C. OF A. (CIV) NO.13 OF 1995

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

SUPREME FURNISHERS (PTY) LTD	1ST APPELLANT
MOHOPOLO MACHELI	2ND APPELLANT
AND	
LETLAFUOA HLASOA MOLAPO	RESPONDENT

HELD AT:

MASERU

CORAM:

STEYN JA,
BROWDE JA,
KOTZÉ JA.

JUDGMENT

STEYN JA:

Respondent instituted proceedings against Appellant in the High Court on the 20th of April, 1993. In his

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application he sought the following relief:

"1. Directing (*sic*) the purported disciplinary proceedings held by the second respondent on or about the 8th day of June, 1992 against the applicant and the result thereof handed by him on the day of June, 1992 as a nullity.

2. Reviewing and setting aside the decision of the second respondent to terminate applicant's employment with first respondent.

3. Directing the respondents to produce the complete typed record of disciplinary proceedings held on or about the 8th day of June, 1992 and the result thereof handed down on or about the 11th day of June, 1992 and serve applicant's attorneys with a copy thereof within seven (7) days of service of this application upon them.

4. Directing the respondents to provide applicant's attorneys with the full operations manual of the first respondent within seven

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(7) days of service upon them of this application.

5. Directing the first respondent to re-instate the applicant in his position as manager at first respondent's branch at BUTHA-BUTHE, which position the applicant held prior to the said purported dismissal.

6. Directing the first respondent to pay to the applicant forthwith applicant's arrears of salary with effect from the 1st day of November, 1992 to the date of reinstatement and in the sum of M2,800.00 plus the yearly increment as at 1st January, 1993.

ALTERNATIVELY

7. Directing the first respondent to pay the applicant damage the measure of which is the sum of six month's salary in lieu of notice, that is to say, the sum of M16,800.00 (Sixteen Thousand Eight Hundred Maloti).

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8. Directing the respondents to pay costs of this application on an attorney and client scale.

9. Granting the applicant such further and/or alternative relief as this court may deem fit."

The matter came before the Court on 9th May, 1995 and in a judgment delivered on the 30th of May, 1995, it was held that "the disciplinary inquiry complained of was demonstrably unfair". The Court (Mofolo AJ as he then was) ruled as follows:

"(a) 2nd Respondent's purported termination of Applicant's employment as contained in letter of 9 September 1992, is hereby set aside and declared invalid.

(b) Respondents are to pay costs of this application."

Respondent was employed by First Appellant (Appellant) as a branch manager of its Butha Buthe Branch with effect from 15 September 1990. He alleged that his appointment was both "indefinite" and "pensionable".

On the 9th of September, 1992, Respondent's employ-

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ment was terminated as per letter which is annexure "C" to his application. This letter signed by the area manager (second respondent in the Court below) reads as follows:

"Dear Mr. Molapo,

RE: TERMINATION OF EMPLOYMENT

Reference is made to our disciplinary meeting on Tuesday 8th September 1992, where we discussed your continued poor performance, failure to carry out instructions and company policies. Mitigating factors were taken into account but due to your final warning and continuous unacceptable conduct, I have no alternative but to inform you that your services have been terminated with immediate effect.

You will be required to hand over the branch, stock manuals, uniforms, vehicles etc; on the 9th September 1992.

Your final salary will be as follows:

1. You will receive notice pay up to the 31st October 1992.
2. You will receive leave due to you as at 31st October 1992.
3. The Pension company will be advised accordingly.

A cheque will be posted to you as soon as possible.

Your faithfully

M. MACHELI

AREA MANAGER
SUPREME FURNISHERS
MAPUTSOE"

There are various factual disputes concerning the

events which precipitated the dispatch of this letter. However, it is clear that in the ordinary course of events, and in the absence of facts or circumstances which cast doubt on the acceptability of a Respondent's version, where an applicant institutes procedures by way of notice of motion the version of the facts deposed to by a Respondent should be accepted as correct.

See *National University of Lesotho Students Union v. National University of Lesotho And Others; C of A (CIV) No.10* of 1990 at p.19 (unreported).

The facts of why and how Respondent came to be dismissed can be summarised as follows:

Respondent was given a written warning by his area manager on the 11th of June 1992. According to appellant, the disciplinary code in terms of which it acted provided for two kinds of written warnings. These are described by Appellant as follows:

"a written warning, where *inter alia* unsatisfactory performance is considered to be of such magnitude that counselling would not be adequate. (This was according to Appellant the

case in the matter under review) and a final written warning which is issued when a written warning has failed to achieve the desired improvement in performance. This means that the employee could be discharged during the period of the final warning."

Appellant then proceeds to contend that as annexure "C" cited above demonstrates, Respondent was duly informed of the charge against him and was given appropriate opportunity to make representations "before the decision to dismiss him was taken by management on the following day".

It then proceeds to point to the fact that in terms of the said code, an employee who has been disciplined and considers such action to be "procedurally unfair" is entitled to appeal against both of the "warnings" as well as his dismissal. His failure to pursue this remedy - so it was contended - demonstrated his acceptance of the procedure as fair and/or precluded him from seeking relief from the Court he having failed to pursue the remedies available to him domestically. Respondent admits that he could have appealed as alleged, but that he was nevertheless entitled to approach the Court - because there had

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been "no such proper disciplinary enquiry".

During February, March, April and May, 1992, Respondent's performance was not up to "acceptable standards". Appellant alleges that during these months, he had failed to achieve the budgets set. The area manager (the deponent) alleges that he gave Respondent a hearing before warning him in terms of the Code and before he was given a final written warning by Mr. Brian Foulkes, the operational manager of the Appellant. The decision to dismiss him was taken subsequently by management. The deponent avers that Respondent's dismissal was "not summary" but on notice "and that he was paid cash in lieu of notice. Applicant was a monthly paid employee and was as such entitled to one month's notice or cash in lieu thereof.

In his judgment, the learned Judge *a quo* quite correctly cites the decision of Mahomed JA (as he then was) in *Koatsa v. National University of Lesotho*; C of A 15 of 1986 (unreported). He refers specifically to the passage where the learned Judge of Appeal says the following:

"A private employer exercising a right to ter-

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> minate a pure master and servant contract is not, at common law, obliged to act fairly. As long as he gives the requisite notice required in terms of the contract, he can be as unfair as he wishes. He can act arbitrarily, irrationally or capriciously."

The Court *a quo* then proceeds to distinguish the present case from *Koatsa* decision on the grounds that the Respondent was not a "menial servant entitled to only one month's notice or one month's wages in lieu thereof". The learned Judge then proceeds to say the following:

> "As to whom the learned Mahomed J.A. was referring to when he said at common law an employer is not obliged to be fair as long as he gives the requisite notice in terms of the contract, it is difficult to say. When, however, Molai J. applied this rule in *'Malipuo Suzan Makara v. O.K. Bazaars (Lesotho) Ltd. supra*, it is possible that the learned Judge could have regarded a till-operator as a menial servant..
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> Within the meaning of the rule sketched above, I hold that a shop manager is not a menial servant liable to be dismissed at the whim of an employer. I have also found nothing untoward in applicant's conduct or his attitude towards his work."

He then finds that the facts show that the disciplinary proceedings were "unfair to the applicant". The reasoning in this regard reads as follows:

> "On the contrary, disciplinary proceedings brought against the applicant were not clear, it was difficult to say whether these proceedings were an inquiry into applicant's poor performance or as was said to rectify counselling 'downfall'. The proceedings were coloured and tainted by the presence of 2nd respondent who acted both as chairman at the inquiry and himself terminated applicant's employment.
>
> I therefore hold that 2nd respondent acted as a judge in his own cause. It is not enough to say that the disciplinary proceedings were unfair to the applicant, it is that the entire exercise was not only a catalogue of errors, but that it bothered on unheard of parody and mockery of a disciplinary inquiry." [*sic*]

The reasoning set out above appears to me to be flawed. In the first place there is no precedent in our law that justifies a distinction based on a "menial" employee and any other employee in regard to whether or not to apply principles of fairness - such as the granting of a hearing before the decision to dismiss is taken. Such distinction as does exist, is that which obtains in respect of an "employer performing a public function" and a "private employer exercising a right to terminate a pure master and servant contract... at common law" (*Koatsa supra* at p.11 - 12). In the case of the former employer—

> "The official or officials who exercise a discretion to terminate a contract of employment by giving to the employee concerned the minimum period notice provided for in the contract, cannot act capriciously, arbitrarily or

> unfairly. In particular, if the real reason for giving to an employee a notice of termination, is some perceived misconduct or wrong committed by the employee, the employee should be given a fair opportunity of being heard on the matter, especially where it appears from the circumstances that the employee had a "legitimate expectation" that he would remain in employment permanently in the ordinary course of events." (*KOATSA op cit*)

See in this regard also, the judgment of Lord Wilberforce in *Malloch v. Aberdeen Corporation* 1971(1) W.L.R. 1578 cited by Mahomed JA in the *Koatsa* case at p.12 - 13.

This principle was further clarified in the judgment of Corbett C.J. in *Administrator Transvaal and Others v. Traub And Others* 1989(4) SA 731 (A) at p.189. The limitation is that the *audi* principle only "comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such individual has a legitimate expectation entitling him to a hearing ...". This was clearly articulated in the passage just cited which is taken from the judgment of Milne JA in *S.A. Roads Board v. Johannesburg City Council* 1991(4) SA 1 at 10 H - I. Or as it was put in *Naran v. Head of Dept. of Local Government Housing and Agriculture (House of Delegates) and Another* 1993(1) S.A.

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405 (T), "the *audi alteram partem* principle is only applicable in cases where a public body exercises a statutory right. The *audi alteram partem* principle is not applicable in the exercise of purely contractual rights." (p.407 B - C).

For a collection of cases in involving the *Traub* case and a discussion of these, see "The Quest for Justice" "Essays in Honour of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa Edited by Ellison Kahn (Juta) 1995 at p.189.

However that may be, on the evidence before us and on an acceptance of the approach to be adopted in cases brought on Notice of Motion, we are satisfied that Respondent did receive a hearing and that the procedures followed by Appellant were substantially in accordance with the provisions of Appellant's disciplinary Code. There was accordingly in our view no procedural unfairness of a kind that would entitle a Court on review - even should it seek to import the provisions articulated in Traub into the contractual relationship between the parties—to interfere with the decision taken by the Appellant.

In this regard, it is relevant to note the comment of Baxter in his *Administrative Law* p. 542 that "a fair

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hearing need not meet all the formal standards of the proceedings adopted by Courts of Law. The vagaries of the administrative process demand much less formality and much greater flexibility". As counsel for the appellant pointed out to us, this passage was cited with approval by Browde JA in *Lesotho Telecommunications Corporation v. Thamahane Rasekila*; C of A (CIV) No.24 of 1991 (unreported).

Insofar as the Court *a quo* based its decision on the presence of Second Appellant (the branch manager) on the disciplinary panel, I cannot agree that "the proceedings were coloured and tainted by this fact". Certainly his participation was not excluded by the Code which provides that disciplinary enquiries will be "convened and chaired" by management. Nothing took place which justifies the extravagant finding that "the entire exercise was not only a catalogue of errors, but that it bothered (*sic*) on unheard of parody and mockery of a disciplinary enquiry".

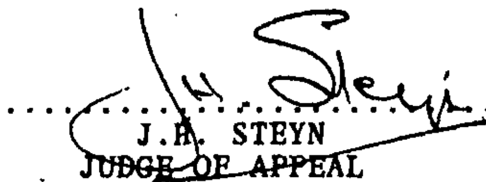
I am satisfied that even were the Court to examine the proceedings with a view as to whether Respondent was treated fairly in respect of the procedures adopted, the answer must be that he was.

Respondent was most certainly not appointed for an "indefinite" period as alleged. He was a monthly paid employee whose employment could be terminated on one month's notice. He received some 6 weeks' pay in lieu of notice. This was in no way in conflict with Appellant's contractual obligations to its employee.

It follows that Respondent's dismissal on the 9th of September, 1992, was lawful and cannot be impugned either as a matter of law or on the facts which we are obliged to assume as correct for purposes of the decision of this matter.

The appeal succeeds with costs. The order granted by the High Court is set aside. In place thereof it is ordered that:

"The application is dismissed with costs."



J.H. STEYN
JUDGE OF APPEAL

I agree:

J. BROWDE
JUDGE OF APPEAL

I agree: ....
pp. G.P.C. KOTZÊ
JUDGE OF APPEAL

Delivered this ...19th... day of January, 1996.

I would add that I have read this judgment to my Brother KOTZÊ JA, who could not prepare this judgment due to illness; that he approves of it and that he has advised me to sign it on his behalf.

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J.H. STEYN
JUDGE OF APPEAL

...19th January, 1996.