IN THE LABOUR APPEAL COURT OF LESOTHO

LAC/A/06/05

Held at Maseru

In the matter between

REMAKETSE MOLAOLI AND 9 OTHERS **APPELLANTS**

AND

LESOTHO HIGHLAND DEVELOPMENT AUTHORITY **RESPONDENT**

CORAM:

HONOURABLE MR.A CTING JUSTICE K.E. MOSITO

ASSESSORS:

MR. O.L. MATELA
MR. D. TWALA

HEARD : **15TH OCTOBER, 2007**
DELIVERED : **22ND OCTOBER, 2007**

SUMMARY

Appeal from judgement of Labour Court - whether they were governed by the Personnel Regulations of the Respondent – Appellants governed by personnel regulations .

Employee becomes automatically confirmed on expiration of four months, and no further confirmation is required unless extended by Labour Commissioner.
Doctrine of freedom of contract, sits at the heart of our law of employment-
A point of law and can be taken at any time and stage .
Hearsay – when matter hearsay it depends on the purpose for which it was tendered.
Retrenchment – consultation necessary – restructuring is reason for retrenchment.
Discrimination is a very loaded phenomenon – ground therefor must be established.
Compensation – How to be assessed.

JUGEMENT

MOSITO A.J.

(1) This appeal arises out of the decision of the Labour Court on an application brought by appellants for an order:

(a) Declaring the retrenchment of Appellants unlawful and procedurally unfair.

(a) Directing the Respondents to pay Applicants 12 months salary as reasonable compensation for their unlawful retrenchment.

(b) Ordering Respondent to pay applicants for all leave due and not taken.

(c) Payment of Applicants' terminal benefits in terms of staff separation policy plus the outstanding overtime worked mountain and incentive allowance in terms of LHDA Regulations from date of employment to date of termination.

(d) Granting the Applicants further and alternative relief."

calling and not treating Appellants as employees, and consequently not giving them their benefits such as mountain and incentive allowances.

(d) The court a quo erred by holding that:-

(i) Appellants were consulted contrary to the evidence of the Respondent that it did not consult them, as they did not consider themselves bound to consult them.

(ii) That even assuming that the court a quo was correct that the Appellants' conditions were governed by the so called "Terms of References", the court erred in holding that the Appellants were consulted under clause 4.9.2 of the said Terms of Reference as required by Law in cases of retrenchment.

(iii) That the court a quo erred in holding that the conditions For involuntary resignation spelled out in the Terms of Reference were complied with by the Respondent in the absence of any iota of evidence providing whether any (ALC and FOT Team Leader and the CPO were involved at all in the process, no evidence having been adduced to prove these facts.

(e) That the court a quo erred and misdirected itself in relying on Exhibit 4 as only evidence demonstrating Appellants outstanding leave days due and not taken, in the light of overwhelming and uncontroverted evidence that Appellants did not take any leave.

(f) That Appellants had to pay costs despite the substantial success by Appellants in that they were LHDA employees as opposed to Respondent's contention that they were independent contractors.

(g) That the court erred in holding that since the Appellants were given notice of their intended termination of their contracts.

5. Both counsel filed detailed heads of argument before us which we found very useful. We now turn to considering the grounds of appeal *seriatim.*

6. When the hearing of the appeal commenced before us, Advocate Sekonyela (assisted by Advocate Mokobocho) for Appellants,

2. One may pause from the outset and point out that the aforementioned prayers which were placed before the Labour Court were phrased with neither clarity nor elegance. Of course courts are not concerned with the elegance of the language used, pleadings are to be considered as a whole and, if by doing so, it is clear what has to be decided, all is well even though the various stages, stages of the pleadings may not be as clear, or as accurate or as elegant as they ought to have been. (***See Epsteein v Christodolou and Another 1982 (3) SA 347 (W)***. The foregoing notwithstanding, it may suffice to say that, the prayers are not an elegant piece of draftsmanship. Cousel are urged to try their best at reaching some minimum level of elegance.

3. The foregoing notwithstanding, the matter was ultimately heard by the Labour Court, and judgment was handed down on the 1st day of September 2005. Dissatisfied with the judgment, Appellants filed an appeal to this court.

4. The grounds of appeal may be summarized as follows:-

   (a) That the court a quo erred in holding that appellants were not governed by Personnel Regulations as LHDA employees since the court had held that they were in fact LHDA employees.

   (b) The court a quo erred in holding as it did that appellants were not retrenched because their structure was dissolved.

   © The court erred in holding as it did that there was no discrimination after holding and finding that the Respondents had a "hidden agenda" for not

calling and not treating Appellants as employees, and consequently not giving them their benefits such as mountain and incentive allowances.

(d) The court a quo erred by holding that:-

(i) Appellants were consulted contrary to the evidence of the Respondent that it did not consult them, as they did not consider themselves bound to consult them.

(ii) That even assuming that the court a quo was correct that the Appellants' conditions were governed by the so called "Terms of References", the court erred in holding that the Appellants were consulted under clause 4.9.2 of the said Terms of Reference as required by Law in cases of retrenchment.

(iii) That the court a quo erred in holding that the conditions For involuntary resignation spelled out in the Terms of Reference were complied with by the Respondent in the absence of any iota of evidence providing whether any (ALC and FOT Team Leader and the CPO were involved at all in the process, no evidence having been adduced to prove these facts.

(e) That the court a quo erred and misdirected itself in relying on Exhibit 4 as only evidence demonstrating Appellants outstanding leave days due and not taken, in the light of overwhelming and uncontroverted evidence that Appellants did not take any leave.

(f) That Appellants had to pay costs despite the substantial success by Appellants in that they were LHDA employees as opposed to Respondent's contention that they were independent contractors.

(g) That the court erred in holding that since the Appellants were given notice of their intended termination of their contracts.

5. Both counsel filed detailed heads of argument before us which we found very useful. We now turn to considering the grounds of appeal *seriatim.*

6. When the hearing of the appeal commenced before us, Advocate Sekonyela (assisted by Advocate Mokobocho) for Appellants,

informed this court that it was now common cause that, the Appellants were employees of the LHDA (herein after referred to as the Respondent). Advocate Matshikiza for the Respondent was asked whether that issue is now common cause and she confirmed that it was. This admission therefore obviated the need for this court to go into the issue whether, regard being had to the evidence, the Appellants were indeed employees of the Respondent as opposed to the original position adopted by the Respondent in the court a quo, that Appellants were independent contractors. We consider therefore that, this court is entitled to approach the matter on the basis that Appellants were employees of the Respondent as from September 1997 when the consultant by whom they were employed left Lesotho, and handed them over to them Respondent.

7. Accepting therefore, as we do that Appellants were employees of the Respondent as from end of September 1997, the first question to answer is whether they were governed by the Personnel Regulations of the Respondent, or by the "Terms of Reference and Operational Procedures for area liaison committees and community liaison assistants?"

8. The Respondent is a public employer established in terms of section 4 of the Lesotho Highlands Development Authority Order No. 23 of 1986 (hereinafter referred to as the Act) section 18 of the Act provides that :-

> "18(1) The Authority shall have such other officers, Servants and agents as may be appointed by the Board.
>
> (2) The Authority shall pay to all its officers, servants and agents such remuneration and allowances as the Board may determine.
>
> (3) The officers, servants and agents of the Authority Shall be under the administrative control of the Chief Executive."

9. Section 7 of the Act establishes the office of the Chief Executive of the Authority, Section 8 provides that the Chief Executive shall be responsible for the execution of the policy of the Authority and the transaction of its day to day business. Section 9 of the Act establishes a Board of Directors of the Authority. Section 58 (i) of the Act provides that the Authority may make rules, providing duties, conditions and terms of employment of its officers and servants. It is presumably in terms of the latter section that the Authority made its Personnel Regulations. It is however, not clear from the record as to when the first Personnel Regulations of the Respondent were made. However, Regulation 1.2 of the Personnel Regulations, provides that

[t]hese amended Regulations were approved by the Board of Directors of the Lesotho Highlands Development Authority on 18 February, 1999." "Regulation 1.3 provides that [t]hese Regulations shall come into operation on 18 February, 1999."

10. Regulations 1.5 provides that any employee who joins the service of the Authority or who remains in the service of the Authority after the introduction of any amendment to these Regulations shall be deemed to have agreed thereto, and shall be bound by such amendment of which the employee shall be notified as and when they are to come into force. It follows therefore that, since it is common cause that Appellants were employees of the Respondent since in or about September 1997, they remained in the service of the Respondent even after the 1999 amendments of the Regulations until their contracts were terminated on the 31st day of May 2004. In terms of Regulation 2.1, all employees including those on probation for a post on the permanent staff, contract employees, part-time (temporary/casual) employees, seconded employees, are to be subject to these Regulations except that, contract, part-time and seconded employees are to be subject to Regulation 3.4. There is a provision in this Regulation that, where these Regulations are in conflict with the terms

and conditions of contract for contract employees and seconded employees, the contracts are to prevail. We may pause here, and indicate that, there is nothing on record to indicate that Appellants were either contract employees or seconded employees. A "contract employee" is one who has been employed for a specific period and whose employment is governed by a specific contract as contemplated in Sub-Regulation 3.6 (see the Definitions Sections to the Personnel Regulations). The later section also defines or "seconded employee" as one who while remaining in the employment of another organization under a contract for a specified period and on terms and conditions mutually agreed between himself, his organization and or the Authority. It also includes any person who, while remaining in the employment of the Authority has been assigned to any other organization under a contract for a specified period and on terms and conditions mutually agreed between himself, the other organization and the Authority. For the sake of completeness, we should also mention that, it does not appear from the record that the Appellants were part-time employees. The Regulations define a part-time employee as a person who is neither a permanent employee of the Authority nor a contract employee but who is under contract to

perform some specific work or undertake a specified journey on behalf of the Authority.

11. The Appellants were admittedly employees of the Respondent, and Regulation 2 refers to all employees. We have understood the word "all" to include the Appellants. Could it be said that Appellants were therefore "permanent employees"? The Regulations define a permanent employee as one who is occupying a position as a permanent staff, and has been confirmed in such a position. (see the Definition Section to the Personnel Regulations).

12. There is no evidence on record that the Appellants were never confirmed after completing their probationary period of four months from end of September or 1st October, 1997 (which ever is the date of their first appointment with Respondent) until 31st May 2004. In terms of section 75 of the ***Labour Code Order No. 24 of 1992***:

> An employee may initially be employed for a probationary period not exceeding four months. At any time during the continuance of the probationary period or immediately at its end, the employee may be dismissed with one week's notice.
>
> The probationary period may be extended beyond a period of four months only with the leave in writing of the Labour Commissioner.

13. There is no evidence that the probationary period of any of the Appellants was ever extended beyond the four months period contemplated by the aforementioned section. In our view, once a probationary period comes to an end, and no extension was granted by the Labour Commissioner, the employee becomes automatically confirmed, and no further confirmation is required.

14. Section 62 of the Labour Code provides for types of contracts. It provides that:-

> (1) A contract of employment may take the form of a contract without reference to limit of time, a contract for one period of fixed duration or a contract to perform some specific work or to undertake a specified journey.
>
> (2) A contract without reference to limit of time is a contract which contains no termination date. It may be terminated by either party, subject to the provisions of the Code concerning dismissal and notice of termination.
>
> (3) A contract for one period of fixed duration shall set forth its date of termination. Such a contract shall, subject to the provisions of section 66 concerning dismissal, automatically terminate on that date and no notice of termination shall be required of either party.
>
> (4) A contract to perform some specific work or to undertake a specified journey shall terminate upon the completion of the work or journey. No notice of termination shall be required of either party, but an employer who terminates such a contract before its completion shall pay the employee all wages and

> other remuneration that would have been owing to the employee if he or she had continued to work until the completion of the contract.

15. It follows therefore that, a contract of employment without reference to limit of time is also contemplated in Section 62 (1) of the Labour Code. These are contracts which Respondents presumably categorizes as permanent contracts, or the holders of which are termed permanent employees. Whatever the appellation given, we are of the opinion that permanent employee refers to an employee who holds a contract of employment without reference to limit of time. If we are correct in this view, we are therefore of opinion that Appellants are permanent employees of the Respondent within the terms of Regulation 3.1.1.1 of the Respondent's Personnel Regulations.

16. The question however is how then do the permanent employees contemplated by the Regulations become subject to terms of another policy called Terms of Reference and Operational Procedures for Area Liaison Committees and Community Liaison Assistants?

17. It is now settled that terms governing the employment relationship are regulated, to greater or lesser extent, by the agreement between the parties. But the parties do not contract in a vacuum. First of all, the

common law operates as a default law, importing terms to the extent that they are not excluded by the parties or by legislation. Secondly, legislation circumscribes the parties' freedom to contract, by introducing a set of minimum standards. Finally, the parties may be contracting within a collective bargaining environment, where the terms of employment are pre-set in industry or plant level collective agreements. The contract of employment also bears a heavy load of implied terms. The terms are "implied" because they are imported into the contract by operation of law, and not the agreement of the parties. The parties can, subject to legislative constraint and public policy, choose to exclude the operation of any one or more of the implied terms. In this sense, then the implied terms operate as a default law.

18. The Labour Code serves as a model for a law that introduces international labour standards in our labour legal jurisprudence Section 4 (b) and (c) of the Code provides that:-

> *"The following principles shall be used in the interpretation and administration of the Code:*
>
> *(a) ...*
>
> *(b) no provision of the Code or of rules and regulations made thereunder shall be interpreted or applied in such a way as to derogate from the provisions of any international labour Convention which has entered into force for the Kingdom of Lesotho;*

(c) in case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation.

(d) where, under the provisions of any other legislation, a person may have a remedy as provided for in that legislation, that remedy shall be in addition to and not in place of any remedy provided for by the Code"

19. The question that has to be determined is, on what basis can it be said that the Terms of Reference formed part of the contracts of employment of the Appellants? In the Labour Court, the Appellants contended that they had neither signed the Terms of Reference and were therefore not part of the terms of their contract of employment. This contention was also advanced before us. The Labour Court held that, nothing turns on whether the Appellants had signed the Terms of Reference or not. It held that there is no rule that requires that for the Terms to be applicable they ought to have been signed by the Appellants. The Labour Court held that the Appellants had not tendered evidence to show that they had signed the Personnel Regulations which they want to govern their relationship with the LHDA. The Labour Court then rejected the letter written by the Chief Executive in which he had indicated that, the Terms had not been

approved by the authorities. The basis of the said rejection was that it ought to have been tendered by the union as the body to which the letter had been addressed.

20. It is correct that there is no rule in the Terms that the Terms will become applicable only if they have been signed by the Appellants. However in our view the Labour Court has missed the issue . The issue is not whether the Terms could only become applicable once they had been signed by the Appellants. The issue was whether the Terms are part of the terms of the contract of employment of the Appellants, whether signed by them or not. There is nothing in either the Terms of Reference themselves, or the Personnel Regulations introducing the Terms of Reference as part of the terms of the contract of employment of the Appellant.

21. We have already indicated in paragraph 10 above that in terms of Regulation 2.1 of the Personnel Regulations, the Personnel Regulations themselves apply to <u>all</u> employees. It was not a mere wishful thinking on the part of Appellants therefore that they be bound by the Regulations. The Regulations themselves provide so in Regulation 2.1. The Personnel Regulations of the Respondent are binding on the Respondent. If it had been the intention of the parties

that the Appellants be bound by the Terms of Reference, we were unable to find a reason why it would have not said so in black and white.

22. The mere fact that the Appellants did not sign the Terms, or that there is nothing in the terms requiring Appellants to sign the terms, does not entitle the Respondent in law to impose terms upon the Appellants who are parties to an employment contract. To uphold this contention would subvert the salutary principle unlying the doctrine of freedom of contract, which sits at the heart of our law of employment.

23. It follows that we are unable to agree with Advocate Matshikiza that, the fact that Appellants were employees of the Respondent, did not mean that they were not governed by the Terms of Reference. We hold that they are governed by the Personnel Regulations which are binding on them as shown in paragraph 10 above. It is correct that it is the nature of Labour Relations that differences in the terms and conditions of service among individual employees are bound to occur as was correctly held in ***Senior University Staff Union v National University of Lesotho CIV/APN/422/96***. However that case is no authority for the preposition that a party is entitled in law to impose terms of service on another partly.

24. We indeed held in **LHDA v Ralejoe LAC/CIV/A/03/2006** that, it is permissible for different policies to operate within the establishment of the same employer. We reiterate our view in the latter case that, the terms of contract of an employee have to be negotiated with the employee and not imposed upon the employee. If the parallel policies are to apply to different employees, the employee must be involved. This is in accordance not only with the doctrine of freedom of contract, but also, with the concept of industrial democracy. It must be borne in mind that public policy generally favours the utmost freedom of contract. This is in line with the *dictum* of Jessel MR in **Printing and Numerical Registering Co v Sampson (1875) LR 19 ER 462** that:

> 'If there is one thing that more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.'

25. It is obvious that the view that we take is that the Terms of Reference are not part of the terms of service of the Appellants.

26. Advocate Sekonyela submitted further that, in any event, the operation of the Terms of Reference were not approved by the LHDA. For this proposition, he relied on Exhibit PM6 which reads follows:-

FRF: ESSG/0185/03/CO 10th July 2003

The General Secretary

Lesotho Transport and General Workers Union

Carlton Centre Office N0. 217

P.O. Box 322

Maseru.

Dear Sir,

Community Liaison Assistants' issues

Although LHDA had undertaken to forward you a copy of the guidelines governing the engagement of the Community Liaison Assistants in the meeting of 19 June 2003, it regrets that this cannot be done as this document is not approved by Project authorities.

LHDA apologies for the inconvenience this might cause you.

Yours you,

Signed:_____

Refiloe Tlali

Chief Executive ai.

26. He contended that the Chief Executive is responsible for the "execution of the policy of the authority as well as the implementation of its day to day business" in terms of Section 8 of the Act, and he is as such the legal face of the Authority. He consequently submitted that what the Chief executive said in that letter could not be doubted. Advocate Sekonyela attacked the evidence of the Respondent's witnesses that sought to prove that the Terms were a working document on the basis that, the Chief Executive did not deny that his office had actually rejected the Terms as not approved by the LHDA. Advocate Matshikiza sought to meet this challenge by contending that the Labour Court was entitled to hold that the Terms were the instrument that guided the relationship between Appellants and Respondent. She argued that Appellants had denied knowledge of the Terms, but there was overwhelming evidence that they in fact knew about them, but did not want to be governed by them. She contended on the authority of **Weintraub v Oxford Brickworks (PTY) LTD 1948 (1) SA 1090 (T)** that, a letter is only evidence of the fact that it was written by the person who wrote it, and that, that person said what the letter contains. She contended that the said letter could not be evidence of the truthfulness of its content. For this contention, she

relied on **Cross on Evidence, 6th Edn,** 1985 at p 600 wherein the learned authors wrote that:-

> "A party relying on the words used in a document for any purpose other than that of identifying it, must as a general rule, adduce primary evidence of its contents."

The learned Counsel then argued that the Labour Court had even rejected the said letter as constituting hearsay evidence. She added that, since Appellants had not appealed against the rejection of the letter by the Labour Court, they could not, therefore rely on it on appeal. The portion of the judgment of the Labour Court relied upon in this regard appears on page 44 as follows:-

> "Furthermore, the fact that a letter was written as alleged can only be attested by the union which is the one to which the letter was written. The two witnesses who testified for applicants cannot testify on its contents as that is hearsay. Accordingly, the evidence of DW 1 and DW 2 that the Terms of Reference were approved by the LHWC around September 1997 cannot be faulted."

27. In our view, the above quotation from the judgment of the Labour Court does not reflect the correct legal position. The witnesses called for the Appellants in the Labour Court, can testify on the contents of the letter, notwithstanding that the letter was not written to them. What they cannot do, is to testify on the truthfulness of the letter's contents. They can in law tender the letter not only to show that the

letter actually exists, but also to prove that what was said therein was said. What Appellants cannot do, is to use the letter and its contents testimonially to prove the truth of its contents. (See **Nqojane vNational University of Lesotho LAC (1985-89)369 at 383).** It all depended on the reason for which the letter was tendered. It follows that the view we hold is that, to the extend that the letter was tendered to prove the truthfulness of its contents, it would be hearsay and inadmissible. However, to the extent that it was tendered to prove that what was said was said or that the letter actually exists, it is not hearsay, and it is admissible. In our opinion, this letter was admissible to prove that the Respondent had written such a letter, and that it had said what it said in that letter, namely, to prove that the Chief executive said that the Terms of Reference had not been approved, not that as a fact those terms had not been approved. It follows in our view that, the letter was wrongly excluded and rejected as hearsay. We are therefore unable to agree with Advocate Matshikisa that Exhibit MP6 was hearsay and inadmissible.

28. The Court does however take judicial notice that such a commission is provided for in the Lesotho Highlands Water Treaty. The Act does not however, introduce the Treaty into the national laws of Lesotho

for purposes of making it part of the domestic law of Lesotho. It follows therefore that the powers of the commission are however not provided for in the Act. More specifically, there is no provision in the Act clothing the commission with the power to approve the Terms of Reference so as to make them applicable to the Appellants.

29. If indeed the letter was admissible as we have found, the question for determination is whether there was evidence before the Labour Court that the Terms of Reference were in fact approved by the Respondent. According to Ms Mahlape Mothepu (DW1), the Terms were approved in September, 1997. She however does not know why the Respondent's Chief Executive said to the union that they were not approved. The witness testified that the Terms of Reference were never signed by the Respondent. She however testified that they were approved in terms of the letter from the Commission (the Commission refers to the Highlands Water Commission). It is significant to point out that the Act does not make provision for the establishment of the said Commission. Although the witness says the said commission was established by statute, no statute was ever brought to our attention establishing the commission.

30. Furthermore, the contention that because Section 8 of the Act was repealed in 2000, the Appellants cannot rely on its provisions as they stood in 1997, is without substance. Thus, if properly taken, this point of approval in terms of Section 8 of the Act would entitle the Appellants to take these point. The question however is whether the Appellants are entitled to avail themselves of a point in their heads of argument, which was neither raised in the court a quo nor in the grounds of Appeal before this court. Appellants' counsel contended that this is a point of law and can be taken at any time and stage. In paragraphs 27 – 28 of **Tsebo Monyako v Lesotho Tourist Board and 4 Others LAC/CV/APN/11/02**, this Court held that:-

> A point of law alleged to be such taken at the commencement of a hearing without notice and without observance of the Rules of Court is however unacceptable, because such a practice constitutes ambushing of a litigant **(see T.A.M. Industries (Pty) Ltd v ALFA Plant Hire (Pty) Ltd C of A (CIV) No. 18/2004 para 8, J. Marobane v Bateman 1918 AD 460 at 464; see Attorney General and others v Kao C of A (CIV) No.26 of 2002; Malebo v Attorney General C of A (CIV) No5/2003** and authorities cited at page 5 of the latter judgement and the reason at pp.6 and 7.

> We are of the view therefore that the two points were not correctly so taken from the bar. They ought to have been raised in the papers. Their being argued from the bar would certainly prejudice the respondents.

30. In our view, the Appellants cannot be allowed to take this point in their heads of argument in the manner they have done. In the same vein, we are unable to accept the Appellant's reliance on a point on lack of approval not because it was not argued in the Court a quo, but because it has not been raised in the ground of appeal before us. We agree with Advocate Matshikiza that this point cannot be raised in the manner Advocate Sekonyela sought to raise.

31. Advocate Matshikiza contended that the issue relating to the approval structure of the Respondent was never raised in the Court a quo. It cannot be raised for the first time on appeal by the Appellants. She went on to contend that the Lesotho Highlands Water Commission is the highest authority in the running of the Project, and that Section 8 of the Act upon which Appellants rely has been repealed by Section 4 of the **LHDA's (Amendment) Act 2000**. Advocate Sekonyela reacted to this challenge by first, conceding that the Section 8 of the Act was indeed repealed in 2000. He however contended that nothing turns on the repeal or otherwise of the section in as much as the

alleged approval of the Terms of Reference he is to have occurred in 1997, not in 2000 or at any time after the repeal.

32. Section 18 of the Interpretation that Act No. 19 of 1977 provides in part that:

> "where an Act repeals another Act in whole or in part..... the repeal shall not:-
>
> (a) .....
>
> (b) affect the previous operation of the Act so repealed or anything duly done or suffered under the Act so repealed.
>
> © affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed."

33. However, whether or not the issue as to approval succeeds, the crucial issue that remains unaffected is that, there is no basis in law for holding that the Appellants' contracts were governed by the Terms of Reference in question.

34. The next question for consideration is whether there was proper consultation as understood and required by our Labour Law. The question is to be preceded by the issue whether the Appellants were retrenched or not. The Labour Court held that this was not retrenchment. The Labour Court held at page 12 of its judgment that:

> "Appellants aver that on the 14th February 2004 they were told that they were going to be retrenched. Respondents' witnesses do not deny the meeting of the 14th but aver that it was to inform Appellants of the dissolution of the CLA System. We are inclined to believe the Respondents' witnesses' version as there more probable version. The Applicants's version is most likely to be spiced to suit their contention that they should have been dealt with in terms of the Personnel Regulations."

35 The appellants' counsel contended that the very meaning of the term "retrenchment" presupposes termination of an employment contract for operational requirement. He contended that, in this case, it is clear that the appellants' contracts were terminated for operational reasons. Respondent's counsel countered the aforegoing contention by arguing that, when dissolving the CLA structure, the Respondent relied on Clause 4.9.2 of the Terms of Reference, which provides that on dissolution one calendar month's notice of the intention to dissolve should be given."

36 The answer to the foregoing challenge revolves around the meaning of the term "retrenchment" as used in Labour Law. This court has in the past, considered the concept of retrenchment in detail in **MAPHOTO ELIAS MACHOLO v LESOTHO BAKERY (BLUE RIBBON) PTY LTD LAC/A/4/04.** Other than confirming our views as reflected in that case, we do not find it necessary to repeat the

discussions undertaken therein. It suffices to point out that, whenever an employer contemplates terminations of contracts of employees for reasons of an economic, technological, structural or similar nature, such an employer does in law, thereby contemplate a retrenchment process. Such an employer has to be mindful of the terms of Article 13 of the **Termination of Employment Convention, (ILO Convention No. 158) 1982.** Such an employer must begin by taking the steps outlined in paragraph 20 in the Macholo's case. As we held in the Macholo's case (*supra*),

> [t]he view that this Court holds... is that, section 4 (b) and (c) of the Labour Code has the effect of giving effect to the provisions of the aforementioned Convention.

37. It follows from the foregoing discussion that a termination of contract on grounds of structural change amounts to retrenchment. In our view, the termination of the contracts of employment of Appellants on the basis of dissolution of certain structures amounts to termination of contract on account of structural change. The very meaning of retrenchment therefore, presupposes termination of an employment contract on operational requirements. The termination of the contracts of Appellants for operational requirements therefore, amounts to retrenchment.

38. The next question is whether the retrenchment was carried out in accordance with the law. Mr. Sekonyela for the Appellants contended that it was not. He submitted that, there is overwhelming evidence and express admission by the Respondent itself that, the meeting of the 14th February, 2004 was not a consultation meeting. The Respondent pleaded in paragraph 15 of its answer that:-

> "We deny that these meetings were consultations as envisaged by the law leading to retrenchments. We submit further [that] as Applicants were not employed by Respondent there was no obligation on its part to consult Applicants. As a result, the LHDA's staff separation policy does not apply to them."

39. The foregoing notwithstanding, the Labour Court held on page 12 of its judgment that:-

> "Clearly, the Applicants were consulted on the 14th February. Subsequently, they were given far longer notice than the one specified in the Terms of Reference. They cannot therefore complain."

40 We are with respect, unable to appreciate how the Labour Court came to the conclusion that Appellants "were consulted on the 14th February", when Respondent itself contends that it did not consult Appellants because it did not consider them to be its employees. We should mention while on this point that the learned counsel for Respondent

quite correctly in our opinion conceded before us that, there was no consultation as envisaged by the law.

41. She however submitted that, courts cannot prescribe how consultations are conducted as long as the procedure is fair. She submitted that Applicants were informed that their task within the Project was complete and the structure was to be dissolved. She further submitted that, there could not be discussion on selection criteria or alternatives as the whole Project was undergoing a *restructuring* process. She further submitted that Article 7 of the ILO Recommendation 199 of 1982 on the Termination of Employment, provides that:

> "A worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in Lieu thereof."

42. The argument proceeded that, the Respondent has complied with the above – quoted Article in as much as Appellants were actually given three months notice more that is required by the Article.

43. In our view, once the Respondent admitted as it did that, it did not consult with the Appellants on their retrenchment, *cadit question*. In our view, the Labour Court erred in holding as it did in the circumstances, that the Appellants were indeed consulted. This is because, the

Respondent itself says contrary to what the Labour Court found, that it did not consult the Appellants because they were not its employees.

44. As indicated above the learned counsel for Respondent further contended that courts cannot prescribe *how* consultation has to be *conducted* so long as it was fair. It is not necessary to decide in the present case, whether or not courts can or cannot prescribe *how* consultation has to be *conducted* so long as it was fair. Assuming without deciding the correctness of this proposition, it would appear that it would be based on an existing consultation. We accordingly refrain from expressing any decisive view in regard to whether either of these defences should succeed.

45. In the present case, there was no consultation, and the issue whether the courts can prescribe *how* consultations should be *conducted*, cannot advance the Respondent's case any further. The reliance by the Respondent on the contention that Appellants were given *notice* in terms of Article 7 above, would not help Respondent as the issue is not one of *notice* but *consultation* which Respondent concedes it did not undertake.

46. The learned counsel for the Respondent argued that, the Appellants were given their terminal benefits and the issue of the lack or otherwise

of consultation does not take the matter any further. It is an academic exercise to determine the issue, so it was in essence argued. The Appellants' counsel countered that to uphold Respondents' counsel's *cont*ention in this regard would subvert the very essence of consultation in labour law.

47. Another question was whether Appellants had proved that they were entitled to leave payment. In paragraph 17 of the originating application, Appellants pleaded that their annual leave was not calculated from the date of their employment and in terms of the LHDA Personnel Regulations of 18 days per annual from date of employment to date of termination. The Respondent's Answer pleaded that Appellants were not entitled to leave payment because they were not employees of the Respondent. The Labour Court held that the Appellants had not pleaded the leave that they allege was due and not taken.

48. The applicants' case was not that they did not take their leave entitlements. Their case was that the computations were not done in accordance with the Personnel Regulations. We therefore agree with Advocate Motshokiza that, there was no evidence as to the periods in respect of which Appellants can be said to have not taken their leave

entitlements. We are therefore unable to interfere with the Labour Court's judgment on this issue. In any event, the Appellants ground of appeal on leave payments was not that they had pleaded the leave entitlements due. Their ground of appeal is that the labour Court erred is relying on Exibit 4. We were not however told why that was so. The main problem is that Appellants did not plead specifically the years or dates in respect of which they did not get their leave entitlements. We cannot therefore interfere with the judgment of the Labour Court on this point.

49. Another ground of appeal was that, appellants had been *discriminated* against as they were not given mountain and incentive allowances like all other employees of the Respondent.

50. The concept of discrimination is a very loaded phenomenon.(See generally the discussions in **Louw v Golden Arrow Bus Service (PTY) LTD 2001 (1) SA 218 (LC)**), (See also **Prince v President, Cape Law Society, and Others 2002 (2) SA 794 (CC)**). It is perhaps convenient to begin with examining the concept of discrimination within the context of the Lesotho Labour Law. Section 5 of the **Lobour Code Order 1992** proscribes discrimination in the following terms:

> "(1) The application by any person of any distinction, exclusion or preference made on the basis of race, colour, sex, marital status, religion,

> political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, is incompatible with the provisions of the Code.
> (2) Sexual harassment, as defined in Section 200 of the Code, shall be prohibited.
> (3) Men and women shall receive equal remuneration for work of equal value.
> (4) Any distinction, exclusion or preference in respect of a particular job based on the narrowly defined inherent requirements thereof shall not be deemed an act of unlawful discrimination.
> (5) For the purposes of this section, the terms "employment" and "occupation" include access to vocational and other occupationally related training, access to employment and to particular occupations, retention of employment and any terms or conditions of employment.

51. It is apparent from the section that, it is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. Thus, the mere existence of disparate treatment of people of, for example, different races, colour, sex, marital status, religion, political opinion, national extraction or social origin, is not discrimination unless the difference in the specified ground is the reason for the disparate treatment. Thus, for the appellants to prove that the difference in wages contended for in this case constitutes discrimination, they must prove that their wages were less than those of their colleagues because of one or other, or some, or all of their specified ground of discrimination reflected in the section. (See for example, **Association of Professional Teachers and Another v Minister of Education and Others (1995) 16 ILJ 1048 (IC) at 1051**).

52. The English Courts rely, *inter alia*, on the standard causation test, described shortly as the 'but for test'. In **James v Eastleigh Borough Council [1990] 1 RLR 288** Lord Goff held at 295 that:

'cases of direct discrimination under s 1(1)(a) can be considered by asking the simple question: would the complainant have received the same treatment from the defendant but for his or her sex? This simple test possesses the double virtue that, on the one hand, it embraces both the case where the treatment derives from the application of a gender-based criterion, and the case where it derives from the selection of the complainant because of his or her sex; and on the other hand it avoids, in most cases at least, complicated questions related to concepts such as intention, motive, reason or purpose, and the danger of confusion arising from the misuse of those elusive terms.'

53. The logic of proving or demonstrating unfair discrimination may be drawn from the approach of the South African Constitutional Court in **Harksen v Lane NO and Others 1998 (1) SA 300 (CC) (1997 (11) BCLR 1489)** at 325A - D. The Court must first ask itself:

(a) Does the act or omission constitute differentiation between people or categories of people?

(b) If the answer is positive, the Court embarks on a two stage analysis:

(c)

'(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then the discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'

54. At the hearing of the matter before us, the court asked the counsel for Appellants whether the issue was one of discrimination, or one of

inconsistency in the application of the Regulations. The court posed this question regard being had to the grounds contained in section 5 of the Labour Code, as well as section 18 of the Constitution of Lesotho. The court sought to find out as to, on what basis the discrimination was founded. Counsel then shifted ground a little, and contended that, it could be that the correct ground ought to have been inconsistency and unfairness in the application of the regulations.

55. We agree with counsel, of course that, fairness requires that persons doing equal work should receive equal pay. See **National Union of Mineworkers v Henry Gould (Pty) Ltd and Another (1988) 9 ILJ 1149 (IC)** and **SA Chemical Workers Union and Others v Sentrachem Ltd (1988) 9 ILJ 410 (IC).**.

56. However, the papers before us pleaded discrimination, and it is on that ground that a decision in this case should be made. While paragraph 11 of the originating application pleads discrimination, it nevertheless does not disclose a ground thereof. We are therefore unable to find that there was discrimination against Appellants in this matter, where no ground thereof had been established. It was therefore not clear on what ground the discrimination can be premised.

57. We have already found that the retrenchment was legally flowed an account of lack of consultation. The question is, what then are the consequences of such unlawful retrenchment?

58. Mr. Sekonyela for Appellants contended that Appellants should be awarded compensation for the unlawful retrenchment. Advocate Matshikiza contended that Appellants ought to have mitigated their loss so as to enable the Court to determine the amount of compensation. She relied on section 73(2) of the Labour Code Order 1992. The section provides:

> "*(1) If the Labour Court holds the dismissal to be unfair,* ***it shall****, if the employee* ***so wishes****, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court* ***shall*** *not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.*
>
> (2) If the Court decides that it is impracticable **in light of the circumstances** for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court shall be such amount, as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses " (Emphasis added).

59. The learned counsel for the Respondent contended that, in assessing the amount of compensation to be paid, account should be taken of whether there has been any breach of contract by any party, and

whether the employee has failed to take such steps as may be reasonable to mitigate his or her loss. She contended that there was no evidence adduced by appellants to show steps taken to mitigate their loss. She also contended that no arguments were made in the court *a quo* on behalf of Appellants on this issue. It may be important to start a consideration of this point by examining the jurisprudence on mitigation of damages. The onus rests upon the respondent to prove that an applicant did not take reasonable steps to mitigate his damages. In **Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)** at 689F Corbett JA (as he then was) said: 'The law is satisfied if the sufferer from the breach has acted reasonably in the adoption of remedial measures. . . .' The learned judge pointed out at 689D – F that:

> 'Being a question of mitigation, the onus of establishing that there were other less costly remedies which respondent ought to have adopted rested upon the appellant. In a case such as the present one, where the breach of contract creates something of an emergency and the sufferer finds himself in a position of embarrassment as a consequence of the breach, the measures which he may be faced to adopt to extricate himself ought not to be weighed in nice scales and the Court should not be astute to hold this onus has been discharged (see remarks of Lord Macmillan in Banco de Portugal case supra at 506; De Pinto and Another v Rensea Investments (Pty) Ltd, a decision of this Court delivered on 28 March 1977 and not yet reported). The law is satisfied if the sufferer from the breach has acted reasonably in the adoption of remedial measures, ibid.'

60. We are view that Appellants have not advanced evidence of mitigation of their loss. The question however is, should the Court turn them away simply because they have failed? In answering this question the Court of Appeal in **Lesotho Bank Khabo 1999-2000 LLR_LB 328** , held that we need try our level best to do justice by exercising a discretion in justification of the award of compensation.

61. We find the principles enunciated by the Court of Appeal above instructive. In ***Komane and City Express Stores (Pty) Ltd LAC/Cir/A/5/02*** this court held that:

> "It is clear from the terms of section 73 above that the Labour Court and consequently this Court, has discretion to order reinstatement. In the present case, Appellants are not asking for reinstatement. They are also not asking for compensation. However the Code enjoins the Labour Court in terms of section 73 to either order reinstatement or compensation. The form of compensation that Appellants are asking for is salary.
> At common law, where specific performance is claimed of a contract repudiated by one of the parties to it, the court has a discretion whether to order that and this applies also to a contract of employment. See **Lesotho Telecommunications Corporation v Rasekila LAC (1990-1994) 261**, see also **Lesotho Bank v Molai LAC (1995-1999) 275.**
> It is however important to point out that the **Lesotho Bank's** case *(supra)* and Lesotho Telecommunications Corporation's case *(supra)* did not deal with section 73 of the Labour Code Order 1992. They were dealing with the common law position. The discretion that is required to be exercised in terms of section 73 (1) of the Labour Code Order 1992 has to be a judicial one taking all the facts (and not speculation) into account.
> In Prayer (c) as reflected in paragraph 1 of this judgment, appellants ask the court to order the respondent to pay their salaries. There are no facts at all set out in the papers let alone in evidence, on which the *quantum* of the Appellants' loss can be assessed as salary from dismissal to date of judgment if this was the intention. See **Lesotho bank Moloi** *(supra)*.
> Whether or not a claim by an employee for his emoluments during the period from his wrongful dismissal to the date of judgment is a claim for damages or specific performance, the answer to the inquiry is the same.

The employee's earnings, if any, during that period should be taken into account since it would be inequitable for him to earn what would amount to a double salary until he is reinstated by the Court. See **Lesotho Telecommunications Corporation v Rasekila** *(supra)* at **269**. As each case must be judged in the light of its own circumstances it is not possible to lay down any rules and principles which are binding in all cases. See **National Union of Textile Workers v Stag Packings (Pty) Ltd 1982 (4) SA 151.**
The issue of the *quantum* of emoluments is one that should be enquired into by the court *a quo* either on affidavits suitably augmented if there is no dispute of fact or, if necessary, by viva voce evidence of the parties."

62. The last issue relates to costs. We are of the view that Appellants have substantially succeeded in their appeal. The order of the Labour Court is set aside and replaced with the following order:

63. In all the circumstances, the following order is made:

1. Appellants are governed by the LHDA Personnel Regulations and not the Terms of Reference.
2. The Retrenchment of Appellants was procedurally unfair for want of consultation.
3. The Respondent is ordered to pay Appellants six(6) months salary as compensation for their unlawful retrenchment. The said compensation is to be computed from the purported date of retrenchment to the end of the six (6) months period running therefrom.

(a) In order to ascertain what *quantum* of such compensation is payable to the individual Appellants, the matter is sent back to the Court *aquo* for the furnishing of evidence thereon.

(b) The Court *a quo* should be furnished with affidavits from both parties regarding wages (if any), which have been earned by the Appellants within 6 months of their retrenchment.

(c) If there is a dispute of fact which cannot be decided on affidavits, the court *a quo* will order that *viva voce* evidence be given by the parties and will in due course make such order regarding the *quantum* of such compensation, if any, to which the Appellants are in the opinion of the court, entitled.

(d) The Respondent's staff separation policy 1998, applies to the Appellants, and payment of Appellants terminal benefits is to be made in terms of the staff separation policy, and the personnel Regulation.

4. There was no discrimination proved in this case, and no award is given to the Appellants under this heading.

5. The prayer for payment of leave benefits is not granted, as the same was neither pleaded nor proved.

6. Respondent is to pay half of the costs of the Appellants in the court *a quo*.

7. Respondent is to pay costs of this appeal.

64. My assessors agree.

K E MOSITO
Judge of the Labour Appeal Court

For Appellants: **Advocates B. Sekonyela and Mokobocho**

For Respondent: **Advocate T. Matshikiza**