C.of A (CIV) No.12 of 1996.

IN THE COURT OF APPEAL OF LESOTHO

In the Matter Between:

CENTRAL BANK OF LESOTHO Applicant

and

MOEKETSI MPUTSOE Respondent

HELD AT MASERU

CORAM:

STEYN, P.
KOTZÉ, J.A.
V. D. HEEVER, J.A.

JUDGMENT

V.D. HEEVER, J.A.

Respondent entered the appellant's permanent employ on 1st April 1984. Some years later, the appellant instituted a non-contributory staff gratuity fund, the purpose of which is described as being "to induce and boost the morale of staff in

an effort to encourage devotion and commitment towards development of the Bank". In terms of clause 6 of the document embodying the rules applicable to this fund,

> "The first payment of gratuity will only be made to eligible employees who have completed ten years of satisfactory service with the Bank..."

It is not disputed that the respondent as a permanent member of staff is an eligible employee.

Clause 12 s v Limitations says:

> "Gratuity is not a right. Rather it is a privilege that the Bank extends to its staff. It will not, therefore, be assignable and cannot be pledged by the employee.
>
> The payment of gratuity will not be automatic. Rather it will depend on the satisfactory performance of the individual employee during the qualifying period".

Ten years having elapsed since he entered the employ of the appellant, on 1 June 1994 the respondent wrote to the Senior Personnel Officer asking why his gratuity had not been paid. He received no reply. On 29 August 1994 his attorneys wrote to the Governor of the Bank, demanding payment of his gratuity. The Senior Personnel Officer replied to this on 12 September 1994, that "I am directed to advise you that the matter referred to in your letter is receiving the attention of management and you will be informed of the outcome in due course".

There is nothing in the papers indicating that any material was placed before "management" to enable it so to attend to the matter, by assessing whether the

respondent qualified for receipt of the gratuity he claimed. Instead, on 28 September the Deputy Governor, Mr. Nyeoe, wrote calling on the respondent to appear before a Commission of Enquiry on 13 October 1994 to answer charges of misconduct against him. The letter refers to a charge sheet which was apparently not annexed to the letter and does not form part of the record before us.

The following day the respondent's attorney wrote to Mr. Nyeoe referring to the appointment, on 28 June 1993, of an Investigation Committee which had reported to the Governor; who did not take a decision but appointed first one and then another official to conduct a disciplinary hearing, which the second - a magistrate - had held to be improper, he having no jurisdiction. In the letter it was contended that the Governor was not entitled to, as it were, have a second bite at that cherry; that were the proposed hearing not on that ground alone improper, respondent had to be served with a charge fourteen days before the enquiry; at which he would be entitled to be legally represented. But primarily the letter demanded that the contemplated hearing to be held on 13 October be cancelled.

It was not. On 13 October, the respondent made written submissions to the "alleged Commission" and heard nothing from them ~~before~~ thereafter. On 27 October 1994 he launched motion proceedings in which he sought an order directing the appellant to pay him the relevant sum - M20,678-30 - as his gratuity forthwith, with interest at 18.25% from 1 April 1994 to date of payment, and costs.

In the meanwhile on 20 October his immediate superior, Ms Letsie, had handed him appraisal forms relating to his work performance during the previous year (1993). According to affidavits filed in opposition to the respondent's application, she demanded that he complete his part of such form and return it by

the morrow. Notice of intention to oppose the application was served only on 14 and filed on 16 of November 1994. The opposing affidavit by Mr. Nyeoe was filed only on 5 December, a number of documents annexed to it having been created in the meanwhile. The most important of these is the 1993 appraisal form filled in by Ms Letsie on 30 November1994 with her scathing comments about the respondent: I paraphrase and summarise:

> "He knows the job but does not want to do it.
> He does absolutely nothing
> He does not take the job seriously.
> He is hardly in the office.
> He is not co-operative at all.
> He reads newspapers in the office, comes
> and goes as he pleases.
> PLEASE transfer him away!"

To come then to the content of the appellant's opposition to respondent's application as outlined above. The Deputy Governor of the Bank denied that the respondent has completed ten years of satisfactory service: his service over the qualifying period has been "an unenviable disaster". Three preliminary points were raised. The only one that merits attention has no real bearing on the outcome of the case. I deal with it nevertheless because of comments made by the court **a quo** as to the validity or enforceability of the appellant's rules relating to gratuities, quoted earlier. The Deputy Governor had namely contended that the application had no basis in law, by reason of the rider contained in **rule 12** that the gratuity is a privilege, not a right. The court **a quo** differed, in my view correctly; since "privilege" is no more or less than a particular kind of right "A special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, race, sex, class, or caste ..... - See Synonyms at **Right**" (Reader's Digest Universal

Dictionary, which then lists as synonyms of "right", "privilege, prerogative, perk, franchise, birthright, title"); "A right, advantage or immunity granted to or enjoyed by a person or class of persons, beyond the common advantages of others...." (Oxford); "A privilege describes some advantage to an individual or group of individuals, a right enjoyed by a few as opposed to a right enjoyed by all (*Le Strange v Dettefar,* (1939) 161 LT 300)" (Claassen, Dictionary of Legal Words and Phrases Vol. 3). According to Rodale's Synonym Finder, Privilege is equated to "right, prerogative, due, entitlement, birthright" and so on.

The learned judge, however, went further, and criticised the relevant clauses in terms which make it questionable whether he approached the dispute between the parties from the correct perspective. He said,

> "I have found sections 6 and 12 of respondent's legislation uncertain, unreasonable, manifestly unjust, oppressive and gratuitous interference with the rights of those under the respondent. Therefore, if section 6 of the respondent's Rules is understood by the respondent as conferring on the respondent a discretion to say what service is satisfactory or not satisfactory, as this connotation is vague and uncertain and smacks of discriminatory practice, to this extent the rule is invalid. Similarly, if section 12 of the Rules of the Respondent imports the payment of gratuity as a privilege and consequently not enforceable, as I have shown supra, to this extent the rule is also invalid."

In the first instance, the relevant rules are not legislation, merely conditions imported into the contract (of employment) between the parties. What they require, is an assessment whether a particular Bank employee (in this case the respondent), falls within the particular class privileged by the rules. The first requirement according to the scheme setting up the gratuity fund, is that he should have been in

permanent employment continuously for ten years. That qualification he has. The limitations to the right are defined in **clause 12**. There are two. The first relates not to its acquisition, but to its content. It is not absolute, in the sense that it may not be dealt with at will, it cannot be assigned or pledged. The second relates to its acquisition. The employee must have given "satisfactory performance" during the qualifying period. What that means is not circumscribed by any qualifying phrase such as "in the opinion of the Director" so as to give any individual or body a discretion to adjudicate whether according to his or its opinion the employee's performance - which can only in the context mean performance of the job he is paid to do - is satisfactory. The reason seems fairly obvious. Ten years is a long time. The incumbents of posts are transferred or retire or die, personality clashes may occur, what matters is whether the employee does the Bank's work well and so enables it to develope, that being the very purpose of the creation of the fund - not whether he is as humble towards a particular superior as that superior would wish, or comes late occasionally, as long as he makes up later and his work does not suffer. The standard must be an objective one.

The appellant's allegations on the merits may be summarized as follows: The evidence tendered to demonstrate that the respondent did not give satisfactory performance for a continuous period of ten years, relates to four incidents:

(1) In 1985 while the respondent was in the Research Department, there was disagreement between him and his superior, Mr. Borotho. There is a letter on file in which the respondent had protested at being taken to task by Mr. Borotho, for not photo-copying the annual report at once when instructed to do so. In his letter, the respondent had justified his alleged disobedience: it had been raining and the report would have got wet. There is

no suggestion that his explanation was not accepted. The cryptic note Mr. Nyeoe annexes as CBL 3 takes the matter no further, save that in the original papers there is writing on the reverse of this page - we do not know by whom - sensibly suggesting that it was difficult to determine the truth of the matter on what was available.

(2) On 25 November, 1985, Mr. Borotho reprimanded the respondent for having absented himself from work on 21 and 22 November without prior leave, the reason proffered not being acceptable, namely that he had had to take his sick child to hospital and make arrangements for its care there. The respondent's written reply of 26 November was that he had asked a colleague to inform Borotho that he would be absent the following day, and why, which she had done. He suggested that two days be deducted from his annual leave. This reply was placed in his personal file, but there is no suggestion that the Bank suffered in any way or the matter required any further attention.

(3) In January 1986, Mr. Borotho addressed a letter to the respondent at the Bank, complaining that he had not mailed the Bank's September 1985 Quarterly Review before going on leave, and ordering him to report for duty the following day to do so. Whether the respondent received this - being on leave and so by definition not at work - we do not know; nor whether he was given any hearing; nor whether the Bank or any colleague of the respondent was noticeably harmed or inconvenienced by the alleged omission.

In his replying affidavit, the respondent said that Mr. Borotho had approved his leave, as was required. Someone assumed respondent's duties in his absence. "He recalled me from leave to mail the reports which have been mailed by the person who assumed duty in my absence .... This incident did not affect my appraisal for 1986 adversely."

(4) On 1. April 1990, the respondent was transferred from Research to the Currency Division of the appellant Bank. Mr. Nyeoe could apparently find no record of any complaints against the

> respondent there until 1993. Then the respondent did not attend a Saturday-morning "destruction" though ordered by Ms Letsie to be there, he being in possession of one of the keys to the safe. She reprimanded him in writing on 28 June 1993 , and asked "Please indicate why this cannot be taken as insubordination". He replied the following day that he had had a prior commitment for the Saturday, of which he had informed her on Friday. He had been transferred to Currency as a Senior Bookkeeper, did not ordinarily work on Saturdays, he had attended destruction on a voluntary basis but it did not fall within his job description and he was not a member of the destruction committee, so that it would be preferable that he deliver the safe key to someone more appropriate. To this Ms Letsie wrote a sharp rejoinder: he was no volunteer but a paid employee and as head of the division she was entitled to assign other duties to him when necessary. "Therefore I instruct you to attend destruction whenever they take place". There is nothing to show why she regarded his attendance as necessary, particularly as ordered now: permanently: "whenever they take place".

In his replying affidavit, the respondent argues that his explanation was a full one, and no adverse appraisal ensued.

Apart from these four incidents, the appellant relied on a letter by Ms Letsie to the respondent dated 9 July 1993 in which she pointed out to him that he had been told to take over the duties of Mrs Dlangamandla, Mrs. Mefane had been transferred to Currency as Bookkeeper, and he was expected to obey the latter and perform such duties as she might assign to him; and Ms Letsie's adverse appraisal summarized earlier. This, as we have seen, came into existence only after the respondent's application had already been launched. The circumstances under which that came about and the correctness of its contents, were disputed.

According to the Bank's opposing affidavits, the respondent had refused to complete the relevant appraisal form, which Letsie said she had initially handed to him in September of 1993 already, claiming that he had lost that one, ignoring another she says she had handed him on 20 October, and apparently refusing to deal with a further one she gave him on 17 November, 1994.

This was disputed by the respondent in his reply. His version is that he had properly completed the 1993 appraisal form and handed it in. After he had launched his application, he was told it had been lost and was asked to fill in so much of the form as it was his duty to do ; which he refused because of a suspicion that the purpose of the exercise was to be able to create an adverse appraisal form for the very purpose of justifying his being denied the gratuity.

The court **a quo** held in effect that it was the respondent's letter of demand for a gratuity that triggered the sudden Commission of Inquiry. In the absence of the result of that Commission, aimed at establishing misconduct on the part of the respondent,

> "I cannot say that such misconduct was proved nor can I, by extension, reach the conclusion that (the respondent's) service was not satisfactory whatever satisfactory service may mean.
>
> I have read respondent's Opposing or Answering Affidavit which does not take the matter any stage further. Respondent has not pertinently answered applicant's queries namely:
>
> (1) That there were never any results of the Commission of Inquiry into his misconduct.
>
> (2) That all that the respondent did when applicant claimed

> the gratuity was a letter saying the matter was receiving attention.
>
> In my view, if the respondent's mind was already made up and the fate of the applicant was a fait accompli, in his letter of 12 September, 1994 and in reply to respondent's letter of 29 August, 1994 the respondent should have in no uncertain terms informed the applicant that as his services was unsatisfactory he was not entitled to gratuity instead of saying applicant's letter was receiving attention"

An order was accordingly granted in terms of the prayers in the Notice of Motion. Hence the present appeal. The relevant notice objects i.a. to the fact that the court **a quo** gave a final order on disputed facts. And it was on this ground alone that Mr. Matabane, who appeared on behalf of the appellant Bank before us, based his argument: the matter should have been referred to trial.

Mr. Pheko, for the respondent, argued that the disputes of fact are not bona fide, and urged us to take a robust approach. Because of features such as that there is no indication that the Bank ever took(presumably disciplinary) steps against the respondent; and that its initial reaction to his claim was not "you are not entitled" but "the matter is receiving attention"; he invited us to make a credibility finding based on the probabilities, that the Bank was mala fide in rejecting the respondent's claim.

On this court's interpretation of **rule 12** relating to the gratuity fund as requiring an objective assessment of the quality of an employee's work performance based on his or her track record (which in an organization such as that of the appellant would presumably be documented) over the relevant period, Mr. Pheko's argument as to the lack of bona fides in regard to the disputes of fact

between the parties appears to me to be **prima facie** correct in regard to the incidents in 1985, 1986 and 1990 listed above. It would probably be more correct to say that those disputes can hardly be described as material ones. They appear to relate to personality clashes rather than any material failure by the respondent to comply with his obligations as an employee towards his employer. The so-called doctrine of legitimate expectation would debar the Bank from withholding his gratuity on the grounds of what it now regards, or says was then regarded as failures on his part to have performed his duties satisfactorily, in **prima facie** trivial respects, where he was as far as the papers reveal not called upon or given a proper opportunity at any relevant time to try to alter such opinion. See generally LAWSA (First Reissue Vol.1 para. 81; which in dealing with the principles of natural justice and the requirements of the injunction **audi alteram partem** is very much in point).

The same cannot be said in regard to the respondent's alleged performance during 1993, which falls within the ten-year period, in regard to which there are disputes between the parties at two levels.

In the first instance, there are two totally contradictory versions as to why annexure CBL 8, the respondent's 1993 staff performance appraisal form, was completed only late in 1994. Should Ms Letsie's version be true, it would be evidence of respondent's contempt for and disregard of normal procedures within the organization aimed at good governance. Should the respondent's version be accepted, it could be cogent evidence of mala fides on her (and through her, the Bank's) part.

Secondly, there is a dispute as to the correctness or otherwise of the content of annexure CBL 8. This amounts to no less than that during 1993 the respondent

did not earn his keep: drew his salary without performing the work legitimately expected of him. Although it appears strange that her assessment consists of broad generalizations on which her alleged opinion is based; and that the Bank produced no adverse assessment relating to the respondent's work performance before 1993; that cannot in my view be regarded as conclusive for the determination of, not probabilities, but credibility; which can only be tested by **viva voce** evidence and cross-examination. Failing that, the test against which matters are to be judged in motion proceedings, would compel dismissal of the application. That all was not plain sailing during 1993, seems apparent from the fact that an Investigation Committee was appointed. We do not know what it investigated, if anything. The fact that no formal disciplinary hearing has been successfully held is not necessarily conclusive as to the question whether the respondent performed his work satisfactorily during 1993. That is a matter which the court can and should objectively determine on the strength of **viva voce** evidence as to what was reasonably expected of the respondent in the post he held, how if at all he fell short of such reasonable expectations, and whether his failure(s) if any should be regarded as material. Mr. Matabane, in my view sensibly and correctly, conceded that the material disputes of fact in the papers which he urged could not be determined without being referred for trial, related to the quality of the respondent's performance during 1993. Since this concession was made for purposes of the appeal, the order which follows should not be construed as prohibiting the adduction of oral evidence of anything other than the respondent's work performance during only 1993. Relevant and material earlier conduct could be introduced provided that doing so would not contravene the dictates of fairness suggested earlier: that it had then been drawn to his attention and he had been given an adequate opportunity to meet any adverse inference sought to be drawn therefrom.

To summarize: in my view the appeal should succeed since no final order should have been granted on the affidavits.

In the ordinary course, costs would follow the event. In this matter, it is more appropriate to order them to depend on the outcome of the renewed proceedings in the High Court, in view of the possibility that one or other of the parties may be shown to have been not merely mistaken, but a deliberate stranger to the truth.

The following order is made:

1. The appeal succeeds, to this extent that the order of the court **a quo** is set aside.

2. The matter is remitted to that court to determine after hearing oral evidence, and in the light of this court's finding as to the norms to be applied as set out in its judgment above, whether the respondent is entitled to the relief sought in his notice of motion, more particularly by reason of his work performance during 1993.

3. The appellant is to file and serve on the respondent, within SIX WEEKS of the date of this judgment, a document in the nature of a Declaration setting out the respects in which it is alleged that the respondent failed to perform his duties in the employ of the appellant satisfactorily, with sufficient particularity to enable the respondent to file a document in the nature of a plea in reply

thereto.

4. The respondent is to file his said reply and serve it on the appellant within SIX WEEKS of receipt of the appellant's document; after which the ordinary rules in regard to trials are to obtain.

5. Costs of the appeal are to be costs in the resumed hearing of the matter provided for above.

L. v. d. Heever

LEONORA VAN DEN HEEVER

JUDGE OF APPEAL

I agree: Sgd:

J. H. STEYN

PRESIDENT

I agree: Sgd:

G. P.C. KOTZ'E

JUDGE OF APPEAL

Delivered on the 27th Day of February, 1997.

For Applicant: Mr. Matabane

For Respondent: Mr. Pheko.