CIV/APN/26/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO NATIONAL DEVELOPMENT CORPORATION EMPLOYEES AND ALLIED WORKERS UNION **APPLICANT**

and

LESOTHO NATIONAL DEVELOPMENT CORPORATION **RESPONDENT**

RULING

Delivered by the Honourable Mr. Justice T. Monapathi on the 12th day of February 2001

This case required me to make a quick ruling for orders as required in the notice of motion because there was a certain amount of urgency involved, more especially about retrenchment of workers. The two most important prayers are 2(b) and 2(c) which asked for two declarations namely that the privatization by the Respondent (the LNDC) of certain services were null and void being contrary to the Privatization Act 1995 and secondly that the resultant purported retrenchment be declared null and void. There was normally a prayer for costs. My reasons would follow. It was understood that I took up the matter quite hurriedly without any opportunity to prepare having been involved in certain other matters. This was most fortunately a matter in which almost the whole array of issues of the factual situations were common cause. What remained mostly was legal conclusions or

inferences.

Having said that much I want to speak about a few things. The first one was this one of urgency which was one of the points-in-limine albeit having been argued together with the merits a Counsel agreed. I had indicated to Counsel that in no way was urgency demonstrated. Indeed I even found that the Respondent could not even speak of prejudice against it although for some time there could have been suspicion on the past of the Applicant that there was going to be that privatization and there was going to be that intended retrenchment. Applicant's Counsel said what moved them to act was when they began to know the names of the concerned employees of the LNDC. Only then could Applicant have known about them. What was important was what made them come to Court having knowledge that some certain employees of the Union were concerned in the intention to retrench. And indeed when one looks at the date that they speak about and the time when they lodged the application it is consistent with that attitude, that is, to have come to Court timeously which I concluded they did. And as I said I could not find that there was any prejudice against the Respondent.

The second issue that I want to speak about is this issue concerning the disputed jurisdiction of this Court. In that as it was submitted by the Respondent that the application belonged to the Labour Court. It has been said therefore that this Court ought not to deal with this matter because in either way what was involved was a master and servant relationship between the Applicant and Respondents about this dispute. I found this argument difficult to follow because in the first place I would hardly say that this matter of the first prayer 2(b) (privatization) was not a matter that could not be dealt with by this Court. I made a finding that this prayer 2(b) was a matter that could effectively be dealt with by this Court.

I had intended to look at the said amendment to the Labour Court Order that Mr. Mosito has spoken about to see if it had that effect that it excluded matters such as that contained in the two prayers from jurisdiction of the Labour Court. In any event I would have felt that the matter of resort to the Labour Court would only come once a finding had been made or decision of retrenchment of the employees which matter was not yet pertinent.

My attitude would be further that even in the event that the question of retrenchment of a matter was indeed for the Labour Court despite the alleged amendment there will be no way of disjointing the two claims from hearing by this Court at the same time if the High Court was able to deal with prayer 2(b) which is the primary prayer then it might as well deal with the second prayer which matter is even premised on the issue of privatization.

I would also find it convenient to deal with two prayers on the principle of *causa continentia* which is primarily a question of convenience where a Court is seized with one matter amongst others which it can effectively deal with. Because according to that principle what rules is convenience and effectiveness to the Court and convenience to the litigants as well. Convenience would also result from a procedure whereby less costs and expense is brought to litigants. And if one Court not two can deal with all the matters it shows that the question of cost had been taken care of. That is my ruling which I made in the context that even if the Respondent was to succeed to show that prayer 2(c) belongs to the Labour Court convenience shows that this Court ought to deal with that prayer and preceding one "about privatization". This I said even supposing the Labour Court was empowered to deal with declarations.

I now deal with what was the main dispute before me that is prayer 2(b). The

main question being this question whether where a parastatal is concerned such as the LNDC it being a parastatal. That is within the definition that we have accepted, that a corporation is a parastatal and corporation an institution or trading institution where government has money interest and equity, a major share holding, major interest. And LNDC being a corporation like others which we have in this country (owned by government) which are corporations and parastatal in terms of the definition in the Privatization Act is not out of the purview of the Privatization Act, as Applicant submitted.

The question therefore being: can any process eg. the structuring out sourcing, contracting out of services such as shown in that section that speaks about methods of privatization where one finds something like "contracting out of service" be alone outside the Privatization Act. Where a portion of the service is given to private trader this being something that had been done by other corporations such as WASA a similar parastatal which have done exactly the same thing out sourcing contracting out the service, the question being whether that process can be done outside the Privatization Act. Can the management of the Corporation choose not to follow the procedures laid out in the Privatization Act. The further question being does the privatization bind all parastatals and the LNDC like other Corporations whereas in the instant case it was common cause that the LNDC was out-sourcing and contracting out a service core. That is the main question.

We have had a few things or most things which are common cause one of them being that section 2 of the Privatization Act seems to apply in all parastatals. Working from the premise of there being no dispute that a Corporation is a parastatal. And where a parastatal is defined in terms of what is contained in section 3 of Privatization Act where amongst the parastatal is meant corporation board or a company or that body in which Government has direct or indirect

ownership, equity or interest as fully defined in the section. Being mostly those government owned institution that generate revenue or are trading concerns.

Then there was no dispute a unit has been granted by the Act called Privatization Unit. One of the things that it does is to regulates its own procedures and then that limit has been given that certain functions in terms of sections of the Act. Subject to the discretion of the Minister it had plain management, implement and control privatization procedure in Lesotho. I was also referred to the long title of the Act which says that it is an Act which provides for privatization of the parastatals establishment of the unit and matters connected with the objects of the section or of the Act.

I was also asked to look at the definition of privatization in the Act which is "transfer to the private sector of part or the whole of the equity or other interest held by the government, directly or indirectly in a Parastatal wholly or partly owned by the government and "privatized" shall be construed accordingly. I agreed with Mr. Mosito that this definition was clear and comprehensive allowed for no resort to a dictionary meaning more especially when section 9 of the Act tells us how the privatisation is to be done. Meaning that one has in mind what is privatization and what is not privatization in terms of the Act.

The attitude the Respondent was that the disputed activity, restructuring or re-organizing of some kind according to operational requirements I found it very difficult to understand this as a justification for not having complied with the Privatization Act when one had in mind that section 9(1) (g) "contracting out a service" Respondent was doing a similar act by outsourcing. The most important thing was that it was difficult for the Respondent to speak about any of the things prescribed as one of the methods of privatization (section 9 of the Act) by saying

that it has the power to do that outside the Privatization Act. As it had been common cause most of the time what was transpired seem to have been an intention to contract out a service a core service, of some kind.

As Respondent contended the use of the word restructuring was a justification or a reason to justify the Respondent to taking itself out of the Privatization Act's purview. I did not agree. What was actually correct was that by Respondent's own admission they were contracting out a service. The main question then being how does it take itself out of the purview of section 8 of the Privatization Act they being the ones who should suggest to the Minister that a kind of privatization is necessary which would then be followed by the provisions of section 8 namely referral to the Privatization Unit so that the Privatisation Unit should do all the necessary things such as control every privatization's process. What the Privatization Unit can do is very comprehensive.

I agreed with Counsel for Applicant that where reliance was being sought from the Act establishing this Respondent's Corporation for its having not resorted to Privatization Act, there must be a provision in the Act that specially speaks about privatization. There was none in the LNDC Act No 20 of 1967 nor in its subsequent amendments. I did not find in the LNDC Act that there was any where mere privatization was provided for as one of the powers assuming that it would in the normal course of commercial or operational activities do the out sourcing or the contracting out services. My finding was that it could no longer do so outside the Privatization Act since the enactment or the advent of the Act. If there was any provision enabling in the LNDC Act then we say that as long as that section has not been repealed by direct reference LNDC should do any privatization, or restructuring, or any of the things the way it likes.

Here we do have a clear and demonstrable impression that the LNDC should work like all parastatals. If there was such enabling provision in the LNDC Act a provision it would be difficult to say that a Privatization Act applies other than the way it has been provided for in the LNDC Act. In those circumstance where an enabling law has been enacted by legislature the LNDC can choose not to apply the Privatization Act. But this was not the case. It may have been that they were pressing needs or concern why it did not follow the Privatization Act it or it may be there were certain pressures which justified what it did in a commercial sense but that did not justify its failure to resort or to apply the Privatization Act.

On principle we did not find out from the Respondent why it could not be dealt with in the way the Act provided, when it was considered that privatization by intention of Parliament was to apply to every parastatal which must be listed as soon as there is intention to privatize. This was more so when it was submitted that the LNDC had to go through the Act like all the parastatal. In that we were have even been shown a gazette showing an identical out-sourcing e.g. WASA. With that example it was in that context of that this Court could take judicial notice that privatization has been done by other Corporations. Some of them actually dismembered themselves, where units or parts were sold to different people and then in others Government remained with but a portion.

Mr. Mosito argues that there would be prejudice to his clients in that instead of making possible for the intended "buyer" to take over the services of all his clients when they are even being retrenched before they were taken over. It was said employees in the core service would be retrenched in the process of sourcing out. A lot of other things were argued before this Court one of them being the method of privatization as I have said. One interesting section was 9(b) any of the method in sub-section 1 may include any of the method or part thereof into a company or

other term a parastatal. I did not find that there was any argument countering that effect of what the LNDC intended to do the effect of that would be to retrench some employees (members of the Applicant) in the process of that "privatization" (which they deny) I believe that the listing of a Parastatal would have to be done by the way of what is prescribed in section 16 (I) of the Act which suggest that at the commencement of the Act the Privatization Unit shall after consultation with Ministry and the parastatal concerned publish in the gazette and newspaper circulating in Lesotho to announce that there will be a list of those parastatal, a brief description of Parastatal to be privatized and other requirement contained in section (c). And finally then I thought that and by agreement with the Applicant that as soon as privatization was intended it must be done according to what is prescribed by the Act because privatization, if I understand well, has the effect of curing many problems that a Corporation may have. One of them being where unit of Corporation was unprofitable it could to be sold out.

I accept that the principle was correct that unlike in the common law situation what is provided for in the Act as against what is the situation under common law that the rights of employees are terminated when these is a takeover. That this was what privatization proCEDURE sought to avoid. Again if my understanding is correct it is that the transfer of undertaking means that the rights of employees are also transferred to the new owner. If I am wrong in this it cannot be to the extent that there was in the circumstance an procedure than what is contained in Privatisation Act. Perhaps that something is to be done in the process of that the LNDC was involved in which touched the rights of employees before the takeover of the core service. Even if this was the situation I do not think it is a justification to LNDC not to go through privatization procedure. Perhaps Mr. Mosito may be wrong in saying the rights of employees are normally safeguarded by privatization. May be in dealing with privatization the question of employees

rights is dealt with and looked into I am saying may be in practice even this act of privatization prejudices employees but to me what is important is that I find that it is unavoidable that privatization must be done according to what is provided in this Act.

If one looks at section 26 (2) the privatization unit almost deals with terms and conditions for engagement act and consultant my understanding that consultation deals with the rights of the employees and other issues it is just that section 26(2) looks like it goes along way around the problem where the terms shall be determined by where the privatization unit with the approval of the Minister. I did not find an answer to why the LNDC would avoid going according the Privatization Act.

I might as well say my observation is that the LNDC has gone out of step of the Act. I observed that the restructuring has had effect on the employees it retrenched the employees and if the Act of privatization is declared null and void retrenchment of employees being one consequences I might as well declare that the purported retrenchment of the employees is null and void. I did not see how I could avoid getting into that conclusion.

I have already in my view considered that as soon as one of the things contained in section 9(1) is done I do not see why the Act should not be followed. There is some novelty about this claim there is something new about it to say that an institution should not avoid following the law that is in the books. One of the basic argument is that why it avoids making use of the law? Why would it have a choice in applying the law or choose to apply its own imperatives and not apply as the law as forum found. Whether it is being said is restructuring or operational dictates because in my mind what is prescribed in section 9 is a remedy to situations

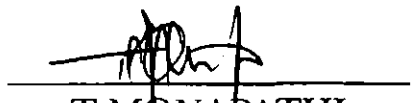
where imperative dictates. If it is a parastatal the difficulty is that the law does not appear to leave any options.

I tried to look at a situation where there may be option I was reminded to look at section 8 whether it left a choice for the Minister I thought it did not. It does suggest that the Minister can prescribe ways of outsourcing, or restructuring other way except that in the Act. But this has not been the argument. It would mean that the Minister had a discretion which he did not have. If that was the situation it should be described in the law.

The order that I make will have consequences one of the consequences will be that these employees will want to go back to work unless the order is stayed. The LNDC in its wisdom should have many options. I did not find any argument in this regard of this kind. There was argument that speaks about that the prayer in 2(b) and 2(c) were a discretionary prayers.

That in my discretion I should refuse the declaration. Even if they are good in my discretion I should not allow them. I did not find any argument that in my discretion that I should refuse the orders. There could have good reasons for example that the Corporation will suffer in one way or the other. It might be for example that the LNDC has re-organised which would say to me that I need not use my discretion and allow the application. This was not the situation.

My order would be to confirm the prayers 1, 2(a), (b), (c) and (d).



T MONAPATHI
JUDGE