

Reportable

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil App. No.033/04
High Court Case Misca No. 1470 of 2001

In the matter between:

**ANNESTHESIA INTENSIVE CARE &
EMERGENCY MEDICAL (PTY) LIMITED**

Appellant

And

MRI BOTSWANA LIMITED

Respondent

Adv. R.A. Solomon S.C. for the Appellant
Mr. John Carr-Hartley for the Respondent

J U D G M E N T

CORAM: P.H. TEBBUTT J.P.
N.W. ZIETSMAN J.A.
S.A. MOORE J.A.

MOORE J A

- 1 Dr Med Willi H. Kommerscheidt is an Anesthesiologist. He is a German national and was headhunted to Mainz in the Republic of Germany by the Defendant. The Managing Director of the Defendant Mr. P.W. Proctor wrote a letter to Dr Willi, as he came to be addressed during the course of his relationship with the defendant, in which he made an offer of employment to Dr Willi.
- 2 Discussion had been going on between Dr. Willi and Mr. Proctor prior to the letter headed RE: OFFER OF EMPLOYMENT dated 03 July 2000.

The letter referred to those discussions and outlined what were to be Dr. Willi's areas of responsibility. He was to function as Head of Department – Operations Division of the Defendant Company and based in Gaborone.

- 3 The Defendant Company is duly incorporated according to the laws of the Republic of Botswana. It is engaged in the business of providing emergency medical and transport services to patients suffering from trauma or other life threatening illnesses which require them to be moved from the location where the emergency arose, to a distant medical facility where specialised medical and or hospital treatment could be obtained.
- 4 As part of Dr. Willi's preparation for taking up the proffered employment , Mr. Proctor indicated that the Defendant Company required him to visit the local German Air Rescue Service, and hopefully do a ride along on some of their helicopters, to get a feel of First World Air Rescue Service operations. He was also requested to get some experience with the German Ambulance Service. In addition, the letter made it clear that the Defendant wanted the prospective Head of Department to attend the Advanced Cardiac Life Support (ACLS) and the Advanced Trauma Life Supports (ATLS) courses upon his arrival in Gaborone and possibly to attend courses in Johannesburg as he would be required to hold an instructor certificate in both ATLS and ACLS. The company policy was to expose Dr. Willi to both local and regional theories and practices in the

relevant fields so that he could effectively both supervise and also train subordinate staff working under him.

5 By the 28th of February 2001 the Plaintiff Company had become extant. Dr. Willi was in essence its body and soul. But it was the company, and not Dr. Willi the individual, which entered into a written agreement with the Defendant company on that day. The agreement contained many terms and provisions: but it is common cause between the parties that clause 9 entitled TERMINATION, which the Respondent contends gave it the right to terminate the services of the Plaintiff, lies at the heart of the dispute which eventually reached the High Court.

6 The text of clause 9 stipulated that:

"Either party may terminate this agreement during the Initial Period upon the giving to the other three (3) months written notice or payment in lieu of such notice, provided that:

- 9.1 termination by the Employer shall be for reason including but not limited to misconduct, incapacity, which shall include poor performance or sickness, or operational requirements:
- 9.2 the Employer shall be entitled to terminate this agreement during the Initial Period without notice upon the commission by the consultant of any act of serious misconduct including, but not limited to, any misconduct involving the use or consumption of alcohol and/or habit forming drugs, whether during or outside working hours and those acts of misconduct set out in the Employment Act Cap 47:01, as amended."

7 Under clause 2 of the Agreement, the Initial Period is "a period of three (3) years ... commencing, notwithstanding the date of signature hereof, on 1 October 2000." It is common cause that the Defendant company purported to terminate the agreement within the Initial Period thus necessitating an application and interpretation of clause 9. It is also agreed that the Respondent gave written notice as required by the clause.

8 The letter of termination is brief and cryptic. It is dated 27 March 2001, and written under the hand of Mr. Patrick Proctor the Defendant's Managing Director. Its critical paragraph reads:

"As per our discussion this morning, we advise that your company's services are no longer required by MRI Botswana Limited, and in accordance with Section 9 of our agreement, three months notice is hereby given."

9 The three months period of notice ending at the end of June 2001, three clear months notice was accordingly given. The first paragraph of the termination letter begins with the phrase "As per our discussion this morning". This clearly suggests that the letter of termination followed a discussion which had taken place earlier that day. It lends credence to the Respondent's contention, which is not disputed by the Appellant, that the parties had discussed the state of affairs between them that morning.

10 The dispute between the parties lies in the content of the discussion. The Respondent says through the oral testimony of its Managing Director Mr. Proctor, as extracted from the record, that it gave as its reasons for dismissing the plaintiff:

- 3.1 The continued problems that the Respondent's Managing Director experienced with Dr. Willi's performance and his attitude.
- 3.2 The importation of goods for Dr. Willi's own use in a shipment of the company's goods was underhand and not following normal standards of business practices.
- 3.3 Dr. Willi's continuing breach of the Defendant's safety protocols in that
 - (i) he did not always wear surgical protective gloves when treating or handling patients.
 - (ii) he sent an ambulance to Palapye to fetch a patient without a medical attendant in the rear of the ambulance.
 - (iii) He was breaching every safety guard that the Respondent had in the company.
- 3.4 Dr. Willi was causing a rift between the Defendant's advisers and the staff and management by doing his continual thinking of doing it his own way. (sic)

11 The Appellant for its part, through the evidence of Dr. Willie, says that:

- 1. This company was asked to report missing items from a consignment of medical goods, signed to airfreight. (sic)
- 2. He was told that his failure to report the missing items to the police would be the reason to terminate his company's contract of services.

3. That was the only reason given to him verbally in the Respondent's office. Mr. Neil Charlton, the Company accountant, was present.

12 There can be no doubt that clause 9 gives either party the right to terminate the agreement during the Initial period upon the giving to the other of three months written notice or payment in lieu of such notice. But this stipulation is subject to a *proviso*. Under the *proviso*, termination by the employer shall be for reason. The draftsman of the agreement omitted the use of the indefinite article 'a' before the word 'reason'. It is my view that though 'reason' is singular, the employer is not confined to giving a single reason as the Appellant has argued. This is made abundantly clear by the words, which follow 'reason' – 'including but not limited to misconduct, incapacity, which shall include poor performance or sickness, or operational requirements.'

13 Clause 9.1 thus gives misconduct, incapacity, or operational requirements as the three principal reasons for termination. But this list is not exhaustive. Further, as has been shown with incapacity, each principal reason is capable of spawning sub-reasons of its own as has been illustrated in the text of the sub-clause where the examples given of incapacity are poor performance or sickness. But the words 'which shall include'

immediately following 'incapacity' make it clear that the employer may rely on other examples of incapacity not expressed in the sub-clause.

MISCONDUCT

- 14 The Appellant submitted that it would appear from the evidence that the Respondent wished to bring the 'reason' for the termination of Appellant's services under the general category of 'misconduct', referred to in clause 9.1. He submits further that it would first have to be established, applying ordinary labour law principles, whether the Appellant had been guilty of misconduct. He also prayed in aid the reference in clause 9.2 to the Employment Act. Cap. 47:01.
- 15 Though the Respondent evidently relied upon misconduct as a reason for terminating the contract, the evidence shows that misconduct was by no means the only cause for complaint by the Respondent, which could very well have relied also upon the Appellant's poor performance. If one were to look at s 26 (4) of the Act where examples of "serious misconduct" are set out, one would find listed there:
- (a) willful disobedience of lawful and /or reasonable orders given by the employer.

- (c) Habitual or willful neglect of duties
- (d) Acts of theft, misappropriation or willful dishonesty against the employer, ...
- (i) Willful refusal to obey or comply with any safety rules or practices for the prevention or control of accidents or diseases;

16 Misconduct, simpliciter, would evidently be conduct of less grave a nature than the examples set out in s. 26 (4) under the rubric of serious misconduct. But it may be helpful to examine Dr. Willi's conduct against the yardstick of "serious misconduct". For if his conduct is capable of amounting to serious misconduct then, *a fortiori*, it would inevitably, amount to simple misconduct giving rise to the Respondent's right to terminate the contract.

17 Under (a) above, there is evidence that Dr. Willi failed and/or refused to follow orders given by the Defendant to attend Advanced Cardiac Life Support and Advanced Trauma Life Support courses because, in his own words "I have the qualification that is why I did not go for ACLS (Advance Cardiac Life Support) training..." He also claimed not to have been sent to the ACLS and ATLS courses. But his reliance on not being sent carries little weight in the light of the reason he himself gives for not going, that is to say, that he was already qualified. His refusal to attend these courses was all the more egregious because it was made clear to him in the Offer of Employment letter of 03 July 2000 that the Defendant wanted him to

hold an Instructor Certificate in both these courses so that he could both train and supervise subordinate staff in these areas.

- 18 There is ample evidence that the Defendant established a Protocol for the conduct of its employees at all levels including Dr. Willi. The learned trial judge found, as she was eminently entitled to do on the evidence, that Dr. Willi was aware of the existence of the protocols and of his obligation to the bound by them. However Dr. Willi, who considered himself to be an expert European professional in his own right, increasingly chafed at being held in what he considered to be an administrative straight-jacket which inhibited his freedom to exercise his own considered professional judgment even where such an exercise was in clear violation of the terms of the protocol. This is how DOW J put it at page 11 of her commendably lucid judgment.

"On Dr. Willi's own evidence, he did not consider himself bound by the Defendant's protocols. He was aware that the Defendant required that protective clothing, including gloves, should be worn in all situations. He, however, decided the decision would be his and that he would make it on a case-by-case basis. He admits to have issued personnel with equipment he knew they were not trained to use. He admits to having used drugs he had obtained from Germany, which drugs were not in the Defendant's list of drugs. The main position Dr. Willi adopted was that he was a qualified doctor and thus was qualified to decide whether a procedure was safe or not, as well as qualified to decide what drugs to use, without reference to the Defendant."

- 19 Under (c) above, Dr. Willi's failure to accompany all evacuation flights as required by the protocols amounted to willful if not habitual neglect of his duties. The evidence of Mr. Proctor is that if more than one emergency arose at the same time, it was Dr. Willi's duty to secure the services of a doctor or doctors from a panel of doctors which the Respondent had established and from which doctors could be drawn as required. At least two separate cases were reported of Dr. Willi being lost in slumber and thus unable to attend to the in-flight needs of patients being transported by air.
- 20 Each of the cases listed above individually, and more so cumulatively is capable of amounting to **serious misconduct** as set out in s. 26 (4) of the Act. It goes without saying therefore that they are more than capable of amounting to **misconduct** under clause 9(1) of the agreement. The judge in the court a quo was accordingly fully justified, upon the cogent, credible and compelling evidence before her, that the Appellant, through its human embodiment Dr. Willi, was guilty of misconduct amounting to a breach of the terms of the agreement and fully justifying its termination by the Respondent.
- 21 Under (d) above, the complaint against Dr. Willi, which he admitted under cross-examination, was that he included his own personal goods with a shipment of the Respondent's goods without authorisation, and charged

the freight upon his personal property to the Respondent's account without prior approval – a clear case of "willful dishonesty against the employer"

- 22 Under (i) above, Dr. Willi's failure to wear protective gloves at all times as required by the Protocols exposed patients to the risk of contracting diseases. Another example of his "willful refusal to obey or comply with any safety rules or practices for the prevention or control of accidents" involved his unauthorised issue, in breach of the Protocols, of Laryngo Scopes to unqualified personnel not trained in their proper use. This vital piece of equipment is a device to lift the tongue and jaw and has a light so that the person using it can see the vocal cord. It is put through to the thorax to secure the airway to the trachea.. Its improper use can lead to complications from spasms. Where the vocal cord closes it induces vomiting. Mr. Lombard who testified in this issue also swore that incorrect use of the scope could cause serious damage to the spine which could be temporary or even permanent. There was also the danger of an unconscious patient breathing his own vomit into the lungs.

THE CASE FOR THE APPELLANT

- 23 The Appellant's first complaint is that since the agreement was silent as to what mechanism must be utilized in order to determine "reasons" within the context of clause 9.1 and of the agreement as a whole, it was

incumbent upon the learned trial judge to examine what this mechanism should be, and in particular, whether the Appellant was entitled to a 'hearing' prior to termination of the agreement in terms of clause 9.1. The Appellant further argued that not only the notice of termination, but also the reasons for such termination should have been reduced to writing.

24 The trial judge was astute to observe that the Appellant's particulars of claim paragraph 5 complained that 'Defendant terminated the agreement between the parties without reason.' She also noted that during the course of the trial the Appellant's case on this aspect had shifted to the allegation that the Respondent had given only one reason – the Appellant's failure to report the missing goods to the police – and that that reason had been given orally at the meeting of 27th March 2001, and had not been reduced to writing.

25 The court *a quo* gave careful consideration to the question whether, in the context of the agreement, and in the absence of a written stipulation that 'reason' for termination must be in writing, both the notice of termination, together with the reason or reasons therefor, should have been in writing. The court came to the conclusion, with which this Court is in full agreement, that the notice of termination must, as it was in the case before her, have been in writing, but that the reason or reasons for terminating the contract need not have been in writing: provided that there

was a sufficiency of evidence to her satisfaction reaching the civil standard of proof, that the reason or reasons for termination were effectively communicated by the Respondent to the Appellant before the delivery of the written notice of termination was made to the Appellant.

26 The agreement itself, made no provision for 'reason' or reasons to be given in writing. Nor did it contain any term requiring the Respondent to afford the Appellant a hearing before giving written notice terminating the contract. In **SELOADI AND OTHERS v SUN INTERNATIONAL (BOPHUTHATSWANA) LTD. 1993 (2) J.A. 174** Lawrence AJ at p179 stated the well established principle of contract law that, in the absence of an express term in a contract or one which could necessarily be implied, the *audi alteram partem* rule did not apply.

27 This is how he expressed this principle at page 179 I to 180 A.

"In Grundling v Beyers and Others 1967 (2) SA 131 (W) Trollip J. held that in contract there was no presumption that the *audi alteram partem* rule operated for the obligation to afford a hearing according to natural justice to apply. There must be an express or necessary implied term of the contract before a hearing could even be considered. See **Russel v Norfolk (Duke) and Others [1948] 1 All ER 488 (KB); Russel v Duke of Norfolk and Others [1949] 1 All ER 109 (CA); Lawlor v Union of Post Office Workers [1965] 2 WLR 579 (Ch) ([1965] 1 All ER 353) at 591-2; Marlin v Durban Turf Club and Others 1942 AD 112 at 122, 127-8."**

28 His Lordship went on at page 180 D-E:

"It was contemplated that generally they (referring to the contracts) would be terminable on a month's notice. I cannot see how the *audi alteram partem* rule can be a necessary implication on a contract so terminable."

29 The *rationes* of Lawrence AJ as set out in the above segments of his judgment in the **Selaodi** case found favour with Khumalo J in **Ludick v Samsa Tiles (Pty) Ltd 1993 (2) SA 197**. Applying the principles expounded in **Selaodi v Sun International** Khumalo J said at page 198 F-G:

In the **Selaodi** case supra at p 10 Lawrence AJ said the following:

"**Grundling's** case is clear authority that the rule of *audi alteram partem* need not be observed, and no terms, whether express or implied in the contract, have been set out by applicants suggesting that a hearing was necessary in the circumstances."

"In the present case the applicant signed a letter addressed to him by respondent setting out the terms of the contract. There is nothing in that document which suggests that the *audi alteram partem* rule applies. The applicant was given proper notice in terms of the contract and he was paid a month's wages in lieu of notice. The services of applicant were terminated because of his racist attitude towards black employees of the respondent and in meetings with officials of respondent this had been pointed out to him in the past. In dismissing an employee the employer may take into account past conduct of the employee and warning given. **Negro v Continental Spinning**

**and Knitting Mills (Pty) Ltd 1954 (2)
SA 203 (W); Strachan v Prinsloo 1925
TPD 709; Maodi (supra at p15)."**

30 Distilling these principles to their very essence, Khumalo J encapsulated them authoritatively when he wrote at page 199 D:

"There are no factors relating to the service contract which, objectively viewed, justify the conclusion that the appellant should have been heard."

31 Having reached the position that the contract could be properly terminated, the court then went on to consider whether the Respondent had in fact communicated any reason or reasons to the Appellant for the termination of the agreement, and also whether, if in fact such reason or reasons were indeed communicated, they afforded the Respondent sufficient justification for the termination of the agreement.

32 Both the Appellant and the Respondent agree that a meeting did take place on 27th March 2001 between the principal human protagonists Dr. Wiili for the Appellant and Mr. Proctor for the Respondent. Both sides also agree that Mr. Charlton the Respondent's accountant was also present at the meeting. At page 10 of her judgment, Dow J. observed:

"The Plaintiff also charged that the Defendant's failure to call Charlton calls for an adverse inference against it. It seems to me though that it is the Plaintiff who must prove its case and that if nothing stopped the Defendant from calling Charlton, equally, nothing stopped the Plaintiff to do the same."

33 The circumstance which may have stopped both parties from calling Mr. Charlton is the fact that by the time the matter came on for trial, that gentleman was in the distant country of New Zealand. In the absence of Mr. Charlton, and having to choose between the oral testimony of Dr. Willi and that of Mr. Proctor, the judge in the court *a quo* embarked upon a careful analysis of all the evidence before her. On the matter of credibility Dow J, perceptively observed at page 7:

“The Plaintiff was adamant and very believable, in his evidence in chief that only one reason, being the ‘missing items reason’ was given to him. In cross-examination though, it appeared that more than just that one reason was discussed.”

34 This propensity of Dr. Willi to envelop the court *a quo* with mists of seeming truth was to repeat itself throughout his testimony. But in every material instance where his evidence was tested, it dissipated as the morning dew evaporates before the ascending sun, under the withering fire of incisive cross-examination. The record of the trial is replete with examples of his poverty as a witness.

35 Quite apart from Mr. Proctor’s evidence on the point, the court *a quo* was justified in observing that “It appears from Dr. Willi’s evidence that he left the meeting with the knowledge that the Defendant had decided to terminate the agreement.” Prior to the meeting that morning, there had been a rising accretion of grievances in the mind of Mr. Proctor and of

resentments in that of Dr. Willi. All of these need not be treated here. A typical example will suffice.

- 36 There was the episode of the shipment from Germany. Dr. Willi resented the fact that the boxes were opened in his absence. He reported shortages thus, whether wittingly or unwittingly, raising the spectre of theft by those who had opened the boxes in his absence or those who may have had access to it when he was not there. To his chagrin Mr. Proctor discovered that, apart from the shortages in the shipment, there was the more serious matter of Dr. Willi commingling his personal goods with the Defendant's goods for which Dr. Willi charged the freight costs to the Defendant company without authorisation. He admitted as much under cross-examination.
- 37 Evidently dissatisfied with Dr. Willi's story about possible thefts from the shipment, Mr. Proctor sought to call the former's bluff, so to speak, by instructing him to report the matters to the Police. Dr. Willi demurred. He claimed that he had to verify the accuracy of the shipment with the suppliers in Germany. Then he raised the matter of an inventory which had been taken in his absence. For over two weeks he stalled while Mr. Proctor, with mounting frustration, pressed him to report the matter to the Police since he was the one personally involved. Up to the time when the

contract was terminated, Dr. Willi was still to comply with that lawful order of his superior Mr. Proctor.

38 The catalogue of other items of misconduct by Dr. Willi leading to tension with Mr. Proctor is set out elsewhere in this judgment and need not be repeated here.

39 Matters were building to a crescendo and Dow J. was undoubtedly correct when she wrote at page 12 of her judgment:

"Thus by the 27 March 2001 Dr. Willi and Proctor were clearly hostile towards each other and I am unable to accept that Proctor would have limited the discussions to just the missing item issue. It is my conclusion that, contrary to what Dr. Willi has stated, Proctor discussed all the many allegations he was to later reduce to writing in the *Aide Memoir* and the *Mecelino letter*."

40 The "Aide Mamorae (sic) – P.W. Proctor" does not carry a date as such though it commences with the line "Meeting with Dr. Willi Kommerscheidt on 27/03/2001." It records as present, P.W. Proctor, Dr. W. Kommerscheidt, and N.A. Charlton. It notes that Dr. Willi and Neil Charlton (as witness) were asked to come to Mr. Proctor's office "to discuss continuing problems experienced with Dr. Willi's performance and attitude." According to this document, the matters discussed include theft of equipment, the numerous requests by Mr. Proctor that Dr. Willi report the matter to the Police, the latter's failure to do so, Dr. Willi's reasons for

his failure to do so, Dr. Willi's having the Respondent pay freight on his personal goods which Mr. Proctor 'found to be underhand and In breach of financial ethics'. Dr. Willi's persistent refusal to wear surgical gloves when treating patients at an accident scene, and his breach of the rules when attempting to send an ambulance to Palapye to fetch a patient without a medical attendant in the rear of the ambulance.

41 This nascent infringement was only aborted by the timely intervention of the operations supervisor who halted the call. Mr. Proctor also bemoaned the fact that what he described as Dr. Willi's continuing insistence on doing things "his" way instead of the company's laid down procedures, was causing a rift between management and staff as well as the medical advisory board. Mr. Proctor finally referred to heated discussions which did not result in any compromise. It takes but little imagination to picture the scene. Mr. Proctor insisting on compliance with the protocols and scolding Dr. Willi for breaching them. Dr. Willi, stubborn and obdurate, refusing to retreat from the fortress of reliance upon his own deliberate judgment into which he has castled himself, reinforcing the shutters even more securely against each new attempt by a frustrated Mr. Proctor to breach them.

42 The other document that Dow J closely and critically examined was the so called Marcelino letter. Mr. Jack Marcelino was the Executive Director

with Mr. Proctor of the Respondent company. The 'letter' is a memo dated 12 April 2001 from Mr. Proctor to Mr. Marcelino. Dr. Willi is the subject of the memo. It advises that the termination of the contract with the Appellant was based upon misconduct, poor performance, and poor operational requirements. It then lists the items set out in the *Aide Memoir* in somewhat greater detail. The trial judge observed at page 22 of her judgment that:

"The two documents are not identical and do not contain the same details but both make out the same complaint against Dr. Willi."

- 43 I agree with her assessment. She also considered a letter to Dr. Willi, dated the 9th April 2002 which purports to have been authored by a Dr. McKendrick, apparently on behalf of the Medical Advisory Group [MAG]. Of this letter, the trial judge had this to say at page 10:

"Dr. Willi's evidence on this was that he had never seen this document before, but he admitted to having requested the MAG to make a statement on the matter raised in the document. One of the things the MAG letter raises is that there were differences of opinions between Dr. Willi and the MAG on treatment modalities. There is an allegation that Dr. Willi was allowing paramedics to undertake procedures and to employ drugs contrary to defendant's stipulated protocols."

- 44 The Appellant contended that these documents, all admittedly written after 27th March 2001, were *ex post facto* concoctions designed to bolster the Respondent's case for terminating the agreement. But, as the court *a quo* has found, as does this court, nothing in the documents themselves, or in

the evidence, apart from Dr. Willi's bald allegation, supports this contention. If the statement contained in the letter of Tuesday, 09 April 2002 and written by Dr. D.R.A. McKendrick, Chairman, Medical Advisory Group, was being relied on by the Appellant to show that there was no justification for terminating the contract, both its tenor and content have, if anything, quite the opposite effect.

45 After opening pleasantries in the first two paragraphs, the third paragraph begins with the ominous expression "However", and then lists, citing the minutes of the Group's meetings, the following matters which, in the view of this court provide ample justification for the termination of the agreement. Dr. Willi did not respond to or challenge the matters set out in this letter. The specific complaints are:

- "1. Dr. Willi's failure to complete the ACL S; ATLS; and APLS courses in South Africa. Since the rest of the staff had been trained according to South African protocols, the completion of these by Dr. Willi would have been not only for his own edification, but were essential to the harmonization of Protocols and uniformity of practices within the Respondent company.
2. This failure of Dr. Willi to qualify himself in and conform to local and regional protocols naturally led to differences of opinion regarding treatment modalities.
3. Dr. Willi's differing absences from Medical Evacuation Flights in breach of Protocols.
4. His prolonged absence from the MRI Control Centre in Gaborone
5. His failure to arrange for local doctors as needed.

6. Disagreements regarding the transportation of psychiatric patients.
7. Conflicting advice being given to staff.

46 Two further points must be noted. There are several references to communications on these matters from the Advisory Group to Mr. Proctor and Mr. Jack Marcelino and, secondly, the common thread running through all these matters is the havoc which was being created within the Respondent's operations by the intransigent refusal of Dr. Willi to abide by the Respondent's protocols. In all these circumstances, the Respondent would have been reckless if it did not take firm action to bring this untenable state of affairs to an end. Termination of the agreement for which there was ample justification, is the only way in which this highly necessary objective could be achieved.

47 From all this it is abundantly clear that Dow J was undoubtedly correct when she found:

1. That there was a multiplicity of reasons justifying the termination of the agreement and;
2. That those reasons were effectively communicated to the Appellant by the Respondent in the meeting of March 2001 albeit in oral form **BEFORE** the letter of termination was delivered.
3. There was no need for the reasons for termination to be given in writing.

48 It goes without saying then that I am in complete agreement with the trial judge when she found at page 12 of her judgment that:

"It is not my conclusion that every allegation of misconduct leveled against Dr. Willi was actually true But I do conclude that Dr. Willi was not entitled to decide which of the Defendant's protocols he would observe and which he would not. The issue of wearing gloves might be a small matter, even though it must be noted that it is not just the health professional that stands to benefit from the protection by gloves, but the patient too. The using of drugs not listed in Defendant's protocol and the issuing personnel with equipment they were not trained to use was serious enough to amount to misconduct."

49 Not surprisingly, Dow J in her conclusion on page 13 wrote:

"I hold that Defendant had reasons for justifying the termination of the contract. I hold further that the Defendant did communicate such reasons to the Plaintiff at the meeting of the 27th March 2001."

50 Those findings of the trial judge are amply justified upon a proper consideration of the evidence before her.

PROCEDURAL FAIRNESS

51 The Appellant submitted that the failure on the part of the Respondent to afford the Appellant "a hearing" was contrary to the principles of natural justice and in particular the *audi alteram partem* rule, entitling the Appellant to an order as originally sought. It cited the case of **Botswana**

Housing Corporation v Rabana [1997] B.L.R. 106 as authority for the proposition that the Appellant was entitled to be heard before the Respondent took the decision to terminate the contract.

- 52 In the opening words of his judgment at page 107 Tebbutt J.A. recorded that "Appellant is a body corporate created by statute viz the Botswana Housing Corporation Act No. 75 of 1970 as amended". The Respondent was an employee of the Appellant whose employment appeared to be bound by the Appellant's standard terms and conditions of service. The court held that in the circumstances of that case the *audi alteram partem* principle did not require the holding of an oral hearing such as that for which the Respondent contended. At page 121 D to page 122 A Tebbutt J.A. as he then was, set out the principles involved with such lucidity that no attempt at condensation or paraphrasing could replicate the clarity of the passage. Accordingly I set it out in full for the benefit of the parties, their legal advisers and for all those who are interested in this area of the law, for whatever reason.

"The principle is one of the most ancient in jurisprudence. In South Africa, whose judicial decisions and utterances are of persuasive value in this country, Colman J. in **Heatherdale Farms (Pty) Ltd. V Deputy Minister of Agriculture 1980 (3) S.A. 476 (T)** at 486D-E said in regard to it:

"it is clear on the authorities that a person who is entitled to the benefit of the *audi alteram partem* rule need not

be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing, or allowed representation by an attorney or counsel; he need not be given the opportunity to cross-examine; and he is not entitled to discovery of documents."

Consonant with the foregoing it has been held that the rules of natural justice do not require a domestic tribunal to "apply the technical rules of evidence observed in a court of law to hear witness orally to permit the person charged to be legally represented ... or to call witnesses Or to cross-examine witnesses" (see **Meyer v Law Society Transvaal 1978 (2) S.A. 209 (T) at 213A-B** and authorities there cited). The body concerned is entitled to determine its own procedure, provided it complies with the applicable contractual provisions. As was stated by the court in **Herring v. Templeman and Others [1973] All E.R. 569 (C.A.) at 587G**:

"The governing body is master of its own procedure. Its members are not judges in a law court, nor are they legal arbitrators. They are entitled to such flexibility in their procedure as they think the particular case under consideration requires."

As pointed out above, appellant's conditions of service also provide for flexibility in its procedures. What is required is that in reaching its decision the employer must apply its mind honestly to the issue and that its procedures must be fair. Fairness in turn requires that the employee should be given an opportunity to meeting the case against him. (See **National Transport Commission and Another v Chetty's Motor Transport 1972 (3) S.A 726 (A) at 735; Slagmont (Pty) Ltd. V Building Construction and Allied Workers Union and Others 1995 (1) S.A. 742 (A) at 755B C; Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) S.A. 43 at 48D-E.**"

54 From a reading of the whole of the judgment of Tebbutt J.A., one could safely infer that the question whether or not the principles of natural justice were observed, depends upon the facts and circumstances of each particular case. These include; (i) the terms of any applicable statutory provisions, (ii) the terms of any relevant rules or conditions of employment, (iii) the steps taken by the employer to bring any disciplinary or other charges against him fully and fairly to the attention of the employee, (iv) the opportunities afforded him to respond to those allegations, (v) the facts and circumstances leading up to the charges and (vi) the conduct of the parties from the date of employment to the termination of his services.

55 In the English case of **Russel v Duke of Norfolk and Others [1949] All ER 109**, Tucker LJ expressed as much at page 118 B-F.

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case. I think from first to last the plaintiff did have such an opportunity.

I agree with my Lord that there is no evidence in the present case that any principle of natural justice was violated.

56 Asuith, L.J. observed *consentiente* at page 118 H

"There is no evidence in the present case that any of the principles of natural justice was violated."

In that case, Lord Goddard C.J. had left to the jury a question whether an inquiry which had been held by the stewards of the Jockey Club was fair. The Plaintiff attended a meeting before the Jockey Club where allegations against him of doping a winning horse were considered. He was accompanied by a Mr. Hardy the owner of the horse. He submitted a written statement in answer to the charges against him. Tucker L.J. concluded at page 112 B that:

"It is clear from that letter that the plaintiff was well aware of the nature of the matter which was being inquired into and necessitated his attendance on April 15 and that he would be called on to give an explanation with regard to his care and management of the horse and so forth."

57 The Plaintiff had complained that his licence had been withdrawn, and that he had been found guilty of misconduct and become a disqualified person without an inquiry having been conducted in accordance with the principles of natural justice. But after reviewing the evidence, which included the Rules of Racing, and the judgment of the learned Chief Justice in the court below, Tucker L.J. concluded at page 115 D – E:

"So, with regard to the withdrawal of the licence, that was a thing which the stewards were entitled to do without any inquiry, and they would have equally been entitled to warn the plaintiff off Newmarket Heath which would have resulted in his becoming a

disqualified person. So much with regard to the case as founded in contract."

58 But Tucker L.J. was not content to leave the matter there. Underscoring what he had said earlier, he wrote reflectively at page 116 - G:

"... if I am wrong in the conclusions which I have reached, and, if it was part of the contract between the parties that there should be an inquiry conducted according to the principles of natural justice and that such an inquiry was a condition precedent to the right of the stewards either to withdraw the licence or to find the plaintiff guilty of misconduct and disqualify him and such inquiry is necessary to support the plea of privilege, then, in my view, there was no evidence here that the inquiry conducted by the stewards was not in accordance with what is called the principles of natural justice."

59 And again at page 117 B:

"in my view on the admitted facts of the case, whether it be a matter of law or whether it be a matter of fact, there is only one possible answer, namely, that it has not been established that this inquiry was not in accordance with the principles of a natural justice."

60 His Lordship then considered the many matters about which the plaintiff complained in support of his contention that the inquiry did not accord with the principles of natural justice. He then continued at page 117:

"It is .. right and proper that he should be given an opportunity of attending the inquiry and giving his explanation. **It does not seem to me that at the outset there is necessarily any particular charge made against the trainer.**" The horse is said to have been doped. The stewards have evidences which satisfies them that there is a *prima facie* case of doping. They require the trainer and the owner to attend the inquiry and to give an explanation. If in the

course of that explanation it is made manifest that there has been negligence or misconduct, a specific charge then emerges, and that is exactly what happened in the present case. [Emphasis added.]”

- 61 His Lordships then went on to consider the plaintiff's explanation, his admission of fault in a material particular – leaving the horse unattended for 20 minutes -, the unmeritorious complaints about the conduct of the inquiry, and ultimately concluded that there was no violation of the principles of natural justice.
- 62 Counsel for the Appellant in the present matter cited the case of **National Development Bank v Thothe [1994] B.L.R. 98(C.A.)** in which the Appellant was found to be a public authority at least for purposes of the controversy before the court. Aguda J.A. who delivered the judgment of the court, with Amissah J.P. and Schreiner J.A. agreeing, made it clear that all statutory bodies employing staff must observe all statutory laws, rules and regulations governing the relationship between employer and employee. In the absence of such rules and regulations, all such public bodies are bound to observe the rules of natural justice in the procedure which they may employ in disciplining members of their staff. The case before the court was by way of notice of motion for judicial review. It found that an employee of a public authority can be removed only after notice; and if the contemplated removal is as a result of misconduct he will be entitled to be served notice and to defend himself. It also held at page

106 A that in a case of willful dismissal from the employment of a public authority, the court may declare such a dismissal a nullity and order a reinstatement. See **Rossouw v Suid-Afrikaanse Mediese Navorsingsraad 1990 (3) S.A. 297.**

63 It is to be noted that the *National Development Bank* case bears many marked dissimilarities from the present case and its usefulness for present purposes is therefore limited by those differences. The Respondent in the instant case is not a public authority. It is a limited company incorporated under the laws of this Republic. The respective rights and obligations of the parties in **National Development Bank** were affected, at least in part, by the National Development Bank Conditions of Service. Those conditions provide that the charge of any offence which involves disciplinary action must be made in writing, clearly stating the nature of the offence, and inviting the employee to reply to the charge as stated. Disciplinary action will only be taken in respect of an offence for which an employee has been charged. No such provisions are to be found in the agreement between the parties in the instant case. Aguda J.A. described the relationship between the parties in the National Development Bank case succinctly at page 109 B where he said:

"Here we are not dealing with an agreement strictly of personal service as usually exists and is common between master and servant. We are here dealing with a relationship of employer and employee governed by rules previously agreed between

themselves as to how that relationship can be brought to an end."

64 Clause 9 of the agreement in the instant case makes no such elaborate provisions as contained in the "Statement of Principles of Disciplinary Proceedings" found in clause 16.1 of the Bank Conditions of Service.

65 There is, however, an even more fundamental difference between the **National Development Bank** case and the one before this court. It is this. The Respondent in that case was a human employee of the Appellant corporate entity which is a public authority. Their relationship was therefore governed by the law relating to employer and employee set against the background of the terms and conditions of employment to which the parties had agreed.

66 In the case before us, the contractual agreement is between two artificial or legal persons neither of which is a human person. Much of the argument which was advanced on both sides would have been more apt and appropriate if Dr. Willi the human person had been the employee of the Respondent. If Dr. Willi was employed at all, he was the employee of the Appellant. He was the human instrumentality through which the Appellant discharged and in the event failed to discharge, its contractual obligations to the Respondent. It is trite that a company functions through the acts of its human agents. The lower level members of the company or

its employees are the muscles, and sinews through which the company acts. The Directors and possibly the upper level managers are the brain and mind of the company. This distinction between a company and its human agents is well settled and established even where as here, Dr. Willi was the living embodiment of all of the elements of the corporate entity.

67 In this regard he was not dissimilar to Mr. Aron Salomon who was in real terms the sole owner of the company which he had established and which had acquired what had been hitherto a business owned by him personally. In **Salomon v Salomon & Co Ltd [1879] AC 22, All ER [1895-9]p 33, Lord Macnaughten**, speaking in the House of Lords, stated the principle which has held sway even since :

“The company is at law a different person altogether from the subscribers to the memorandum. “

68 It was more recently restated and applied by the House of Lords in **Lee v Lee’s Air Farming Limited [1960] 3 All ER 420**. The correct basis therefore upon which to approach the question at issue here – whether the Respondent was entitled under clause 9 to terminate the agreement – is to seek to discover whether the Respondent company was entitled to terminate the agreement on the grounds of the Appellant company’s alleged breach of the written contract which had been entered into by the parties as evidenced by the agreement signed by them on the 28th February 2001.

69 In essence therefore, this is not a case involving the wrongful dismissal by an employer by an employee. Nor is it one in which a corporate leviathan or well-heeled statutory corporation or intimidating department of the central Government, is ranged against a puny individual. It is a case in which two moderate sized companies, not markedly disproportionate in physical or human resources, entered into contractual relations at arms length where they appeared, at least on the face of it, to be equally capable of enforcing their respective rights and discharging their respective obligations under the contract. Indeed, it is because they were so evenly balanced that neither Mr. Proctor for the Respondent, nor Dr. Willi for the Appellant could effectively better the other.

70 Mr. Proctor, Protocols in hand, insisted, with decreasing success but with mounting frustration, upon their strict observance. Dr. Willi, proud of his professional standing and his German expertise, felt increasingly galled by what he considered to be the monotonous bleatings of a man, innocent of the medical arts, and singularly unqualified to give him orders. He would have none of it. Protocol or no Protocol, Mr. Proctor's whining notwithstanding, he would act in accordance with his own deliberate judgment which he considered to be far superior to the restraining protocol. A standoff had been reached. Mr. Proctor could take Dr. Willi's obduracy and intransigence no longer. His only recourse was to terminate

the contract with the Appellant which was not performing its contractual obligations to the Respondent in terms of the agreement.

71 This court, therefore is in complete agreement with the trial judge who found that the Respondent had justifiable reasons for terminating the contract, that the Respondent effectively communicated those reasons to the Appellant on the 27th March 2001, and who rejected the testimony of Dr. Willi that the only reason given to him for the termination of the contract had to do with the circumstances surrounding the importation of goods from Germany and his failure to report the alleged theft to the Police.

EPILOGUE

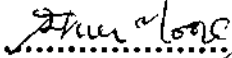
72 It is clear from the conclusions reached in the foregoing paragraphs that the Respondent was fully justified in terminating the contract between the parties. The Respondent fulfilled its contractual obligations by giving the Appellant three months written notice and by paying the Appellant company in full during the period of that notice. The Respondent met its obligations by giving the Appellant reasons for terminating the contract. The oral reasons conveyed in the stormy meeting of 27 March 2001 were sufficient. There was no need for those reasons to be put into writing.

73 Under the contract entered into between these two companies, the rules of natural justice did not apply. But even if they did, there is more than a sufficiency of material in the evidence to enable this court to come to the conclusion that even though the rules of natural justice were not applicable, they were in fact observed by the Respondent. The Appellant was constantly reminded of its many transgressions over a considerable period of time. It ignored the many futile attempts by the Respondent to persuade it to act in accordance with its contractual obligations. By the 27th March 2001, Dr. Willi could have been in no doubt about the many allegations levelled against him and as a consequence against the Appellant company. He had heard all of these allegations many times before. But on the 27th they were restated again. Dr. Willi had made many unconvincing and unsatisfactory responses to these allegations in the past. At the heated meeting of the 27th there can be no doubt that he defended himself and his company with his customary vigour and disdain. He had had more than an adequate hearing and a full opportunity of putting the Appellant's case at its highest.

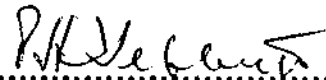
74 In the event then, it ordered that:

The appeal be and is hereby dismissed with costs to the Respondent.

DELIVERED IN OPEN COURT AT LOBATSE THIS 27th DAY OF JULY
.....2005.


.....
S.A. MOORE
JUDGE OF APPEAL

I agree


.....
P.H. TEBBUTT
JUDGE PRESIDENT

I agree


.....
N.W. ZIETSMAN
JUDGE OF APPEAL