IN THE LABOUR COURT OF LESOTHO

CASE NO LC 132/96

HELD AT MASERU

IN THE MATTER OF:

TEFETSO MOTHIBE APPLICANT

AND

NATIONAL UNIVERSITY OF LESOTHO RESPONDENT

JUDGMENT

The applicant herein is a lecturer at the respondent university. In August 1988 he went to the United States of America to pursue a doctoral degree in History pursuant to the respondent's Localisation and Training Policy. The supreme governing body of the respondent is the Council. In June 1989 the Council adopted a resolution that staff in training be financially supported in order to enhance training and retention of staff. This resolution entailed payment of 100% dependents allowance to staff on study leave, payment of travel expenses for staff members' family where a staff member wanted the family to join him and payment of health insurance where a staff member's scholarship did not cover it, to mention some.

In his testimony the applicant avers that in 1991 he came to Lesotho to conduct research. When he was due to return he approached the Registrar of the respondent to request that he "...should be the beneficiary of this Council decision." He stated further that his request was successful as the Vice Chancellor approved payment of air-tickets for members of his family as well as their medical insurance. However, the costs of the tickets was to constitute a loan to the applicant until the end of the financial year in June 1992. The loan was to be written off against the next financial year's budget, when it was hoped the University's financial position would have improved. The applicant handed in Annexure "TM2" as confirmation of his testimony. Applicant contends that the loan was never written off and the

deductions have continued to be made from his salary until at the time of launching these proceedings.

The respondent's version substantially corroborates the applicant's story, save for very few instances. In particular the respondents state that the decision was taken subject to the availability of funds, which had not yet been allocated by Government. They state further that the Council did not even inform staff of this decision because it was not yet in force and that it was infact never implemented due to lack of funds. However, the lecturers applying for the benefit were authorised to take loans which if Government was willing to fund would be written off, the respondents stated.

The applicant also testified and the respondent did not deny it that when he was due to return from the United states the respondent failed to provide him with money for the return air-tickets of members of his family. he had to raise money from friends to be able to buy the tickets. The applicant thus seeks an order directing that the respondent writes off the loan and repay him what has been deducted from his salary up to date. He further seeks an order directing the respondent to repay him the money spent for the purchase of the return air tickets for members of his family from the United States.

Mr. Phafane on behalf of the applicant argued strongly that there is no merit in respondent's submission that the Council's decision was passed subject to the availability of funds. He handed in "TM1" which is minutes of Council's Meeting of 8th June 1989 where the decision was taken. He further pointed to the letter ("TM2") written to the applicant by the Registrar of the respondent approving his request to be financially assisted so that he could take his family with him to the U.S. Both these Annexures Mr. Phafane argued, do not support the argument that the decision was made subject to the availability of funds.

The University is the creature of statute vide Order No.9 of 1992 (the Order). It is as such a public authority which, as Baxter puts it in his Administrative Law 1984 Juta & Co. at p.384,

> ***"possesses only so much power as is lawfully authorised...."***

It seems to this Court that nothing turns on whether Annexures "TM1" and "TM2" specifically state that the decision was conditional upon availability of funds or not. The issue is whether having lawfully carried out the decision as it is apparent was the case, the University was capable of implementing it in the absence of funds specifically budgeted for it?

The view that we hold is that the Answer to this question must be in the negative. Section 38 of the Order provides as follows:

> ***"38. The Council shall:***
>
> ***"(a) in each year adopt for the next year, commencing of (on?) the first day of July, a budget for all funds of the University other than those to which paragraph (b) of this section relates, and shall approve all amendments to the budget and shall control the expenditure of the University so that it confirms (conforms?) as nearly as practicable to the approved budget.***
> ***"(b) review annually funds available to the University by way of bequest, donation or special grant, and the expenditure thereof and shall subject to the terms of any trust and before any such expenditure is made, approve the proposed disposition of those funds."*** **(emphasis added).**

Clearly, even if the respondent, in adopting the resolution that it took, it did not specifically state that the resolution could only be implemented if funds were available, that conditionality was imposed by the Order which established the respondent. There is no evidence either viva voce or documentary before court to show that the Council ever adopted a budget to finance the implementation of the resolution in question as is envisaged in Section 38(a). Neither is there any evidence to prove that the Council ever approved a proposal for the disposition of funds bequeathed or donated to the University, or funds otherwise available to the University through a special grant, to finance the implementation of the resolution as it is envisaged in Section 38(b) of the Order.

The applicant is himself a witness to the foregoing proposition because when he applied for the extension of the benefits of the resolution to himself he was instead given a loan. In his evidence he states clearly that this was done because he had applied in the middle of the financial year. Did the University subsequently make budgetary arrangements to finance the scheme in the financial year starting July 1992 and in the years that followed? This is the question the applicant should have answered, but he did not. In their Answer the respondent said the resolution was never implemented due to lack of funds and that even the staff were never officially informed of it. Save for alleging under cross-examination that the current budget for the scheme is M2 million the applicant did not deny that as at the time that he was on study leave there were no funds to implement the scheme. Indeed under cross-examination the applicant admitted that he learned of the resolution through another member of staff who was the member of the Council not the University; and that since he did not know the budget of the University he should have accepted when the respondent said it did not have money.

Applicant averred that when he was due to return from the U.S. he again approached respondent for money to buy the tickets for his family. He testified that the money never came despite being promised by a Mrs. Mosaase that the money had been sent to him. At the end he had to ask for help from friends and it was only then he was able to buy the tickets. Applicant testified further that he spent $3032-00 US dollars on the tickets for which he is now seeking reimbursement.

We have already observed that the respondent has said that the resolution was never implemented due to lack of funds. Applicant himself finally conceded respondent's plea that it never had funds to implement the scheme. The applicant took his family to the U.S. on the hope that the resolution in terms of which the respondent would cater for their travel costs would be implemented. However this was never to be. The respondent cannot be made to pay for a scheme that it has not yet implemented. Applicant alone should bear the consequences of the risk he took by taking his family to his place of study under the terms of a scheme which was only in the planning stage. Accordingly the claim for refund of the cost of the tickets cannot succeed.

Applicant's further contention was that the respondent should write-off his loan and repay him what he has paid to date in accordance with the terms of Annexure "TM2" which stated that the loan would be written off at the end of the 1991/92 financial year. For a clearer understanding of this contention, it will be helpful to quote the conditionalities of "TM2" in full. Annexure "TM2" communicated to the applicant the Vice-Chancellor's approval for payment of air tickets and medical insurance for members of his (applicant) family on the following understanding:

> ***"1. that because of the unfavourable financial position of the University presently, the costs of the tickets for the present period up to the end of the financial year in June 1992 shall constitute a loan to yourself;***
>
> ***"2. that this loan referred to in sub-paragraph (1) above, including repayments you may already have made at that time, shall be written off by the University against next financial year's budget when hopefully, the financial position shall have improved."***

The applicant handed in an extract of minutes of the Council Meeting of 14th November 1994 ("TM5") wherein the issue of his reimbursement was discussed. He testified that in that meeting The Council did not deny its liability to him save that it stated that it was bankrupt.

Mr. Molete for the respondent contended that it is incorrect that Council admitted liability to the applicant and objected to the minutes of Council being presented as evidence. While we agree with Mr. Molete that the minutes being relied upon do not show any admission of liability to the applicant, we cannot agree with him that the said minutes could not be presented to court as evidence. The said minutes were handed in under oath and there was neither an objection to their being handed in nor an opposition to them as a true record of what was discussed at the meeting.

Mr. Molete further argued that Annexure "TM2" merely speak of "write-off" and says nothing about reimbursement. He argued further that write-off is canceling and not repayment. He conceded however, that at best the applicant would only

claim that the respondent had agreed not to continue deductions. In our view this is where the crux of the issue is.

We are in full agreement that write-off does not entail repayment unless accompanied by an express provision to that effect. The Concise Oxford Dictionary defines "write-off" as meaning to, "2 cancel the record of (a bad debt etc.); acknowledge the loss of or failure to recover (an asset)." What this means is that as at the next financial year the respondent would cancel the loan to applicant and regard it as a bad debt to itself and that whatever applicant would have paid in servicing the loan would be cancelled and the applicant in turn regard it as a bad debt to himself. There is therefore, no question of applicant seeking reimbursement for what he paid prior to the 1st July 1992.

Respondent adduced the evidence of Mr. Putsoa the respondent's Bursar who testified that the writing off of the loan was subject to the financial position of the respondent improving. In support of this averrement, the respondent handed in Exhibit 1, which is the letter written by the Vice Chancellor to the Registrar in which he had stated in part;

> ***"I write with reference to your letter addressed to Mr. Mothibe in connection with the issuance of tickets to his family. Your letter is substantially correct, except to say that if as a result of financial stringency we are not able to provide allocation to cater for all those eligible for the same privilege, (including of course Mr. Mothibe's family) the recovery of the loan will continue. I thought I should make this quite clear."***

Mr. Putsoa stated that in his understanding the Registrar should have warned the applicant of the contents of this letter.

Under the pressure of cross-examination, Mr. Putsoa had to concede that he had no knowledge if the Registrar did infact inform the applicant of this latest position emanating from the Vice-Chancellor. It is clear that the letter having not been copied to the applicant he (applicant) could not be expected to know of its contents unless the Registrar forwarded it to him or wrote him another letter to inform him of its contents. In the premises Exhibit 1 is not helpful to the respondent's defence to applicant's claim of an entitlement to the write-off of the loan as at 1st July 1992.

Even though neither Counsel raised this issue it is pertinent in our view to decide whether the respondent had the power to cancel the loan advanced to the applicant in the light of the provisions of Section 38 of Order No.19 of 1992 which we considered earlier. Section 35 of the Order provides:

> ***"35(1) All fees and all other monies received by The Council under this Order or otherwise shall be applied by the Council for the purposes of the University.***

"(2) For the purpose of this section, the application from time to time of moneys by the Council for the purpose of,

"(a) enabling a member or former member of the University to pursue study or research at the University or elsewhere than at the University;

"(b) the advancement of learning generally;

"(c) .....
"shall be deemed to be an application of those moneys for the purposes of the University."

The relevant minute of the Council's Meeting which adopted the resolution stated that the resolution was "....calculated to support financially staff in training and to enhance training..." (see minute 1.1.2.8.1 of Council Minutes of 08/06/89 - "TM1"). In our view the Registrar's letter ("TM2") was within the four corners of Section 38 of the Order read with Section 35, in as much as the funds loaned to applicant were for the purposes stated in Section 35 sub-section (2) paragraphs (a) and (b). The respondent therefore, wrongly continued to deduct money from applicant's salary after June 1992 because that loan had by agreement since been written-off.

Mr. Molete argued that should the applicant succeed in his claim for reimbursement, it is confusing what amount the applicant is entitle to because the deductions reflected in the payslips applicant handed in (Annexure "TM3") include also deductions for other small debts and loans. Furthermore, he contended, the applicant has come up with two different figures of what he is owed, both of which differ from the respondent's own figure. He therefore, suggested that it would be better for the court to order that calculations be based on respondent's records.

This matter was previously sought to be amicably settled and the court ordered the parties to go and quantify and submit the sum of money the respondent had already deducted and which was due to the applicant. The settlement fell though because the parties could not agree on the amount. We do not however believe that there is a likelihood of confusion regarding the amount applicant is entitled to.

In his own testimony the applicant sought to explain the discrepancy in his figures. He admitted that at one point he claimed M19,000-00 while at another he claimed M14,950-00. He explained that the discrepancy was caused by his having calculated the deductions on a constant figure of M500-00 and yet there were some months when a lesser figure was deducted after Council Meeting of 14th November 1994 voted to lower his monthly installment. He agreed that there were deductions in respect of other debts but these deductions have been shown separately.

Mr. Phafane argued, and we are in full agreement, that whatever is owed to the applicant as a consequence of the wrongful deductions from his salary is peculiarly

within the knowledge of the respondent. The pay slips are the record of the respondent, as such there is no reason for them to conflict with the records in the possession of the respondent. In any event all deductions have been shown separately and what they are for. In the premises we do not agree that there will be confusion as alleged, as what amount is due to the applicant. It should easily be discernible from the records in the possession of the respondent including the payslips in the possession of the applicant (Annexure "TM3") what amount has been deducted from the applicant since July 1992 to date, for the purpose of repaying the loan. Accordingly the prayers of the applicant are granted as follows:

(a) The respondent is directed and ordered to write-of the loan for the time being given to the applicant in 1992.
(b) The respondent is ordered to reimburse the applicant the money that he repaid to service the loan since 1st July 1992 to the date of judgment.

(c) Costs of suit.

THUS DONE AT MASERU THIS 9TH DAY OF MARCH, 1999.

L.A LETHOBANE
PRESIDENT

P.K. LEROTHOLI
MEMBER **I AGREE**

K.G LIETA
MEMBER **I AGREE**

FOR APPLICANT : **MR PHAFANE**
FOR RESPONDENT: **MR MOLETE**