IN THE LABOUR COURT OF LESOTHO

CASE NO LC 150/95

HELD AT MASERU

IN THE MATTER OF:

MONTOE MPHAOLOLI	**APPLICANT**
AND	
UNITY ENGLISH MEDIUM SCHOOL	**1ST RESPONDENT**
LERATO KHAKA	**2ND RESPONDENT**
BOIPELETSO MOHAPELOA	**3RD RESPONDENT**

JUDGMENT

The cause of action herein arose in May 1994, when the applicant was dismissed as Manager of the first respondent. In June 1994 applicant instituted proceedings in the High Court of Lesotho under case number CIV/APN/196/94. In September 1995, the High Court transferred the aforesaid case for determination by this court. In his Originating Application, applicant prayed for relief under paragraph 4 in the following terms:

> ***"(a) That the alleged purported decision of the Board of Directors of the first respondent to dismiss the applicant from the employ of first respondent in his held post of Manager thereto be set aside and be declared null and void and of no force and effect.***
>
> ***"(b) Annexure "C" to the founding affidavit of the applicant in CIV/APN/196/94 and Annexure "A" in this application be declared null and void and of no force and effect to the extend that it purports to be a notice of meeting for failure to comply with clause 5(iii) of the first respondent's constitution.***

"(c) The third respondent be interdicted from continuing to hold himself out as Acting Chairman of the first respondent's Board of Directors and in that capacity usurping applicant's powers as chairman of the Board of first respondent.

"(d) Respondents be directed to pay costs of this application jointly and severally, the one paying the others being absolved.

"(e) Paying applicant his salary by first respondent from the date of purported dismissal to the date of judgment.

"(f) Permitting applicant access to the premises of the first respondent.

"(g) The second respondent be ordered to return to the offices and premises of the first respondent, a cheque book in the name of first respondent and not to remove same therefrom other than by due process of the law.

"(h) Granting applicant such further and/or alternative relief as this Honourable Court may deem meet (fit?) and just in the circumstances."

It is common cause between the parties that applicant was both Manager and chairman of the Board of Directors of the first respondent. However, he was only paid for the job of Manager which was his full time job. It must be stated from the onset that this Court has jurisdiction to deal only with employer/employee issues and not inter-organisational disputes. Accordingly, therefore, applicant's prayers 4(b), (c), (f) and (g) are totally misplaced as they are not employer/employee disputes. They are clearly inter-organisational disputes which do not belong to this Court. The issue for determination by this Court, which falls squarely within its jurisdiction, is in the view of the Court contained in prayer 4(a) of the Originating Application.

It was Mr. Mosito's contention that he admits that in terms of clause 6 of first respondent's constitution applicant was appointed to the position of Manager by the Board and that it was, therefore, the Board which had the authority to terminate him. He, however, contended that as Mr. Machai, who was one of the Board members had deposed in his affidavit no Board meeting ever resolved to:

(a) call applicant to appear before it as alleged in annexure "C" to the Originating Application;

(b) dismiss applicant as Manager.

He contended further that since applicant was the chairman of the Board, meetings of the Board could only be called by him or through his authorisation. The

meetings which purported to resolve as in (a) and (b) above were a nullity as they had neither been called by the applicant as chairman nor authorised by him.

In response Mrs. Chimombe contended that the said meetings of the Board were properly constituted because the applicant was removed from the Chairmanship of the Board by the parents meeting of the 27th March 1994, which also nominated the third respondent as acting chairman pending the election of a substantive chairman. (See Annexure "U7"). In his papers applicant has sought to challenge the constitutionality of the parents' decision to remove him as chairman of the Board of Directors (see Annexure "E" to Originating Application). As already stated it is not for this Court to pronounce on the constitutionality of the meetings of the first respondent. For our purposes it suffices that meetings were convened, as to who should have convened them or chaired them is an issue that can perhaps be resolved through other fora. Mrs. Chimombe contended further that in any event applicant could not have convened the meeting of the 22nd May as that meeting was about him and to do so would be making him a judge in his own cause.

It does appear from the affidavit of the third respondent that a meeting of the Board was convened on 9th May 1994, which resolved to invite applicant to a meeting on the 22nd May to answer certain allegations that related to his conduct. (See also Annex "U1" being minutes of said meeting of 9th May 1994). It appears further from Annexure "C" that on the 18th May applicant was written a letter inviting him to a meeting as aforesaid. Once again applicant wants this Court to declare Annexure "C" as a nullity for its non-compliance with first respondent's constitution. That issue falls outside the jurisdiction of this Court. For our purposes we are satisfied that he did receive Annexure "C" as is evidenced by his reply to it per Annnexure"D" to the Originating Application.

What is clear from Annexure "U1" is that Mr. Machai did not attend the meeting of 9th May 1994. He infact was the only person who was absent without apology since the applicant and one Mrs. Makhakhe had tendered their apologies. Since this was the meeting which resolved to call applicant on the 22nd May to answer the Board's complaints against him, Mr. Machai could not have not known about its resolutions as he did not attend it. However, in paragraph 2(b) of his affidavit he seeks to deny that a Board meeting took place. This denial is outweighed by Annexure "U1" which is record of the minutes of the meeting of the 9th May.

According to paragraph 8.4 of 3rd respondent's affidavit which is not contradicted by the applicant, Mr. Machai was again absent at the meeting of 22nd May, which resolved to terminate the applicant. He could not therefore, know of its decisions when he did not attend it. Mr. Machai's affidavit is therefore of no value in these proceedings; in so far as it seeks to deny that the Board of Directors of the first respondent met to deliberate and pass resolutions in respect of applicant's employment, because he is the one who did not attend the scheduled Board meetings.

Mr. Mosito further contended that Annexure "C" did not disclose the agenda of the meeting which applicant was invited to attend. He submitted that applicant was alleged to have made "certain unilateral decisions" and to have taken "certain steps" without specifically stating what these unilateral decisions and/or steps were. Mrs. Chimombe submitted in response that; Annexure "C";

> ***".....intelligibly disclosed the agenda of the meeting (and that) out of his own volition (applicant) denied himself a fundamental right to be heard and must bear the consequences."***

She regretted that Annexure "C" was cauched in a manner that it did not disclose specific acts which were a subject of complaint against the applicant, but averred that the court should take into account that members of the Board are lay persons. She submitted further that applicant should have come to the meeting to protest if he felt that Annexure "C" did not sufficiently disclose the agenda of the meeting. She concluded by contending that there was infact substantial compliance with the requirements of fairness. She referred to the decision of this Court in Maisaaka 'Mote .v. Lesotho Flour Mills LC59/95 and the authorities therein cited.

It is common cause that prior to the writing of Annexure "C" the applicant had written Annexure "E" dated 16th May 1994, which showed in no uncertain terms that there was a power struggle between the applicant and the first respondent's Board of Directors. Annexure "C" in our view confirmed Annexure "E" that there was infact a power struggle between applicant and the Board as is evidenced by the following allegation appearing in the first paragraph of Annexure "C";

> ***"todate, you made certain unilateral decisions, took certain steps and also kept on making pronouncements that the Board views as deliberate attempts on your part to undermine its authority, that of the parent body and the provisions of the school's constitution."***

This was a clear confirmation that there was a power struggle in the management of the affairs of the first respondent, hence the Board decided to charge applicant of undermining it by, inter alia, making unilateral decisions.

In the case of Maisaaka 'Mote .v. Lesotho Flour Mills supra this Court had occasion to refer to Baxter's Administrative Law (1984) at p.542 and 543 where the learned author comments respectively as follows.

> ***"fair hearing need not necessarily meet all the formal standards of the proceedings adopted by the courts of law."***

And further;

> ***"the courts have refused to impose upon the administration the duty to hold trial type hearings where these are not prescribed by statute".***

The court went further to quote Edwin Cameron in his article "The Right To A Hearing Before Dismissal", Part 1 (1986) 7 ILJ 183 a p. 185 where the learned Judge submits that;

> ***"the whole field of proper labour relations is characterised by an inherent flexibility, and natural justice should not be led into the trap of strict legalism."***

At p.201 of the same article Cameron goes further to state that;

> ***"it would be grossly unfair to summon an employee to a fairly timed enquiry but leave him or her ignorant of what conduct is complained of until the hearing commences. This would render futile the employee's attempt to prepare for the hearing. So the employee should be told what conduct will be put in issue at the disciplinary enquiry..... The requirement is not technical. If it is obvious what is in issue, the employer is not obliged solemnly to inform the employee of what he or she already knows."***

It seems to the Court that the applicant herein was already essentially aware of what dispute existed between him and the Board of the first respondent. Furthermore, Annexure "C" substantially informed him of what conduct was complained of. The questions he posed in his letter of 20th May (Annexure "D") which was his response to Annexure "C" leave us in no doubt that applicant knew and understood what conduct the Board was not happy about. Thus in his letter he advances the following questions under questions 3 and 4;

> ***"3. As a Manager with whom and how often should I consult on the daily routine running of the school?***
>
> ***"4. What is the meaning of unilateral decisions? With whom do I have to consult in the school management?"***

Mr. Mosito's contention that applicant was accused of making "certain unilateral decisions" and taking "certain steps" without specifying what these unilateral decisions were and the steps complained of, amounts to elevating form over substance. In the first place applicant knew what was being complained of, for he was the one who was engaged in a tug of war with the Board about the administration of the first respondent, hence the questions he asked in Annexure "D". Secondly, the specificity he is yearning for is not essential as the body before which the applicant was to appear was not a court of law. To uphold his contention would amount to imposing trial-type hearing on first respondent's domestic administrative tribunal. The Court is satisfied that Annexure "C" sufficiently disclosed the conduct which applicant was invited to come and make

representations about. The other clarifications which he sought by his letter of 20th May, might well have been sought at the meeting.

In paragraph 6 of his Originating Application the applicant had also contended that his dismissal was unlawful because the reason for his dismissal is not covered by the Labour Code and that he was not given a fair hearing before his dismissal. Annexure "B" is the letter of dismissal of the applicant and it details some ten charges which form the basis of applicant's dismissal. In his address Mr. Mosito did not say how these numerous complaints of misconduct against the applicant fall outside the provisions of the Labour Code. In our view however, they squarely fall within the provisions of Section 66(1)(a) of the Code as they relate to applicant's conduct at work. With regard to the question of a hearing applicant was called to a hearing on 22nd May 1994 per Annexure "C", which was dated 18th May 1994. The applicant declined to attend that meeting because he felt it was too soon and he demanded that the third respondent should reply to his letter of the 16th May 1994 first.

Assuming that applicant received Annexure"C" on the same day that it was written, it gave him at least four days advance notice of the meeting. Indeed Mrs. Chimombe submitted in paragraph 4.1.4 of her heads of argument that since applicant leaves in Maseru where the letter was written it can be safely assumed that he received the letter on the same day that it was written. Assuming again that he received it on the 20th, which would suggest that he replied to it on the same day, he had at least two days advance notice of the meeting. Whichever be the correct date of his receipt of Annexure "C", the time it gave him was enough for him to prepare for the hearing. By not attending the meeting as he did, the applicant authored his own misfortune. He cannot therefore later be heard to say that he was not afforded an opportunity to be heard. In our view therefore this application ought not to succeed and it is accordingly dismissed.

THUS DONE AT MASERU THIS 8TH DAY OF JANUARY 1997.

L. A. LETHOBANE
PRESIDENT

A. T. KOLOBE **I CONCUR**
MEMBER

P. K. LEROTHOLI **I CONCUR**
MEMBER

FOR APPLICANT : MR. MOSITO
FOR RESPONDENT : MRS CHIMOMBE