

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

LESOTHO FLOUR MILLS
MINISTRY OF AGRICULTURE
ATTORNEY-GENERAL

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

AND

SEHOHOANA JOHANNES KAO

RESPONDENT

HELD AT:
MASERU

CORAM:
BROWDE AJA
v.d. HEEVER JA
SHEARER AJA

JUDGMENT

BROWDE AJA:

In 1972 the Respondent obtained an appointment as public servant in the Government of Lesotho. He rose through the ranks to become the Principal Secretary in the Ministry of Agriculture (the Second Appellant) which position he held from 1981 to 1985. In 1985 he was seconded by the

Government to the First Appellant where he assumed the position of General manager. On 5 June, 1987, a letter was addressed to the Respondent by the Ministry of Public Service informing him that it had been decided to retire him from the Civil Service as from 31 July, 1987. It was stated in the letter that

“[this] it effectively terminates your secondment to the Lesotho Flour Mills, the decision to retire you is without prejudice to your appointment with that organisation as General Manager.”

It is quite clear from the terms of that letter that the Respondent's tenure as a public servant came to an end, and that as far as the Government was concerned he was retired.

On 31 July, 1987, i.e. the effective date of the Respondent's termination as a Public Servant, the First Appellant offered him the position of “General manager Designate” and set out in a letter of that date the conditions of employment which would thenceforth be applicable. One of the conditions was that he became “a member of the Board of Directors of Lesotho Flour Mills”. The offer was accepted and the conditions confirmed by letter dated 7 July, 1989, addressed to the Respondent and signed by one P.S. Banford as “Managing Director”.

The Respondent's founding affidavit then sets out that on or about the 23 September, 1996, (i.e. after his employment with the First Appellant had

run for about 9 years) he was arrested on "an allegation of involvement in a crime of fraud committed against the 1st Respondent (the present appellant)", and released on bail.

Because of the allegations which were levelled against the Respondent, the Principal Secretary for Agriculture addressed a letter to the Respondent which reads as follows:-

"Sir,

After consultations, it is my advised opinion that I should ask you to proceed on an unrecorded leave until you have had an opportunity to clear your name of the allegations levelled against you.

You will continue to receive your full salary, and your other benefits will continue to be paid and provided for.

I hope the investigations will be made expeditiously so that we put all this behind us."

Leave was taken by the Respondent on the terms set out and, it seems, all was well until he received another letter "with shock". This letter was signed by one Masilo who also described himself as The Principal Secretary for Agriculture. This letter is dated December 9, 1996 and reads as follows:

"Sir,

CHARGES OF FRAUD LESOTHO FLOUR MILLS
CASE NO.CR/793/96

Charges of fraud and conspiracy to commit fraud have been

preferred against you in September, 1996; case No.CR/793/96 refers.

2. It is my intention to institute charges of Breach of Discipline contrary to Sections 18(1) and 14(1), (2) of the *Public Service Act* against you.

3. In terms of Section 20(1) of the *Public Service Act* 1995, I propose to suspend you from duty. Sub-section (2) provides that you shall not be entitled to payment of any salary or any benefits during the period of suspension.

4. You are entitled to make representations to me regarding the above proposal. Such representation should be in writing, and should reach me not later than 13th December, 1996.

Yours sincerely

Moeketsi Masilo
PRINCIPAL SECRETARY FOR AGRICULTURE"

The shock referred to by the Respondent was caused, no doubt, by the fact that this letter is a clear repudiation of the earlier letter and, if valid, radically affects the respondent's rights including his right to payment of any salary at all.

Before proceeding further, it is necessary to point out the following. On the papers there exists a dispute relating to the exact nature of the Lesotho Flour Mills. i.e. the First Appellant. The Respondent appears to contend that the First Appellant is a Company which seems to be borne out, *prima facie* at least, by the terms of his appointment already referred to and other correspondence in the papers before us including a letter of congratulation on

his appointment addressed to the Respondent by the "Managing Director" of the First Respondent. Mr. *Makhethe*, who appeared for the Appellants, argued that there was no Board of Directors in the First Appellant and that the misdescriptions were attributable either to ignorance of the true position or else a desire on the part of the officials to boost their egos. Mr. *Makhethe* contended that the First Appellant is merely an organisation which, although autonomous in its relations with its employees, nevertheless remains an organ of government. This dispute would have been relevant only if the authority was questioned of the two so-called Principal Secretaries of Agriculture who addressed the letters to the Respondent which are above referred to. In the course of his argument, however, Mr. *Makhethe* contended that the Appellants' case is based on the fact that the Principal Secretaries concerned were both properly authorised representatives of the government and were therefore entitled to bind both the First and Second Appellants to the terms in which the letters are couched. Counsel further conceded that the Public Service Act did not apply to the Respondent. One has only to read the letter addressed to the Respondent on his retirement by the Government Secretary to see that this latter concession is clearly right. After recording the decision to retire the Respondent from the Civil Service in terms of Section 12(2) of the Public Service Order 1970 the letter concludes,

"I wish to commend you for the contributions you have made in the administration of public affairs in Lesotho during your tenure of employment as a Civil Servant and to wish you a happy retirement."

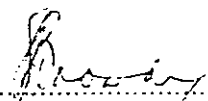
The problem facing the Appellants, in the light of the above, is that the Appellants, having properly been bound to pay the Respondent's salary during his "unrecorded leave", which was to continue until he had been given the opportunity to clear his name and had done so, by a subsequent unilateral decision sought to deprive the Respondent of his salary during the "unrecorded leave" so granted and accepted. Mr. Makhethe submitted that the Appellants were entitled under the common law to so deprive the respondent of the rights emanating from the September letter because of the allegations which were made against him. I cannot agree with that submission. There has been no authority placed before us (nor do I think such authority exists) which indicates that the common law permits of a unilateral alteration to a properly constituted contract between master and servant, or any parties for that matter. There was, therefore, no ground for depriving Respondent of his salary unless it was by agreement, which, in this case it was not.

I have come to the conclusion, therefore that the December letter must be regarded as an invalid attempt to resile from the contract evidenced by the September letter and that it is unnecessary to consider the effect of the latter's reference to the Public Service Act (which was inapplicable) as the source of the powers purportedly exercised by the Principal Secretary for Agriculture. The effect of this finding is, of course, that the Respondent is entitled to his salary in terms of the letter of 9 September, 1996 which in turn means that he can sit back doing nothing and getting paid for it. The remedy to this

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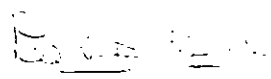
anomalous situation lies with the Appellants. In the December letter the Principal Secretary stated that it was his intention "to constitute charges of Breach of Discipline" against the Respondent. As far as we are aware this has never been done properly or at all. If the Appellants wish to extricate themselves from the position they are now in, they must accept that the Public Service Act 1995 does not govern their relationship with the Respondent and they must conduct a proper disciplinary enquiry giving the Respondent a fair opportunity to answer all the evidence they may wish to rely on as grounds warranting the dismissal of the Respondent from their employ. Until that is done they must face the fact that the letter of 9 December, 1996, has no force or effect and the Respondent remains in their employ though on the agreed "unrecorded leave", and is entitled to the benefits emanating from the terms of his employment.

The appeal is dismissed with costs.



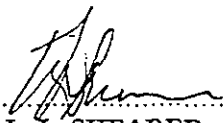
 J. BROWDE
 ACTING JUDGE OF APPEAL

I agree:



 L. v.d. HEEVER
 JUDGE OF APPEAL

I agree:


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B. L. L. SHEARER
ACTING JUDGE OF APPEAL

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Delivered at MASERU this 4th day of February, 1998.