

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) NO. 41/2017**

In the matter between:

**THAMAHANE RASEKILA**

**APPELLANT**

**And**

**TELECOM LESOTHO (PTY) LTD**

**RESPONDENT**

**And**

**TELECOM LESOTHO (PTY) LTD**

**APPELLANT**

**(In the Cross-Appeal)**

**And**

**THAMAHANE RASEKILA**

**APPELLANT**

**CORAM: MUSONDA, AJA**

**MOKHESI, AJA**

**MTSHIYA AJA**

**HEARD** : 29 NOVEMBER 2018

**DELIVERED** : 7 DECEMBER 2018

### **SUMMARY**

*Labour: Termination of contract of employment on acting basis – employee refusing to be heard, dismissal in terms of the disciplinary rules.*

### **JUDGMENT**

#### **MTSHIYA AJA**

[1] This is an appeal against the judgment of the Labour Appeal Court (a Division of the High Court.) The judgment appealed against was delivered on 9 June 2017. The respondent has, in turn also lodged a cross-appeal whose details I shall give herein later.

[2] It is common cause that the appellant was on 1 January 1982 employed by the then Lesotho Telecommunication Corporation (LTC), initially as Chief of Finance. During the currency of his employment, the appellant rose to the position of Director of Marketing and Information. Whilst holding that position on the

permanent establishment of the respondent, the appellant was, from 31 May 1996, appointed Acting Managing Director for an unspecified period. However, on 29 April 1999, the appellant was, at the pleasure of the respondent's Board, appointed Acting Managing Director for a period of nine (9) months. The appointment was renewable.

[3] The appellant then served in the position of Acting Managing Director for a period of 4 months before the appointment was terminated on 18 August, 1999.

[4] Upon being removed from the position of Acting Managing Director, the appellant reverted to his substantive position of Director of Marketing and Information. He was then asked to vacate the house of the Managing Director which he had been allocated as Acting Managing Director.

[5] The appellant refused to vacate the Managing Director's house. He was, for his refusal to vacate the house, subsequently charged with the offence of disobeying a lawful order. A disciplinary panel was set up to hear and determine his case. The appellant was upon being found guilty of the offence, he was summarily dismissed. He then approached the Labour Court challenging both the termination of his contract as Acting Managing Director and his final dismissal from his substantive

post of Director of Marketing and Information. In both cases, he alleged procedural and substantive unfairness.

Initially, the Labour Court referred the matter to arbitration but the matter ended up in the Labour Appeal Court, where on 12 June 2009, prior to the matter being heard, the court issued the following order:-

“It is hereby ordered that:

1. *In terms of Section 38A (3) of the Labour Code (Amendment) Act No. 3. Of 2000 it is directed that referral A1573/02 be heard by the Labour Appeal Court sitting as a court of first instance on such dates as may be allocated by the Registrar.*
2. *Applicant to state his case fully in written form and to serve the same with the 1<sup>st</sup> respondent.*
3. *The question of representation to be dealt with at the first hearing.”*

[6] The court *a quo*, sitting as a court of first instance, captures the relief that the appellant sought from it in the following terms:-

*“In this matter, the Applicant is suing the Respondent Telecom Lesotho (PTY) LTD – which is a successor to the former Lesotho Telecommunication Corporation (LTC). In the main, the Applicant’s claim is two (2) pronged. Firstly, the Applicant claims compensation/damages for the unlawful termination of his appointment as Acting Managing Director of the then LTC.*

*The second leg of the relief claimed is founded on the alleged unlawful dismissal after disciplinary proceedings on a charge of insubordination to lawful orders. The orders were that the Applicant vacate the house No. 245 he had been occupying as Acting Managing Director.”*

[7] The above are the two major issues that fell for determination by the court *a quo*. At the end of the hearing, the court *a quo* found in favour of the appellant and awarded as follows:-

*“The court gives the following award unlawful termination of Acting appointment.*

*1. 5-9 months from June 1999-June 2000 salary including benefits and allowances.*

*2. M100,000.00 award for unlawful dismissal as Director – Marketing Division.”*

The appellant was not happy with the quantum in respect of each item above and hence the appeal to this court.

[8] The above award shows that both the termination of his contract as Acting Managing Director and the summary dismissal from his substantive post of Director of Marketing and Information were found, by the court *a quo*, to be unlawful.

[9] Although the appellant, who is a self-actor, listed a total of 18 grounds of appeal, he agreed at the commencement of the hearing that his concern was on the quantum on each item in the award.

[10] As already stated, on 16 August 2017, the respondent cross-appealed. It is the finding of unlawfulness in respect of the respondent's actions against the appellant that the cross-appeal herein seeks to address.

Accordingly the grounds of appeal filed under the notice of appeal are:-

**“ON TERMINATION OF ACTING APPOINTMENT**

1. *The court a quo erred in its finding that appellant was not afforded an opportunity to make representations before his acting appointment was terminated, and further in finding that the decision to terminate the acting appointment was made in appellant’s absence, despite clear evidence to the contrary.*

2. *The court a quo erred in finding that the letter of the 13<sup>th</sup> August 1999 calling upon appellant to convince the board why his acting appointment should not be terminated constituted a termination of the appointment already, whereas the said letter was a call for representations in a meeting scheduled for the 18<sup>th</sup> August, 1999.*

3. *The court erred by not finding that the termination of appellant’s acting appointment was justified in the circumstances.*

4. *The court erred in finding that appellant’s fate had already been decided in a number of board meetings in his absence. The court should have appreciated that the board was entitled to discuss the issue of bad relations between appellant and the board.*

5. *Even assuming without conceding that the termination of the acting appointment was unlawful, the court erred and misdirected itself by awarding appellant compensation of five months plus nine months’ salary thereby disregarding precedents and/or comparable cases in awards for compensation in Lesotho.*

6. *The court erred by giving the impression that appellant was entitled to an opportunity to make representations before the decision that he vacates the MD’s house was made. There was no such entitlement in law, especially when appellant was being given alternative accommodation in accordance with the requirements of his substantive position to which he had reverted when the decision was made.*

**ON DISMISSAL FROM THE SUBSTANTIVE POSITION**

7. *The court erred and misdirected itself by no finding that fair and valid reasons for appellant’s dismissal from his substantive position had been proved, namely a deliberate and persistent refusal or disobedience of lawful orders, which the court found to have been “a steadfast refusal to vacate the MD’s house”.*

8. *The court a quo therefore erred by awarding appellant compensation for his dismissal from his substantive position.*

9. *The court erred in particular in this respect, in view of its finding that the disciplinary charges were not motivated by the fact that the appellant had lodged complaints and/or grievances about alleged outstanding benefits as contended by appellant, but by his refusal to obey lawful orders.”*

[11] With respect to the awards, Advocate Ratau for the respondent, submitted that in the event of the court confirming that the termination of the appellant’s contract as Acting Managing Director and the summary dismissal from his substantive post of Director of Marketing and Information, were indeed unlawful, the respondent would not oppose the damages awarded by the court *a quo* in both situations. That being the case, it is imperative that the court should therefore commence by determining the cross-appeal.

It is only upon this court agreeing with the court *a quo* that the respondents’ actions were unlawful, that the appellant’s dissatisfaction with the awards can then be examined.

[12] In the cross-appeal, grounds 1-5 revolve around the issue of whether or not the appellant’s termination of his contract of employment as Acting Managing Director was procedural and lawful. It is therefore crucial to examine how both parties dealt with the issue, commencing from the appellant’s appointment. In so doing, we should always bear in mind that the appellant’s position has always been that his appointment was assignment

based in terms of Section 62 (4) of the Labour Code of 1992. That understanding, as I shall demonstrate from the facts, was wrong.

The appellant contends that he was appointed specifically to attend to the restructuring/privatization of the respondent. There is nothing in the record to support that standpoint.

[13] In order to fully appreciate the dispute that then arose between the appellant and the respondent upon his appointment as Acting Managing Director, it will be necessary to reproduce herein the correspondence or literature relating to that appointment.

[14] On the 29 April 1999 the respondent's Board of Directors met and resolved as follows:-

1. *The whole of Article 31.1.5 of the Personnel Regulations handbook of LTC be deleted and substituted with the following:*

*“The decision regarding termination shall be taken by the Managing Director, or any other person appointed by the Board, and in the case of a Divisional Head, a panel consisting of the Managing Director or any other person appointed by the Board of Chairman, and two members of the Board appointed by the Chairman of the Board.”*

*This amendment will be effective as from the date of the Board meeting approving the amendment.*

2. *Mr. Thamahane C.F.D. Rasekila be and is hereby appointed as Acting Managing Director of LTC with all the powers and responsibilities that usually attach to the position of a Managing Director but subject to the control and authority of the Board.*



3. *Without derogating from the generality of the above, Mr. Rasekila, as Acting Managing Director, shall be responsible for the day-to-day management and administration of the LTC.*
4. *The appointment provided for in resolution 2 above shall be affective from the date hereof and shall be for a period of 9 months renewable at the pleasure of the Board.*
5. *The appointment provided for in 2 above shall be on the same terms and conditions of service and with the same benefits as presently attach to the position of the Acting Managing Director.*
6. *The Board approves and accepts the recommendations of John Crook Consulting which recommendation have also been accepted and approved by the Privatisation Unit and which relate to the proposed new structure for the LTC as well as the "Short-Term Turn Around Plan, 1998". These recommendations have been brought to the attention of the Board as part of the endeavor to privatize the LTC in terms of the Lesotho Privatisation Act No. 9 of 1995.*
7. *The LTC Board resolves to implement the recommendations referred to in resolution 6 above and to this end specifically authorizes and empowers Mr. Rasekile to do all things necessary to give effect to this resolution including consulting with staff in regard thereto.*
8. *In pursuance of the amended Article 31.1.5 of the Personnel Regulations the Board appoints Mr. Thamahane C.F.D. Rasekila as the "other person" as provided for in the amended Article 31.1.5 of the Personnel Regulations."*

It is common cause that the appellant was then appointed Acting Managing Director in terms of resolutions, 2-5 of the above Board minutes. It should be noted from the onset that the appellant was merely stepping into the shoes of the substantive Managing Director who had been suspended. There is nothing in the above resolutions to suggest that this was an assignment based contract. Admittedly, a key result area was reflected in resolution number 6 above as privatization. That did not in any way restrict his

functions as an Acting Managing Director to the Privatization Project. That was only one of his major functions.

[15] On 13 August 1999, the Minister of Communications, who was also the Chairman of the respondent's Board of Directors, addressed a letter to the appellant in the following terms:-

*"Dear Mr. Rasekila*

**YOUR APPOINTMENT AS ACTING MANAGING DIRECTOR OF LTC**

*As you are aware there are serious problems in regard to your position as Acting M. D. of LTC. These relate to a number of issues ranging from sour relations between yourself and the P. S. Mr. Mathibeli; your package as Acting M. D.; Board concerns about some of the decisions that you have taken in the past; problems between yourself and your management team to mention but a few.*

*In your letter to me dated 20 July 1999 you indicated that you too perceive the situation to be serious and that the matter needs to be addressed urgently.*

*In the recent past a number of Board meetings have been held at which the problem has been discussed. These meetings, as you are no doubt aware, have been held in your absence.*

*It is the feeling of the Board that the situation has to be addressed urgently because it is the Board's perception that the difficulties associated with your appointment are adversely affecting the day to day operations of the LTC.*

*The Board feels that it has lost respect for and confidence in you and that it can no longer work with you. Because of this the Board feels that it would be in the interest of LTC and everyone else concerned if your appointment as Acting M.D. were to be revoked and you returned to your substantive post. In this event a new Acting M.D. will have to be appointed.*

*The Board wishes to discuss this matter with you and to this end a full Board meeting, to be held in the Boardroom, has been arranged for 9.00 a.m. on 18 August 1999. At this Board meeting the Board will want to know from you whether you accept that the*

*Board has lost confidence in you and can longer work with you. If you do not agree you will be called upon to persuade otherwise.*

*You are accordingly required to attend the meeting of 18 August 1999. Please note that a similar meeting was previously arranged for 2 August 1999 which you failed to attend. I must warn you that if you fail to attend the meeting of 18 August 1999 the Board will be compelled to revoke your appointment without recourse to you.*

*You must please understand that I now view this matter as extremely urgent. As you are aware the drive towards privatization is moving along quite quickly and I cannot allow problems between yourself, the Board, the P.S. and your other managers to get in the way of this process. Besides this the day to day operations of LTC need to be addressed. You are accordingly required to treat the meeting of 18 August 1999 as your top priority.*

*At the same time if you accept that your appointment as Acting M.D. of LTC is not working out then you can let me know before the meeting of 18 August 1999 in which event the meeting will be unnecessary. I will thereafter see to it that your appointment is properly revoked.*

*Kindly confirm in writing by close of business, Monday 16 August 1999, that you will be attending the meeting of 18 August 1999. Otherwise let me have your acceptance that your appointment as Acting M.D. of LTC is not working out.”*

Indeed a meeting of the Board, which the appellant, who was also a board member attended, was held on 18 August 1999.

The minutes of that Board meeting read, in part, as follows:-

*“3. The Chairman indicated that the purpose of the meeting was to discuss the issue of the appointment of Mr. Rasekoai as Acting Managing Director of LTC. He indicated that the Board had decided to convene the meeting on that day (18 August 1999) for the purpose of consulting Mr. Rasekila regarding the consensus opinion of the Board to the effect that it no longer had confidence in Mr. Rasekila as Acting Managing Director. He indicated that the Board and decided that a formal letter be written to Mr. Rasekila informing him of the wish of the Board to discuss the matter with him.*

*4.The Chairman indicated that there appeared to be sour working relations between the Acting Managing Director and the Principal*

Secretary. He pointed out that he did intervene to resolve the differences but that it had come out that the problem could not be resolved.

The Chairman indicated that on the whole Mr. Rasekila's relations with the Board were not healthy. He indicated that the Board had many concerns about Mr. Rasekila and that equally with the advice of his lawyers. Mr. Rasekila also had many concerns about the Board.

5. The Chairman indicated that it was the strong feeling of the Board that a lot of time that should be used to the benefits of the work of the LTC was being wasted on endless discussion of differences between the Acting Managing Director and the Board. The Chairman indicated that the Board strongly felt that it no longer had confidence in Mr. Rasekila as Acting Managing Director and accordingly held the view that it would be better if Mr. Rasekila's appointment as Acting Managing Director was abrogated and that he should return to his substantive appointment.

6. In his response, the Acting Managing Director, regretted that the management of the Affairs of LTC he was entrusted with should come to an end in the manner it was coming to an end. He pointed out that it had been indicated to him that the appointment was for a certain limited time, but it turned out to be four years. He thanked God for divine guidance and expressed gratitude to all those who assisted him in the task of managing the LTC.

7. The Acting Managing Director remarked that he felt ashamed as he had not anticipated that things could take the turn they had taken. He observed that his acting appointment was being abrogated because of sour relations with Mr. Mathibeli. He further observed that he had the impression that his differences with Mr. Mathibeli had been ironed out.

8. The Acting Managing Director referred to the letter written to him by the Chairman of the Board. He indicated that he had great difficulty with convincing the Board otherwise in its perception that it had no confidence in him because in his view, the Board had already taken a decision against him.

He indicated that to his understanding he worked under the control of the Board and felt that his mistakes needed to be pointed out to him.

9. The Acting Managing Director thanked the Board for the decision to abrogate his appointment. He however, felt that the Board should have drawn his attention to the mistakes he had been making as Acting Managing Director.

10. *The Acting Managing Director Chairman once more indicated that the primary reason for the abrogation of his Acting Appointment was his relations with the Principal Secretary. He observed that he was being punished without being given the opportunity to state his side of the story.*

11. *In conclusion, the Acting Managing Director observed that a person reaps what he sows. He further observed that it had always been his wish to have good relations with the Board. He expressed a word of thanks to the Board. He indicated that he accepted the decision taken by the Board wished whoever would succeed him should have the full benefit of matters of concern fully explained to him. He wished the Board well in its future work.*

12. *Mr. N. Monyane, drew the attention of the Acting Managing Director to the contents of the letter addressed to him by the Chairman of the Board in particular the part indicating that the Board had lost confidence in the Acting Managing Director.*

*Mr. Monyane observed that the purpose of the meeting was to give Mr. Rasekila the opportunity to persuade the Board otherwise. He observed that even though the Board had its own view on the matter under discussion, Mr. Rasekila was being afforded the opportunity to convince the Board and persuade it to change its perception. He observed that the Board could as well be wrong in its perception hence it was for the Acting Managing Director to convince the Board to have a different perception.*

13. *Mr. Nthongoa observed that the Acting Managing Director, Mr. Rasekila had in his Mr. Rasekila's own words thanked the Board for the decision it had taken and further that he accepted but that his successor should have the benefit of issues of concern fully explained to him.*

14. *The Acting Managing Director observed that it was clear to him that a decision had been made and that he thus had difficulty with convincing the Board otherwise. He observed that in his view the Board was reluctant to discuss his shortcomings with him. He felt that he had no power to convince the Board for fear of being dismissed from LTC. He expressed appreciation for the fact that the Board was not dismissing him from the LTC but was saying that he should return to his substantive position.*

15. *In concluding the discussion of the agenda item, the Chairman observed that both sides had opportunity to discuss the issues involved. He indicated that Mr. Rasekila had declined the opportunity to convince the Board otherwise but had expressed acceptance of the decision of the Board to abrogate his appointment as Acting Managing Director. The Board would thus*

*accordingly proceed to abrogate the appointment of Mr. Rasekila as Acting Managing Director.”*

[16] On 19 August 1999, Chairman of the respondent’s Board confirmed the revocation of the appellant’s appointment as Acting Managing Director in the following terms:-

*“Dear Mr. Rasekila*

***REVOCATION OF YOUR APPOINTMENT AS ACTING MANAGING DIRECTOR OF THE LESOTHO TELECOMMUNICATIONS CORPORATION.***

*I refer to the Board Meeting of yesterday, Wednesday 18 August, 1999 at which the above issue was discussed and I confirm that by agreement between the parties, it would be best if your appointment is immediately revoked.*

*In furtherance of the above, I here advise that the Board, after you left yesterday’s meeting resolved to revoke your appointment as acting Managing Director of the Lesotho Telecommunications Corporation and this letter serves to advise you of that decision. Kindly revert to your substantive post with immediate effect.”*

[17] On 19 August 1999 the appellant respondent to the above letter in the following terms:-

*“Dear Mr. Minister – Ntate Mphafi*

***YOUR LETTER OF TO-DAY AUGUST 19<sup>TH</sup> 1999***

*I wish to acknowledge receipt of your letter as referred to above. May I please advise Sir that it is necessary that I leave the office of the Managing Director with someone to keep the work going. Your instruction is that I revert with immediate effect; and indeed I have no problem with that. It is only for the sake of continuity that I think I should hand over to someone.*

*Sir, I wish to beg that it is not right to say that the decision was reached in agreement with me. Your letter of 13.08.99 paragraph*

*5 thereof refers of the Board decision which is said to have been arrived at in earlier meeting(s) whereby I was not present. This decision as you put it to me yesterday was arrived at because of the sour relations between me and the PS, Mr. Mathibeli, not because of any failure on my part to perform any specific duties in the office of the Managing Director. Even to date the accusations leveled against me have never been substantiated; which thing leaves a dent on my name.*

*Sir, please note that because of your letter of May 21<sup>st</sup> 1999; appointing me to act in the office of the MD with related benefits for a period of nine (9) months; I have had to get into costs/expenses with a hope that during this period I shall be having specific steady income as a surety. Indeed my previous appointment dated 31.05.96 was not so specific thus leaving me very much on the fence. I could not ban (budget) on it in the same way as your offer of May 21<sup>st</sup> 1999 allowed. This does not mean that the moral and/or legal riders related thereto were meaningless either.*

*Ntate Mphafi; let us please appreciate that there are moral and legal obligations here which we may not afford to ignore even as this bitter decision had to be taken in my absence and without consultation; perhaps because I was only acting. Above all please let me hand over to the appointed person for the sake of continuity in this crucial office.”*

[18] It is important to note that throughout, the appellant maintained that the decision to terminate his contract was arrived at before the meeting of 18 August 1999. There is evidence to the effect that relations between him and the Board had already soured before that date but I find no evidence that a decision to terminate his contract had already been made. The decision was made on 18 August 1999. There is also evidence that prior to the Minister’s letter of 13 August 1999, the appellant had, on 20 July 1999, acknowledged the existence of problems referred to in the Minister’s letter of 13 August 1999.

[19] As at 8 November 1999, the appellant was fighting for his benefits attaching to the terminated contract. He had, in my view, agreed to go but wanted to be paid for the further remaining five (5) months. He thus wrote to the new Managing Director in the following terms:-

*“I attach herewith for your consideration copies of the letters of my appointment as acting MD in May 1996 as well as in April 1999. These letters are fully self-explanatory. In particular I would like to draw your attention to items (4) and (5) of the Resolution of the Board dated 29<sup>th</sup> day of April 1999. This particular items merely drive home the confirmation of the terms and conditions covered under the letter dated May 31<sup>st</sup> 1996 on my first appointment as Acting MD, as well as determining the period involved.*

*Acting MD, it seems to me that somehow the Corporation or its principals lost track of the commitments from these letters. Months have gone by now without compliance to the obligations the Board entered into when they appointed me on two occasions as already indicated. There also seems to be a dead silence on my previous inquiries on related benefits.*

*I suggest that the Corporation honours all the financial obligations so as to avoid forcing me into a lawsuit on the issue of related benefits. It is my contention that the Board of Directors acted very much against natural justice and expectations when they terminated my acting appointment in the manner they did.”*

[20] On 20 April 2000 the appellant wrote to the Labour Commissioner confirming that he had not approached the courts but wanted to be paid his benefits. The main issue was his benefits.

The Labour Commissioner, in a memorandum addressed to the Principal Secretary Transport and Communication on 30 May 2000, also confirms the appellant’s prayer for benefits.



Furthermore on 21 June 2000 the Principal Secretary – Communications informed the Labour Commissioner, in part, as follows:-

*“I note from your letter that, Mr. Rasekila complains that the Board of LTC “unilaterally and prematurely” terminated his acting appointment with LTC. This is basically not correct as the Board fully consulted him before his appointment was revoked by agreement between him and the Board of LTC. I was present at the meeting. It is the Board’s view that Mr. Rasekila is not entitled to any benefits of the position of Managing Director from the date of revocation of his appointment as Acting Managing Director.”*

[21] The appellant’s thrust therefore was, throughout, on benefits and at the same time alleging that his contract as Acting Managing Director was revoked prematurely and without him being given a fair hearing.

He further maintained that his contract was assignment based and that it was cancelled on 13 August 1999 and not 18 August 1999. As I have already indicated the facts do not support his assertion. The facts confirm that the contract was terminated on 18 August 1999.

[22] The respondent, on its part, submitted, in parts, as follows:-

*“8.6 Applicant was given a fair and proper hearing before his acting appointment was revoked. The rest of the allegations contained herein are irrelevant.*

*8.7 A decision had not yet been made when applicant was called to the meeting of the 18<sup>th</sup> August 1999 as alleged. The purpose of the said meeting was to afford applicant the opportunity to make representations before the Board and convince the Board not to revoke his acting appointment. He was entitled to be informed that*

*the Board was no longer impressed with his performance. It would have been unfair to expect him to believe the Board was still pleased with his performance while it was not.*

*8.8 Indeed annexure TR11 was written to applicant immediately after the meeting of the 18<sup>th</sup> August 1999. He gave up in his attempt to convince the Board not to resolve his acting appointment and left the meeting effectively leaving the matter to the discretion of the Board to decide as it saw fit in the circumstances. A decision was made by the Board thereafter, properly so.*

*8.9 The allegation that the meeting of the 18<sup>th</sup> August 1999 was an after thought is incorrect. No basis is laid down for this proposition. It is reiterated that it was only fair in the circumstances that applicant attends the meeting while fully aware of the Board's attitude so that he tries his best*

*8.10 Noted. All terms of the acting appointment of applicant were fulfilled by the then LTC. The issue dealing with the assignment is not issuably dealt with so that a proper response thereto is impossible to put forth."*

The court a quo accepted the factual version as presented by the appellant and then reasoned as follows:-

*"The applicant was also being requested to attend a full Board meeting due to be held on 18<sup>th</sup> August 1999 – at which meeting the applicant was to tell the Board whether he accepted what was in fact "... a termination of his appointment as acting Managing Director".*

*It is quite, clear that having been appointed acting Managing Director of LTC on 29 April 1999, the applicant was being relieved of this appointment on 13<sup>th</sup> August 1999 – that is some mere four months after appointment as acting MD.*

*It is clear that when applicant's fate had been decided at a number of LTC Board meetings, these had been held in the applicant's absence. This is clearly conceded by the Minister in his letter date 13<sup>th</sup> August 1999. This immediately prompted the applicant to respond in a letter to the Minister on the 18<sup>th</sup> August 1999 indicating that seemingly his fate had already been sealed."*

[23] The above finding was not correct. The correct position, supported by evidence is that the appellant was removed from the

position of Acting Managing Director on 18 August 1999, at a Board meeting which he attended and was afforded the opportunity to clear himself of the allegations. Although not agreeing with the Board's decision, he was able to thank the Board for having given him the opportunity to serve. He even requested to be given time to properly handover to the new incoming appointee. Furthermore, it was appellant who, on 19 August 1999, formerly advised the staff of the new development.

[24] The detailed minutes the Board clearly show that an open discussion had ensued. Admittedly this was not a formal disciplinary hearing but all indications are that the appellant had grudgingly accepted his fate. He had, in the interest of fairness been given the opportunity to show cause why he should remain in the post of Acting Managing Director, a post which per his appointment details, was "at the pleasure" of the Board. That is what he accepted.

In ***Matekane Mining and Investment (PTY) Limited C of A (CIV) 52/2013***, where a similar situation arose, this court had this to say:-

*"12. Coming now to the matter of a hearing before dismissal, s 66 (4) of Labour Code Order, 1992 says this:*

*"Where an employee is dismissed (for a reason connected with the employee's conduct at the workplace) he or she shall be entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made, unless, in light of the circumstances and reason for dismissal, the employer cannot reasonably be expected to provide this opportunity..."*

13. A hearing thus means an opportunity to be heard. There are no requirements as to how such opportunity should be structured or when it should be afforded. Plainly, the words “at the time of dismissal” do not mean, literally, on dismissal or even immediately before dismissal. As the Labour Appeal Court points out, a hearing could be afforded even before the declaration of an ultimatum.

14. The law’s overriding requirement is that dismissal must be procedurally fair cf. **Commander of LDF v Mokoena LAC 2000-2004 539 (CA) at 545 A.F.** Assessment of whether due fairness was observed in any case depends on the facts and circumstances of that case. The norm is for the employer to afford the employees the opportunity to state their reasons opposing dismissal. However, as s 66 (4) shows, there may be circumstances where it would not be reasonable to expect the grant of that opportunity.

15. Where the circumstances allow for the opportunity for the employees to be heard, the question is whether in fact that opportunity was given.

16. The opportunity in question is for the employees to defend themselves “against the allegations made” (s 66 (4)) and, as already mentioned, to advance reasons why dismissal should not ensue **Molise v Steven’s Spar Blackheath (2000) 21 ILJ 519 (LAC) at 543G.**”

Admittedly *in casu* we are not focusing on dismissal but on internal reassignment, dictated by commercial requirements. However, I believe the principles enunciated in the above cases are relevant.

Indeed notwithstanding, the fact that the appointment was at the pleasure of the Board, the Board still granted him an opportunity to be heard. He squandered that opportunity by refusing to put his case forward and walking away from the meeting, which meeting he described as a ‘hoax’. He totally refused to place his case before the Board, which was then left with no alternative but to terminate his contract.

[25] It is also important to note that on appointment as Acting Managing Director, he was accorded the salary and benefits attaching to the office of Managing Director. He confirms same in his letter of 18 August 1999 with respect to his initial appointment. He wrote to the Acting Managing Director, in part, as follows:-

*“It has been brought to my awareness that certain member(s) of staff of L.T.C. lodged a secret complaint to member(s) of the Board indicating this or that in connection with the benefits enjoyed by the office of the Managing Director particularly those accorded me as the acting MD appointed from within the Corporation.”*

[26] As already seen, the Board minutes confirm the above which I bring out in order to dispel the notion that the appellant was on an assignment based contract. The privatization task was not in any way based on a separate special contract to which conditions attaching to the office of the Managing Director would not apply. The appellant accepted that his functions were not confined to privatization. To that end, it is totally misleading to give the impression that he was being given special treatment, such as a consultant who, under normal circumstances would be engaged on the basis of an agreed fee. That was not the case.

[27] It should further be noted that the fact of being elevated at the pleasure of the Board, did not give the Board licence to abuse him. To that end, in addition to granting him the opportunity to present his case, the Board went further to seek mutual agreement to end the contract. That was due to non-working relationship

between the appellant, the Board and management. The contract did not in any way imply that the nine (9) months would stand irrespective of any major differences on operational issues. The respondent was therefore correct to argue that once the contract ended the benefits attaching thereto, fell away.

[28] My conclusion is that the contract was lawfully terminated. The provisions of the Labour Code were not breached, particularly Section 62(4) which the appellant relied on. The appellant was no longer entitled to the benefits of the Acting Managing Director from the date of termination of the nine (9) months contract. The cross-appeal succeeds on grounds 1-6.

See also ***Lesotho Revenue Authority v 'Mamonyane and Others C of A (CIV) No. 1/2016 and Khoboko v Lesotho Bank LAC (1995-1999)***.

[29] I now turn to the allegation that the appellant was unlawfully dismissed for a charge of disobeying a lawful order.

Upon the revocation of his contract as Acting Managing Director, the appellant, having reverted to his substantive post of Director of Marketing and Information, was asked to vacate the Managing Director's residence. He refused and was then charged with the offence of "wilful disobedience to lawful orders given by the Acting Managing Director". A disciplinary panel was then set up to deal with the alleged charge of misconduct against the appellant.

[30] Section 29.3.5 of the respondent's Personnel Regulations provides as follows:-

*"In a case where the officer to be disciplined holds a post of a Divisional Head or its equivalent he shall appear before a formal hearing conducted by the Managing Director as Chairman of the panel and two members of the Board appointed by the Chairman of the Board. The panel shall impose a penalty which shall be communicated to the Divisional Head concerned by the Managing Director."* (own underlining).

Section 33.1.2 of the same regulations also provide as follows:-

*"An employee may be summarily dismissed in the following circumstances:*

*For wilful disobedience to lawful orders given by his/her supervisor."*

The disciplinary hearing was conducted on 6 and 14 April 2000. Having heard the matter, the panel came up with the following finding and decision:

*"The decision of the Panel:*

*We find Mr. Rasekila guilty of wilful disobedience of a lawful order given to him by his supervisor to vacate House No. 245 Hillsvie in contravention of LTC Personnel Regulation 27.3.4. Our unanimous decision is the Mr. Rasekila should be summarily dismissed in accordance with LTC Personnel Regulation 33.1.2."* (own underlining).

The appellant was advised of the above decision on 31 May 2000 and thereafter he unsuccessfully appealed to the Chairman of the Board.

[31] I have already explained that in appealing against the judgment of the court *a quo*, which was in his favour, the appellant is only challenging the quantum of the damages granted in his favour. However, it appears that challenge is led to the cross-appeal, the grounds of which are listed under paragraph 10 of this judgment.

In support of the grounds of appeal on the appellant's dismissal from his substantive post of Director of Marketing and Information, the respondent (appellant in the cross-appeal) submitted, in part, as follows:-

*"In his testimony, the applicant confirmed in no uncertain terms that he refused to vacate the house, claiming that the respondent was avoiding certain legal obligations of theirs hence his insistence to remain in occupation of the house. The court a quo rightly found that appellant persistently refused to vacate the house and put the matter as follows: "Having steadfastly refused to vacate the MD's house, the applicant was soon slapped with a notice of a disciplinary hearing..."*

*The court further remarked as follows "Refusal to vacate the MD's house cannot be classified or ranked so as to fall under the ambit of Section 66 (3) (c). Indeed whereas the applicant had communicated his grievance to the Labour Commissioner, was the applicant also entitled to refuse to vacate the MD's house at No. 245 Hillside? The disciplinary proceedings were clearly not founded on the fact of his lodged complaint or grievance over the payment of his allowances or benefits but over his refusal to vacate the MD's house".*

[32] The above are the same arguments that were placed before the court *a quo*. I must say, on his part, the appellant (respondent in the cross-appeal) maintained that he was denied a fair hearing and that there was bias on the part of the panel. I must quickly point out that there was no evidence for his assertions.



[33] In dealing with the aspect of his dismissal, the court *a quo* indeed made a finding that the appellant had refused to obey the orders given. The court observed:-

*“Having steadfastly refused to vacate the MD’s house, the applicant was soon slapped with a notice of a disciplinary hearing on 24<sup>th</sup> March 2000, premised upon the charge “of wilful disobedience to lawful orders given by the Acting Managing Director that you refuse to vacate the LTC MD’s house No. 245 at Hillsvie.*

*After the disciplinary hearing, the applicant was being summarily dismissed with immediate effect from 31 May 2000.*

*It is the applicant’s standpoint that the disciplinary action was taken vexatiously against him only because he was rightfully claiming his benefits after the termination of his contract as Acting MD and that this disciplinary step flew in the face of provisions of Section 66 of the Labour Code Order which (as amended) reads:*

*Unfair dismissal*

- “66 (1) .....*
- (2) .....*
- (3) The following shall not constitute valid reasons for termination of employment*
- a) .....*
- b) .....*
- c) filing in good faith of a complaint or grievance or the participation in a involving the alleged violation of the code other laws or regulations or the terms of a collective agreement or award. (my embolden)*
- d) .....*

*In order to fall under the ambit of the above mentioned provision of the Code, it is important to determine whether the applicant was being disciplined “for filing a complaint against his employer grievance or participating in a proceeding against his employer,” or*

*for refusal to obey the orders of the Board and the acting Managing Director.*

*Refusal to vacate the MD's house cannot be classified or ranked so as to fall under the ambit of Section 66 (3) (c). Indeed whereas the applicant had communicated his grievance to the Labour Commissioner, was the applicant also entitled to refuse to vacate the MD's house at No. 245 Hillsvie? The disciplinary proceedings were clearly not founded on the fact of his lodged a complaint or grievance over payment of his allowances or benefits but over his refusal to vacate the MD's house."*

The above finding was correct.

[34] It is, however, strange that after such a correct finding and correct analysis of the situation, the court *a quo* then went on to conclude as follows:-

*"It is clear that an employer may not be disciplinarily proceeded against for having taken steps to vindicate his sights under the Labour Code. The vindication of the rights under the Labour could be the sine qua non of the proceedings. Without being controverted, the applicant gave evidence to the effect that the **LTC** and its Board were in arms against him and wanted him not only out of the house but out of the **LTC** as well. This he succeeded in persuading the court to understand."*

[35] The above conclusion, on the part of the court *a quo*, was wrong. Once the court had found that the appellant had in fact steadfastly refused to obey the order to leave the Managing Director's house, it should have interrogated whether or not the order was lawful and whether or not disobeying was unlawful. The order, although historically linked to the decision to cancel his contract as Acting Managing Director, was only anchored on his refusal to vacate the Managing Director's house. He was a senior member of management in the organization and he fully knew that

the termination of his contract as Acting Managing Director took away, from him, the salary and benefits attaching to that office. It is true that he was still fighting for his benefits but that did not give him a legal right to resist lawful orders coming from the respondent.

[36] It is therefore my finding that the decision of the disciplinary panel, arrived at procedurally and in terms of the employment regulations of the respondent, was correct. The appellant committed an act of insubordination. To that end, I agree with the respondent's submission that:-

*“Appellant’s conduct fell squarely within the kind of insubordination that should be labeled as serious, persistent and deliberate. The respondent therefore had a fair and valid reason for the dismissal of the appellant from his substantive position of Director Marketing in LTC. The Labour Code (Codes of Good Practice) notice of 2003 provides in Section 7 (1) (d) that “An employer may dismiss an employee if the employer has a fair reason for the dismissal”. The Codes further provide in Section 7 (13) that “A reason is valid if it can be proved. In other words a dismissal will be unfair if the employer is not able to prove the reason for dismissal.”*

[37] In view of the foregoing the cross-appeal on grounds 6-9 should also succeed.

Furthermore, the upholding of all grounds of appeal (i.e. in the cross-appeal) entails that the judgment of the court a quo should be set aside. That also means the appellant's appeal falls away.

[38] With respect to the issue of costs, I take note that this is a labour matter and the appellant executed same as a self-actor, I

would therefore think it is only fair for each party to bear its own costs.

[39] I therefore order as follows:

1. The main appeal be and is hereby dismissed.
2. The cross-appeal succeeds and the judgment of the court *a quo* be and is hereby set aside.
3. The termination of the appellant's contract as Acting Managing Director on 18 August 1999 and his subsequent dismissal from his substantive post of Director Marketing and Information, having been lawful, be and are hereby confirmed.
4. Each party shall bear its own costs.

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**N. T. MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

I agree:

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**P. MUSONDA**  
**ACTING JUSTICE OF APPEAL**

I agree:

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**M. MOKHESI**  
**ACTING JUSTICE OF APPEAL**

For Appellants : Adv. In Person (Thamahane Rasekila)  
For Respondent : Adv. S. Ratau