CIV/APN/107/91

In the Application of:

'MAPITSO 'MATLALANE MPHAHAMA ..... Applicant

and

BARCLAYS BANK P.L.C. ..... Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 5th day of September, 1996.

The applicant herein filed, with the Registrar of the High Court, a notice of motion in which she moved the court for an order couched in the following terms:

> "(a) Declaring applicant's dismissal by Respondent null and void;
>
> (b) Directing Respondent to re-instate applicant forthwith;
>
> (c) Directing Respondent to pay applicant's emoluments with effect from the date of dismissal to the date of re-instatement;
>
> (d) Directing Respondent to pay costs hereby;
>
> (e) Granting applicant such further and/or alternative relief."

The Respondent Bank intimated intention to oppose

the application. Affidavits were duly filed by the parties.

It is common cause from affidavits that, in July, 1984, the applicant and the Respondent Bank concluded a written contract of employment whereby the latter employed the former as a clerk. The written contract, admittedly signed by the parties, included, inter alia, the following clauses:

> "2. The employee shall serve a probationary period of six months and if in the opinion of the Bank at the end of such probationary period, the employee's work and conduct are satisfactory he/she shall be placed on the Bank's permanent clerical staff."
>
> "13. In the event of the employee being guilty of any breach of the provisions of this agreement or of misconduct of any kind, whether during or out of office hours of which the Bank shall be the sole judge, or becoming insolvent, or entering into any arrangement with his/her creditors, it shall be lawful for the Bank to determine this agreement at any time without notice, anything to the contratry herein contained notwithstanding, in which event the employee shall only be entitled to salary due up to the date of such dismissal."
>
> "15. This agreement shall be terminable by one calendar month's written notice on either side."

Upon successful completion of her probationary period, the applicant was, in March 1985, admittedly

confirmed and placed on the Respondent Bank's permanent clerical staff. She became, thereby, a member of pension and insurance scheme established by the Respodnent Bank for its permanent staff. However, on 12th February, 1991, the Respondent Bank addressed, to the applicant, a letter (annexure "MMM1") by which the former advised the latter that her contract of employment was being terminated on one calendar month's notice, in accordance with the provisions of Clause 15 thereof; the applicant would be entitled to her terminal benefits together with a cheque in lieu of notice and the notice would commence on the 1st March, 1991 and end on 30th March, 1991.

The applicant contended that as a member of the Respondent Bank's permanent establishment, she had a legitimate expectation to work until she attained the retiring age or resigned or her services were lawfully terminated after she had been accorded a hearing. At the time of the termination of her contract, the applicant had, however, not attained the retirering age; she did not resign her employment nor was she afforded the opportunity to be heard as natural justice demanded in the circumstances. The purported termination of her contract of employment by the Respondent Bank was for those reasons unlawful and, therefore, a nullity. Hence her application for the order as aforesaid.

In responce, the Respondent Bank conceded that at the time her contract of employment was terminated, the applicant had not attained the retiring age; she had not resigned her employment nor had she been afforded the opportunity to be heard. The Respondent Bank contended, however, that in terminating the applicant's contract of employment reliance was made to the provisions of Clause 15 thereof. For these reasons, no allegations of misconduct of any kind were made against the applicant as it would have been the case had reliance been made to the provisions of Clause 13 of the contract of employment. Regard being had to the provisions of Clause 15 of the contract, which was binding on the parties, the Respondent denied the applicant's contention that the termination of her contract of employment was unlawful and, therefore, a nullity.

It is not disputed, from the affidavits, that when, on 12th February, 1991, the Respondent advised her that her contract of employment would be terminated, the applicant was given notice to that effect. If her contract were to be terminated in terms of the provisions of Clause 13 thereof, it would have been unnecessary for the Respondent to do so. Moreover, it is significant that at the time of the termination of her contract, the applicant was advised that she would be entitled to her terminal benefits.

Had the intention been to terminate the contract under the provisions of Clause 13 of her contract the applicant would have been entitled to only her salary due up to the date of such termination. It could not have been necessary, in my opinion, to advise the applicant that she would be entitled to her terminal benefits.

On the foregoing, I am inclined to agree with the contention that in terminating the applicant's contract of employment, as it did, the Respondent Bank relied on the provisions of Clause 15 and not 13 thereof. That being so, the salient question that arises for the determination of the court is whether or not before terminating her contract of employment, as it did, the Respondent Bank was obliged to observe the principles of natural justice, in particular the audi alteram partem.

In this regard it is signficant to bear in mind that the Respondent Bank was not an employer performing a public function but a privat employer exercising a right to terminate a pure master and servant contract. In the leading case of C.of A.(CIV) No. 15 of 1986 Koatsa v. The National University of Lesotho (unreported) Mahomed, J.A. (as he then was) had this to say at P. 11:

> "A private employer exercising a right to terminate a pure master and servant contract is not, at common law, obliged to act fairly. As long as he gives the requisite notice required in terms of the contract, he can be as unfair as he wished. He can act arbitrarily, irrationally or capriciously. The position of an employer performing a public function is not the same. The official or officials who exercise a discretion to terminate a contract of employment by giving to the employee concerned the minimum period of notice provided for in the contract, cannot act capriciously, arbitrarily or unfairly. In particular, if the real reason for giving to an employee a notice of termination, is some perceived misconduct or wrong committed by the employee, the employee should be given a fair opportunity of being heard on the matter, especially where it appears from the circumstances that the employee had a "legitimate expectation" that he would remain in employment permanently in the ordinary course of events."

Assuming the correctness that it was a private employer exercising a right to terminate a pure master and servant contract, it must be accepted that in terminating, as it did, the employment contract of the applicant, the Respondent Bank was, on the Authority of the decision in Koatsa v. The National University of Lesotho, supra, not obliged to act fairly or apply the principles of natural justice, in particular the audi alteram partem. All that was required of the Respondent Bank was to comply with the provisions of the applicable contract's clauses which were binding on the parties. I have already found that in terminating the contract, the Respondent Bank made relience on Clause 15 thereof. All that Clause 15 provided was that either party should give one

calendar month's written notice to terminate the contract. In my finding the Respondent Bank did comply with the provisions of Clause 15 of the contract by addressing to the applicant a letter of 12th February, 1991 (annexure "MMM1" attached to the founding affidavit). It reads, in part:

"Dear Madam,

re: Your Employment with this Bank

In terms of Clause 15 of the Employment contract you entered into with this Bank, either party may terminate the contract, by giving the other one calendar month's written notice.

This Bank has decided to terminate your employment and you are accordingly given one calendar month's notice to this effect, persuant to Clause 15 of the Employment Contract, which notice will commence on the 1st March, 1991 and terminate on 30th March, 1991.

You are entitled to terminal benefits in terms of the Employment Act and these will be calculated and assessed as soon as circumstances permit and be paid to you together with a cheque in lieu of notice on the 20th February, 1991 which you may uplift from Maseru Manager's office from that date, during normal working hours.

Yours faithfully,

_____

Personnel Manager."

Coming now to her contention that as a member of the Respondent Bank's permanent establishement, the applicant had a legitimate expectation to work until she had attained the retiring age, etc. it is significant that the contention was denied by the Respondent Bank. It was not really in dispute that Clause 15 of the Employment contract admittedly concluded and signed by both the Respondent Bank and the applicant herself provided that the contract could be terminated by either of the parties giving one calendar month's written notice. That the applicant was, no doubt, aware of and in terminating the contract, the Respondent Bank did exactly that i.e. gave the applicant one calendar month's written notice. If she were aware that her contract could, in terms of the provisions of clause 15 thereof, be termianted, on one calendar month's written notice, I fail to comprehend how the applicant could be heard to seriously contend that she had a "legitimate expectation" to work until she attained the retiring age etc.

The onus of proof that her dismissal was null and void rested squarely with the applicant on the well known principle that he who avers bears the onus of proof. On the facts disclosed by the affidavits, I am not convinced that the applicant has, on a preponderance of probabilities, satisfactorily discharged that onus. I am, therefore, unable to

declare that the applicant's dismissal by the Respondent Bank was null and void. That in my view is sufficient to dispose of the whole application and it will be purely academic to proceed to deal in details with the rest of the prayers in the notice of motion.

This application is accordingly dismissed with costs.

B.K. MOLAI

JUDGE

5th September, 1996.

For Applicant : Mr. Malebanye

For Respondent : Mr. Mochochoko.

CIV/APN/44/91

IN THE HIGH COURT OF LESOTHO

In the application of:

'MATSELISO MOTEMEKOANE ..... Applicant

and

ATTORNEY-GENERAL .....1st Respondent
COMMISSIONER OF POLICE.....2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 22nd day of October, 1996.

In an application for an order, inter alia, directing the Respondents to release to the applicant, a certain motor vehicle with registration numbers LMG885T, the former filed notice that they would, on the day of hearing move the court for an order striking out from the record of proceedings, the supporting affidavit of one Lehana Motemekoane as well as annexures "MM1" and "MM2" attached to the replying affidavit. No Notice of intention to oppose the order to strike out was filed. However, on the day of hearing, the applicant did appear and inform the court that she was opposing the notice for an order to strike out.

In as far as it is relevant, the facts disclosed in her founding affidavit, were briefly that the applicant was the lawful owner of the motor vehicle, the subject matter of this dispute. On 8th February, 1991, the Respondents' police officers, acting within the scope of their official duties, seized the vehicle from a certain Sekhobe Motemekoane on the ground that they wanted to speak to the owner thereof. The vehicle had since been in the custody of the police.

According to the applicant, her vehicle was neither a stolen property nor had it been used in the commission of a crime. The Respondents' police officers had, therefore, no justification to seize it, as they did. Hence the institution of these proceedings for an order as aforesaid.

The answering affidavit was deposed to by D/Tper Moshoeshoe who, inter alia, averred that prior to 7th February, 1991 he had credible information that the vehicle, the subject matter of this dispute, had been stolen. He mounted investigations and on 7th February, 1991 found the vehicle at the Maseru Traffic Department in the possession of a certain Lehana Motemekoane, who explained to him that the owner thereof was a person named Peters Motemekoane.

In support of the applicant's replying affidavit,

Lehana Motemekoane deposed to an affidavit in which he, however, averred that he had explained to the Respondents' police officers that the applicant was the owner of the vehicle, the subject matter of this dispute. He denied, therefore, the deponent's averment that he had explained to him that Peters Motemekoane was the owner of the vehicle.

Be that as it may, the deponent went on to aver that upon examining the vehicle, he noticed that its window identity marks had been tampered with. Consequently he had reasonable suspicion that the vehicle had been acquired unlawfully and seized it. He denied, therefore, the applicant's averment that the vehicle, the subject matter of this dispute, was not a stolen property and she was the lawful owner thereof. It is, however, significant to observe that as proof of her averment that she was the lawful owner of the vehicle, the applicant attached, to her replying affidavit, annexures "MM2" and "MM1" being the vehicle's certificate of registration and payment acknowledgement receipt, respectively.

The deponent further denied the applicant's averment that the vehicle had been seized from Sekhobe Motemekoane on 8th February, 1991. In fairness to her, the applicant conceded, in her replying affidavit, that the vehicle had, indeed, been seized

not from Sekhobe but from Lehana Motemekoane as alleged by the deponent.

Following his seizure of the vehicle, the subject matter of this dispute, the deponent went to Maseru Subordinate Court where he obtained an order authorising the respondents' police officers to retain it in their custody until produced at a trial or investigations had been concluded. As proof thereof, he attached annexure "MJM1" (the order). The deponent averred, in the answering affidavit, that ever since its seizure and retention in the police custody, he had been looking for Peters Motemekoane or the true owner of the vehicle, the subject matter of this dispute, but all in vain. His investigations were, for that reason, not concluded nor had a trial been held. He denied, therefore, the applicant's averment that the police officers had no justification to seize and retain the vehicle in their custody.

Wherefor, the Respondents prayed that the application be dismissed with costs.

The grounds upon which the notice of motion to strike out was based were that, as the supporting affidavit of Lehana Motemekoane and annexures "MM1" and "mm2" did not form part of the founding affidavit, the Respondents had no opportunity to respond to them.

Both the supporting affidavit and the annexures were, therefore, embarrassing.

It is, however, significant to observe that the Respondents themselves averred, in their answering affidavit that Lehana Motemekoane had explained that the vehicle, the subject matter of this dispute, belonged to Peters Motemekoane, a fact denied by the applicant who claimed that she was the owner thereof. All that Lehana Motemekoane averred in his supporting affidavit was that his explanation was to the effect that the vehicle belonged to the applicant and not Peters Motemekoane as the Respondents wished the court to believe. That being so, the supporting affidavit was a reply to the Respondents'own answering affidavit. It was quite relevant to the issue and the Respondents could not, therefore, properly move that it be struck out.

Likewise, in their answering affidavit, the Respondents denied the applicant's averments that the vehicle, the subject matter of this dispute, was not a stolen property nor was it used in the commission of an offence. When in her replying affidavit, the applicant attached annexures "MM1" and "MM2" purporting to be proof of her averments, the Respondents could not properly be heard to say the

annexures were embarrassing and should , therefore, be struck out.

In my view, the motion to strike out both Lehana Motemekoane's supporting affidavit and the annexures attached to the applicant's replying affidavit was ill-conceived and ought not to succeed. It is accordingly dismissed with costs.

B.K. MOLAI

JUDGE

22nd October, 1996.

For Applicant : Mr. Nathane

For Respondent: Mr. Putsoane.