

C. of A.(CIV) No.17 of 1995

IN THE LESOTHO COURT OF APPEAL

In the matter between:

TS'ELISO TSEHLANA

Appellant

and

ATTORNEY GENERAL
MINISTER OF AGRICULTURE

1st Respondent
2nd Respondent

HELD AT:
MASERU

CORAM:

STEYN, J.A.
BROWDE, J.A.
V.D. HEEVER, A.J.A.

J U D G M E N T

V.D. HEEVER A.J.A.

The appellant is an employee of the State within the Department of Agriculture, having joined the Civil Service as a forester on 1st August, 1977. On the recommendation of the Ministry, he was granted study leave during 1987. He attended the University of

Bangar in Wales and obtained a B Sc degree in forestry in June of 1980. He was already a man with a wife and children to support, and received his dependants' allowance during the period of leave granted him for purposes of these studies.

In October of 1990, he was again granted leave for purposes of studying further, at the same institution, with a view to obtaining a M Sc degree. Before he could do so, he returned home on account of illness. During his authorised absence he was again paid his dependants' allowance in respect of his wife and children.

In 1992, he went to Zambia where he obtained a teaching qualification at the Technical and Vocational Teachers College. During his absence, he was not paid a dependants' allowance. On his return he was promoted within the Ministry of Agriculture, being appointed as a lecturer at the Lesotho Agricultural College at Leribe. He spoke to various officials within the Ministry about the fact that he had not been paid dependants' allowance during his years' absence in Zambia. His requests bore no fruit. His attorneys wrote, and received no reply. A reminder brought forth only that the First Respondent was taking instructions. Further reminders were equally unsuccessful, despite the fact that the Senior

Personnel Officer in the Ministry, Mr. Monyane, had over the months promised that payment would be made soon. He, therefore, approached the High Court on Notice of Motion for an order -

"(a) ...

(b) Directing Second Respondent and/or officers subordinate to him to pay Applicant's dependants' allowance in respect of the period from February 1992 to December 1992"

with interest at 25% a tempore morae, and costs.

In his founding affidavit, the appellant set out the pre-history detailed above, and alleged that he had been granted study leave, for a third time, during January of 1992, prior to leaving for Zambia. Mr. Monyane, referred to above, in an opposing affidavit, testified that when appellant's M Sc studies were interrupted and he returned home on account of illness, the British Council had conveyed a medical recommendation that because of his poor health he should not return to Wales for at least three years, if ever. When the appellant's application for study leave was submitted, his immediate superior had been informed that his application had been turned down. The appellant had been informed of this. He nevertheless proceeded to Zambia. He had been informed that his allowance had been withheld because

his absence had been unauthorised. The admitted promise made that he would be paid his allowance, was in the course of negotiations with the Principal Secretary "at the end of which the Ministry decided against such payment on the basis of applicant's leave without its authority and permission".

In a supporting affidavit, Ms Matete, a personnel officer attached to the Ministry of Agriculture, said that she had personally informed the appellant of the decision of the Ministry to refuse his application for study leave (in) January, 1992, which he ignored.

In his replying affidavit, the appellant stated that he had been nominated for study leave by his immediate superior in the Ministry, and given his air ticket by the Ministry. He denied that he had been told that his application had been turned down. He was not recalled home by his employers.

In view of the conflict revealed by the affidavits as to whether he had obtained study leave or not, the matter was referred for viva voce evidence.

The appellant's oral testimony may be summarised as follows:

His immediate superior, Mr. Senekane, approved his

application. The Ministry did not inform him that his pay was being stopped. His wife wrote and told him that she had received his salary (in accordance with his written authorization to the Ministry) for only one month. No disciplinary action was taken against him on his return. Instead, he was promoted, being transferred to lecture at the Agricultural College, where he is now the vice principal.

Cross-examination, however, caused cracks in this story. On his return, he realized that his application had gone no further but "ended up with Mr. Senekane". He realized that someone else had to give final approval. He admitted, by necessary implication, that his ticket did not necessarily emanate from the Ministry: there was a project which was sponsored by a Scandinavian country, and the appellant had received the ticket to Zambia from Mr. Tapane, the project co-ordinator or manager on behalf of the sponsor. "I signed the papers, was given a ticket, nobody stopped me ... The circumstances led me to believe that everything had been approved". In re-examination, he said that he came to tell his immediate superior Senekane when he left, but Senekane was not in. The appellant left a message for him.

He denied that there were good grounds for refusing him leave - his health was excellent; but in

the absence of any allegation that the decision to refuse him study leave was not motivated by belief in the facts at the disposal of those empowered to decide on his application, the correctness or otherwise of those facts is irrelevant and need not detain us here.

Mr. Monyane, since retired, gave evidence of the procedure followed in respect of an application for study leave. A candidate's Ministry applies on his behalf to the Public Service. The appellant's department was told that his application had not been submitted to the public service because of available information - presumably, from Wales and on the subject of the appellant's health. The travel ticket given to the appellant did NOT come from the Ministry; though Monyane could not say what the origin of the ticket or scholarship was. He explained why no disciplinary action had been taken against the appellant for having absented himself from his employment without authorisation: the attitude of the Ministry was that the fact that he had not been paid during that absence, served as punishment in itself. That may perhaps constitute an unfair labour practice which the appellant might be able to attack in the correct forum on a number of grounds, *inter alia* that the basic requisite of equity that a man should be heard before punishment is inflicted on him was ignored. But it is irrelevant to the present enquiry,

namely, whether the appellant was indeed given study leave, which is a prerequisite to his being paid the dependants' allowance he claims. The Ministry itself was not unsympathetic, and an application was at a later stage forwarded to the public service asking that leave be granted retrospectively, apparently without success.

Ms Matete also testified orally. She was told telephonically that leave had been refused, that a letter would follow, and ordered to inform the appellant immediately not to leave the country. The appellant came into her office that Friday afternoon, his last day before leaving, and she gave him the message verbally. There was no time to write him a letter. His reaction was that he was already in possession of a ticket and intended going.

The Court *a quo* believed the witnesses Monyane and Matete and, was not guilty of any misdirections in its assessment of the evidence. Indeed, the appellant himself conceded that he merely inferred or accepted that he had been granted study leave - a matter he had not in fact followed up, and an allegation he made in his founding affidavit which he did not and could not prove. In argument before us his counsel urged that the respondents are estopped from alleging that no study leave had in fact been granted him, "regard

being had to the fact that on two occasions he applied for study leave following the same procedure". This argument has no merit. The respondents did nothing to mislead the appellant into acting in a particular way to his prejudice, more especially did not itself provide the appellant with a ticket to Zambia - a factor on which the appellant initially relied heavily. He himself was lax in not following up his application and discovering its fate. Moreover, it is trite law that estoppel is a weapon of defence, not one that can found a cause of action. Cf Pandor's Trustee v. Beatley & Co., 1935 TPD 358, 363, 364; Rosen v. Barclays National Bank, 1984(3) S.A. 974 (W), 983 H - 1.

Although one has a measure of sympathy for the appellant since the Ministry was and is only too happy to have him back and benefit from the skills he acquired during his unauthorised absence, he could just as readily, having to all intents and purposes absconded, have returned in due course and applied for and received employment with some private firm.

Where he founded his claim for dependants' benefits on the allegation that his application for study leave had been properly granted; and the court *a quo* correctly found that that allegation had not been proved; the appeal cannot succeed. It is

accordingly dismissed, with costs.

Leo V.D. Heever

LEONORA VAN DEN HEEVER
ACTING JUDGE OF APPEAL

I agree :

J.H. Steyn
J.H. STEYN
JUDGE OF APPEAL

I agree:

J. Browde
J. BROWDE
JUDGE OF APPEAL

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