IN THE LABOUR COURT OF LESOTHO

LC/2/94

HELD AT MASERU

IN THE CASE OF EKKERHART OOSTERHUIS APPLICANT

AND

BISHOP PHILLIP MOKUKU RESPONDENT

A W A R D

The applicant in this proceedings is a medical practitioner from Holland. He was offered a post as medical practitioner at the Anglican Church Hospital of St. James at Mants'onyane in January 1993 for a fixed period of four years. This period was to end in January 1997. However, on 13th April, 1994, applicant's contract was terminated by the Chairman of the Hospital Board, respondent in this proceedings, in terms of Article 6(b) of applicant's contract of employment which provided thus:

> *"This contract can be terminated by either parties (sic) by giving three (3) months' notice in writing or three (3) months' salary."*

The letter communicating termination of applicant's contract referred to discussions held between applicant and respondent on 12th April, 1994, and sought to confirm in writing what

apparently was communicated verbally at the said meeting. On 18th April, some five days after the termination, applicant wrote to the respondent informing him that, *".....I make objection in terms of the Labour Act (sic) against your written termination of my contract without giving me any reasons for doing this."* He further requested that since he was soon proceeding to the Netherlands a reply be faxed to Zeist, presumably a town or city in the Netherlands where applicant would be able to be contacted.

On the 2nd June, 1994, the Chairman of the Board wrote to the applicant via the mode appointed by the latter communicating the reason for the termination of his employment. Of particular relevance in my view is paragraph 2 of that letter which reads:

> *"According to the judgment of the Hospital Board, the Management Committee was not functioning properly and effectively under your leadership because there was a considerable lack of the necessary close cooperation."*

It is common cause that at the time of his termination, applicant had since been elevated to the position of Medical Superintendent thus becoming head of the Management Committee of the Hospital. Applicant in turn wrote back on June 9th refuting the reasons advanced by the Chairman of the Board and instead advancing his own reasons as to how and why the hospital was experiencing management problems.

A series of other letters which I need not burden this award with followed, written by applicant among others, to the Secretary of the Hospital Board and the Honourable Minister of Health and Social Welfare. It is, however, apparent from the record that the matter was also taken to the Labour Officer for the Thaba-Tseka District, who in his letter of 2nd August, 1994, to applicant (Annexure XXII), appeared to have virtually

given up the hope of having the dispute between applicant and respondent amicably settled, for he stated that he had met with the respondent who, inter alia, *".... mentioned that the Hospital Board had made decision regarding your dismissal and that decision stands."* In the same letter the Labour Officer advised the applicant to take his complaint to the Labour Court for final decision.

When applicant filed his originating application he stated the relief sought as immediate reinstatement in his position as Medical Superintendent or alternatively, *"payment of all financial expenses and the amount due to the Dutch Government and the unpaid holidays and overtime."* It should be noted that originally applicant filed this matter in person hence the inelegant language in the prayers. It is, however, common cause that when this matter was finally heard, applicant had since returned to his country, consequently his representative abandoned the prayers contained in the originating application and instead sought a declaration that up to the time of this ruling applicant was in law still an employee of the respondent by virtue of his dismissal being unfair.

A pre-hearing conference was held in this matter both counsel agreed that the point for the determination by this court is whether there has been a dismissal and if so whether it is fair or unfair, or whether applicant's employment has been correctly and lawfully terminated in terms of his contract of employment. Mr. Hlaoli for the applicant and Mr. Mafantiri for the respondent addressed the court on this issue on the 9th February, 1995 and the award of the court was reserved.

Mr. Hlaoli's arguments can be summarised as follows:
That the court should read and interpret the letters written to the applicant by the respondent and it shall be clear that

the respondent invoked Article 6(b) of the Contract of Employment simply to effect a dismissal. He further says that this is clear from respondent's letter of 2nd June, 1994 which accuses applicant of incompetence and yet he had not been given the opportunity to rebut the accusations. Mr. Hlaoli further says that, the conduct of the respondent shows that they had infact dismissed applicant. He referred us to the Thaba-Tseka District Labour Officer's letter of 02/08/1994, to applicant and applicant's letter of 21/07/1994 to the Honourable Minister of Health and Social Welfare, both of which were premised on applicant's dismissal and were copied to the respondents. Mr. Hlaoli submits that if it was not true that applicant had been dismissed, respondent should have corrected the distortion and untruth contained in the two letters to the effect that applicant had been dismissed by respondent.

Mr. Mafantiri on the other had pointed out that the contract was correctly terminated in terms of the contract of employment between the two parties. He further said that applicant was paid three months salary in lieu of notice, which he accepted, he is therefore, estopped from challenging his termination. Mr. Mafantiri further argued that in terms of the contract between the parties in particular Article 6(b), in terms of which applicant's employment was terminated, there is no need for either party that terminates the contract in terms of that article to advance reasons for that termination. He submitted that it was therefore, inappropriate for applicant to seek to obtain reasons for his termination from the respondent. Finally he pointed out that the letters referred to by Mr. Hlaoli were only copied to the respondent for information and there was therefore no obligation on respondent to respond to them.

I will start with this very last argument. It is true that save where it has clearly been stated as to why a letter is being copied, as a general rule copies are meant for information of those to whom they are copied. A person to whom a letter has been copied cannot, however, contend himself with noting a letter, contents of which implicate him is a material way. It is incumbent upon a person so implicated to straighten the record immediately, otherwise he will be estopped from later turning round and argue that he has been misrepresented.

In my view the respondent in casu must be estopped from denying at this stage of the proceedings that he dismissed applicant. If it is true that he had not dismissed applicant as the latter had consistently complained, he ought to have straightened that fact. Even if he may not have been bound to do so as he argues, he at least owed the Honourable Minister of Health to whom the complaint had been directed, that clarification. His silence confirmed the contents of the District Labour Officer's letter that, the Hospital Board's decision to dismiss applicant cannot be varied and those of applicant's letter to the Honourable Minister that he was dismissed on 12/04/94 by the respondent. It is thereore sufficient to find on this ground alone that respondent did infact dismiss applicant. There are however, other aspects of this case which should not pass our comment.

Mr. Mafantiri argues that Article 6(b) of the contract of employment does not require a party invoking it to give reasons. This is true, but Section 69(1) of the Labour Code Order 1992 (the Code) enjoins the employer to furnish the employee with written statement of reasons for his or her dismissal. Section 61(3) of the Code provides:

"No person shall employ any employee and no employee shall be employed under

contract except in accordance with the provisions of the Code. Any contract .... which contains any term or condition less favourable to the employee than any corresponding term or condition for which provision is made by the Code, shall be construed as though the corresponding term or condition of the Code were substituted for such less favourable term or condition of service in such contract."

By virtue of this section the requirement that reasons for dismissal be provided to the employee, as a more favourable term to the employee, is taken as though it has been incorporated into the Contract of Employment of the parties and therefore, respondent ought to have given reasons of termination to the applicant. Indeed respondent did correctly furnish the reasons in his letter of 2nd June, 1994 to the respondent.

It has also been respondent's contention that since applicant accepted the three months pay in lieu of notice he is estopped from later challenging his dismissal as unfair. It is common cause that at common law a contractual relationship is determined by an offer and acceptance of a compromise in full and final settlement of a creditor's claim. It has, however, been held that in employment relationship an acceptance of payment tendered by the employer to the employee cannot prevent the employee from later challenging his termination in terms of the relevant employment legislation. In Paper, Printing, Wood and Allied Workers' Union and Others versus Delma (Pty) Ltd (1989) 10 ILJ 424, the individual applicants on behalf of whom the Union had initiated the proceedings, had accepted the amounts tendered by the respondent at the time of dismissal. Counsel for respondent sought to persuade the court that on the basis of their acceptance of these amounts their dismissals should be found to be lawful. Louw A M in dismissing this contention held on page 431 of the judgment that:

"In the present matter it is the court's view that while a civil claim that could be brought in a court of law may well have been compromised (by the acceptance of the offer), the applicants are nonetheless entitled to question the fairness of the respondent's behaviour before the industrial court."

The above principle was endorsed by Kachelhoffer A M in Kruger en Ses Ander .v. A S Transmission & Steering (Edms) Bpk (1994) 5 (8) SALLR. In that case, it was ruled that the industrial court shall interfere with contracts involving agreements in full and final settlement, because the employee is in a vulnerable and weak position. There is such a great potential for abuse of such contracts by employers that the Labour Court has in appropriate circumstances, an obligation to interfere. I have no doubt that the instant matter is one that warrants the intervention of the court particularly when applicant's unique situation is taken into account. He is an expatriate. He was posted to a hospital in the mountain areas. He could not, without risking serious financial hardships for himself and his family refuse an offer of payment of three months salary. His very future was, until this matter is settled, uncertain. But, to show that he never accepted his termination, some five days after the letter terminating his service was written, he wrote back and protested.

The final submission by Mr Mafantiri was that applicant's contract had correctly been terminated in terms of Article 6(b) of his Contract of Employment. Mr. Hlaoli contended on the other hand that the article in the Contract of Employment was invoked in order to effect a dismissal. He argued that if this was an ordinary severing of relations and not dismissal, there was no reason for accusations of inefficiency and incompetence as is reflected in respondent's letter of 02/06/1994 to applicant.

I take it for the moment that there is no dismissal and that the termination has been done in terms of the Employment Contract between the parties. The question now is, has the contract been correctly terminated. In my view the answer must be in the negative, in the light of a plethora of authorities on this subject. It has been submitted by leading figures in labour law and labour relations that:

> *"An employer cannot escape the concept of unfair dismissals by including in the contract of employment a provision to the effect that the employer may at any stage give say 30 days notice or payment in lieu of notice and that the employee cannot thereafter challenge the termination. If this notice was sufficient then it would be the easiest way to avoid an employer being challenged on any termination or dismissal." (See Guide to Unfair Labour Practices Chapter 3 paragraph 3302, FSA Contact Industrial Relations Service).*

It would indeed be a sad day for industrial relations and fair labour practices if employers could be allowed to dismiss employees as if they were disposable commodities as and when they wish, relying on a notice provision in the contract of employment. A provision entitling a party to terminate an employment contract can only be interpreted to mean that such termination, if it is done at the initiative of the employer, shall be effected only upon justifiable cause and all the principles of natural justice having been complied with. In Clarke .v. Ninian & Lester (Pty) Ltd (1988) 9 ILJ 651 at 655, De Villiers M said the following:

> *".....an employer cannot without valid reason give an employee notice of termination of service merely because the agreement of employment provide for such notice. The employer can only rely on such notice where the employee is guilty of some misconduct or has breached a material term of the contract which does not warrant instant dismissal, or if legitimate reasons exist for retrenchment and retrenchment guidelines are followed."*

In my view therefore, applicant's contract of employment has not been correctly terminated, because the employer could not just rely on Article 6(b) of the Contract of Employment without justifiable cause.

By his letter of 2nd June, 1994, respondent showed that applicant had infact been terminated because in *"the judgment of the Hospital Board, the Management Committee was not functioning properly and effectively under (applicant's) leadership."* Because of applicant's alleged failures his contract of employment was terminated in terms of a clause in his contract. In terms of Section 68(a) of the Code, dismissal includes *"termination of employment on the initiative of the employer."* It is common cause that applicant protested at the termination of his employment under the aforesaid clause of his employment contract, but that protest fell on deaf ears.

In the normal cause of things a clause like Article 6(b) of applicant's Contract of Employment will be invoked by mutual consent. By its very nature it is not a punitive clause, but merely a safety valve through which parties can escape should the relationship get to a point where it can no longer be expected to continue. It is, however, common cause that in the present case, respondent invoked it as a punitive measure to get rid of applicant thus making it qualify as a dismissal in terms of Section 68(a) of the Code. I am therefore satisfied that the respondent has by conduct, in law and expressly dismissed applicant as is evidenced by:

(a) His failure to correct various communications, copies of which were sent to him, that he had dismissed applicant.
(b) Definition of the word dismissal as including

termination of employment on the initiative of the employer.

(c) Respondent's letter of 2nd June, to applicant in which a judgment was communicated to applicant as to why he had been terminated/dismissed.

Having found as I did that applicant was dismissed and not ordinarily terminated as argued, the issue now is, has he (applicant), been fairly dismissed. in terms of respondent's letter of 2nd June 1994, applicant was dismissed because under his leadership, the management committee was not functioning properly. Applicant's termination was therefore connected with his capacity to do the work he was employed to do as is envisaged under Section 66(1)(a) of the Code.

Under Section 66(4) *"where an employee is dismissed under sub-section (1)(a) or (b) he or she is entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made..."* This is a fundamental principle of natural justice which has been enshrined in our law. It has been upheld in a number of landmark decisions of the Industrial Court, the High Court and Court of Appeal. (See Koatsa Koatsa .v. NUL, C. of A. (CIV) No.15 of 1986, Lesotho Telecommunications Corporation .v. Thahamane Rasekila C. of A. (CIV) No.24/91, see also Baxter, Administrative Law pages 593-594 and Edwin Cameroon, *"The Right To A Hearing Before Dismissal"* (1986) 7 ILJ 183 - 217 (Part I) and (1988) 9 ILJ 147 - 186 (Part II).

It is common cause that in Casu, applicant had to squeeze reasons for his dismissal out of the respondent. When finally those reasons were given they became a subject of exchange of further letters between respondent and applicant in which the latter sought to give his side of the story as to how the management failures at the hospital came about. This was the most inappropriate way of effecting a dismissal. The reasons

applicant sought to advance in his letter of 09/06/1994 to respondent relating to what in his view were the causes of the management problems of the hospital, ought to have been given in a proper hearing. In his article, The Right To A Hearing Before Dismissal (1988) (ILJ 147 at page 171 E. Cameroon says the following:

> *"It has now been authoritatively established that there is no jurisdictional bar preventing the Industrial Court from adjudicating the claims of unfairly dismissed senior executives, including directors of companies. Their claims to procedural fairness before dismissal must therefore be assessed in the same way as those of other employees, namely with the consideration to all the relevant circumstances."*

It will be recalled that applicant was, as the Medical Superintendent, the head of the management team of the hospital. He therefore, on the authority of the above article by Cameroon, has no less claim to procedural fairness, prior to dismissal than lower class employees.

Landman A. M. as he then was, held correctly in the case of Erasmus .v. B. B. Bread Ltd (1987) 8 ILJ 537 at page 544 that a disciplinary code does not normally apply to a person in the position of a manager. It is sufficient that there is a proper enquiry in which the principles of natural justice are observed. In Visser .v. Safair Freighters (EDMS) BPK (1989) 10 ILJ 529 at page 535 Basson A. M. is interpreted by Bulbulia D. P. (in De Klerk .v. Del Ingenieurswerke (EDMS) BPK (1993 14 ILJ 231 at page 233) as saying:

> *"The most important requirements where a manager is dismissed on the basis of incompetence or incompatibility is that he must receive warnings, that he must be properly informed of the allegations against him, that he must be given a fair trail where the requirements of fairness imply that the rules of natural justice must be observed and that he is consequently entitled to representation and an opportunity*

to state his case."

It is common cause that applicant was not given a hearing. He was called to a meeting by the respondent, which neither of the two recognize as a hearing for purposes of procedural fairness. Indeed the way he (applicant) was called to the meeting that led to his dismissal did not come any closer to informing him that he was being called to an enquiry or that he was going to face allegations that might lead to his dismissal. The respondent in his letter of 29/03/1994, merely said, *"I urgently need to meet with you out of my concern for the present situation within the management team of the hospital. Could you please come to Maseru to see me tommorow."* We do not know what transpired in this meeting, neither do we know if any other meetings were held. The next we know from the record is a letter of 13th April which refers to a meeting the previous day and confirms that applicant's contract is terminated. Presumably a decision was reached at this meeting to terminate applicant's contract.

There is no evidence that before terminating applicant, a hearing was ever held. Indeed in answer to applicant's averment in the originating application (Ad. para 3(c)), that if there were any allegations against him, he was never given a chance to defend himself, respondent merely says, *"the contents hereof are denied."* In further submission applicant says *"according to the Labour Code 1992 Section 66, my dismissal was given without any allegations made and therefore unfair."* (Ad. para 3(d)). Respondent's answer to this is *"the provisions of Section 66 of the Labour Code have no application to the present proceedings."* Clearly therefore, applicant has made a case that he was dismissed without an enquiry and his arguments are not challenged by respondent. The argument that the Labour Code has no application is superseded by the finding I made earlier that applicant's contract has not been properly terminated

under Article 6(b) of the Contract of Employment.

Applicant has further not been counselled or given warnings about his shortcomings if there were any, in accordance with the precedent in Visser's case supra. Indeed in his letter to the Honourable Minister of Health which is attached to the record as Annexure XXI, applicant contended that he had served in comparable position for 35 years in the then Transkei and the Netherlands. It goes contrary to common sense that a person of that wealth of experience can be unable to run a hospital of the size of St. James after only one year. If the respondent had done his homework he might well have found that the problem lied elsewhere and not with applicant. Accordingly therefore applicant's dismissal is held to be unfair.

In conclusion I should comment on two issues that Mr. Mafantiri raised when he closed his address. Firstly he said that the court should not entertain this case in the light of the time lapse since the case arose and that after all applicant has since left the country. Secondly he asked the court to take into account that the hospital has no funds.

If I may start with the second submission, the court asked Mr. Mafantiri as to where he got the information that the hospital had no funds. His response was that this was his personal view. It is trite law that a lawyer is merely a representative of his client and not his witness. Mr. Mafantiri cannot without authorisation from the Hospital Board purport to attest on its behalf that the hospital has no funds. To be meritorious such mitigation either had to be made on a sworn affidavit or testified viva voce by a duly authorised representative of the Hospital Board. The Chairman himself could have made this plea

in his answer but he did not. Mr. Mafantiri's plea in mitigation is therefore, without basis and improper as Mr. Mafantiri is not a proper person to make it.

On the question of prescription, claims for unfair dismissals are to be presented to the labour Court within six months of the termination of the contract of employment of the employee concerned. (See Section 70(1) of the Code). Applicant was dismissed on or around 13th April, 1994. This case was filed on 31st October, 1994. Clearly therefore, when this case was filed the six months time limit had lapsed by some two weeks. Mr. Mafantiri therefore, says this factor coupled with the fact that applicant has since returned to his country of origin is ground for this court not to entertain applicant's case.

Mr. Hlaoli has argued, correctly in my view, that applicant's departure from the country does not extinguish his rights. The pertinent issue is one of prescription. In terms of Section 70(1) of the Code, the court *".....may allow presentation of a claim outside the period prescribed in sub-section (1) above if satisfied that the interests of justice so demand."* In Paper, Printing, Wood and Allied Workers' Union & Others .v. Kaycraft (Pty) Ltd & Another (1989) 10 ILJ 272 at page 275, it was held that *"the Industrial Court has the discretion to condone the failure to comply with the time-limits prescribed by Section 43(4)(a) if good cause is shown."* It is common cause that in casu no cause was shown as to why this case has been filed out of time. Even when respondent raised this issue applicant's counsel did not take opportunity of his right of reply to show why this case was filed out of time and why the late filing should be condoned.

The Lesotho equivalent of the South African Section 43(4)(a) of the Labour Relations Act is Section 71(2) of the Code. The RSA Act specifically places the onus of prove on the defaulting party. The Section provides in part that:

> *"Unless the Industrial Court on good cause shown decides otherwise, no order may be made under this sub-section if the relevant application under sub-section (2) was not made within thirty days ....."* (my emphasis).

The Code on the other hand empowers the Labour Court to condone late filing if satisfied that the interests of justice so demand. It does not necessarily place the onus on a defaulting party. In my view therefore, the explanation furnished by the defaulting party in our case, is relevant to some, not all cases, in order to help the court to make an informed decision, whether the interests of justice demand that the late filing be condoned.

It does not however, mean that without such explanation/justification the court will always be unable to determine what the interests of justice in the circumstances are.

I am of the view that the principle in Melane .v. Santam Insurance Co. Ltd. 1962 SA 531 would be more relevant in guiding the court in this respect. In that case it was held that:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated,*

they are not individually decisive."

I am strongly persuaded that the foregoing extract prescribes a suitable test to be used in circumstances like the present, save that where the phrase *"sufficient cause has been shown"* is used, I would substitute therefor the following phrase, *"requirements of justice so demand."* The principle in the above case was followed by Ehlers D P as he then was in Metal & Allied Workers Union .v. Filpro (Pty) Ltd (1984) 5 ILJ 171 at page 177.

In following the precedent in Melane's case supra as confirmed by Ehlers in Metal & Allied Workers Union supra, I take it as pertinent that I should consider the relevant facts of this case. When the case arose in April 1994, Part III Division D of the Code, which establishes this court, was still suspended. Applicant could not therefore, taken his case to a court that did not exist. It appears from the record, however, that applicant did not just sit back and did nothing. He took his case to existing labour institutions to try and help him have the case settled in accordance with the provisions of the Code. In particular he lodged a complaint with the Thaba-Tseka District Labour Officer. (See Annexure XV, XIX, XX and XXII to applicant's originating application, all of which are letters from Mr. Mako, the District Labour Officer for Thaba-Tseka on this issue).

On the question of the degree of lateness, I am convinced that the time of two weeks is not an unacceptably long time by which a time limit can be extended. Indeed this court was officially inaugurated on 21st October, 1994, and this matter was filed a week later, which was pretty fast. The very number of the case bear testimony to this, because it was a second case to be filed immediately after the court started to function.

I have already shown that the strict requirement that good cause be shown is a specific requirement of the South African law and not ours, so in our case, there is no strict need for explanation. On the prospects of success and importance of the case, applicant has already succeeded in all the areas of contention between him and the respondent. The case is certainly an important one in the light of the fact that applicant had been recruited from a far away country. It was untenable for respondent therefore, to have passed a death sentence on him without affording him the opportunity to defend himself. His contract, was for a fixed period, its termination must have disorganised applicant with regard to prospects for getting an alternative job either here or back home.

On the question of fairness, I have already shown that applicant originally initiated this proceedings in person. Mr. Hlaoli only came in to argue the case. It would thus be grossly unfair on applicant, if the court were to hold that his claim has prescribed simply because as a layman he could not make an application for condonation of late filing in his originating application. Were the court to adopt a strict legalistic approach in this matter, it would be failing in its chief function as it is enshrined in Section 27(2) of the Code that *"....it shall be the chief function of the court to do substantial justice between the parties before it."*

In the circumstances, I am convinced, after considering and weighing all the relevant facts that it is in the interests of justice that applicant's late filing of this case be condoned. Respondent is after all not placed in a prejudicial position, because since his dismissal applicant has kept this issue life by not only continuously writing to him, but also involving

labour authorities to help broker some settlement, a factor which should count towards breaking prescription. One of the latest meetings between respondent and the Thaba-Tseka District Labour Officer was on 29/07/1994, just two months before this case was filed (see annex XXII to originating application). The late filing has not therefore prejudiced respondent.

AWARD

As already pointed out, applicant has amended his prayers to one of a declarator that up to the date of this ruling, respondent's purported dismissal of applicant be declared null and void and set aside and that applicant be paid his salary from the date of purported dismissal to the date of this ruling. This has been very lenient on the part of the applicant as he was entitled to claim more, but has limited his claim only to the date of the judgment.

It is accordingly declared that respondent's purported termination of applicant's employment on 13/04/1994 amounted to an unfair dismissal and as such is set aside.

The respondent shall pay applicant his arrears of salary from the date of purported termination to the date of this ruling, less the three months salary paid to applicant in lieu of notice.

THUS DONE AT MASERU THIS 28TH DAY OF FEBRUARY, 1995.

<u>L. A. LETHOBANE</u>

PRESIDENT

<u>K. BROWN</u>	***I CONCUR***
MEMBER	

<u>K. MOJAJE</u>	***I CONCUR***
MEMBER	