

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 133/96

HELD AT MASERU

IN THE MATTER OF:

LIKANO TSIU

APPLICANT

AND

LESOTHO AGRICULTURE DEVELOPMENT BANK RESPONDENT

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## JUDGMENT

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The applicant herein is the manager of the Maseru Branch of the respondent. This application arises out of his alleged suspension by the Board of Directors of the respondent on or about 4th July, 1996. The respondent denies that the applicant was suspended. According to them the applicant was sent on mandatory leave per the instruction of the sole shareholder of the respondent, namely; the Government of Lesotho. It has been Mr Matsau's contention that the so-called leave is nothing but a suspension.

In papers before Court the applicant challenges the mandatory leave/suspension on essentially four grounds. Firstly, he argues that he was not given a hearing. Secondly, he contends that in sending him on leave/suspending him as it did the Board abdicated its power in contravention of Section 8 (1) of Act No.5 of 1976 by allowing itself to be dictated upon by the Government. Thirdly, he averred that in terms of the respondent's Personnel Regulations a suspension can only be imposed following a disciplinary hearing. Fourthly, he argued that in terms of the Personnel Regulations only the Managing Director could suspend him, not the Board. In the view of the Court only two issues are relevant for the determination of the fairness or otherwise of applicant's suspension/leave.

Before attempting to address those issues, however, it is essential to give a brief summary of the facts in so far as they are relevant for the determination of the

issues before the Court. On the 4th July, 1996 the Board of Directors of the respondent convened an extra-ordinary meeting. The meeting was informed that the Government of Lesotho, which is the sole shareholder of the respondent intended “..... *to implemented recommendations contained in the 1995 Management Audit Report prepared by a Maseru firm of Auditors, Peat Marwick (and that) the shareholder had found it appropriate to implement the recommendations in the absence of certain top Management of the Bank*”. (See Annexure “BD 1” to the originating application at p.2).

According to the minutes of the extra-ordinary meeting (annexure “BD 1”) it had always been the intention of the Government that the recommendations be implemented in the not too distant future. However, the events which took place during the week of the 4th July had persuaded the Government to move swiftly and urgently in implementing the recommendations. The meeting was informed that reports reaching the Acting Minister of Finance at the time indicated that “.....*certain top Bank Managers were planning to burn Bank files which contained information of value to the Bank and to the shareholder; and that to carry out that mission, Chubb filing cabinet keys which were normally in the custody of a certain Mr Lethusang Maliehe had been seized from him by the Maseru Branch Manager, Mr Likano Ts’iu*”. This is the same Ts’iu who is the applicant in this matter.

Annexure “BD1” shows that after being given this information, the Chairman read the names of the Managers the shareholder wished to grant leave for at least three months. There were four persons in all. The persons so named “..... *were all called into the Board meeting and were all advised that a handing over should be carried out with immediate effect*”. The Chairman of the Board invited the named officials to make suggestions and/or representations, but the officials simply asked for letters directing them to proceed on leave. (See p.3 paragraph 4 of Annexure “BD1”).

In the view of the Court it is pertinent to decide first the issue whether the applicant’s leave is infact a suspension as the applicant had contended. It is common cause that the applicant’s leave was with full pay and no loss of benefits. In the view of the Court to attempt to distinguish between suspension and mandatory leave amounts to splitting hairs. A suspension is essentially a leave that is given to an employee without him requesting for the same and so is the mandatory leave which the applicant was ordered to take. Suspension may be with or without pay and it is normally applied when there is a suspected mischief or as a penalty following disciplinary action. In the same way the applicant was given compulsory leave because there was a fear that he was involved in a conspiracy to destroy certain records containing valuable information. Clearly therefore, whether what the applicant was given was termed leave, is immaterial because it had all the essential elements of a suspension and we do find it to have been a suspension.

Now coming to the issues raised by the applicant, we start first with a hearing. It was Mr Matsau's contention that the applicant was suspended without a hearing on the 4th July, 1996 and that even when his suspension was extended on or around the 14th October, 1996, that extension was not preceded by a hearing. In its answer the respondent admitted that the applicant was not given "sufficient prior notice" and went on to say that in view of the urgency and volatility of the situation created by the reports that the bank's property was in danger, it was not necessary to give the applicant any prior notice. (See paragraph C and H of the answer). Regarding the extension of the suspension the respondent again confirmed that the applicant was not given a hearing and went on to say since the Board was implementing the directive of the Minister to extend applicant's suspension it was not necessary for the Board to convene a hearing prior to complying with the directive of the Minister. (See paragraph R of the answer).

In his submissions in Court, however, Mr Van Tonder sought to contradict the contents of his answer by arguing that the applicant was in fact given a hearing. He contended that as the minutes of the Board meeting show the applicant and his colleagues were invited to make representations and they declined the opportunity. A proper reading of the minutes (Annexure "BD 1") will show that the details regarding the reasons for the suspension of the applicant were communicated to the Board in the absence of the applicant as he was not a member of the Board. He was only called into the meeting to be informed of the decision to suspend him after the Board members had been told why the Government wanted him to be temporarily put aside. This also clearly appears in paragraph 4.2 of the applicant's founding affidavit and it is admitted by the respondent in its answer under paragraph B. It was clearly making a mockery of the rules of natural justice to ask applicant to make representations on what he did not know. No hearing can be said to have been given in the circumstances.

It is common cause that subsequent to the extra-ordinary meeting of the 4th July, applicant was written a formal letter which advised him of his suspension on the 8th July, 1996. Other than to inform the applicant that he was to proceed on a three months leave, during which period consultants would be brought into the bank to implement the recommendations of the 1995 Management Audit Report, the letter maintained a deathly silence on why it had become necessary to implement the recommendations, in the absence of the applicant. On the 24th September the applicant was again written a letter which advised him of the Government's desire to have his leave extended indefinitely and was invited to appear before the Bank overseer to make representations. By letter of the 7th October, applicant was informed that he was in fact to make representations before the Board. Applicant, correctly in our view, declined to appear before either the Bank overseer or the Board. It seems that just like in the previous suspension applicant was just being invited to make representations without being informed on what he was to make representations. Ironically, however, the Board knew fully well why the shareholder had said that applicant be relieved of his duties for a while and yet they

meticulously kept this information away from him. In such circumstances there was, once again no way in which the applicant could make representations. Accordingly therefore, even this so-called extension of applicant's leave was improperly done as once more no hearing was afforded to the applicant.

It was applicant's further contention that in any event, the Board had no authority to suspend him and that in terms of the Personnel Regulations only the Managing Director had such an authority. The Court was referred to the case of LTC .V. Thahamane Rasekila C. of A. (CIV) No. 24 of 1991 (unreported). Where the Court of Appeal upheld the decision of the High Court to reinstate the respondent because the Board of Directors instead of the Managing Director had dismissed the applicant, contrary to the Personnel Regulations.

Mr Van Tonder for the respondent did not dispute that the applicant was suspended by the Board. He, however, sought to distinguish the Rasekila case from the instant matter by arguing that in the present case the Board had to do the functions of the Managing Director under the regulations, because there was no Managing Director as he had also been suspended or sent on leave. By so arguing Mr Van Tonder was clearly not denying that under the respondent's Personnel Regulations it is only the Managing Director who is empowered to suspend the applicant.

As the Court of Appeal held in the Rasekila case, it was a clear breach of the Personnel Regulations for the Board of Directors to suspend the applicant because only the Managing Director could do so. The argument that there was a vacuum is not sustainable because the Managing director did not go on leave with the office. Indeed the Personnel Regulations empower him to "..... delegate any management level employee of the bank to exercise any of the powers..... of the Managing Director under the regulations". On these two grounds alone applicant's suspension was a nullity as it was carried out in breach of the regulations and in violation of the rules of natural justice.

Because of the heavy reliance that was made by the respondent on Section 7 (1) of the Lesotho Agricultural Development Bank Act No.5 of 1976 in its answer, the Court is of the view that some comment is necessary. It was the respondent's contention that when it suspended the applicant as it did, the Board was carrying out the directive of the Minister given in terms of Section 7 (1) of the Act which provides that;

*"7(1) The Minister may in relation to the exercise by the Bank of its powers under this Act, give such general directions to the Bank as appear to be necessary in the public interest and the Bank, shall, subject to Sub-section (2), comply with those directions".*

The Act does not define who the Minister responsible for its administration is. Be that as it may, in the view of the Court Section 7 (1) refers to the exercise of the powers of the Bank under Part II of the Act. These are the general policy objectives of the Bank not specific powers of appointment and termination of staff which have in terms of the regulations been delegated to the Managing Director. If the Minister seeks to influence an appointment or termination of a member of staff, he is obliged to do so through the Managing Director and not directly. Indeed as Mr Matsau correctly submitted in our view, the word “directions” which is used in Section 7 (1) relates to giving policy guideline not an instruction, which is what a “directive” is. We are fortified in this view by the definition of these two terms in The Concise Oxford Dictionary. “Direction” is defined in meaning 3 as follows “*3a; the course or line along which a person or thing moves or looks, or which must be taken to reach a destination. b;(in pl) guidance on how to reach a destination*”. Since the word is used in the plural in Section 7 (1) clearly the meaning which best suit it is the one in 3b. “Directive” on the other hand is defined as “*a general instruction from one in authority*”. The respondent clearly misconstrued the meaning of Section 7 (1) when it saw it as a blank cheque to the Minister to direct them on the daily running of the Bank; which is the function of the Board, with disciplinary control delegated to the Managing Director. This argument could not therefore save the respondent.

## **AWARD**

In the circumstances the Court makes the following award:

- (a) The purported suspension/leave of the applicant on the 4th July, 1996 and the purported extension thereof on the 17th September, and/or 12th October and/or 14th October, 1996 by the Board of Directors of the Respondent is declared a nullity and it is set aside.
- (b) The respondent is directed to allow the applicant to resume his duties with the Bank with immediate effect.
- (c) This not being a case of unfair dismissal Section 74 (2) of the Code regarding restriction on imposition of costs, has no application. Accordingly the respondent is ordered to pay the costs of this application.

**THUS DONE AT MASERU THIS 9TH DAY OF APRIL, 1997.**

**L.A LETHOBANE**  
**PRESIDENT**

**T. KEP A**  
**MEMBER**

**I CONCUR**

**M. KANE**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR MATSAU**  
**MR VAN TONDER**