IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 29/2010

In the matter between:

THE ATTORNEY GENERAL 1ST APPELLANT
THE PUBLIC SERVICE COMMISSION 2ND APPELLANT
DISASTER MANAGEMENT AUTHORITY 3RD APPELLANT
CHIEF EXECUTIVE OF DISASTER MANAGEMENT AUTHORITY 4TH APPELLANT

and

TŠELISO SEHLOHO AND 41 OTHERS RESPONDENTS

CORAM: RAMODIBEDI, P
MELUNSKY, JA
FARLAM, JA

HEARD : 13 APRIL 2011
DELIVERED: 20 APRIL 2011

SUMMARY

Disaster Management Act, 2 of 1997 – appellants appointed in terms of section 11 thereof – main question whether the respondents were public officers in terms of the Public Service Act 13 of 1995. High Court holding that they were, that regulation 8(12) of the Public Service Regulations 2008 converted their temporary status into permanent employees; and that they could not be dismissed by the Chief Executive of the Disaster Management Fund (DMA).

On appeal, held –

1) The respondents were not officers of the DMA and did not become members of the Public Service in terms of section 11(2) of the DMA Act;

2) The respondents were temporarily employed staff in terms of section 11(3) of the Act, and, on the assumption that they could nevertheless be appointed to the Public Service, there was no direct evidence that this occurred;

3) The respondents relied on inferences in an unsuccessful attempt to establish that they were appointed by the Public Service Commission or that the Commission confirmed their appointment or that it delegated powers of appointment to the DMA's Chief Executive;

4) Nor did the maxim *omnia praesumunter rite esse acta* have application to the respondents' appointment;

5) The appellants' assertion that the Commission played no part in the respondents' appointment could not be disregarded. To the contrary their version had to be accepted where it differed from that of the respondents;

6) The appeal was accordingly upheld.

JUDGMENT

MELUNSKY, JA

[1] The essential question that arises in this appeal is whether the 42 respondents are public officers for the purposes of the legislation relating to the Public Service.

They were all employed by the third appellant, the Disaster Management Authority ("the DMA") at different times between 1999 and 2004 as temporary employees and while the Public Service Act, 13 of 1995, ("the 1995 Act") was in force. Clauses (b), (d) and (e) of each letter of appointment read as follows:

> "(b) Your appointment will be on temporary month-to-month terms.
>
> (d) You or Authority that appointed you, may give one calendar month's notice of termination of appointment, for which no reasons need be given.
>
> (e) In other respects, you will be governed by the Public Service Act 1995, Financial Orders, and other laws, orders, rules and regulations as in force from time to time."

Each letter of appointment was written on the DMA letterhead and was signed by the DMA's Chief Executive or Acting Chief Executive.

[2] On 20 February 2009, the DMA's Chief Executive, the

fourth appellant in this litigation, informed each respondent in writing that his or her employment with the DMA would be terminated with effect from 1 April 2009. The reason for the termination of each employee's services was, it was stated, that the DMA did not have the funds to pay their salaries.

[3] Section 7 of the 1995 Act provided as follows:

> "Appointments to the public service are:
>
> a) On permanent and pensionable terms; or
> b) On temporary terms; or
> c) On contract terms."

The 1995 Act was repealed by the Public Service Act, 1 of 2005 ("the 2005 Act"), section 8(1) of which is in almost identical terms to section 7 of the 1995 Act save that it adds another category of employee, one who is employed on "casual labour terms". Section 8(2) of the 2005 Act, which

was relied upon by counsel for the respondents, reads:

> "Any person who is appointed to the public service after the coming into operation of this Act shall be appointed under any of the appointments set out in sub-section (1), and the conditions of employment made under this Act."

The 2005 Act came into operation on 1 April 2005 and, as I have indicated earlier, the respondents were appointed before this and while the 1995 Act was still in operation. Furthermore the reference to section 8(2) avoids the very question for decision in this appeal, which is whether the respondents were appointed to the public service. It need not be referred to further.

[4] The respondents agree that they were appointed according to the terms of the letter of appointment set out in para [1] but they maintain that they were appointed to the public service in terms of section 7 (b) of the 1995 Act. Section 154(1) of the Constitution of Lesotho defines

"public office" to mean "any office of emolument in the public service" and "public officer" means "a person holding or acting in any public office". The Public Service Regulations 2008, made in terms of the 2005 Act, came into force on 2 June 2008 and Regulation 8(12) provides:

> "The terms of all serving [public] officers appointed in the Public Service on Temporary and Non-pensionable terms before the coming into operation of the [2005] Act shall be varied to Permanent and Pensionable."

The respondents' initial argument, and contained in the founding affidavit, is that although appointed on temporary terms, they were appointed to the public service; that they were public officers; that their appointments on temporary terms were converted to permanent appointments by the aforesaid Regulation 8(12); and that in terms of section 137 of the Constitution (to be referred to later), their appointments could be terminated only by the Public Service Commission ("the Commission") and not by the

Chief Executive of the DMA. Consequently the purported termination of their employment by the written communication of the Chief Executive on 20 February 2009 was invalid and of no force and effect.

[5] Relying on the aforesaid submissions, the respondents instituted motion proceedings in the High Court for an order declaring the termination of their contracts to be unlawful, null and void and of no force and effect and for their reinstatement into the positions they held before their contracts were terminated, without the loss of remuneration or other benefits. Despite opposition by the appellants, Monapathi J granted the relief claimed in the notice of motion. This is an appeal against the learned Judge's order.

[6] The appellants' argument was based partially on an

interpretation of certain provisions of the Disaster Management Act, 2 of 1997 ("the DMA Act"). As the long title proclaims, the main purposes of the Act are to establish the DMA, to regulate its powers and to make provision for emergencies arising out of disasters. A disaster is defined to mean:

> ".....a progressive or sudden, widespread or localised natural or man-made event ....."

The definition proceeds to provide examples of events that fall into the category of disasters but there is no need to detail these in this judgment. The significant fact is that a disaster is usually an event of limited duration but that while it lasts temporary employees might be required to mitigate the consequences of the emergency and to provide aid, care and assistance to persons affected thereby.

[7] Section 11 of the DMA Act reads:

> "(1) There is established a Disaster Management Authority which shall consist of a Chief Executive, a Deputy Chief Executive and such other officers as may be appointed.
>
> (2) The Authority shall be a public office, and accordingly, the laws governing the Public Service shall apply to the Authority and its officers.
>
> (3) Any other staff required for the purpose of the Authority shall be temporarily employed staff or serving members of the Lesotho Defence Force, the Royal Lesotho Mounted Police or volunteers."

What is clear from the provisions of the section, and this is the main submission of counsel for the appellants, is that officers of the DMA automatically become members of the Public Service while temporarily employed staff do not. The distinction between the two categories of employees is reinforced, counsel submitted, by the provisions of section 45 of the DMA Act. The argument, therefore, is that as the respondents were initially employed on a temporary basis by the DMA's Chief Executive and not by the Commission they did not become members of the Public Service and

that Regulation 8(12) of the Public Service Regulations did not apply to them.

[8] One of the questions that arose in argument was whether it was legally permissible for the DMA or its Chief Executive to appoint temporary staff as members of the Public Service or whether, in terms of section 11, this is excluded, either expressly or by necessary implication. I will assume, for the purposes of the appeal, that the DMA had the right to appoint temporary staff to the public service in terms of section 7 of the 1995 Act. The question is whether this occurred.

[9] This, however, is a convenient stage to refer to the provisions of section 137 of the Constitution. In terms of section 137(1) substituted by section 2 of the Fifth Amendment to the Constitution Act, 8 of 2004, the power to appoint persons to the Public Service, including the

power to confirm appointments, vests in the Commission. The section also provides that the power to terminate appointments vests in the Commission. Section 137(2), however, authorizes the Commission, in writing, to delegate its powers of appointment to any one or more members of the Commission or, with the consent of the Prime Minister, to any public officer.

[10] In order to overcome the difficulties created by section 137 of the Constitution, counsel for the respondents submitted that the Chief Executive appointed the respondents "in line with" Regulation 223(1) of the Public Service Regulations 1969. The Regulation provides for the procedure to be followed if a "head of department" wishes to apply for an appointment to be made to the Public Service on temporary terms of service. The definition of "head of department" is defined in section 4 of the 1995 Act

to mean:

> "a public officer who has been designated head of the public officers of a department by the Minister".

The fourth appellant is the Chief Executive of the DMA: he is not a head of department, nor is there any evidence that he was designated head of the public officers of a department and, in fact, he was not employed in a department. Second, it was submitted that the fourth appellant is presumed to have observed the statutory requirements precedent to the appointment of the respondents as public officers. This submission is based on the presumption of regularity expressed by the maxim *omnia praesumuntur rite esse acta.* The maxim applies where it is proved that an official act has been performed. It is then presumed that all procedural formalities have been complied with. It has no application here as it has not been established that the fourth appellant appointed, or even intended to appoint, the respondents as members of

the Public Service as I shall presently indicate.

[11] Counsel for the respondents also relied in argument on the form used to appoint his clients, the main provisions of which are clauses (b), (d) and (e) set out in para [1] above. The submission made is that the form used is *in pari materia* with appendix II B to the Public Service Regulations 1969 and that it is a clear indication that the respondents were appointed under the Public Service Act 1995. The form used on the DMA's behalf, however, does not follow the form in Appendix II B in all material respects. Firstly, clause (a) of the form in the Appendix provides not only for the salary but for increments in accordance with the Public Service Regulations while clause (a) in the DMA's form is confined to the salary payable to the employee: there is no mention of increments. There are also minor differences between the forms in respect of clause (c). Much more significant,

however, is the fact that in clause (d) of the Appendix it is provided that the employee *or the Commission* (my emphasis) or the appointing authority may terminate the appointment. In clause (d) of the letters of appointment, the words "or the Commission" have been omitted, the effect of which is that only the employee or the DMA may terminate the appointment. Finally the words "Public Service Regulations 1969" which appear in clause (e) of Appendix have been omitted from the DMA's letters of appointment. It will be necessary to re-visit this submission when I refer to the replying affidavit where the matter was pertinently raised (see para [17]).

[12] I turn now to consider the affidavits. According to the founding affidavit, the respondents stated that they were:

> ".. engaged and/or appointed on temporary month to month terms by the Public Service Commission through the Chief Executive by operation of law."

What is not clear is the basis on which it is claimed that the Public Service Commission played any part in their appointment, save for the further averment that "the public service laws" were applicable to them in terms of section 11 of the DMA Act. Consequently and due to the operation of Regulation 8(12) they allegedly became permanent members of the Public Service. There are no facts or evidence to support the bald allegation that the respondents were appointed by the Commission "through the Chief Executive". The averment that this occurred "by the operation of the law" was simply left in the air. The averment that the Public Service laws applied to the respondents in terms of section 11 of the DMA Act was also not explained and is vague in the extreme. These aspects of the respondents' case will, however, be dealt with later when the replying affidavits are considered.

[13] In all events the allegations made by the respondents were met with an emphatic denial by the Chief Executive in his answering affidavit. He denied that the appointments of the respondents were made by the Public Service Commission through the Chief Executive. He added:

> "The decision [to appoint the respondents] was that of [the DMA] and myself and not that of the Public Service Commission."

The Chief Executive explained that when an emergency arises, he appoints additional people on a temporary basis to meet the situation and that when the emergency has fallen away, their employment usually also falls away. In the case of most of the respondents, however, further emergencies then occurred and they continued to remain in employment on a month to month basis, rather than for the Chief Executive to terminate their employment and

then re-employ them. What is clear from the Chief Executive's affidavit is that the Commission had nothing to do with the appointment of the respondents. The Chief Executive concludes:

> "I must therefore emphasize that the [respondents] were never members of the Public Service. Accordingly, the Public Service Regulations did not .....apply to them."

[14] Contrary to the trite rules of law and practice, the respondents sought to introduce new facts and allegations in their replying affidavit. This seems to be a tactic that, most regrettably, is not infrequently employed in this jurisdiction. I will, however, refer to some of the points raised in reply. One is that the respondents were engaged as officers in terms of section 11(2) of the DMA Act. Not only does this appear to be contradictory to the averment in the founding affidavit that they were appointed on temporary terms, but it is incorrect and, as I will indicate,

it is also in conflict with counsel's submission in this Court. They were appointed in terms of section 11(3) as "temporarily employed staff" in order to meet emergencies that arose from time to time, as the Chief Executive explained in his answering affidavit. The section draws a clear distinction between officers and other staff required. The latter "shall be temporarily employed staff", whereas an officer means "a holder of a post, especially of a public, civil or ecclesiastical office" (Concise Oxford Dictionary 10th Ed.). What is clear from the Chief Executive's affidavit is that the respondents were not appointed as permanent officers.

[15] A further allegation made in the replying affidavit follows from what has been asserted in the previous paragraph. It is this: the DMA is a public office and the laws governing the Public Service apply to the DMA and its officers in terms of the aforesaid section 11(2). That

premise is correct but that is not to say that because the DMA is described as a public office in section 11(2) all persons employed by it are *ipso facto* public officers. A subsequent allegation, however, appears to be somewhat inconsistent with what was earlier stated by the deponent to the replying affidavit, namely:

> "As indicated earlier I aver that we were public servants by operation of law in as much as we were employed into a public office known as the Disaster Management Authority. As a public office the Disaster Management Authority has no power to employ public officers. It is therefore incorrect to contend that we were employed by the Authority as it has no such powers in law regard being had to the statute that created it."

The implication from this statement may be that, according to the respondents, they were appointed by the Commission or that, as submitted in argument the Commission had delegated the powers of appointments to the Chief Executive or that the Commission had confirmed or ratified his appointments. These averments, however,

were not made in the founding or even the replying affidavits; they are inconsistent with the fact that the letters of appointment were signed by the Chief Executive without reference to the Commission and, as emphasized earlier, the Chief Executive made it clear that the Commission was not involved in the appointment of the respondents. Furthermore, the statement that the respondents were public servants by the operation of law because they were employed "into a public office", the DMA, seems to be based on the assumption that the definition of "public office" in the Constitution (see para [4] above) applies to the DMA. It appears to me that the definition applies only to individuals, i.e. to "[persons] holding or acting in any public office". The expression "public office" is not defined in the DMA Act and the Constitutional definition has not been incorporated into that Act. But even if the DMA is to be regarded as a public

office as defined in the Constitution, there is no room for the assumption that all of its employees, including temporarily employed staff, are public servants by the operation of law.

[16] Furthermore, the allegation that the DMA had no power to employ the respondents appears to me to be incorrect. The fact of the matter is that the Chief Executive acts on behalf of the DMA and, in terms of section 21(2) of the DMA Act, he is responsible for the execution of its policy and the transaction of its day-to-day business, included in which is the duty to:

> "maintain an adequate national disaster *management structure and capacity"* (my emphasis).

It is obvious that employees have to be engaged to carry out the DMA's main function – to meet emergencies and to provide assistance and protection to victims of disasters.

There is no suggestion in the Act that the DMA cannot appoint its own employees. It would indeed be most surprising if this were the case. On the contrary the powers of the Chief Executive, as expressed in section 21(2), appear to me to include the power to do so. This power of appointment would certainly apply to temporarily employed staff. There would, moreover, be no need for the Commission to appoint even the DMA's officers for, in terms of section 11(2), as had been previously stated, the laws of the Public Service apply to them automatically. I refer, too, to the fact that the DMA in terms of section 11(1) consists of certain officials and "such other officers as may be appointed". There is no express provision in the Act as to who is to make the appointments but it would certainly seem to be clear that the appointments may not be made by any person or body other than the Chief Executive on behalf of the DMA.

[17] The respondents also relied on the letters of appointment for their contention that the Chief Executive of the DMA appointed them to the Public Service. I have referred to this aspect in para [11] above, but the respondents' contention was raised only in the replying affidavit. The main argument advanced was that in terms of paragraph (e) of the letters (set out in para [1] above) the respondents' contracts were governed by the Public Service Act 1995, Financial Orders and other laws, Orders, Rules and Regulations. This, according to the argument, had the result that the respondents were employed on temporary terms of service as public officers in terms of the 1995 Act and section 154 of the Constitution. Leaving aside for the moment the Chief Executive's averments to the effect that the Commission played no part in the appointment of the respondents, the actual content of the letters of

appointment falls short of having the result contended for by the respondents. One reason is the material, and apparently deliberate, omission of the words "or the Commission" in the letter compared with the form in Appendix II B. The effect, according to the wording of the letters, has been set out in para [11] above. It is probable that if the respondents' arguments were contained in the founding affidavit instead of the reply, the Chief Executive would have replied thereto. As matters stand, however, it is fair to draw the inference that as the Chief Executive's letters provided that the Commission had no right to terminate the agreement, the Commission also did not appoint, or authorize or confirm the appointment of the respondents. This inference is, moreover, in accordance with what the Chief Executive has deposed to in his affidavit. It is also my view that paragraph (e) of the letters of appointment do not assist the respondents for the words

"in other respects" in the paragraph exclude, *inter alia,* the Commission's right to terminate the contracts. The result is that the letters of appointment do not amount to proof that their contracts were governed by the Public Service Act, 1995.

[18] Once it is accepted that the respondents were not appointed as public officers, the Commission would have no right to terminate their employment. In this event the right to terminate would vest in the DMA and would ordinarily be exercised by the Chief Executive. Indeed it would be absurd to suggest that the DMA would be powerless to dismiss its own staff. Moreover it is expressly provided in paragraph (d) of each letter of appointment that the Authority that appointed each respondent (the DMA) would have the right to terminate the appointment on one calendar month's notice.

[19] That brings me to the next submission by the respondents, namely their denial that the DMA did not have the funds to pay their salaries. This resulted in considerable differences between the appellants and the respondents, which are reflected in the affidavits. Fortunately this dispute need not be resolved by this Court, for it is clear that in terms of paragraph (d) of the letters of appointment, the DMA need give no reasons for the termination of the respondents' employment. The fact that reasons were given does not mean that in the contractual setting the reasons are now open to challenge.

[20] The determination of this appeal has been made more difficult by the respondents' failure to set out their allegations clearly and explicitly in their founding affidavit. The averments are sometimes confusing and even

contradictory. For instance what precisely is meant by the crucial statement that the respondents were appointed by the Commission "through the Chief Executive by operation of law? The phrase "by operation of law" has not been amplified or explained in the context in which it is used. Secondly, the averment that they were appointed in terms of section 11 of the DMA Act adds little to their submissions as it is unclear whether they claim to have been appointed as officers in terms of section 11(2) or as temporarily employed staff in terms of section 11(3). What the respondents in fact did was to attempt to amplify their founding papers in the replying affidavit and to introduce new allegations therein. One of such allegations is the statement quoted in para [15] above to the effect that they became public servants simply by being employed into a public office, as if they entered the Public Service by the process of osmosis. In argument before this Court the

respondents' counsel eventually accepted that his clients were indeed "temporarily employed staff" contemplated in sections 11(1) and (3) of the DMA Act". This is precisely expressed in counsel's heads of argument (paragraph 3.19).

[21] After all is said and done, it is now time to summarise the main conclusions at which I have arrived:

1. In so far as there are disputed factual issues between the version of the respondents and that of the appellants, as contained in the Chief Executive's affidavit, the latter is to prevail. This is based on the well-established principle in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635, which has frequently been applied in this Court (see Monnanyane v SOS Children's Village & Others

(2005-2006) LAC 416 at 419 D-I) and is so well-known that there is no need to set it out in detail in this judgment. What is more the Chief Executive's averments were met with a bare denial, and no direct contradictory evidence was put forward in reply by a person who had actual knowledge of the facts, such as a member of the Commission.

2. After putting forward various vague and sometimes contradictory versions in an endeavour to justify how they became members of the Public Service, the respondents finally appeared to accept that they were temporarily employed staff in terms of section 11(3) of the DMA Act. What is not correct, in my view, is the implied submission that section 11(1) also applied to such staff. Moreover, the further submission that such staff

are public officers, appointed and regulated in terms of the Public Service Laws does not accord with a proper construction of the section.

3. Temporary staff, who are employed in terms of section 11(3) do not *ipso facto* become public officers. It is assumed, however, that the Act does not preclude their appointment into the Public Service. On this assumption they would have to be appointed by the Commission, or their appointment would have to be confirmed by the Commission, or the Commission would have had to delegate powers of appointment to members of the Commission or to a public officer with the consent of the Prime Minister. None of this occurred.

4. The presumption in favour of regularity does not apply in the absence of proof that the Chief

Executive at least purports to appoint the respondents to the Public Service. That he did not purport to do so is clear from the terms of his affidavit which, it may be added, would be sufficient to rebut the presumption if ever it arose.

5. The respondents also relied – albeit in reply – on the Chief Executive's letters of appointment. The submission in this regard was that he appointed the respondents to the Public Service. The contents of the letters of appointment do not, in my opinion, support the respondents' argument but even if he did purport to appoint them to the Public Service, the appointments would have been invalid on the obvious grounds that section 137 of the Constitution was not complied with.

6. Despite the respondents' assertions to the contrary, the DMA had the power to appoint and

dismiss temporarily employed staff. It is unthinkable that a comparatively large and important organization such as the DMA could function properly if it was precluded by law from exercising such powers.

7. Finally it is only necessary to re-iterate that the respondents were engaged as temporarily employed staff in terms of section 11(3) of the DMA Act; that they were employed on temporary month-to-month terms, subject to one calendar month's notice of termination by the employer or the DMA for which no reasons need be given; that they were appointed by the Chief Executive on behalf of the DMA; that the Public Service Commission played no part in their appointment; that they did not become members of the Public Service; that in terms of their contract of

employment the Chief Executive, on behalf of the DMA, terminated their contracts.

[22] In the result the following order is made:

1. The appeal succeeds with costs;

2. The order of the Court *a quo* is set aside and is replaced with the following:

"The application is dismissed with costs".

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L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

_____

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____

I.G. FARLAM
JUSTICE OF APPEAL

For Appellants : Adv P.J Loubser

For Respondents : Adv K.E. Mosito KC