CIV/APN/213/88

IN THE HIGH COURT OF LESOTHO

In the Application of :

'MAMMUSA 'MUSA — Applicant

V

TEBA. (R.SA.) HEAD OFFICE)	1st Respondent
TEBA. (MASERU BRANCH OFFICE)	2nd Respondent
MOKETE MAHULA	3rd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 2nd day of February, 1990.

This matter came before me for hearing on 10th August 1988.

The applicant approached this Court on motion proceedings against the respondents for an order

(a) declaring her dismissal by the 3rd respondent null and void,

(b) directing the 1st and 2nd respondents to re-instate her with all her rights and benefits,

(c) directing the 1st and 2nd respondents to pay the costs of this application if they should oppose it,

(d) directing the 3rd respondent to pay the costs of this application,

(e) for any further and or alternative relief.

The application is opposed.

The 3rd respondent is reflected on papers as the employee of the 1st respondent. He holds office of a Senior Representative in the premises occupied by the

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2nd respondent in Maseru. The 1st respondent is the head office stationed in the Republic of South Africa.

In her founding affidavit the applicant set out that she was employed by the 2nd respondent on behalf of the 1st respondent in December, 1982.

It is common cause that the applicant was stationed in Maseru for the regular discharge of her duties with the 2nd respondent during the subsistence of her employment. The applicant was employed as a receptionist under the terms and conditions spelt out in annexure "A".

It appears that due to experiencing breathing difficulty the applicant consulted Dr Matsela in 1985 and was advised to avoid smoky environment. The second opinion that the applicant sought in 1986 confirmed the previous doctor's diagnosis.

The applicant was accordingly granted an internal departmental transfer. Annexure "B" shows that in approving this arrangement the management informd the applicant that with the exception of her salary her disignation and grading would change.

Annexure "C" suggests that there was a discussion between the applicant and the 3rd respondent. It appears that the thrust of this discussion centred on the applicant opting for going back to the cash office. The 3rd respondent's attitude was favourable to the applicant's preferance save that the 3rd respondent insisted that the applicant should produce a medical certificate showing that she was then fit to work in a smoky environment. Apparently this Cash office is frequented andoccupied by people who smoke most of the time. The 3rd respondent gave the applicant up to a Friday to produce that certificate. The letter advising her bears 28.1.1987 stamp mark of the 2nd respondent.

Annexure "D" shows that the applicant's doctor indicated that the applicant's allergy to smoking warranted that she should avoid smoking as this constituted

a health hazard to her. The doctor recommended that the applicant should work in an office which is free from smoking and smokers.

It appears that on 25th November 1986 the 3rd respondent had addressed a letter to the 2nd respondent's Manager recommending that the applicant be transferred to Head Office Lesotho or some other office; alternatively he asked if she could not be referred to specialists of the Medical Division for treatment until her ailment had been cleared. In that letter the 3rd respondent had indicated that it is the mine workers who smoke a lot in his offices and as these were his clients he was at a quandery what to do to make them desist from smoking.

The applicant complains that this letter and in particular the portion recommending that she be referred to specialists were ignored by the 2nd respondent.

But as clearly spelt out in that letter the writer did not strictly make any such recommendation. He merely wished to be advised if there was any possibility whereby those Senior in authority could have the applicant referred to specialists.

In any event Coetzer the deponent who is the 1st respondent's manager in Lesotho averred that the specialists of the Medical Division referred to in annexure "g" are general practitioners employed by TEBA in the Republic of South Africa and the applicant's condition of employment did not provide for medical treatment by these general practitioners or by any other Company employees, or make provision for any liability whatsoever in respect of a medical condition pertaining to the applicant. Significantly this averment has not been gainsaid by the applicant.

Coetzer lays stress on the fact that the proposed reference to the specialists was an alternative proposal. The main one being that the applicant be transferred to another job; and this seems to have been done out of sympath

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for the applicant's health problems for the 1st respondent had no need for her services in the new but rather in the old position which she had held.

The 3rd respondent had expressly advised the applicant that the transfer would affect her grading, and that the new post carried a lower grading than her existing post.

Coetzer further emphasised that the applicant was aware that the 1st respondent uses the Paterson grading system, which pays higher salaries in higher grades and vice versa. Nevertheless, the 3rd respondent explained to the applicant that despite her transfer being granted at her request, there would be no reduction in her salary, but under the circumstances it would not be possible to award her future routine annual increments until there was a closer approximation between her salary and the salaries of the other staff members in her job category.

In para 9 of her founding affidavit the applicant avers that on 9th January 1987 she was asked to sign an undertaking by which she should accept not to be entitled to an increment which the rest of the staff would receive in July. The applicant refused to sign this undertaking for she regarded it as contrary to the express or even implied terms of her original contract. To her this appeared to be no more than a mere ruse or afterthought devised by the respondents to form part of the new conditions of her transfer.

The applicant avers that she was confronted with three options, namely

(a) to sign the declaration not to get increment, or

(b) to go back to cash office, or

(c) to resign.

She accordingly chose to go back to cash office for she realised the respondents were not prepared to assist her in her plight even though she is a member of the Fatal

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Accident and Illness Insurance Scheme of the Rand Mutual Assurance Company and as such is entitled to expert medical treatment, and that if her services are to be terminated due to illness it should be with specific recommendation by medical officers. She thus bemoans the fact that the 3rd respondent gave her until Friday 30th January, 1987 to produce a medical certificate of fitness.

In response to the above Coetzer averred that as the Lesotho Manager of the 1st respondent he is charged with the general administration of the affairs of the 1st respondent in this country. Amongst his duties are the employment and dismissal of staff members and other employees. Acting in this capacity he had delegated to the 3rd respondent powers and duties to act as he did on clear instructions and with full authority from Coetzer himself.

Coetzer acknowledged that annexure JC2 is a true copy of the document which the 3rd respondent asked the applicant to sign.

He further states that this document does not impose a new condition of employment on the applicant but merely confirms in writing the consequences entailed in the Paterson grading in so far as they relate to the post offered in a smoke-free environment. All it seeks is a formal acknowledgment from the applicant that she accepts the said consequences specifically the fact that routine future annual salary increments will be affected. This gives rise to a dispute of fact regarding which see Stellenbosch Farmers' Winery vs Stellenbole Winery 1957(4) S.A. 234.

The applicant refused to sign the document in question.

Coetzer avers that by refusing to sign it the applicant created a severe predicament for both herself and the respondents. On the one hand she had produced a medical certificate by which the respondents considered themselves bound, to the effect that she should not work in an environment permeated by tobacco smoke, while on

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the other hand she had refused to accept the implication of the reduced Paterson grading pertaining to the only alternative post available to her, and by her refusal had prevented the respondent from employing her in the post.

It is averred that from 9th to 23rd January, 1987 the applicant performed no duties. It was only after a series of discussions were held and various possible alternatives open to the applicant were considered that a solution was lighted upon on the basis of which the applicant chose to return to the post in the cash office.

The respondents however, mindful of the fact that the applicant had obtained a medical certificate stating that she should not work in the cash office where the atmosphere was always fusty and heavy with tobacco smoke asked her to obtain a further certificate for purposes of assuring them that her health condition had improved to the extent that it could bear the hazardous atmosphere prevailing in the cash office without trouble.

Thus Coetzer explains that the letter of 28th January 1987 was merely a confirmation of the discussion previously held and not intended as a demand for the production of a medical certificate but as an indication that if the applicant wished to return to the cash office, the 1st respondent was eager to be satisfied that the applicant was physically able to perform her duties there.

There appears to be some merit in the respondent's denial that the 1st respondent was not prepared to assist or help the applicant as alleged for evidence exists to show that the 1st respondent acceded to the applicant's transfer in the first place.

It is admitted by the respondents that the applicant is a member of the Fatal Accident and Illness Insurance Scheme, but denied that such membership entitles the applicant to medical treatment or other benefits alleged by her. The explanation given as to the benefits accruing from this

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scheme is that it provides for a payment on death of a member. Hence not the applicant but her nominated beneficiary would be entitled to a benefit in the event of the applicant's death in service.

It appears that it was on account of the deadlock that had been reached, namely that work in the cash office was detrimental to the applicant's health on the one hand while on the other hand she had repudiated the alternative post offered to her on her own application, that the manager decided to terminate the applicant's services.

It is important to note that it was decided not to dismiss the applicant summarily but to terminate her services in terms of section 14(4)(b) of the Employment Act 21 of 1967 providing:

> "Either party may terminate a contract
>
> (a) .....
>
> (b) in any other case, by payment to the other party in lieu of notice of a sum equal to all wages and other remuneration that would have been due to the employee up to the expiration of any notice of termination which may already have been given or which might then have been given."

Coetzer avers that he was compelled to take this step because the applicant had for a long time been not performing any duties and because by her own doing there was no post for her to occupy; and consequently it became clear to him that there would be no point in inviting the applicant to continue to work for a further month. However the 1st respondent offered the applicant one month's salary in lieu of notice.

Termination of the appliant's services was effected in terms of annexure "F". Payment of her salary for the month of February 1987 was tendered in lieu of one month's notice in the sum of M558.38. The applicant refused to accept the payment. But see CIV/APN/81/87 'Nena vs Pioneer Motors (Pty) Ltd. (unreported) at p. 3 where it was said

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"The employee has no right to refuse to accept payment in lieu of notice and to insist on being given notice."

She instead wrote JC5 to the 3rd respondent. The upshort of this letter is that as no lawful cause for termination of her services had been given by the employer and no opportunity granted her to reply or comment on any accusations giving rise to the termination of the contract she still regarded herself as an employee of TEBA. She expressed the hope that the 3rd respondent's letter would be passed on to the proper authorities by him.

The 3rd respondent approached her at least three times instructing her to leave the premises becasue she had been dismissed. Ultimately she complied.

The applicant averred that annexure "J" was written without the 1st and 2nd respondents' knowledge. But Coetzer on behalf of both respondents denies this. No replying affidavit has been filed by the applicant to deny or even qualify the respondents' averments. She contents herself with saying through her counsel that Coetzer's statements are hear-say. But Coetzer indicated from the outset that averments made in his affidavit are within his knowledge and/or appear from the records under his control further that he verily believes them to be true and correct. Yet there is authority for the view that the correct approach where disputed facts are not replied to by the applicant is to accept the respondent's version together with those which are common cause.

There seems therefore to be no reason why the court should doubt that the letter annexure "F" was written upon Coetzer's express instructions. Nor should any doubts be allowed to cloud his assertion that the 1st respondent repeatedly ratified the action of the 3rd respondent. In any event the 3rd respondent has confirmed as true what has been said on behalf of the 1st and 2nd respondents.

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For these reasons I regard as true averments contained in paragraphs 19.1 through 19.3.

The applicant made much of the obiter statement made by a judge of this Court in deciding CIV/APN/89/87 where her application was dismissed on technical grounds that she had not then sought the assistance of her husband as required by law. The learned judge further commented that the applicant was in his view wrongfully dismissed.

This application has been thus brought here on the same facts for the same relief.

It would have perhaps strengthened the applicant's case if the papers before the court then were made to stand as pleadings and the proceedings converted into a trial followed by an order that the respondents be absolved from the instance.

As the matter stands now it amounts to an abuse of process and on that ground alone ought to be dismissed . I don't see what role was intended to be played by the 2nd respondent in these proceedings.

However I decided to assess and consider the merits of the applicant's case but have found on the basis of the relevant law and the decided cases on the matter i.e. CIV/T/450/85 Bernard Sepetla vs Metro Lesotho (Pty) Ltd. (unreported), that there is no merit in this application. It is therefore dismissed with costs.

J U D G E.

2nd February, 1990.

For Applicant : Mr Monyako
For Respondents : Mr Koornhof.