

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABO MICHAEL MOTSEKI

Applicant

and

**LESOTHO AGRICULTURAL DEVELOPMENT BANK
SEKHOHOLA MOLELLE**

**1st Respondent
2nd Respondent**

JUDGMENT

Delivered by the Honourable Mr. Chief Justice Mr Justice
J.L. Kheola on the 1st day of August, 1996

On the 19th April, 1993 and in CIV/APN/422/91 the applicant was granted an order couched in the following terms:

- (a) Applicant's dismissal by Respondent is declared null and void;
- (b) Respondent is directed to re-instate Applicant forthwith to the position he held immediately prior to his dismissal with Respondent with full benefits;
- (c) Respondent is directed to pay Applicant's salary with effect from the date of dismissal to the date of re-instatement;
- (d) Respondent is directed to pay interest at the rate of 18% with effect from date of dismissal to date of payment;
- (e) Respondent should pay costs hereof.

In the present application the applicant seeks an order in the following terms:

- (a) Committing 2nd Respondent to prison for contempt of Court and fining 1st Respondent accordingly;
- (b) Directing Respondents to pay the costs hereof;
- (c) Granting Applicant further and/or alternative relief.

The trouble started on the 24th April, 1993 when the applicant duly turned up at first respondent's place of business with the intention of resuming his duties thereat in terms of the order of the Court. It turned out that no proper preparations had been made for the applicant to resume his duties. There was no office for him and the monies due to him had not been calculated. The Personnel Manager of the first respondent asked him to come back on the following Monday which was the 26th April, 1993.

At about 12.20p.m. on the 26th the applicant was shown a schedule of payment due to him in terms of the Court Order. He entirely disagreed with the amounts some amounts in the schedule and pointed out that some amounts due to him, for example FSSP allowance, had not been included and that as regards amounts included he has been underpaid. He also queried the method used to calculate interest due thereon. When the applicant wanted to see the second respondent he was told that he must make an appointment. In any case the second respondent had indicated that he agreed with the amounts reflected in the schedule shown to the applicant. After a long argument the applicant decided to leave so that he could consult with his lawyers.

On the same day, i.e. the 26th, the second respondent wrote two letters addressed to the applicant. These letters are marked Annexures "CC" and "DD" to the founding affidavit. Annexure "CC" reads as follows:

"26 April, 1993

Mr. T.M. Motseki
P.O. Box 0463
MASERU WEST

Dear Sir,

THABO M. MOTSEKI V LADB

We are in receipt of the judgment and court order in the above matter. With respect we comply as ordered by the court. You are therefore re-instated forthwith.

Yours sincerely,

C.S. MOLELLE
MANAGING DIRECTOR

Annexure "DD" reads as follows:

"26 April, 1993

Mr. T.M. Motseki
P.O. Box 0463
MASERU WEST

Dear Sir,

Whereas we comply with the Court Order dated 21st April, 1993 regarding your reinstatement in the employ of Lesotho Agricultural Development Bank and payment to you of your salary from the date of dismissal to the date of reinstatement, we draw your attention to the fact that we have information that you have been in paid employment since 1st April 1992 and that you are therefore entitled to payment of salary with effect from the date of dismissal to the date you commenced duty with your current

employers.

Please find attached a schedule of moneys due to you.

Yours faithfully,

K.M. QHOBELA
PERSONNEL MANAGER.

The letters were hand-delivered to the applicant by the first respondent's messenger at about 6.00p.m. on the 26th April, 1993. The applicant alleges that he refused to receive those letters and told the messenger to deliver them to his lawyers. The uncooperative attitude shown by the applicant towards his employer was uncalled for at this stage. As the letters were addressed to him he could have taken them and given them to his lawyers himself. There is now a dispute as to whether the applicant accepted the letters or not. The respondents allege that he received the letters on the 26th April, 1993 and that one of them informed him that he had been reinstated forthwith. They contend that his failure to resume his duties amounted to desert^{ion}~~ion~~. I would probably agree with the respondents that the applicant received the letters if they supported their allegation with an affidavit by their messenger who delivered the letters. They became aware of this dispute in the founding affidavit but they ignored it.

On the 30th April, 1993 the respondents wrote a letter (Annexure "FF" to the founding affidavit) in which they informed the applicant that his failure to report for duty amounted to desertion. If the applicant had not received Annexure "FF", one would have expected him to have gone to the respondents and to

have told them that he was not aware that he had been reinstated and that he was reporting for duty. Instead, of doing that the waited until the 3rd day of May, 1993 when his lawyers wrote Annexure "GG" in which they clearly indicated that they had received Annexure "CC", "DD" and "FF". It is therefore not correct that the applicant's attorneys became aware of the reinstatement letter only on the 12th August, 1993 as the applicant alleges in paragraph 6.2 of his founding affidavit.

In paragraph 3 of Annexure "GG" the applicant makes it quite clear what he means by reinstatement and says:

"Mr. Motseki did consult with us on the 26/04/1991. The following day we wrote you a letter setting out the points of difference between him and yourselves and expressed a hope that you would attend to the same soonest. More importantly, we emphasised the point that he was to be reinstated with full benefits. Your letter of the 26/04/93 to Mr. Motseki stated that he was being reinstated forthwith. It did not say anything about his full benefits except to repeat and offer a total arrived at via the same method of calculation he had hotly disputed and rejected. The reinstatement you talked about in your letter is not the reinstatement the Court has ordered; it is without full benefits and that is at variance with the Court Order. You therefore still have to comply with the said Court Order."

It is quite clear that the applicant is not prepared to accept reinstatement with **full benefits**. This attitude complicates the matter because the parties are unable to agree as to the method to be used in the calculation of the full benefits. The applicant refuses to accept reinstatement without

full benefits calculated according to his own method. The respondents refuse to use the applicant's method. There is a deadlock. In its order of reinstatement the Court did not tell the parties how the full benefits were to be calculated. The pertinent question is whether the respondents are committing contempt of court by refusing to pay an amount which they think is excessive. To complicate the matters further the applicant has already accepted a certain amount of money without prejudice but has decided not to resume his duties with the first respondent while negotiations about the money allegedly outstanding are going on.

The applicant is under the impression that if they cannot reach an agreement on the question of full benefits due to him, the respondents must be regarded as being in contempt of Court. In *Hebstein and Van Winsen: Civil Practice of the Superior Courts in South Africa*, 3rd edition, pp. 651, 652, civil contempt is defined as the wilful and **mala fide** refusal or failure to comply with an order of court.

In *Putco Ltd v. T.V. & Radio Guarantee Co. (PTY) Ltd. and other Related Cases* 1985 (4) S.A. 809 (A.D.) at p. 836 Smalberger, AJA said:

"Once a failure to comply with an order of Court has been established, wilfulness will normally be inferred, and the **onus** will rest upon the person who failed to comply with such order to rebut the inference of wilfulness on a balance of probabilities (cf *Du Plessis v Du Plessis* 1972 (4) SA 216 (0) at 220A-D). This can be done by such person establishing that he did not intentionally disobey the Court's order."

Mr. Mathe, counsel for the respondents, submitted that the second respondent had no intentions of disobeying the Court's Order. The respondents were served with the Court Order on the 23rd April, 1993. The following day on the 24th April, 1993 preparations for office accommodation and calculations to pay applicant were put in motion. The second respondent took it upon himself to see to it that applicant's office was arranged to have him accommodated. Immediately thereafter applicant was informed by second respondent by the letter of the 26th April, 1993 that he was reinstated forthwith. **Mr. Mathe** submitted that there was no wilful default or disobedience on the part of the respondents not to obey the court's order. There is no **mala fide** disobedience. The second respondent had intended to reinstate applicant after preparations had been made.

In paragraph 5.2 of his replying affidavit the applicant alleges that the second respondent wrongly believed that he (applicant) had to report for duty only after he (second respondent) had told him to do so. Can a person who had wrongly believes that he shall comply with a court order only after certain conditions have been fulfilled be found guilty of contempt of court? Can an inference of mala fides or wilful disobedience be inferred upon the respondents on the facts of his case? I am of the view that the answer must be in the negative to both questions posed above. Even the applicant was under the mistaken belief that unless he had been paid what he regards to be his full benefits, he could not resume his duties. I hold a different view. I think that the applicant was under an

obligation to report for duty as soon as it came to his knowledge that he had been reinstated. The negotiations about the full benefits and the method of calculating them would continue after he had come back to work.

Looking at Annexures "CC" and "DD", it is difficult for me to infer wilfulness on the part of the second respondent. The applicant was reinstated forthwith (Annexure "CC"), a schedule of moneys due to him was attached (Annexure "DD"). On the 26th April, 1993 when the respondents wrote the above two letters there is nothing to show that they were not genuine in their undertaking that the applicant had been reinstated forthwith. It was the applicant who was unwilling to accept reinstatement with full benefits. To make payment of full benefits a precondition to reinstatement was a serious and unsurmountable problem because the parties failed to agree on the method to be used to calculate the full benefits.

I have come to the conclusion that the applicant has failed to discharge the onus of proof which is on him to show that the second respondent's failure was wilful or mala fide.

In the result the application is dismissed with costs.


J.L. KHEOLA

CHIEF JUSTICE

1st August, 1996.

For Applicant - Mr. Matabane

For Respondents - Mr. Mathe.