IN THE LABOUR COURT OF LESOTHO

CASE NO LC 126/95

HELD AT MASERU

IN THE MATTER OF:

JONES MULENGA APPLICANT

AND

LESOTHO PHARMACEUTICAL CORPORATION RESPONDENT

JUDGMENT

It must be stated from the onset that closing addresses in this matter were made before only two members of the original three who constituted the panel, due to the untimely death of Mr Koung who was the workers' panellist. The decision arrived herein is therefore the decision of the two members who have appended their signatures sitting in terms of Rule 25 (2) of the Labour Court Rules 1994.

This case arises out of the suspension and subsequent dismissal of the applicant by the respondent corporation. Applicant alleges that he was verbally told of his suspension without any reasons being given, by the Principal Secretary for Health on the 30th November, 1993. He was written a formal letter of suspension on the 10th December, 1993. This letter was written by the aforesaid Principal Secretary, and it is annexed to the originating application as annexure "JM 5".

In the letter the Principal Secretary informed the applicant that;

> ***"..... on the basis of detected irregularities in procurement practices and other improprieties it has become imperative for the Board to suspend you from duty in order to protect the property of the***

> ***corporation and also to facilitate investigations of the charges against you".***

Several conditions attached to the suspension. For the purposes hereof we can only mention that the suspension was to be without pay and it was to last until the conclusion of the investigations. The applicant was also told in the letter that he had a right to make representations to the Board against his suspension if he so desired. Applicant did write a letter in exercise of this right. Once again for purposes of this judgment it suffices that of the several issues he talked about, we mention just two. Those were the following;

(a) that during his term of office he had never been cautioned either by the Board or the NDSC on any operation irregularities and yet even without having an audience with him his suspension had been implemented;

(b) that members of the Board should take note of the severity of the conditions attached to his suspension.

On the 8th March, 1994, the applicant wrote to the Principal Secretary again (annexure "JM 8" to the originating application) complaining about the delay in ending his ordeal. He told the Principal Secretary that up to the date of the letter he had waited for 98 days to see justice take its course and yet nothing was happening. In paragraph 4 (b) he stated that;

> ***"I learn unofficially, that an injury was finally commissioned, again, by no means was this immediate, nor was I, the accused, ever involved in the investigations, yet I also learn that the report of the findings has been finalised and submitted to the chairman. Once again I wish to register my strong reservations about the impartiality of the said report".***

In his letter of the 24th March, 1994 (annexure "JM 9" to the originating application) the Principal Secretary confirmed that the investigations had been completed at the end of February. He however, stated that the delay had been caused by the Board's inability to meet and consider the report. Thereafter nothing was heard from either side until 5th October, 1994, when the Principal Secretary wrote to the applicant telling him that the Board of Directors of the respondent had resolved to dismiss him retrospectively with effect from 1st December, 1993.

In his originating application, the applicant challenges the fairness of both his suspension and the dismissal. With regard to the suspension the applicant contends that it was unfair and unlawful because, the Principal Secretary suspended him in his capacity as such and not as Chairman of the Board of Directors. He went further to say that in writing the letter of suspension, the Principal Secretary does

not purport to act on any resolution of the Board of Directors and that the letter was written on the Ministry's letter heads instead of those of the Board.

In response Mr Molete for the respondent contended that the letter of suspension clearly state that the author has been directed by the Board to communicate the decision to suspend the applicant. This much is clear on the face of annexure "JM 5". What the Principal Secretary has done wrong is to sign himself in the letter as Principal Secretary and not as Chairman of the Board of Directors. In our view, however, this single lapse is outweighed by the contents of paragraph 2 of the letter, in which the Principal Secretary starts his first sentence with the words "*I am directed to advise.....*" and in the third line of that paragraph where he states; "*.....it has become imperative for the Board to suspend you from duty .....*". It is explicitly clear from this paragraph that the suspending authority is the Board of Directors. If the Principal Secretary was communicating the decision of the Board as the Court has found, he was infact communicating the Board's resolution. It would be a duplication to say in addition that the decision was the resolution of the Board.

In our view nothing turns on the argument that the letter of suspension was not written on the letter heads of the Board. As Mr Molete pointed out, even applicant's letter of appointment ("JM 3" to the originating application) was still written on the same letter heads as the one on which the letter of suspension was written and yet the appointment was not invalidated as a result.

The second ground on which applicant attacked the legality of his suspension was that the suspension was indefinite. Mr Molete on the other hand contended that the suspension was not indefinite because it was until the conclusion of investigations. Mr Matsau for the applicant sought to rely on the judgment of this Court in Edith Mda .V. NUL LC 14/94 (unreported) in which this Court held the suspension of the applicant to be irregular because it was open-ended. The Mda case is clearly distinguishable from the present case in that the University Rules governing suspension specifically provided that suspension could be imposed on an employee for a period not exceeding one month, which has not been shown to be the case with the rules of the respondent herein.

As Mr Molete correctly pointed out applicant's suspension was to last until the conclusion of the investigations. That is not an open-ended suspension, long though it may practically have proved to be. Accordingly therefore, we are not persuaded that there is merit in this argument.

Mr Matsau contended further that the respondent had no power to suspend the applicant unless his contract provided for it. Significantly, however, Mr Matsau gave the Court no authorities for this proposition; save to refer to Clause 16 of the respondent's Personnel Regulations and say that in terms of that clause a suspension may only be imposed on an employee as a penalty not pending

investigations as was the case in hoc casu. This argument has clearly lost sight of Clause 16.1.7 of the Regulations which provides that;

> ***"If it appears prejudicial to the interest of the corporation to allow an employee to continue in his post, the employee may be suspended from duty pending immediate inquiry".***

The question whether the respondent could suspend the applicant pending an investigation is clearly answered by this clause, for as an employee of the respondent the applicant was governed by these regulations. On the issue of whether in the absence of such a clause the respondent could suspend the applicant as it did, the answer will be found in the decisions of this Court in Anthony Qhojeng .V. LHPC Case No LC 145/95 at p.4 (unreported) and Tumisang Neko & 2 Others .V. LHPC Case No LC 138/95 at p.4 (unreported), where the Court held that unless specifically prevented by for instance, a statute, collective agreement or the employer's own in house rules it is within the employer's common law powers to impose a suspension on an employee when it is deemed necessary in the interests of the organisation.

Mr Matsau contended further that applicant's suspension was unlawful because he was not afforded a hearing. He conceded that where the employer shows urgency, such employer may be relieved of the duty to afford the concerned employee a hearing. He concluded that the Principal Secretary's letter of suspension does not show any urgency. Mr Molete in his answer contended that applicant was not given a hearing because it was necessary to act promptly to arrest further decay. In submissions before the Court he contended that Mr Matsau' s reasons for attacking applicant's suspension are relevant to a dismissal not suspension. He submitted that the burden placed on the employer in carrying out a dismissal is not equal to that placed on the employer who suspends an employee pending investigations.

What is clear is that the respondent concedes that the applicant was not afforded a hearing prior to suspension; they merely seek to justify why they could not give him a hearing. It seems to the Court that Mr Molete's submissions in Court on why the hearing was not given or why it was deemed not necessary are not sustainable in the light of the decision of this Court in the case of Thato Liphoto .V. Lesotho Agricultural Development Bank LC 21/95 (unreported) which was based on the ratio extracted from the South African Case of Muller & Others .V. Chairman of Ministers' Council, House of Representatives & Others (1991) 12 ILJ 761. In that case it was held that the rules of natural justice are not excluded in suspension cases because of the prejudice it entails to the suspended person. The basic principle is that employees of public bodies like the respondent who are empowered to make decisions affecting the existing rights of other employees exercise public functions and as such they are enjoined to act fairly. (See Koatsa Koatsa .V. NUL C. of A. (CIV) NO 12 of 1985).

That the applicant had to be afforded a hearing prior to the suspension is in the view of the Court not debatable in the light of the decision in the Liphoto case supra. However, as Mr Matsau correctly conceded it may be necessary to impose a suspension without a hearing for reasons of urgency. It was Mr Molete's contention that indeed there was urgency because it was necessary for the respondent to act promptly to stop further damage being caused. Whether there was urgency or not is a fact that is peculiarly within the knowledge of the Board. But urgency does not altogether dispense the need for a hearing to be held. Wade in his Administrative Law book 6th Edition at p. 566, submits that;

> ***"suspension without pay in particular may be a severe penalty and even suspension with pay may gravely injure reputation. In principle the arguments for a fair hearing are answerable, and if for reasons of urgency it cannot be given before action is taken, there is no reason why it should not be given as soon as possible afterwards".***

No suggestion was made that by inviting applicant to make representations if he desired the Board was affording him a hearing. Indeed it would be untenable to so suggest because the letter of suspension was silent on why applicant was being suspended, thereby making it impossible for him to address the pertinent reasons that resulted in his suspension. Furthermore, in his own letter of representations (annexure "JM 6" to the originating application), the applicant did complain in paragraph 4 that he had been suspended without any audience being had with him. Accordingly therefore, applicant was clearly not afforded a hearing either before or after the suspension and to this extent his suspension was procedurally irregular.

Applicant equally challenged his eventual dismissal from the employ of the respondent on the ground that it was effected without affording him a hearing. Respondent answered this contention by saying that the applicant was given a hearing by the investigating team. (See paragraph 12 of the respondent's answer Ad para 10.3). This contention is not supported by the uncontradicted facts before Court. In annexure "JM 8" the applicant wrote to the Principal Secretary stating, inter alia, that; he had learned unofficially that an inquiry was commissioned, which had already submitted its report to the Chairman and yet he as the accused was not in any way involved in the investigations.

In his letter of response, (annexure "JM 9") the Principal Secretary confirms the completion of the investigations and goes on to state that;

> ***"it also strikes me that you were not interviewed by the investigator. Despite this seeming flaw I reiterate my earlier assurance of a fair deal".***

Other than this admission by the Principal Secretary there has been nothing further to contradict applicant's assertion that the investigating team did not interview him. There is no dispute either in papers or in submissions before the Court that

annexure "JM 11" by which applicant was advised of his dismissal was also not preceded by any hearing. Clearly therefore, Section 66 (4) of the Code which requires that an employee be afforded the opportunity to answer any allegations against him before his dismissal was infringed. In the same way as the suspension the dismissal was procedurally unfair.

Mr Molete contended that even if the applicant was unlawfully dismissed in November, 1994, he has no claim to be an employee of the respondent after December, 1993, because his contract like all other expatriate staff had been extended up to the 30th December, 1993 and that thereafter applicant's contract was not renewed. He also contended that even applicant's suspension could not have lasted until the 5th October, 1994 when he was written a letter purporting to terminate his employment because his contract had infact expired on the 30th December, 1993. It was Mr Molete's contention, therefore, that even if the applicant succeeds on the contention that his suspension and dismissal were unlawful he should be entitled to no more that one month's salary, namely; the December 1993 salary when his contract terminated by effluxion of time.

In his originating application the applicant had relied on Clause 15 of the schedule to his agreement of service with the respondent which provides that five months prior to the completion of his twenty four months contract the employer shall give the employee notice in writing whether they desired him to extend his contract and that such extension would normally be for a further period of twelve months. Mr Matsau contended that when applicant' appointment as Managing Director was not renewed upon its termination in June, 1993 (which was the date of its expiry) it must be taken to have been tacitly relocated at least for a further period of twelve months to July, 1994. In our view this contention cannot be upheld. Firstly, the schedule on which reliance is being made is the schedule to applicant's agreement of service as Operations Manager. When he was later promoted to position of Managing Director no further reference was made to this schedule. Secondly, there is no proof of any kind that this schedule contains standard provisions which apply to all expatriate employees. Thirdly, there is nothing in the schedule to suggest that if an employer does not notify an employee five months prior to termination of the contract whether he desires to renew the employee's contract or not, then such contract would be automatically renewed for a further period of twelve months.

However, it does seem that after June, 1993 applicant's contract was extended because he continued in employment. As to how that was done it is not known to us. Annexure "A" to the answer is an extract of the minutes of the Board meeting. According to this minutes a member of the Board reminded the meeting that contracts of all expatriate staff were expiring in December, 1993. So, even the Board confirms that as of November, 1993 applicant was still on a validly extended contract. It is significant that the said Board meeting appointed a sub-committee to go and look into the expatriates' contract and "*.....make proposals for their renewal to the Board of Directors".*

Once again there is no evidence of what recommendations were made to the Board regarding the renewal of the contracts. Mr Molete stated, without adducing any evidence to that effect that all contracts were renewed except that of the applicant. What is clear to us is that applicant's contract like all expatriates contracts was of a fixed duration which was subject to renewal as is evidenced by the resolution of the Board to appoint a sub-committee to look into and make proposals on the renewal of contracts of expatriates staff.

In terms of Section 62 (3) a contract of fixed duration terminates automatically on the pre-set date of its termination. In such a case no notice is required. Section 68 (b), however, provides that the ending of a contract of a fixed duration which provides for a possibility of renewal amounts to the dismissal of the concerned employee. In other words a contract of fixed duration which provides for the possibility of renewal would require that all requirements relating to dismissal, particularly the audi alteram partem rule be complied with for its termination to be lawful. In the same way as in the case of dismissal, the concerned employee would have to be formally informed of the termination and the reasons therefor. Nothing of the sort happened in hoc casu; and it cannot just be assumed that the applicant's contract terminated when nobody told him it was. If anything, the respondents caused him to remain their employee beyond the termination date by suspending him beyond 30th December, 1993.

If no measures were taken to renew applicant's contract for a specific period as before, it then continued, but now as a month to month contract until lawfully terminated. The Principal Secretary's letter of suspension never qualified applicant's suspension as being until the end of December when his contract terminates, but it said it was until the conclusion of the investigations. In the premises we are of the view that Mr Molete's contention that applicant's contract expired in December, 1993 has no substance. He was an employee until when his contract was purportedly terminated by letter dated 5th October, 1994. The Court has already found that this dismissal was procedurally unfair and it therefore cannot be allowed to stand.

AWARD

For the reasons canvassed in the judgment both the suspension of the applicant and his subsequent purported dismissal are declared unfair, unlawful and of no force and effect for non-observance of the audi alteram partem rule. In the premises applicant's prayers are granted as follows;

(a) The respondent shall pay applicant his monthly salary for the whole period when he was purportedly suspended until when he was purportedly dismissed, namely; 1st December, 1993 to 5th October, 1994.

(b) **In terms of the contract of service applicant was entitled to three months period of notice of termination of his contract or payment in lieu thereof. Accordingly the respondent shall pay applicant three months' salary in lieu of notice.**

(c) **Payments under both paragraphs (a) and (b) shall be calculated at the rate of applicant's remuneration at the time of his purported suspension.**

(d) **Applicant has claimed that he is entitled in terms of Clause 7 of his conditions of employment to claim payment of gratuity calculated at 25% of his annual salary. The period for which he claimed gratuity is September, 1992 when he was made Managing Director to January, 1995, which would include the three months notice period. This claim was not opposed by the respondent. However, in the light of the fact that applicant was no longer in respondent's employ after the 5th October, 1994, but instead was serving another employer with effect from 11th November, 1994, the Court is of the view that no gratuity need be paid to him for that period. The three months for which the respondent has been ordered to pay him in lieu of notice does not restore him to the service, it simply lawfully terminates the contract in terms of the agreement of service. Accordingly therefore, the respondent shall pay applicant his 25% gratuity for the period 28th September, 1992 to 5th October, 1994.**

(e) **Applicant's claim to payment of leave ".....during the period of his employment to lawful termination thereof....." is not clear because in terms of the law employees ought to take their leave. Where it has not been taken clear evidence of that as well as the alternative arrangements made should be availed to the Court. In the absence of such evidence the Court is left with no alternative but to disallow the claim.**

(f) **There is no order as to costs.**

THUS DONE AT MASERU THIS 7TH DAY OF APRIL, 1997.

L.A. LETHOBANE
PRESIDENT

A.T. KOLOBE **I AGREE**
MEMBER

FOR APPLICANT: **MR MATSAU**
FOR RESPONDENT: **MR MOLETE**