write a short summary of the dossier for consideration by the Head of Department, with suggestions on what action is to be taken e.g. whether the officer is to be charged or not, whether to consult the Attorney

General or not and what charge, if any, may be preferred against the officer" (see page 7 Notes on Lesotho Public Service Disciplinary Rules and Procedure by M. M. Qhobela). Furthermore the procedure to be adopted should have complied with the instituting of disciplinary proceedings in terms of Public Service (PSC) Rule 541 (to seek Attorney General's direction), PSC Rule 5-42 (when appropriate a charge to be prepared), PSC Rule 5-43 (appointment of adjudicator), PSC 5-44 (service of Charge Sheet) and the necessary procedures of hearing and final decision as provided further in the Regulations. This was not done. I would find that the Applicant had a legitimate expectation that he would be dealt with in terms of the Public Service Rules being by way of due process, in which implies notice of intended action and opportunity to be heard, as is the real content of *audi alteram partem* principle, part of which is procedural justice.

It appears to be possible that Government may employ persons to perform duties in furtherance of government activities without appointing them to the public service It is also proper that such officer depending on their agreement with the respective ministry of the government may not be seen to be occupying an office "of emoluments" strictly speaking. (see also TSEkoa and Flour Mills case page 5-7). But I do not agree that for purposes of discipline (at least) the Applicant would not be subject to

Section 19(1) of the Public Service Order 1970 and all other provisions prescribing for matters of disciplinary procedures. It means therefore that failure to grant the Applicant a hearing amounts to failure to grant a statutory hearing which would be categorized as violating a jurisdictional fact. (See HERMANNESBURG MISSION vs SUGAR INDUSTRY CONTROL BOARD (1) 1981(4) SA 278 (H) 287-8).

Having answered the question of adequate notice, fairness, and whether the Applicant was a public servant, the only question to deal with is the Applicant's submission that having not been dealt with by way of Public Service disciplinary procedure, and having been dismissed by the First Respondent the Applicant was dismissed by a wrong person. This kind of problem was put in focus in the case of LESOTHO TELECOMMUNICATION CORPORATION vs THAHAMANE RASEKILA C of A (CIV) 24\91 at page 8 where Browde JA says :

> "I have come to a conclusion therefore that the decision to dismiss the Respondent taken by the Board of Directors and not by the Managing Director and that being so the decision was in breach of the regulations which govern the relationship between the parties on this ground alone the Respondent was entitled to re-instatement and to that extent the appeal must fail."

This statement may be found to be too broad when sought to be applied to the facts of the present application but the point being made is that the Second Respondent would not just make into himself the powers to dismiss the Applicant without such a

specific power being conferred on him. This is also meant to convey the understanding that "power is not conferred upon the administration generally, and any power which is conferred may be exercised by the office holder or body upon which it is conferred alone. If someone else purports to exercise the power, the latter's act is simply *ultra vires* and invalid." (See BAXTER ADMINISTRATIVE LAW 1st Edition at page 426). And furthermore that : "Except in the case of an exercise of power under the prerogative, a public authority has no powers other than those which have been conferred upon it by legislation". (See BAXTER, ADMINISTRATIVE LAW 1st Edition at page 38)

I have been persuaded that my task is an easy one, that is: to "declare the dismissal by the Second Respondent null and void." There has never been an attempt to persuade me that the fact that the Applicant had a two year contract which could or could not normally be renewed was a factor to consider in exercising my discretion. This Applicant has worked a mere 11 months of the two year period. It is submitted however that there would also be no need to pray for re-instatement on the basis that "once notice was insufficient the purported dismissal was a nullity and as the invalidity was disputed the Appellant became entitled to a declaration Order in terms of prayer (a) set out above. In this regard see KOATSA KOATSA v NATIONAL UNIVERSITY OF LESOTHO C of A (CIV) 15\86. "Once there was no

dismissal there is no question of re-instatement, and prayer (b) was therefore, not necessary." (See MOSALA KHOTLE vs ATTORNEY GENERAL C of A (CIV) 13 of 1982 - 22\01\93 - per Browde J.A. at page 5). In the LTC and Rasekila case the Court of Appeal went on from page 11 to page 14 to review the law on re-instatement of employees and such related Orders such as payment of emoluments, damages and specific performance and the Court's discretion in proper cases and stated at page 12. "In so far as the re-instatement of the employee is concerned however, South African Courts, have since Schierhout case, re-instated employees when it was considered equitable to do so. See for example NATIONAL UNION OF TEXTILE WORKERS vs STAG PACKING (PTY) LTD 1982 (4) SA 151."

It is clear from the aforegoing that I took the view that Applicant's claim (a) and (b) ought to be allowed.

T. MONAPATHI
JUDGE

For the Applicant : Mr. Nathane for L. Pheko & Co.

For the Respondents : Miss Sesing for Attorney General