

C OF A (CIV) NO.32 OF 95

IN THE COURT OF APPEAL FOR LESOTHO

In the matter between:

EDGAR TSIETSI NTHUNYA

APPELLANT

AND

LESOTHO TOURIST BOARD

RESPONDENT

HELD AT:
MASERU

CORAM:

STEYN JA
BROWDE JA
LEON JA

J U D G M E N T

BROWDE, JA

On 23 July 1991 the appellant was employed by the Respondent as General Manager. This appointment was confirmed in a letter from the respondent's managing director dated 18 December 1992 which "admitted {the appellant} into a permanent and pensionable establishment with effect from 26 July 1992". It was specifically stated that the "terms and conditions of service will, however, remain unchanged". The condition of service which is relevant to this appeal provides that the services of an employee may be terminated for the reason, inter alia, that is worded as follows:-

"(vii) Abolition of his post caused by change in the Board's organisation, provided that with permanent staff, efforts shall be made to find suitable alternative position within the establishment."

On 11 November 1994 the Respondent's board of directors gave the directive for the abolition of the post of general manager on the grounds of redundancy which led to the writing of a letter addressed to the appellant dated 28 November 1994 terminating his services with immediate effect.

This led to an application by the appellant to the High Court in which he sought a declaration that the purported termination was null and void and an order reinstating him.

The application came before Kheola CJ who dismissed it with costs. It is against that order that the present appeal was brought.

Mr. Sello, who appeared for the appellant, urged us to find that the abolition of the post of general manager was mala fide and that this is demonstrated, so the submission went, "by the fact that no attempt seems to have been made, indeed there never was any intention, to find a suitable alternative position for (the appellant) within the establishment" (I have quoted from

the affidavit of the appellant upon which Mr. Sello based his submission) Mr Sello conceded that appellant bore the onus to prove mala fides which concession, I believe, was properly made.

The allegation that the respondent acted mala fide was denied by respondent's managing director who stated that the abolition of the post of general manager was based on "objective and unbiased" recommendations of independent consultants. It is also of crucial importance that the appellant deposed to the fact that he himself recommended that there was no need for both a general manager and a managing director and in his replying affidavit states as follows:-

"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 stratagem 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."

The appellant's case in reply seems to have become, therefore, not that the abolition of the post was effected mala fide but that it was a stratagem on the part of the respondent to appoint someone else to the post of managing director and not the appellant. We only have the word of the appellant that the person appointed was "not better qualified, if at all, than me for the post" and self-praise being no recommendation it can hardly be relied upon as a proper ground for finding that the appointment of the respondent's deponent was mala fide.

The respondent further sought to argue that the termination of his employment should be declared null and void because, so the argument went, in breach of the condition of his employment the respondent failed to make efforts to find a suitable alternative position for him within the establishment. In its answer to that allegation the respondent deposed to the fact that

"The structure of the Respondent does not make room for easy redeployment 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."

It was only in his replying affidavit that the appellant stated that the post of the Research Development Manager had become vacant prior to the appellant's dismissal and by implication only that he could have been given that post. Nothing is said as to whether or not the post was suitable for him to occupy and it cannot therefore be regarded as an answer to the respondent's allegation that there was no suitable alternative position which could be found for the appellant.

The argument on behalf of the appellant must, therefore, be rejected and the appeal is accordingly dismissed with costs.

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[Signature]
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J. BROWDE
JUDGE OF APPEAL

I agree

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[Signature]
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J. E. STEYN
JUDGE OF APPEAL

I agree

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[Signature]
.....
R. N. LEON
JUDGE OF APPEAL

Delivered at Maseru this^{19/1} day of January, 1996.