



**IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA HELD
AT LOBATSE**

CACLB-012-09

In the matter between:

ANDREW BABEILE

APPELLANT

AND

ATTORNEY-GENERAL OF BOTSWANA

RESPONDENT

Lobatse, 22 and 30 July 2009

D. Boko for the appellant

K. N. Sebotho for the respondent

J U D G M E N T

**CORAM: DR S TWUM JA
C. T. HOWIE JA
LORD ABERNETHY JA**

LORD ABERNETHY JA

1. The appellant is Andrew Babeile. The facts of the case are in all essentials common cause. In 2003 he was an employee of the Unified Local Government Service. At that time he held a Motor Vehicle Technician Certificate in auto mechanics. Wishing to improve his qualifications he applied for and in August 2003 was

- offered a place to study for a Bachelor of Mechanical and Automotive Engineering degree at the University of Bradford, England. This was a 3-year course starting in September 2003.
2. The appellant then applied for sponsorship from his employer to enable him to undertake the course. In the meantime, in order to secure his place at the university, he accepted their offer.
 3. On 15 September 2003 the appellant was granted sponsorship for the course by the Local Government Service Management in Botswana.
 4. Not surprisingly the sponsorship was subject to certain conditions and on 15 September 2003 the appellant entered into an agreement with the Local Government Service Management. It was signed by the appellant and on behalf of the Government and was witnessed.
 5. It was a standard form of agreement entitled Agreement for Candidates Attending Courses. The preamble was in the following terms:

“WHEREAS the candidate has been selected to attend a course of instruction in AUTOMOTIVE ENGINEERING for duration of 3 YEARS (hereinafter called the course) at the expense of the Local

Government Service Management for the purpose of improving his/her qualifications for the duties he/she is performing or for the duties he/she will perform if appointed to the Local Government Service.”

6. There then followed a number of undertakings to which the appellant agreed. For present purposes the undertaking in Clause 2 (d) is the important one. It is in the following terms:

“If at my request I undergo University Degree training for a period exceeding one academic year I shall be subject to the following conditions:

.....

(d) I undertake to comply with the Rules listed in the Schedule hereto.”

7. The Schedule mentioned above bears the heading “Rules for Candidate Attending Courses.” Rule (d) is in the following terms:

“(Every candidate selected to attend a course is required) to devote his/her full-time attention of following the course for which he/she was selected unless permission to undertake other work or to modify his/her contract or duration is granted.”

The Schedule was also signed by the appellant.

8. The appellant then proceeded to the United Kingdom. At the end of September 2003 he embarked on the Mechanical and Automotive Engineering course at Bradford University. It soon became evident that that course had an intense and advanced mathematical component which was beyond the appellant’s

capabilities. It appears that this was a problem he shared with all the other Batswana students on the course, of which there was a good number.

9. On realizing the problem the University advised the students, including the appellant, to change courses to one which did not require a high level of Mathematics.
10. Acting on this advice the appellant chose a BSc degree course in Automotive Design Technology and changed to that course. He did not seek, nor was he granted, permission from the Local Government Service Management before he did so.
11. It appears that it was some time before the Local Government Service Management learned of the change but by letter dated 15 October 2004 their Establishment Secretary wrote to the appellant in the following terms:

“SPONSORSHIP: YOURSELF

We would like to inform you that your unilateral decision to change programme of study from Beng Mechanical and Automotive Engineering to Automotive Design and Technology without the prior consent of the Establishment Secretary was contravention of the General Orders 199.4 and 199.5 governing your scholarship award.

In pursuant of General Order 199.5 of the Unified Local Government Service be informed that the

government has decided to terminate your scholarship forthwith. The Botswana High Commission in London is by copy of this letter advised to arrange for your return to Botswana.

You are advised to contact this office upon your arrival in Botswana.”

12. General Orders 199.4 and 199.5 are not quoted in the record except in the judgment of GAONGALELWE J dated 23 February 2009, which is mentioned later. The Orders are in the following terms:

“199.4 An Officer sent for training may not change his course or repeat a year without the prior permission of the Director.

199.5 Officers who proceed to for extended courses, repeat a year, or change their course without the prior approval of the Director will be subject to withdrawal of financial support, and to disciplinary action.”

They form part of the Unified Local Government Service General Orders and applied to the appellant.

13. That letter was sent to the appellant through the Botswana High Commission in London. On receipt of it the appellant together with a number of other Batswana students in a similar position sought the assistance of the High Commission. They invited the Deputy High Commissioner and the Education Attache` to come to Bradford and assess the situation at first hand. After they had

carried out their assessment they invited the appellant and the other students to a meeting and advised them of their findings. They also advised them to continue with their studies and said they would take the matter up with the Establishment Secretary.

14. It appears that this was done but the Establishment Secretary was unmoved. In a savingram to the High Commission dated 8 November 2004 he wrote as follows:

**“RE: TERMINATION OF SPONSORSHIP – JOHNSON
DIKOKO, TAPOLOGO SENGWAKETSE, DANIEL
MOTHEO, ANDREW BABEILE, KABO
MATLHABAPHIRI AND ELIJAH MOTSUMI”**

Reference is made to your Savingram dated 4 November 2004 Ref: HCL 9/6/Q in which you recommended that the above named officers be allowed to complete their studies uninterrupted.

We regret to inform you that we are terminating the scholarships of the officers the core reason being that the program the officers are pursuing has no relevance to the work situation of the Local Authorities. We request that the officers be flown back home because this program is not going to benefit this country in any way. We request that the officers’ return be expedited to avoid unnecessary expenditure.”

15. In light of this the appellant and three other students wrote to the Establishment Secretary on 17 November 2004 seeking to persuade him that in substance there was no difference between the Mechanical and Automotive Engineering course and the Automotive Design Technology one. They wrote that

“..... the course contents of the programme we are currently undertaking is exactly the same as the one we had enrolled in before. The only difference is Engineering Mathematics whereas we have opted for Technology Mathematics. This was an optional subject. All core subjects done under Mechanical and Automotive Engineering are still done under Automotive Design Technology. In essence, we have not changed the programme as your office purports, but have rather changed our options which led to change in the programme name. All core subjects have not been affected.”

In support of that they referred to a letter dated 29 October 2004 which Professor Day, the Dean of the School of Engineering, Design and Technology at Bradford University had written to the Botswana High Commission in London. In that letter Professor Day explained that the Automotive Design Technology course “covers essentially the same material as Mechanical and Automotive Engineering but is broader, more practically oriented and mathematically less demanding.” They also sought to persuade the Establishment Secretary that the Automotive Design Technology course was as relevant to their employment back in Botswana as the Mechanical and Automotive Engineering one was.

16. By letter dated 18 November 2004, Professor Day also wrote directly to the Establishment Secretary giving a comparison between the two courses and enclosing a programme specification for each of them. “They show a large element of commonality,” he

said, “in those modules dealing with engineering science (applied to Automotive Engineering) and computer aided design.”

17. On 30 November 2004, the Establishment Secretary replied to the appellant as follows:

“SPONSORSHIP YOURSELF

I acknowledge receipt of your letter dated the 17 November 2004.

Please be informed that the decision to terminate your sponsorship still stands. General Orders 199.4 and 199.5 is very clear on what should be done when officers change courses without prior permission from the Establishment Secretary. In addition be reminded that you signed an agreement document “Rules for candidate attending Courses” item d which still indicates that permission be sought first before effecting any change. Let me once more advice you to contact this office upon arrival in Botswana.

The Botswana High Commission in London is by copy of this letter advised to arrange for your return to Botswana as soon as possible.”

18. The appellant and two other students then appealed to the Permanent Secretary of the Ministry of Local Government in Gaborone. Their letter dated 29 December 2004 set out the history of the matter and made reference to the correspondence which had passed. In that letter they stated, *inter alia*, that “we were not given any chance to explain our side of the story before a conclusion was reached, which contradicts government grievance procedure.”

19. By letter dated 17 February 2005, an official in the Permanent Secretary's office replied in the following terms:

“WITHDRAWAL OF SPONSORSHIP – YOURSELF

I acknowledge receipt of your letter dated 7th December, 2004 addressed to us on the above issue. I am under instruction to communicate the decision of the Permanent Secretary.

The contents have been carefully scrutinised. In addition we sought advice from the Mechanical Engineering Department of the University of Botswana so as to guide us as to the relevance of your current course to your duties, and the similarity, if any, between the sponsored course and the course you are undertaking. The conclusion is that the two courses are not similar, both in content and application.

Secondly, you chose to change your course without the prior authorization of the Establishment Secretary. This is a serious breach of the Memorandum of Agreement which cannot be condoned.

For those reasons, your appeal has been rejected and the Establishment Secretary's decision, terminating your sponsorship is upheld.”

The date 7 December in that letter is clearly a mistake for 29 December.

20. That is the last of the correspondence on the question of withdrawal of the appellant's sponsorship.

21. The appellant did not return to Botswana as had been requested but stayed in Bradford continuing his studies. He successfully completed the second year of the degree course in Automotive Design Technology and was then able to proceed to the third and final year commencing in September 2005.
22. Whether the appellant did that is not known and is not relevant for present purposes. What is relevant is that his failure to return to Botswana as requested was treated by his employers as desertion from duty. By letter dated 28 June 2005, the Establishment Secretary of the Local Government Service Management wrote to the appellant as follows:

“RE: DESERTION FROM DUTY – YOURSELF”

Following your termination of sponsorship and subsequent dismissal of your appeal by the office of the Permanent Secretary – Ministry of Local Government your continued absence from duty without permission constitutes desertion from duty.

In pursuant to General Order 49.1 the office of the Establishment Secretary deems it that you have repudiated your contract of employment after failing to report for duty after termination of your sponsorship.

You are, effective 1 July 2005, dismissed from duty for desertion in accordance with General Order 49.1.

In accordance with General Order 49.5 you are given fourteen days from date of receipt of this letter to apply to the Office of the Establishment Secretary for the review of this dismissal.”

23. The appellant did not seek review of his dismissal within the fourteen days stipulated. He returned to Botswana on 4 August 2005 and shortly thereafter put the matter in the hands of his attorneys.
24. In a letter dated 16 August 2005 to the respondent, copied to the Establishment Secretary, Local Government Service Management, the appellant's attorney, Mr. *Boko*, set out the circumstances of the case and demanded (i) reinstatement of the appellant's scholarship so that he could return to Bradford University to continue his studies and (ii) reinstatement of his employment together with full payment of his salary and benefits. He warned that if no reply was forthcoming by 19 August 2005 the appellant would launch an urgent application to seek the relief indicated.
25. No reply was forthcoming and on 12 September 2005 the appellant's attorneys filed an application on the basis of urgency seeking an order in the following terms:
- “(a) Declaring that the Respondent's termination of Applicant's scholarship is unlawful.
 - (b) Declaring that Respondent's termination of Applicant's employment is unlawful.
 - (c) Directing the Respondent to ensure and facilitate Applicant's return to the University of Bradford in time to continue his studies when

the academic year begins on 26th September 2005.

(d) Costs of suit.”

26. The application was opposed by the respondent who took two points *in limine*. These were, first, that there were no grounds for urgency and, secondly, that the respondent had not been given one month’s notice of the application in terms of section 4 of the State Proceedings Act, Cap 10.01. The matter came before GAONGALELWE J who on 6 October 2005 ruled in favour of the respondent on both points. The appellant’s application was therefore struck off with costs.

27. On 24 July 2007, the appellant launched the present proceedings. His application was in similar but slightly different terms to his earlier one. It sought an order in the following terms:

- “1) Declaring that the Respondent’s termination of Applicant’s scholarship is unlawful.
- 2) Declaring that Respondent’s termination of Applicant’s employment is unlawful.
- 3) Directing the Respondent to ensure and facilitate Applicant’s return to the University of Bradford in time to continue his studies when the academic year begins or as soon as practically possible.
- 4) Costs of suit.
- 5) Any further or alternative relief.”

28. The matter again came before GAONGALELWE J and in a judgment dated 23 February 2009 he dismissed the application with costs.

29. On 26 March 2009 the appellant filed a Notice and Grounds of Appeal against that judgment. The Grounds of Appeal were as follows:

“2.1 The court a quo erred in law and misdirected itself in asserting that the **Audi Alteram partem** rule did not apply to the present case;

2.1.1 The Court a quo erred in so far as it stated that the Applicant had no existing rights to pursue the course he had changed.

2.1.2 The Court a quo also erred in failing to take into account that General Order 199.4 of the Government Service General Orders does not entail strict compliance.

2.2. The Court a quo erred in fact by failing to consider the fact that it was not at the Applicant’s own initiative that he changed courses.

2.2.1 From the submissions on record it is evident that all students from Botswana who undertook studies in Automotive Engineering could not cope with the mathematics component for that course and were recommended by the institution to undertake studies in Automotive Design Technology.

2.3. The Court a quo also failed to fully consider the facts of the case, more particularly that the Appellant would have acquired the profession of being an Automotive Engineer.

2.3.1 The purpose of the Sponsorship was for the Appellant to obtain training as an Automotive Engineer, the course that Appellant changed to was not a variance or inconsistent with the terms of his sponsorship.

2.3.2 The Respondent failed to show how the course in Automotive Design Technology was at variance in substance and content to the course of Automotive Engineering.

2.4. The Court *a quo* also erred at law in deciding that the Appellant had been afforded a right to be heard before he was dismissed from employment.

2.4.1 The letter dated 15 October 2004 did not call upon the Appellant to make representations pertaining to employment.

2.4.2 The appellant was not afforded the right to be heard before his employment was terminated.”

30. In his submissions to this Court, as he had done in his Heads of Argument, Mr. *Boko* for the appellant focused principally on his first ground of appeal. He submitted that the *audi alteram partem* rule applied in this case. The Court *a quo* had misdirected itself in holding that it did not on the ground that the appellant had no right to pursue the course he had changed to. It was submitted, on the contrary, that the appellant had a right in terms of his contract with the Local Government Service Management to undertake studies in Automotive Engineering. The nature and content of the course he had changed to was still automotive engineering. Mr. *Boko* relied on Professor Day’s letter of 18

November 2004 mentioned above. The course the appellant had changed to would have led to him qualifying as a professional automotive engineer. It was submitted that he therefore still had rights flowing from his contract that made the *audi alteram partem* rule applicable. It was common cause, however, that the appellant had never been offered a hearing prior to the termination of his scholarship.

31. It was further contended in the appellant's Heads of Argument that, since the appellant had a legitimate expectation that he would obtain a qualification in automotive engineering, he was entitled to some form of hearing but before this Court Mr. Boko stated that he was not going to pursue that point.

32. What has been referred to as the *audi alteram partem* rule is a legal doctrine which is well recognized in the law of Botswana. In the Court *a quo* the judge formulated the rule in the following way:

“The rule is that when an official or body contemplates taking a decision prejudicially affecting an individual in his liberty or property or existing rights the latter has a right to be heard before the decision is taken unless there is a statute indicating the contrary.”

No exception was taken to this formulation and it is consistent with authority. For example, in *Attorney-General v Shadrack*

Gerald Kgomo and 20 Others, CACLB-039-07, TEBBUTT JP, with whom the other judges of the Court of Appeal agreed, quoted with approval the words of CORBETT CJ in *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 at 748 G-H, where the learned Chief Justice said this –

“The classic formulations of the principle (expressed in the maxim *audi alteram partem*) state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken unless the statute expressly or by implication indicates the contrary.”

33. In this case clearly no question arises as to the appellant’s liberty or property. But Mr. *Boko*’s submission was that the appellant had rights flowing from his contract with the Local Government Service Management that made the *audi alteram partem* rule applicable. This, as stated earlier, was based on the contention that the nature and content of the course the appellant had changed to was still automotive engineering and would have led to him qualifying as a professional engineer. The learned judge *a quo* held otherwise. He held that since the appellant “had changed courses unilaterally it cannot be said he had a right to pursue the course he had switched to.”

34. In my opinion the learned judge *a quo* came to the right conclusion. The Local Government Service Management was, of course, a public body but that is not relevant in the present context. The appellant and the Local Government Service Management entered into a contract in relation to the sponsorship on 15 September 2003 and their rights and duties under that contract are defined only by the express terms of that contract. (In some cases further terms may be read into the contract by necessary implication but that does not arise in this case.) The relevant terms of the contract are perfectly clear. By Clause 2 (d) the appellant undertook to comply with the rules listed in the Schedule. Rule (d) in the Schedule required the appellant to devote his full time and attention to following “the course for which (he) was selected unless permission to undertake other work or to modify (his) course contract ... is granted.”
35. Unfortunately the appellant did not comply with that rule. He had contracted for a course in Automotive Engineering and he changed to a course in Automotive Design Technology without obtaining permission from the Local Government Service Management to do so. He was therefore in material breach of the contract.

36. There is no term in the contract requiring the Local Government Service Management to afford the appellant a hearing or some other kind of opportunity of presenting his case before terminating the contract in the event of such a breach by the appellant.
37. In the absence of such a term (express or implied) it is a well established principle of contract law that the *audi alteram partem* rule does not apply. See *Anesthesia Intensive Care & Emergency Medical (Pty) Ltd v MRI Botswana Ltd* [2005] 2 BLR 252, in which statements to that effect in *Seloadi and Others v Sun International (Bophuthaswana) Ltd* 1993 (2) SA 174; and *Ludick v Samca Tiles (Pty) Ltd* 1993 (2) SA 197 were quoted with approval.
38. For these reasons this ground of appeal must fail.
39. In coming to this conclusion, I am conscious that in a similar application in the High Court by one of the appellant's fellow students, *Kabo Charles Matlhabaphiri v Attorney-General* No. 88/2005, LESETEDI J found in favour of the applicant. The applicant in that case had been sponsored for a course in Automotive Engineering but ended up taking the course in Automotive Design Technology. Despite that, Professor Day's uncontroverted evidence, which the learned judge accepted, was

that the applicant was “on the course for which he was originally offered sponsorship.” On the basis of that evidence the judge held that the applicant was not in breach of his sponsorship agreement. The Local Government Service Management had therefore no right to terminate the agreement.

40. The evidence which was accepted by the judge *a quo* in this case was different. Professor Day did not go so far as to say that the appellant was on the course for which he was sponsored. Moreover, as was pointed out in the letter of 17 February 2005 to the appellant from the Permanent Secretary to the Ministry of Local Government, which was quoted earlier in this judgment, advice was sought as to the relevance of the Automotive Design Technology course to the appellant’s duties and any similarity between that course and the course for which he was sponsored. The advice that was given was that the two courses were “not similar, both in content and application.” In that situation the judge *a quo* was in my opinion entitled to proceed on the basis that the appellant was in breach of his sponsorship agreement and also of General Orders 199.4 and 199.5.

41. The next two grounds of appeal can be quickly disposed of. In the context of the appellant’s duties in terms of the contract, the

sponsorship agreement, it is irrelevant that the change of courses was not initiated by the appellant himself. Equally it is not a relevant consideration that by completing the course he changed to the appellant would have acquired the profession of an automotive engineer. Quite simply, in terms of the contract the appellant undertook not to change courses without permission but that is what he did.

42. The fourth and final ground of appeal is that the Court *a quo* erred in deciding that the appellant had been afforded a right to be heard before he was dismissed from his employment. The appellant's Heads of Argument say nothing in support of this ground of appeal and, although he did not withdraw it, Mr. *Boko* very fairly conceded that he had difficulty in supporting it.

43. In my opinion he was right to adopt that attitude. The letter of dismissal dated 28 June 2005 has already been quoted earlier in this judgment. It concludes by giving the appellant "fourteen days from date of receipt of this letter to apply to the Office of the Establishment Secretary for the review of this dismissal." That was said to be in accordance with General Order 49.5.

44. The appellant did not avail himself of the opportunity he was given. The essence of the submission put forward on his behalf in the Court *a quo* seems to have been that the opportunity he was given was not adequate and he should have been given the opportunity of an oral hearing.
45. As the learned judge *a quo* pointed out, there is nothing in the *audi alteram partem* rule which necessarily requires an oral hearing. He added that “all that is required is that the person concerned be afforded a fair opportunity to present his side of the story in whatever form”. Reference was made to *Botswana Housing Corporation v Rabana* [1997] BLR 106, a decision of this Court.
46. In my opinion the learned judge’s decision on this matter cannot be faulted. It is sufficient to refer to the passage in TEBBUTT JA’s judgment in *Botswana Housing Corporation v Rabana* at p 121 D-E where he quotes with approval what COLMAN J said in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 at 486 D-E –
- “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.”

The other judges of the Court of Appeal agreed with TEBBUTT JA.

47. For all these reasons the appeal is dismissed with costs.

**DELIVERED IN OPEN COURT AT LOBATSE ON THURSDAY 30 JULY
2009.**

**LORD ABERNETHY
JUSTICE OF APPEAL**

I AGREE

**DR S. TWUM
JUSTICE OF APPEAL**

I AGREE

**C. T. HOWIE
JUSTICE OF APPEAL**

*Duma Boko & Co – Legal practitioner for the appellant
Attorney-General – Legal practitioner for the respondent*