C OF A (CIV) 31/95

IN THE LESOTHO COURT OF APPEAL

In the matter between:

LESOTHO BANK — **APPELLANT**

and

MAITSE MOLOI — **RESPONDENT**

HELD AT:
MASERU

CORAM:

STEYN, P.
KOTZÉ J.A.
VAN DEN HEEVER, J.A.

JUDGEMENT

KOTZÉ JA

In the court **a quo** Monaphathi J on 20th October 1995 made an order in the terms following:

(a) The dismissal of Applicant from Lesotho Bank of 13th June 1991 is declared wrongful and unlawful;

(b) The Respondent is directed to pay the Applicant's salary, allowance, rent and leave pay with effect from the date

of dismissal to-date with such necessary adjustments as to increment as may be necessary;

The Respondent is directed to pay interest thereon at the rate of 18% a tempore morae;

(d) The Respondent is directed to adjust the interest rate on the Applicant's loans with Respondent prior to the purported dismissal to the applicable staff rate of 3%;

(e) The Respondent is directed to pay the costs hereof.

The Respondent (Applicant **a quo**) was dismissed by Appellant (Respondent **a quo**) on 13th June 1991 from his employment as manager of the Maseru branch of Appellant. The said dismissal followed upon the Respondent's suspension from duty after a theft of bank cheques occurred and after a Commission of Enquiry reported on the matter. The letter of dismissal recorded that the termination of Respondent's employment was "in terms of paragraph (e) of Applicant's Offer of Appointment and clause 13 of its conditions of service". The last mentioned clause provides that service is subject to one month's notice on either side.

The respondent launched his application for the relief referred to in the opening paragraph of this judgment on 26th June 1993 i.e. some 2 years after his dismissal. Facts not in dispute are the following:

(a) At all times material up to 13th June 1991 the Respondent was in the lawful employ of Appellant as manager of its Maseru branch - a position which was permanent and pensionable, drawing rent allowance.

(b) Respondent was entitled to a company car, twenty-one days annual leave and three special leave days per annum.

© Respondent's term and conditions of service were subject to Appellant's conditions of service - a nine page document.

(d) The letter of dismissal addressed to Respondent reads as follows:

"I am directed to inform you that your employment with Lesotho Bank has been terminated with effect from the date of this letter in terms of paragraph (e) of the Bank's offer of appointment and clause No.13 of Lesotho Bank Conditions of Service which you have signed.

All benefits and entitlements due to you will be paid in accordance with Bank policy and the employment law.

Please return the company car and all other Bank property in your custody or under your control.

Yours sincerely,

P. Kotelo (sgd)
GENERAL MANAGER a.i."

(e) The letter of dismissal was preceded by a letter of suspension written by the Minister of Finance in his capacity as Chairman of Appellant's Board of Directors. A hearing was not extended to Respondent prior to his suspension.

(f) Respondent was not heard by Appellant's board of directors prior to the letter of dismissal being served upon him.

(g) After his dismissal, applicant has been charged interest on his loans at the rate of 25% instead of the staff rate of 3%.

The Appellant now appeals against this order, framed in the terms prayed by the respondent in his notice of motion. Both are ambiguous, since reinstatement of the respondent was neither specifically sought or specifically granted. The effect of paragraphs (b), © and (d) seem however to aim at just that, although the words "to date" in paragraph (b) blurs this intention. It would ordinarily mean " to date of judgment". Then what of the future? The same reservation applies to the words "of 3% " in paragraph (d). There is nothing on the papers to indicate that the staff rate was permanently fixed.

Because the respondent was given no hearing before he was dismissed, that dismissal may well have been unlawful. cf Koatsa v. National University of Lesotho C. Of A (Civ) 15/1986. The relevant order prayed was, however intended only as the necessary prerequisite for the further relief sought in the following prayers. By itself prayer (a) amounts to no more than a legal opinion. In my view the respondent did not on these papers establish that he was entitled to the consequential relief sought. The parties were locked in a contractual relationship which on respondent's version, the appellant unlawfully repudiated. In such event, the party wronged is obliged to decide within a reasonable time how he intends to react: accept the repudiation and sue for damages, or sue for specific performance. What he cannot do, is do nothing for an unreasonable time, and then sue for specific performance in a matter of this kind. We are not dealing with a contract where the nature of the performance tendered by the wronged party usually makes the time of such tender immaterial - for example, the delivery of a car where the buyer changes his mind and purports to cancel. Where the obligation of the wronged party is an ongoing one,

the longer he postpones deciding whether to insist on specific performance by the employer, the more one-sided and inequitable his insistence becomes : it goes without saying that he himself can neither perform his obligations towards the employer whom he seeks to hold bound, as here, in time irrevocably gone by; nor regain the same position as before in an organisation that may have altered considerably in the meanwhile.

Where specific performance is claimed of a contract repudiated by one of the parties to it, the court has a discretion whether to order that - and this applies also to a contract of employment. See Lesotho Telecommunication Corporation v. Rasekila C.of A(Civ.) No.24/91.

Assuming that the court appreciated that it had a discretion in the matter, it misdirected itself, in the first instance, in having no regard to time already elapsed but merely speculating about the future - without, in turn, affording the appellant a proper opportunity of being heard as to the effect an order of reinstatement would have had at that stage: two years on. Those effects were put in issue, and could not be determined on the papers. The respondent did not, to give any acceptable reason for his inordinate delay.

Nor can prayers (b), © and (d) be regarded as a claim for damages after (tacit - by reason of that delay) acceptance of the appellant's repudiation. There are no fact at all set out in the papers on which the quantum of the respondent's loss can be assessed at salary from dismissal to date (i.e. of judgment) if that was the intention. It can only be established by evidence in a trial on appropriately particularised pleading.

It follows that the appeal must succeed.

An ancillary matter concerns an order in the following terms made by the Court **a quo** on 7th December 1995 at the instance of Appellant

"1. It is ordered that the operation and coming into effect of orders (a), (b), (c), (d) and (e) made on 20th October 1995 be suspended and stayed, pending the outcome of the appeal against the said Orders".

Despite its success in this application the appellant was ordered to pay 75% of Respondent's costs of the application. The granting of the said order is also the subject of an appeal to this Court by Appellant. Regard being had to the fact that the noting of an appeal in Lesotho does not operate as a stay of execution of the judgment appealed against, an application for stay was vital to protect applicant against a possible application for contempt of Court and was appropriately granted. I am of the view that the aforesaid order of costs should be set aside. It is an order which violates principles of fairness.

The appeal succeeds with costs. The order of the court **a quo** is set aside and replaced with an order dismissing the application with costs.

The order of costs granted in the application for stay of execution is similarly set aside. Respondent is ordered to pay the costs occasioned by his opposition.

G.P.C. KOTZÉ
JUDGE OF APPEAL

I agree

J.H. STEYN
PRESIDENT OF COURT OF APPEAL

I agree

L. VAN DEN HEEVER,
JUDGE OF APPEAL

Delivered at Maseru this 5th day of February, 1997