IN THE LABOUR COURT OF LESOTHO

LC/42/05

HELD AT MASERU

IN THE MATTER BETWEEN

TEBOHO MAFATLE **APPLICANT**

AND

TELECOM LESOTHO (PTY) LTD **1ST RESPONDENT**
LABOUR COMMISSIONER **2ND RESPONDENT**

JUDGMENT

Training policy – not official until approved by Board – Evidence policy approved August 2005. Policy – Applicant's action not covered by policy - Evidence in court – Not right way of amending policy.
Set-off – surcharge – no contractual basis – company law – only directors can resolve to recover costs – Application upheld.

INTRODUCTION

This is a case in which a former employee is suing his former employer, 1st respondent for the payment of his terminal benefits which the first respondent has withheld on account of debts allegedly owing to it by the applicant. It was surprising how the Labour commissioner becomes a necessary party as to be joined in these proceedings. The Labour Commissioner, rightly in our view, did not file any opposing papers in this matter. At the start of the hearing of this matter counsel for the applicant wisely, withdrew the Labour Commissioner as a party in this matter. Accordingly, the matter is now between the applicant and the first respondent whom we shall from now on refer to as the respondent.

STATEMENT OF CASE

It is common cause that the applicant was employed by the respondent from January 2000 to February 2005 when the applicant resigned. The applicant was employed in a senior management position of Management Accountant Manager. Following a requisite one month's notice, the applicant resigned from the employ of the respondent on the 18th February 2005.

SUMMARY OF EVIDENCE

Applicant testified that upon giving notice of his resignation he talked with one Mr. Lesitsi (DW1) who is the Benefits, Compensation and Industrial Relations Officer of the respondent to find out about payment of his terminal benefits. The said Mr. Lesitsi promised him that he would be paid same on the last day of work. That promise did not materialize. He then telephonically spoke to Mr. Lesitsi and he (Mr. Lesitsi) promised that he would be paid by the end of the month.

Applicant averred that respondent's employees normally get their monthly salaries on 23rd and 24th of a month. It was not clear, however, if by month end Mr. Lesitsi meant calendar month or month for purposes of salary. It would appear that applicant's understanding was the latter, hence on the 23rd February 2005, he sent Mr. Lesitsi an email in which he enquired when he can expect to be paid. Mr. Lesitsi responded on the same day to the effect that "everything is on the verge of finality…". He went further to say he would make sure that payment is effected before the end of the week.

However no payment was forthcoming as promised and applicant had to write a letter to Mr. Lesitsi on the 4th March 2005 detailing all the failed promises. When this letter was not responded to applicant had to send an appeal to his former Divisional/Departmental Manager Mr. Wonder Nyakudya on the 7th March 2005. On the 8th March applicant was paid his salary for February, but no terminal benefits were included. On the 14th March 2005, applicant again emailed his manager Mr. Nyakudya to tell him that thirty days after his resignation he had still not been advised about his terminal benefits. The Divisional Manager's prompt response dated same day was to the effect that "Mr. Lesitsi is working on the terminal benefits and will advise you shortly…".

Applicant testified that a few days after this response he got a call from Mr. Lesitsi's office asking him to come and collect his letter, which he did. The letter he found was annexure "F" to the Originating Application. It detailed applicant's terminal benefits and deductions made therefrom which finally left applicant with a negative balance of M52,154.55. There were essentially four deductions made in respect of tax, training costs, staff investment fund loan and a telephone bill. Applicant's testimony was that he had a problem with two deductions only, and those were the training cost and investment fund loan deductions.

Applicant testified that he had indeed been paid for by the respondent to pursue an MBA programme with the University of the Free State. This programme was recommended by the supervisor at an appraisal session. The supervisor, PW2 did testify that indeed they recommended that applicant undertake the programme not because of any particular shortcoming, but to prepare him for higher managerial responsibilities. Applicant testified further that even though he was assisted financially by the respondent he did not enter into any loan agreement with them which would entitle them to demand that he repays the fees paid on his behalf.

In his testimony applicant relied on annexure "I" which he handed in court as the training policy in terms of which he applied for and was approved to undertake the aforesaid programme of study. Under cross examination he was alerted to "TL3" to the Answer which the respondents say it's the one in terms of which his application was approved. He denied this.

With regard to the staff investment loan the applicant's testimony was that he did not owe the fund anything. Infact the fund, he testified is the one that owes him. He handed in Annexure "H", a provisional statement from the fund dated 27th July 2005 which showed that he infact had a credit balance of M3,492.00. The statement had been updated to February 2005.

Respondent adduced the evidence of Messrs Lesitsi and Mandoro, DW1 and DW2 respectively. DW1's evidence had no bearing on applicant's denial of indebtedness. His had been to circulate a checklist to various heads of departments to show if there is anything applicant had failed to return or any outstanding loans due from him. The amounts which applicant complains that they have been wrongly deducted, were shown to be owing by officers in charge of the relevant sections. In the case of Training it was Mr. Mandoro and in the case of Investment Fund Loan it was a Mrs. Maimane. It is however striking why all the time that applicant was enquiring about his benefits, DW1 did not inform him that they were busy working on his debts with the organisation. Instead he gave applicant the impression that they were simply working out the benefits. Not even PW2 who is a very senior officer of respondent hinted to this in the various email communications they had with applicant. He merely says he verbally raised the issue of repayment of training costs with applicant, but as we say the emails they exchanged with applicant on the issue of his benefits say nothing about this.

It is common cause that Mrs. Maimane did not testify. Mr. Mandoro testified that "TL3" was the relevant training policy that applied when applicant was approved to go for MBA programme. He testified that Annexure I, which applicant handed in as the applicable policy, had existed since October 2003 but just a draft. He testified that it only got the approval of the Board in August 2005. Pursuant to clause 6.2 of "TL3" applicant is liable to refund the respondent the cost of the training if he fails to complete the course, he testified. He testified further that applicant has not completed the course as the respondent's employee, hence why he indicated in the checklist that he is indebted to respondent in the amount of M69,970.30, this being the tuition and other expenses connected with the training paid on behalf of the applicant to date.

ANALYSIS OF THE EVIDENCE & CONCLUSIONS

This court was presented with two training policies namely annexures "I" and "TL3". Applicant sought to show that his application to go to school was approved in October 2003. He averred therefore, that annexure "I" should be taken as the one that governed the training policy when he went to school because it is in any event dated October 2003. Asked how he came

to have a copy of annexure "I" he said he extracted it from the intranet. Mr. Kao for the respondent asked him under cross-examination when annexure "I" came into operation, he said it came into operation in October 2003 even though he forgot on what date. He asked him if he would deny evidence that the policy had not had the approval of the Board and he said he would not deny.

Applicant enlisted Mr. Nyakudya PW2 to come and testify in support of his case. He was shown annexure "I" and he said he could only recall seeing it when it was passed for comments. He (i.e. PW2) however was relying on "TL3" as the relevant training policy that applied. Mr. Mandoro who testified on behalf of respondent stated categorically that October 2003, was only the time that the draft was made. It however only got the Board's approval in August 2005. Even the application forms that applicant filled are annexures to "TL3". He has not filled any of the forms which go with annexure "I". It is our view therefore, that annexure "I" may have existed for sometime as a draft, but it would not be an official working policy unless it had the approval of the Board, which it undeniably only got in August 2005. It follows that applicant was governed by the policy as contained in "TL3".

Reliance was placed on clause 6.2 of TL3 to justify the training expenses deductions. The clause provides:

> *"6.2 Recovery of costs*
>
> *The organisation reserves the right to recover from the employee the full costs of a course, undertaken in the previous 12(twelve) months, on a prorata basis under the following circumstances:*
>
> - *the employee leaving programme during the course of study;*
> - *The employee leaving the organisation within one year of completing the course;*
> - *Failure by the employee to complete the course; and*
> - *Failure of the course."*

Applicant testified that none of the above conditionalities apply to him. In particular he testified that he's still pursuing the course. There is sense in that submission because none of respondent's witnesses testified to the contrary. The only witness who came close to connecting applicant's case to any of the above conditions was Mr. Mandoro. His evidence was that the applicant has failed to complete the course as the respondent's employee. That is factually correct, but that particular scenario is not catered for under clause 6.2 of the policy. What Mr. Mandoro was doing through his evidence was to fill the gaps in the policy, but that is not the way to amend a policy. It follows that it has been wrong for the respondent to rely on clause 6.2 as it does not empower them to act as they did in the circumstances of this case.

Applicant further averred that he had not entered into any loan agreement with the respondent to justify their surcharge on him. It seems to us there is again merit in this contention. Respondent cannot just cling onto employee's benefits in the absence of any formal contractual arrangement permitting it to do so. The provisions of clause 6.2 do not per se constitute an agreement for surcharge. Finally, on this issue, clause 6.2 of the policy reserves the organisation the right to recover the costs. Other than Mr. Mandoro's signature on "TL5" showing that applicant is indebted to respondent in the amount shown, there is no evidence that the organisation itself has exercised the right by way of a resolution to recover the tuition costs they paid for the applicant from him. In law company decisions are exercised by Board of Directors through resolutions. It is therefore, only the Board which can resolve that the costs be recovered because they are the legal agents of the organisation. (see Gibson, South African Mercantile and Company Law, Juta & Co. 1997 p.364, Mahlomola Seboka .v. Lesotho Bank CIV/APN/227/91 (unreported) and Lineo Moalosi .v. Catherine Xu & Another LC23/04 (unreported).

Indeed none of the witnesses for the respondent said in effecting the set-off they were implementing the company's resolution/decision that such costs be recovered. This is further borne by the fact that all the time applicant was asking about his benefits, none of the officers he talked to hinted the issue of recovery of costs. We are of the view that PW2 and DW2's oral evidence that they verbally told applicant about the recovery of the costs is an

afterthought. Even if they did, their communication does not constitute the necessary company resolution that such costs be recovered.

As we indicated Mrs. Maimane who is the one who authorised that an amount of M3,553.90 be deducted as balance owing to the staff investment fund did not testify. Annexure "H" which applicant handed in is a provisional statement prepared by Mrs. Maimane on the 27th July 2005. The statement showed that the applicant had a credit balance of M3,492.00. These are contradictions which could only be cleared by Mrs. Maimane herself. In the absence of that clarification this court is bound to uphold applicant's contention that the deduction made in respect of an outstanding loan to the staff investment fund is unjustified. In the circumstances applicant's prayers are granted as follows:

1. The respondent is directed to pay applicant's severance pay with interest calculated from 10th March 2005.

2. Respondent is further ordered to pay applicant's pension monies that it has withheld with interest calculated from the date the pension money was retained by them.

3. Costs of suit

4. The interest shall be calculated at 27% and all payments shall be subject to tax deduction as required by law.

THUS DONE AT MASERU THIS 8TH DAY OF NOVEMBER 2005

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE **I CONCUR**
MEMBER

L. MOFELEHETSI **I CONCUR**
MEMBER

FOR APPLICANT: **MS SELLO-MAFATLE**
FOR RESPONDENT: **MR. KAO**