

IN THE LABOUR COURT

CASE NO. LC/36/95

HELD AT MASERU

IN THE MATTER OF:

JOALANE KHAILE

APPLICANT

AND

HATA-BUTLE (PTY) LTD

RESPONDENT

JUDGMENT

The respondent is a business complex comprising of a supermarket, butchery, filling station and what is referred to only as the estate. In 1980 the Board of Directors of the respondent entered into an agreement with Frasers Lesotho Ltd., in terms of which the latter would act as consultants to the respondent company and would have full managerial control of the business of the respondent. The relevant parts of the agreement to this judgment read:

"whereas Hata-Butle Co. (Pty) Ltd has requested Frasers Lesotho Ltd to provide to it the management of its proposed business in rented premises at Roma, and to supply it or procure the supply to it of the merchandise to be offered for sale by it at the said premises;

Now therefore it is agreed as follows:

"2.4 Frasers will be obliged to exercise its best endeavours to establish the business on a firm financial and trading foundation as quickly as possible and to train the employees of the company to take over the complete management of the business as quickly as possible.

"3.2 Frasers shall act as consultants to the company and shall have full managerial control of the business on the basis hereinafter set forth, save that they shall not engage in, agree to, perform or undertake any of the following acts except by virtue of the prior resolution or delegation of the Board of Directors of the company.

"3.2.8 appoint, dismiss or alter the conditions of employment for the establishment or adjustment of salaries of the senior staff except as provided herein;

"3.3 The store manager shall, subject to the over-riding decision of Frasers; (emphasis added)

"3.3.2 employ, settle the terms of employment and dismiss the company employees apart from senior staff;

"3.4 without detracting from the generality of Fraser's obligation of manage the business Frasers shall-

"3.4.3 settle the basis for selection of and terms of employment of staff other than senior staff and seconded staff." (emphasis added).

Article 1.6 of the agreement defines senior staff as follows:

"1.6 "senior staff" means senior officers and employees of the company in the capacity of store managers or above but excluding Frasers' employees who have been seconded to the company."

Subject to the foregoing provisions of the agreement between Frasers and the respondent, the applicant was employed in May 1987 as a shop assistant by the management of the respondent. In 1992, applicant was appointed by the Board of Directors of the respondent to the post of bookkeeper after being successful at the interview. The letter of appointment specifically mentioned that;

"as bookkeeper you are directly answerable to the Board of Directors and you are expected to liaise with the managers of our enterprises in your day to day activities."

In November 1993, the chairman of the Board of Directors of the respondent wrote a letter to the Area Manager of Frasers Lesotho, the relevant part of which read;

"After careful consideration of your proposals put before us as per your letter under reference, the Board of Frasers Lesotho is informed that a decision has been taken to manage the company's business operations directly, with smooth taking over arranged as follows:

- (i) that handing over will commence on December 1st 1993 to the end of February 1994.**
- (ii) That on December 1st 1993 the chairperson of Hata-Butle will introduce the General Manager to you at your office.**
- (iii) That on the 1st December 1993 the General Manager will be introduced to the staff at the supermarket and butchery at 1.30 pm."**

On the 18th November 1993, the General Manager designate was offered a contract of fixed duration from 1st December 1993 to 31st May 1994. During the one year of handing over the new General Manager was to observe how Frasers was managing the company to enable him to fully take over the management of the business at the end of the handing over. Under paragraph 2 of his letter of appointment it was stated as follows:

"The following personnel will be directly answerable to you as the General Manager:

- supermarket manager**
- butchery supervisor**
- filling station supervisor and the**
- bookkeeper.**

At the end of the handover the General Manager was given a new contract starting from June 1994. This new contract empowered him to "be in charge of all staff and ensure that there is improvement of productivity and you shall employ and terminate services of staff as necessary except that for senior management the chairman of the Board shall be consulted."

It is common cause that in December 1994, the General Manager wrote applicant a letter of termination which he stated was necessitated by the changes in the running of the supermarket as a result of the management changes. The letter stated in paragraph two that according to the new organisational plan applicant's services were no longer going to be required. When he gave evidence before the court the chairman of the Board of Directors explained that the applicant was appointed by the Board to the position of bookkeeper as the watchdog of the interests of the respondent while Frasers was the manager, because the latter's accounts office was based in Johannesburg. He explained further that during the period of Fraser's management, the business was comprised of only a supermarket and a filling station. Under the new management two more business operations were incorporated and these were the estate and the butchery. According to his evidence, the expansion of the operations of the respondent resulted in the post of bookkeeper becoming redundant. A higher post of accountant was now required and the applicant did not qualify for it.

The applicant, however, challenged her termination on the grounds that she had been dismissed by a wrong person as she was employed by the Board of Directors, as such she could only be terminated by it. Alternatively she asked the court to declare that the reasons relied upon for her termination are invalid because the post is not redundant. However, before dealing with these two issues we intend to start by determining some of the issues which do not appear in applicant's statement of case and yet were relied upon by the applicant in support of her case after hearing oral evidence by the chairman of the Board of Directors Mr. Mabathoana.

Firstly, Mr. Mosito for the applicant, argued that paragraph E of respondent's answer must be expunged, because the date of 28/02/92 on which it purports the meeting of the

Board of Directors took place conflicts with the date given in annexure 2 of the answer, which is 28/02/93. Annexure 2 purports to be an extract of the Minutes of the said meeting of the Board of Directors. In evidence before court the chairman of the Board added to the confusion by saying that the meeting took place on the 28/02/94. There were thus three different dates on which the meeting allegedly took place. It was Mr. Mosito's further contention that if the oral evidence could be regarded as a correction of the error the correction is improper, because if the applicant wanted to amend paragraph E he should have followed the procedure provided in the rules for doing so. Mr. Mabathoana explained in his answer that the difference in years was a result of the typing error. It seems to us that this is so, because notwithstanding the inconsistency in the years, the date and month are consistent. Secondly, in terms of the letter of 26th November 1993, which was written by the chairman of the Board to Frasers Lesotho Area Manager, the handing over was to commence on the 1st December 1993 to the end of February 1994. It is therefore probable that such a meeting could have been held on the 28th February 1994 as this was the last day of the process of handing over which had started in 1993.

As regards whether the chairman's evidence is a proper way of amending the contents of paragraph E, we are of the opinion that this is so. Mr. Van Tonder sought to apply for the amendment of the dates from the bar. Mr. Mosito objected and Mr. Mabathoana's oral evidence was called precisely to come and straighten the confusion in the papers regarding dates. In any event the applicant cannot claim to have suffered any harm as a result of this correction, because by their own admission nothing of the sought purported to have taken place in February 1992 and February 1993, by paragraph E of respondent's answer and annexure 2 to the answer, did take place.

Mr. Mosito further objected to annexure 2 of the answer in that whilst it purports to be an extract of minutes of the Board of Directors, it is infact a report that has been compiled to fight applicant's case. In particular he relied on the last sentence of the said annexure 2 which read;

**"This was done by the chairman accompanied by the Directors
on the same day."**

Mr. Mabathoana conceded under cross-examination that this sentence was inserted to answer the applicant. There is no doubt in our minds that this so called extract of the Minutes is a fabrication. What is clear is that no such Minutes were ever taken. There is, however, a possibility that a decision to authorise the chairman to go and inform the workforce about the management changes could well have been taken, albeit informally, and implemented by the chairman. There is no justifiable reason in our view to disbelieve the chairman of the Board that a decision to that effect was taken and was duly communicated to the workers. Indeed the applicant adduced no evidence to disprove the allegation that the workforce was informed about the management changes on the day in question. Even if the decision had not been taken, there would be nothing wrong with the chairman of the Board, of his own, calling the work force to inform them about the changes in management as long as the changes are approved by the Board.

Coming now to the main issue of who had the power to terminate the applicant. It seems to us that, the applicant's terms of employment were different under the management agreement with Frasers and new the management. Under the former management, the applicant fell under senior staff who in terms of article 3.2.8 of the Management Agreement, were not to be appointed by Frasers. Also in terms of Article 3.3.2 of the Agreement, Frasers could not dismiss senior staff. They were appointed by and were answerable directly to the Board. But immediately upon his appointment as apprentice General Manager, from December 1st 1993 to 31st May 1994, the General Manager designate was specifically informed in his letter of appointment that, the four senior staff namely; supermarket manger, butchery supervisor, filling station supervisor and bookkeeper were directly answerable to him. In our view upon his appointment, the General Manager became the direct representative of the Board, hence all the staff which was responsible to the Board was to be responsible to him.

The effect of the change was to substitute the General Manager for the Board. Where Frasers had to make decisions with the Board, under the new arrangement the Board was to be represented by the General Manager. Under paragraph 8 of his letter of fixed term appointment, the General Manager designate was empowered to appoint and

dismiss staff, but with regard to senior staff the board had to be consulted. Clearly, therefore, the General Manager had the power under his temporary appointment to dismiss the applicant provided he had consulted the Board.

It is common cause that the General Manager was given a new contract of appointment in June 1991. Paragraph (g) of his new letter of appointment was almost identical with paragraph 8 of the former fixed term appointment. In particular it still vested powers of appointment and dismissal of staff in the General Manager, save that in the case of senior management the chairman of the Board has to be consulted. There are two major changes that are noticeable in the new contract. The first is that reference is no longer made to senior staff, but it is now made to senior management, secondly the chairman of the Board, instead of the whole Board now has to be consulted. The issue is whether the applicant was part of senior management, who could only be terminated after consultation with the chairman of the Board. This question was put to Mr. Mabathoana in cross examination. His answer was in the negative. He listed senior management as the General Manager, the supermarket manager and the accountant. Clearly therefore, the applicant remained senior staff but was not senior management. The accountant filled that higher rank. However, under the new contract of employment of the General Manager, senior staff could be dismissed by him without consulting anybody and it is clear that that is exactly what he did when he terminated the applicant.

Mr. Mosito contended that the General Manager's terms of appointment are not the terms of appointment of the applicant. There is no question that the applicant has always been the employee of the respondent irrespective of whether she was appointed to her position by Frasers Lesotho Ltd in terms of the Management Agreement or directly by the Board of Directors. The circumstances that led to the agreement providing for two categories of employees namely those appointed by the Board and those hired by the corporate manager have been explained by the chairman of the Board in his evidence. Since the manager was a legal persona, which acted through its servants, the Board of the respondent also reserved to itself the right to appoint certain senior level employees who would be their eyes and ears in ensuring that the interests of the respondent are not marginalized.

When the management was changed from a legal persona to a human person the dual structure of control of the employees came to an end. All the employees except for the seconded staff remained the employees of the respondent, but the answerability changed. The Board of Directors delegated its powers of appointment and dismissal of those senior employees whom it used to appoint directly, to the General Manager. The employment and dismissal of those other employees who fell directly under Frasers Lesotho Ltd was inherited by the new General Manager, who took the place of Frasers Lesotho Lesotho Ltd. It seems to us that nothing fundamental to the employment of applicant occurred, save that there was reorganisation of the administration of the respondent in that the dual control of staff by Frasers and the Board was centralised under the General Manager, in whom the Board vested all the powers of appointment and dismissal. There is nothing wrong with this and it does not amount to changing the terms of appointment of staff. If the Board has empowered a person to exercise its functions and powers, whenever those functions and powers are exercised by that person they are actually being exercised by the Board through the agency of that person.

Mr. Mosito had argued in the alternative that the court should declare that the reasons for termination of the applicant are invalid. He supported this assertion by alleging that the post of bookkeeper is not redundant because the respondents have appointed a new bookkeeper in the place of applicant. As a matter of fact and practice allegations of this kind cannot be admitted from the bar. It was for applicant to adduce evidence in support of this allegation so that the respondent could rebut it. Mr. Van Tonder did not, correctly in our view, bother to address this allegation in his answer. It is only appropriate that we also do not belabour it any further. We accordingly find that there is no irregularity or unfairness in the termination of the applicant's contract which warrants the court's intervention. The application is therefore dismissed.

Costs will be costs in the suit.

THUS DONE AT MASERU THIS 16TH DAY OF SEPTEMBER 1995.

L. A. LETHOBANE

PRESIDENT

M. KANE

I CONCUR

MEMBER

K. MOJAJE

I CONCUR

MEMBER

FOR APPLICANT

:

MR. MOSITO

FOR RESPONDENT

:

MR. VAN TONDER