IN THE LABOUR COURT OF LESOTHO

CASE NO LC 23/97

HELD AT MASERU

IN THE MATTER OF:

JAMES A. INGRAM — APPLICANT

AND

TRAINING & RURAL DEVELOPMENT CONSULTANTS (PTY) LTD — 1ST RESPONDENT

INTERSCIENCE SERVICES (PTY) LTD T/A LOXTON VENN & ASSOCIATES — 2ND RESPONDENT

JUDGMENT

The applicant was employed by the second respondent as Centre Supervisor for the first respondent. The second respondent is a South African company. The first respondent is a Lesotho company which is the joint venture between John Addis and Associates (JAA) and Loxton Venn & Associates (LVA) which is the trading arm of Interscience Services (Pty) Ltd. None of the two companies which merged to form the first respondent have a separate legal existence in this country. Applicant was employed by the parent company, Interscience Services (Pty) Ltd which then seconded him to work as the seconded LVA consultant to contract 530 as supervisor of the first respondent based at Thaba-Tseka.

In 1994 the Lesotho Highlands Authority had invited proposals for a project for award of contract 530 which was for training and income generation for seriously affected persons in the Highlands Water Project area. LVA and JAA had entered into a joint venture (the first respondent) to bid for the project which bid was successful. However, the contracting parties according to the evidence of Mr.

Ingram were Interscience Services (Pty) Ltd & JAA with the first respondent being their trading name.

In January 1995 the first applicant was awarded the contract which was to begin in February 1995. The applicant was offered his contract as Centre Supervisor in March 1995. But as stated the contract was between him and the holding company namely, Interscience. Sometime in June 1996 applicant allegedly had a car accident en route to Thaba-Tseka which forced him to return to Maseru. He contacted his employers who informed him to stay in Maseru and that he should meet with two directors of the first respondent Mr. John Addis and Dr. John Rutherford on the 26th June 1996 at the Lesotho Bank building.

The three did meet as arranged and the applicant avers both in his Originating Application and in evidence in chief that when he entered the room where the meeting was going to be held John Addis said he did not like him and he did not like him back at the Centre in Thaba-Tseka. When he turned to Dr. Rutherford to get clarification of what all this was about, Dr. Rutherford asked him to resign. When he refused he told him he had two options to dismiss him outright or to hold a disciplinary hearing.

The respondent however, denies that the meeting had anything to do with applicant's accident. They aver in paragraph 9 of the Answer that the meeting with applicant was to discuss his (applicant's) position as Centre Supervisor and his performance as Centre supervisor as well as the progress with the Rural Development Project. They deny the remarks ascribed to Mr. John Addis. They attached annexure "C" to the Answer which is the handwritten notes of the discussion which were kept by Dr. Rutherford. Whilst admitting that off the record they suggested to applicant to consider least painful option of resigning with notice, they deny the rest of the allegations and stated instead that at the meeting the applicant was advised of a formal internal disciplinary hearing to investigate charges of non-performance and disloyalty towards the project.

Applicant states that after the meeting he was served with annexure "B" to the Originating Application being notification of disciplinary hearing which was to be held within the following seven days, with the details of the charges annexed to the letter of notification. In our view this lends credence to respondents' averment that the meeting was not concerned with applicant's accident, because the detailed nature of the charges show that the charges had been framed before that meeting. What it does not say however, is whether applicant knew beforehand what the meeting was going to be about. In our view however, nothing turns on whether applicant knew what the meeting was about because as it would seem, the meeting was purely to inform him of the charges and to suspend him from visiting his office at Thaba-Tseka.

On the 28th June applicant was informed per Telefax message that the hearing would be held on the 4th July 1996 at Midrand, Johannesburg in South Africa. He was further informed that accommodation and travelling costs for him and his representatives would be borne by LVA and that;

> ***"You may request from us relevant documentation/evidence from RDC which you require for your defence at the hearing. We will consider your request and where appropriate ensure that, such documentation/evidence is made available to you." (Annexure "C" to Originating Application).***

In his evidence in chief applicant avers that the above letter (annexure "C") reached him on the 30th June 1996.

Applicant avers that he was not allowed to review documents relating to the hearing prior to the date allocated for the hearing and that he was prevented from going to Thaba-Tseka to speak to his witnesses. He refers this court to annexure "C" to the answer in support of this claim. It is his contention that he had to answer the charges preferred against him without relevant documents. We have herein quoted a letter of notification of disciplinary hearing which advised the applicant that he could request from the respondents, documents relating to evidence he would require at the hearing. It is therefore incorrect to say he was not allowed access to the documents because it had been made clear to him that documents he needed would be made available on request.

Furthermore, applicant has himself stated that at the end of the interview with the disciplinary committee "(he) was given an opportunity to replay in writing to each and everyone of the new allegations against him. He replied as per annexure "H" hereunto attached which is self-explanatory." (see paragraph 18 of the Originating application). It must however, be stated that according to the record of the proceedings PP. Nos. 103-106 it was not the new allegations that were to be answered with the aid of the documentation, the applicant had himself suspended responding to some of the charges claiming that he needed to review documentation. This opportunity he was granted and in the meantime no decision was made by the chairman. It was furthermore, the instruction of the chairman that applicant's response after seeing the documents must be "...in writing so it's clear what your meaning is." (p.104 of record of proceedings). As for the so-called new allegations, the applicant himself declined to respond to them on the basis of the documentation alone and contended "I would definitely want a record of the minutes before I could go through the new allegations." (see p.177 of the record).

With regard to being prevented to visit the site and speak to the witnesses, we accept the respondent's denial that they never prevented applicant from speaking to witnesses. In his evidence in chief applicant testified that he was still able to speak by telephone with the likes of Mr. Long who was still at Thaba-Tseka. Mr. Long told him he was not able to assist him with evidence he needed because he was going

to testify for the respondents. Annexure "C" which the applicant sought to rely upon to support the allegation, merely informs applicant that the respondents "...have been advised by LHDA and other parties that you are circulating unsubstantiated rumours to third parties to the effect that you have been "fired" and that you have been used as a scapegoat." The respondent through Dr. Rutherford simply warned applicant against this conduct. Another letter annexed to applicant's papers which is neither marked as an annexure nor stamped in terms of the rules, which prevents applicant from interfering with respondent's client, the LHDA about contract 530, is dated 10th July 1996, which is approximately a week after the hearing. Even if the applicant might want us to believe that even at that time he was still soliciting witnesses, the letter merely warns him against soliciting information pertaining to contract 530 directly from LHDA which is respondent's client. This the respondent is entitled to do to protect its contractual relationship with the LHDA, but it did not amount to preventing applicant from finding persons to testify on his behalf. However, the LHDA in a separate communication to the applicant dated 3rd July, 1999 (annexure "F" to Originating application) declined applicant's request for LHDA i.e. its staff to sit in as witnesses in the disciplinary hearing. They stated that "unfortunately contractual obligations with Messrs Training and Rural Development Consultants (TRDC) does not allow LHDA to sit in such forums, and besides we take the mater at hand, to be entirely internal, and needing to be resolved within TRDC."

It is not unusual for employees to be suspended from visiting their offices during investigations leading to disciplinary proceedings. We entirely endorse Mr. Buys' submission in paragraph 17 of his submissions that applicant could not just be allowed uncontrolled access to project records and premises after a decision was taken that he was going to be disciplinarily charged. The respondents were not acting unreasonably in imposing the restrictions but as it turned out applicant was not prejudiced beyond remedy because he still had access to speak to witnesses by phone and he was allowed access to the records he needed for his defence.

Applicant alleges further that even though he was given access to the papers they were no longer of value because he could no longer cross-examine witnesses called in support of the conviction. It must be stated from the outset that when applicant was allowed to go home and at his leisure review the documents he had requested, he had not yet been convicted. He had ample opportunity therefore, to ask for the recall of those witnesses that he needed to ask question after seeing the documents. Furthermore, he was to make written responses to the allegations on the basis of information gleaned from the documents. He had all the chance to refute the evidence of witnesses in the written submissions he made on the basis of the information coming to light after reviewing the documentation. We are therefore, not persuaded that the documents were no longer of value when he was allowed to see them as he alleges.

It is common cause that the applicant submitted the list of the documents he would need on the 3rd July when the hearing was to be on the 4th July. It was a fairly long list of documents, but according to the respondents, virtually all the documents were available at the hearing "...apart from one or two small things such as the bank deposit book which I have taken note of, but everything that he requested is available here..." Clearly therefore it can safely be concluded that applicant denied himself the opportunity to see the documentation he needed for his defence before the hearing by submitting the list on the eleventh hour, regard being had to the fact that he had become aware of the charges against him on the 26th June 1996. However, throughout the hearing the applicant asked for the second hearing, presumably because he did not have documents before him then. He was afforded that second hearing when he was given all the documents he needed to go and make written responses to all the allegations against him. He responded in a 27 page typed document to each and every one of the allegations. We are satisfied that there was up to this stage substantial compliance with the principle of a fair hearing.

Applicant averred in his Originating Application that some of the charges he was confronted with were new. He never specified what these charges were. Even during his oral testimony he never informed this court as to which are those new allegations which he was unfairly confronted with at the hearing. Pages 177 – 178 of the court record (p106 – 107 of the record of the disciplinary hearing) is where applicant's claim that there were new allegations is debated. What is clear is that it was applicant's own view, which was not accepted by all in the hearing that there were new allegations. It was therefore his duty to detail to this court those new allegations.

In his written submissions the applicant has made reference to only one allegation which he regarded as new. This is the issue which concerned the handover of houses under 174A contract which according to respondents was not properly supervised by the applicant even though it fell under his responsibility. This was raised as further evidence, not a new charge, that the applicant was grossly negligent and/or incompetent in his duties as he had been with the snag list with which he was specifically charged for failing to complete and hand them over to the owners timeously. As it would have been expected, applicant was not convicted on the example cited to substantiate the charge, but only on the issue with which he had been specifically charged, namely, failure to complete the snag list on schedule.

Applicant avers in paragraphs 20 and 21 of his Originating Application that on the 15th July he was served with a letter of recommendation from the chairman of the disciplinary committee, but was never subsequently served with a letter of termination of his services. He avers further that "this notwithstanding, it is applicant's contention that he had been forced to leave his employment by the respondents as it was clear that the respondents no longer liked him and could not permit him back." This averrement insinuates a claim of constructive dismissal but the applicant has not established such a case either in papers or in evidence.

In his oral testimony he averred that in his opening remarks the chairman had said he would make recommendations to the Executive of the second respondent. He stated that this Executive is a board which he expected a letter of dismissal to emanate from one of its members. The respondents have averred in their Answer that the proceedings were tape recorded and indeed the verbatim nature of the record proves this. Nowhere in that record is it recorded that the chairman would make recommendations as claimed by the applicant. The letter of notification of the disciplinary hearing (annexure "C") stated that "*the hearing will be chaired by Mr. C A Antrobus, a Director of the holding company, Interscience Holdings (Pty) Ltd and a senior consultant with LVA.*" It is now common cause that the applicant was employed by Interscience (Pty) Ltd of which the chairman of the enquiry was one of the Directors. It is trite law that a Director in a company is in a position to take decisions that bind the company. There would therefore, be no logic in Mr. Antrobus who was already properly seized with the exercise of the power to dismiss the applicant to further recommend. He would infact be recommending to himself as he is a member of the Board of Directors and clearly this would not make sense.

It is possible that the applicant has been misled by the use of the word "*recommend*" in Mr. Antrobus's letter to him (annexure "J"). The letter clearly states that "(I)...*confirm my decision that your employment can justifiably be terminated based on the eidence presented to me. Considering your plea for mitigation... I have recommended that you be given one month's notice*..." (emphasis added). The underlined words are particularly significant in that with regard to the dismissal, the chairman says he has made a decision not a recommendation. If ever a recommendation in the true sense of that word is what he had made and not a decision, he would not communicate that recommendation to the applicant as a recommendation is subject to be accepted, rejected or to be varied by the authority to whom it is made. Accordingly, notwithstanding the inelegance of the communication of the verdict by Mr. Antrobus, we are nonetheless satisfied that he did make a decision that applicant be dismissed with one month's notice. This much was well known by the applicant as all correspondence between him and the respondents and their respective attorneys was on the basis that the applicant had been dismissed.

In his written submissions Mr. Mosito contended that it was the appellate tribunal that was guilty of failure to give the decision. In his evidence the applicant stated that his appeal was heard on the 8th November 1996. He stated further that at the end of the hearing he was told that he would be informed of the outcome of the appeal within seven days. When seven days lapsed without hearing from the chairman of the appeal, the applicant instructed his attorneys, Webbers to inquire from respondent's attorneys about the appeal. Applicant's attorneys complied by letter dated 3rd December 1996. On the 5th December the respondent's attorneys responded and informed the attorneys for the applicant that the chairman of the appeal "still found that sufficient ground existed to justify the termination of your

client's employment with Loxton Venn and Associates. In view of the extensive documentation and time necessary to formulate the reasons for the appeal, such appeal report is not yet available." In his evidence applicant said he received this letter on the 12th December and he did agree that the letter informed him that the chairman of the appeal was upholding the decision of the initial enquiry and that he would furnish him with the details. Clearly therefore, the decision of the appeal chairman was communicated to the applicant through his attorneys. This much the applicant has confirmed in his evidence and it was his instructions that correspondence to him from respondents be routed through his attorneys and not directly to him. (see bundle of documents marked "TRD1" in particular letter dated 26th September 1996 written by applicant's attorneys to respondents' attorneys.).

Having dealt with the pleadings and the applicant's testimony we come to consider those aspects of Mr. Mosito's submissions which have not already been addressed. Mr. Mosito argued that the applicant was prejudiced in his defence because he was not allowed to visit his office at Thaba-Tseka and that Dr. Rutherford specifically prevented the applicant from making "*...direct communication with a staff member at the RDC".*

First of all it is important that this quotation is put in its proper context by showing that in the same remark Dr. Rutherford had started by saying "*Mr. Chairman, the issue is very clear: you may request from us relevant documentation evidence from RDC which you require for your defence and hearing."* Quite clearly the statement of Dr. Rutherford was simply to require applicant to go about preparing his defence through procedures laid by the respondents which was to ask for documentation that he would need through the respondents and not directly from the staff of the Centre. He then concludes; "*it would be totally inappropriate for Jim to make direct communication with a staff member at the RDC <u>in the light of what has happened.</u>" (emphasis added).* The emphasised words have been conveniently left out in Mr. Mosito's quotation and this was clearly because, they show that the respondents had a reason for not wanting applicant to get documentation from everyone of the staff at the Centre. Understandably certain of the documents were privileged and they could not just be taken out without direct supervision and control of the Directors.

Similarly the question of going back on site would clearly violate the terms of applicant's suspension. He was not allowed to visit the site again one can safely assume for the safety and security of the business of the respondents regard being had that one of the charges applicant faced was disloyalty to the project. Even then the applicant was not as prejudiced as he would want us believe because he was still on phone contact with the LHDA. He referred to Dr. Rutherford's letter of the 28th June where he threatened applicant with legal action if he continued to make contact with the LHDA. He also averred that the applicant only came to know of the LHDA's letter where they declined participation in the proceedings on the 7th July 1996 when the hearing had been on the 4th July. We have already shown that the respondent was entitled to protect its contractual relations with the LHDA and

applicant's invitation of the LHDA as an institution to sit in such a forum was preposterous. The LHDA confirmed in writing to the applicant that it did not want to get involved.

In his submissions Mr. Mosito says the applicant was not aware of such a letter at the time of the hearing as he only got the letter on 7th July which was after the hearing. In the first place, this allegation is not supported by evidence as applicant never at any stage testified to this effect. In the second place, Dr. Rutherford informed the hearing on the very first page of the text of the hearing that;

> ***"...Jim listed a series of witnesses from LHDA on his request list. LHDA have indicated that they do not in any way want to be involved and we have agreed that it will be entirely an 'in house' hearing and as a result a number of the witnesses which Jim has listed are not present today and we will have to decide to what extent that influences Jim's opportunity to defend his case. If it is relevant, although we don't believe it is relevant, because we feel most of the instances relate to an in house situation. However, if it is relevant there is opportunity to reconsider those issues and possibly the contacting of LHDA. I would advise against that as they have indicated their wish not to be involved."***

It is significant that the applicant never at that stage denied knowledge that the LHDA have said they did not wish to be involved. The conclusion we draw is that the applicant was already aware of the LHDA's refusal to partake in the proceedings at the time of the hearing.

Mr. Mosito submitted further that the applicant was not afforded enough time to prepare. This cannot be true because the applicant was served with the charges on the 26th June 1996 and the hearing was only held on the 4th July. At the start of the hearing the chairman asked him "you received adequate notice of this disciplinary hearing and you have had at least two days to prepare for your case?" His answer was "no this is the first time I have had a chance to look at any other document and I have not had chance to revisit some of the points in here that are referring to letters." It must be remembered that the applicant himself only presented his list of documents on the 3rd July when the hearing was on the 4th July. By and large he was the author of the situation he was complaining of. Notwithstanding that the respondents had availed virtually all those documents and at the end of the interview he was allowed to take the documents home with him to go and prepare detailed written responses, which he did. It is therefore untenable to suggest that with that much time at his disposal to study the documents and respond at his leisure he still was not given enough time to prepare his defence.

Mr. Mosito averred further that the LHDA ought to have been in favour i.e. to support the termination of the applicant because, in terms of contract 530 pageGC---14;

> ***"The consultant (TRDC) shall obtain the employer's prior approval in writing before taking any of the following actions (a) appointing professional personnel to carry out any part of the services, including the terms and conditions of such appointment."***

In the first place contract 530 was never availed to the court as such we do not know its provisions. We cannot therefore, make any finding on it. In the second place, that contract was between the LHDA on one hand and Interscience and JAA on the other hand. It can therefore only be enforced by the parties to it and not an outside party like the applicant. Reliance on that contract is therefore misconceived. Applicant has throughout his evidence conceded that he was employed by Interscience and that was the only body that could terminate his services.

He contended further that in his letter to applicant the LHDA environmental Manager Mr. Bertilsson had said that the disciplinary hearing of the applicant was convened by TRDC. This could well be true. Infact the disciplinary proceedings were initiated by the Directors of TRDC. This is understandable because the applicant was seconded to this body and it was that same body which he had not served to the satisfaction of its holding company. Having put him through a disciplinary process TRDC had discharged its obligations in respect of the applicant. Only his employer namely Interscience could take any further steps such as dismissal and this is what happened. There never were two contracts namely an employment contract and a secondment contract. There was only one namely, the employment contract, the condition of which was that the applicant was going to serve on secondment to a project in Thaba-Tseka. When the secondment contract ended the employment contract ended as well and vise versa.

Mr. Mosito submitted further that it was procedurally unfair to the entire disciplinary process that the respondent has failed to make available to the applicant or to this court the detailed findings and/or the minutes of the appeals hearing. It was not however shown in what way this was unfair as it has often been said the courts do not lay laws governing the conduct of disciplinary proceedings of employers. Such laws are laid by the employers either unilaterally or by agreement with the workers. In the absence of a rule to that effect the court cannot formulate its own. Accordingly we do not see merit in this submission. Equally untenable is the suggestion that there was unfairness resulting from the respondents' attorneys informing applicant's attorneys that the chairman of the appeal had not completed the report but was upholding the findings of the initial enquiry. This is the kind of fishing expedition which must not be permitted. Applicant was at that time represented by attorneys who never discerned any unfairness in the response. In his own evidence applicant was contend with the arrangement save that he still yearned for the full report. At what stage then was the unfairness felt. This is clearly an afterthought as indeed no case of this kind was made either in papers or in evidence before the court.

As for the report of the appeal hearing the respondent has admitted that save for the letter from respondents attorneys advising that the appeal chairman was upholding the dismissal, nothing further followed from the respondents concerning the appeal. This court cannot however deduce any unfairness from this. Applicant received the finding of the chairman of the appeal and that is what was important to him. There was no further room for appeal so the report even if it was availed was going to serve no practical purpose. The report which was of practical significance was that of the initial hearing to enable applicant to prepare his appeal. That he got. For these reasons applicant's case in the main cannot succeed.

Alternatively applicant contended that the decisions of the disciplinary and appeal tribunals were invalid for failure to comply with the notice period provided for in the contract between the applicant and the second respondent. This court has no power to declare administrative decisions invalid. It can however declare such decisions unfair. In his evidence in chief the applicant said in terms of the contract he was entitled to three months notice which he said he was never given. This testimony is corroborated by the record at page 14 where it is provided that "the appointment may be terminated by either party upon giving the other three calendar months notice in writing. "It is now common cause that the chairman of the enquiry gave applicant only one month's notice which was upheld by the chairman of the appeal. No explanation was given by either of the chairmen for disregarding the contract the applicant had entered into with the second respondent. To this extend therefore, the 2nd respondent is guilty of breach of contract between it and the applicant.

It is common cause that the second respondent is a South African company with no existence as such in Lesotho. Only the first respondent which has no contractual relations with the applicant existed in this country. It was for this reason that Mr. Buys has argued very strongly that this court has no jurisdiction over this dispute and contended that it is South African law that applies. To strengthen this argument he pointed out that the applicant was not even paid in Lesotho in contravention of Section 82(1) of the Code which provides that wages shall be paid at or near the workplace. This issue was never suggested to the applicant to enable him to rebut it as such it must be disregarded.

As regards the jurisdiction Mr. Mosito submitted correctly that it is res judicata in that the High Court overruled the earlier decision of this court where it had decided that it lacked jurisdiction. Accordingly this court is bound to make an order against Interscience albeit its physical non-existence in this country. Since the applicant has already been paid one month's pay in lieu of notice it follows that he is owed two months pay to make up three months. This much is conceded by the respondent on page 8 at paragraph 13.1 of their written submissions. It is accordingly ordered that the respondents pay applicant two months salary in lieu of notice together with all benefits he would have got in those months but for the dismissal.

There is no order as to costs.

THUS DONE AT MASERU THIS 7TH DAY OF DECEMBER, 2000.

L.A LETHOBANE
PRESIDENT

M. KANE
MEMBER **I AGREE**

G.K. LIETA
MEMBER **I AGREE**

FOR APPLICANT : MR MOSITO
FOR RESPONDENT: MR BUYS