

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEHOHOANA J. KAO

APPLICANT

AND

LESOTHO FLOUR MILLS (PTY) LTD
& 2 OTHERS

RESPONDENTS

JUDGEMENT

Delivered by the Honourable Mr. Justice G. N. Mofolo
on the 2nd day of October, 2002

The applicant has approached this court for an order couched in the following terms:-

1. Declaring the purported termination of applicant's employment contract null and void and of no legal force and effect.
2. (a) Directing 2nd and 3rd respondents to pay applicant his arrears of salary from the purported dismissal to date.

- (b) Directing the 2nd and 3rd respondents to pay applicant interest at the rate of 18.5% on arrear salary.

ALTERNATIVELY

- (c) Directing 2nd and 3rd respondents to pay applicant's terminal benefits in the nature of pension, leave pay and severance pay from the date of termination of the contract to date.
3. Directing 2nd and 3rd respondents to pay applicant his remuneration in the nature of housing allowance, utilities, transport and staff sales allowances from the date of purported dismissal to date.
 4. Granting applicant such further and or alternative relief as this Honourable Court may deem meet.

In his founding affidavit the applicant has alleged, *inter alia* and at para. 4, that at all material times the applicant was an employee of the Lesotho Government working for Lesotho Flour Mills, Maseru and that (para. 5) the Principal Secretary for Agriculture 'purported to terminate applicant's contract of employment with the Government of Lesotho per Annexure "A".

The Principal Secretary had then written Annexure "B" to which the applicant reacted by means of Annexure "D". A letter dated 14th May, 1998 by the Principal Secretary was replied to by applicant by Annexure "F". (vide

para.7) The applicant has also made reference to Annexure “K” and “G” (para. 8)

It would appear applicant’s case is that the termination of his contract is null and void ‘for failure to comply with the terms of section 64(1) of the Labour Code in that it gave me an insufficient notice’. ‘Furthermore, the termination was without reasons therefore, and without a pre-dismissal hearing ---’ (para.9). At para. 11 applicant draws the court’s attention to the fact that the 1st respondent ‘has now been privatised’ and ‘in terms of its privatisation procedure I ought to have been given a retrenchment package -----’. Applicant also draws the court’s attention to the fact that ‘I still have the vehicle that had been assigned to me while I was in employment during and before my suspension’ and ‘I have no objection to returning the said vehicle provided my contract is properly terminated in accordance with law.’

In order not to confuse issues, before reacting to applicant’s specific allegations in his founding affidavit as sketched above, I wish first to refer to

judgement in **Lesotho Mills & Another v. Sehoana Kao LLR 1997-98 p.322** which reflects at p.325 charges of fraud brought against the applicant for the period September, 1996.

The letter from Principal Secretary for Agriculture dated 9th December, 1996 refers to Public Service Act, 1995 so that it can be inferred that then the applicant was a public servant. Apart from this, the Court of Appeal in its judgement came to the conclusion that then the respondent (now applicant) was a public a servant. The Principal Secretary also invited the respondent (now applicant) to make representations in writing not later than 13th December, 1996. In terms of the judgement, ‘if appellants wish to extricate themselves from the position they are now in,’ amongst other things ‘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 -----’. (the reported text is wrong here and I have relied on the original text C. of A. (CIV) No. 17/97) which reads, further, ‘until that is done they must face the fact the letter of 9th December, 1996 has no force of

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.' It is also noteworthy that following concession by Mr. Makhethe for the Attorney-General, the court found as a fact that the Public Service Act, 1995 did not apply to the respondent (now applicant). I wish also to underscore the fact that in dismissing the appeal, the Court of Appeal also found that the respondent (now applicant) 'is entitled to the benefits emanating from the terms of his employment'.

On the heels of the judgement referred to above, which was delivered on 4th February, 1998, according to annexure "KC" dated 1st June, 1998 and annexure "KC" of 2nd June, 1998 with heading PAYMENT OF MR. S. J. KAO'S SALARY & BENEFITS, it would appear two cheques were drawn in favour of the applicant in the amount of M91,865.40 and M69,105.48 respectively, cheques acknowledged by B. Sooknanan & Associates on 2nd June, 1998 in respect of Court Order CIV/APN/170/97 being annexure "Z5".

I have gone into the issue of the Court of Appeal case and **CIV/APN/120/97** above to isolate facts and demonstrate that what was paid in these cases has nothing to do with the present application in that the applicant's case is restitution or payment of benefits arising from 14th May, 1998 when his contract of employment was terminated.

Be this as it may, but I think the court must determine first when, actually, applicant's contract of employment was terminated. From the record of proceedings it would appear 3rd respondents acknowledging applicant's letter of 8th April, 1998 had conveyed to the applicant certain of his (3rd respondent) motives and directions including the intention by the 3rd respondent to terminate applicant's contract of employment.

In the letter the 3rd respondent informs the applicant 'though charges against you have been dropped, much water has flowed under the bridge since the later days of your suspension.' Examples of the water flowing under the bridge are given as:-

1. Privatisation of the 1st respondent the result of which being that 1st respondent will have a new owner with new employees, retrenchment of employees on a massive scale; further, 'no present employees, including the head of the 1st respondent will be entitled as of right to be employed by the new owner.'
2. The 3rd respondent then refers to his good working relationships with Mr. Letsoela who acted during applicant's 'suspension and my perception is that he is doing extremely well as the Head of the Lesotho Flour Mills, far better than yourself during your spell of office as General Manager.'
3. The 3rd respondent says given circumstances in 2 above staff relationships could be strained and to continue working with applicant would not be in the best interest of the 1st respondent.

The applicant was invited to make representations which the applicant rejected out of hand in his letter of 6th May, 1998.

As for 1. above, what for would applicant's contract of employment be terminated, because of privatisation. I don't think so because in terms of Act No.3 of 1999 Lesotho Flour Mills (Vesting) Act, 1999 sec.7.

(1)

A person who is permanently employed under the Trading Account before the commencement date and is not under notice of dismissal or resignation, on the commencement date, becomes an employee of the company on the same terms and conditions as that applicable under the Trading Account.

- (2) A contract of employment of a person referred to under sub-section (1) shall, on the commencement date, be deemed for all purposes to be a single continuing contract of employment.

The Vesting Act appears to have had a retroactive operation for it came into operation on the 18th February, 1998, and by the way, when it came into operation the applicant has been re-instated into his position by the Appeal Court on 4th February, 1998 barely two weeks before the Vesting Act, 1999 came into operation. When the Vesting Act, 1999 came into operation, the applicant was on the staff of the 1st respondent, was not under notice of dismissal or resignation. 3rd respondent's assertion of 1st respondent hiring 'new employees' and 'no present employees including the head of Lesotho Flour Mills, 'not being' entitled as of right to be employed —' on the privatisation of the 1st respondent is to be seen as a farce, false and misleading.

As for 2 above, it is not the fault of the applicant that the latter was falsely implicated and suspended from duty thus ushering in a situation in which the applicant is no longer wanted. Conditions which now make applicant unwanted are not of his making and he cannot be made to suffer because of

them. Concerning 3, above, that if applicant continued in his employment staff relations would be strained and it is in the interest of the 1st respondent that the applicant should be removed from office I could not disagree more for equally it is in the applicant's interest that he should be removed from office for good cause and this court has found no such good cause; nor is this court oblivious of the judgement above re: Lesotho Flour Mills and Another v. Sehoana Kao in which at p. 329, I repeat, the Court cautioned:

‘if the appellants wish to extricate themselves from the position they are now in, 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.’ Further, ‘until that is done, they must face the fact that the letter of 9th December, 1996, has no force or effect and the Respondent remains in their employ -----’

Unfortunately for the respondents, charges against the applicant have now been dropped and once more, it is up to respondents to extricate themselves from the awkward position they have created for themselves for, in the view of this court, the letter of 14th May, 1998 purporting to terminate applicant's employment with the 1st Respondent has no force or effect and applicant remains in their employment.

Accordingly the application is granted in its substantive with costs to the applicant.



G. N. MOFOLO
JUDGE

For the Applicant : Mr. Mosae

For the 1st Respondent : Mr. Malebanye

For the 2nd Respondent : Mr. Letsie