IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/CIV/A/07/2012**

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT

AUTHORITY **APPLICANT/APPELLANT**

AND

THABO MOHLOBO & 18 OTHERS **RESPONDENTS**

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS: MR. S. KAO

MRS. M. MOSEHLE

Heard on: 27TH June, 2013

Delivered on: 03th July, 2013

SUMMARY

Application for recusal on the basis of perception of unfairness and possible bias – Judge having been party to two previous judgments in the Labour Appeal Court and having made certain findings of fact therein on the basis of facts that were presented before Court then. Legal principles on recusal discussed and applied – Application for recusal granted.

Costs – Costs awarded to the Respondents and are to include costs of two counsel

JUDGEMENT

MOSITO AJ

INTRODUCTION

1. The present application arises out of an appeal by the Applicant in which the Applicant is not satisfied with the judgment of the Labour Court. The above appeal was initially set down for hearing on Wednesday, 30 January 2013. On this day the LHDA moved an Application from the Bar for the Honourable Judge Presiding to recuse himself. Pursuant to this Application the LHDA was directed to serve and file formal application papers by 8 February 2013. The Respondents were directed to file their Answering papers by the 15th day of February 2013. The LHDA was directed to file its Replying papers by the 22nd day of February 2013. The formal Application papers in support of the Recusal Application were duly served and filed.
2. In this application therefore, the Applicant prays for an order in the following terms:
   a) That the Honourable Judge appointed to hear the abovementioned appeal, Honourable Judge K. Mosito, recuse himself in the said appeal;
   b) That the costs of this recusal application are to be paid by the Respondents jointly and severally in the event that this application is opposed;
   c) That the costs occasioned by the postponement of the Appeal on 30 January 2013 be costs in the cause of this recusal application;
   d) Further and/or alternative relief;
3. The background to this application is that, on 26th January 2011 I handed down two judgments in this Court. These judgments were: *Thabo Mohlobo & others v The LHDA (Case number LAC/CIV/A/2/2010)* and *Lebohang Kule & others v The LHDA (case number AC/CIV/A/05/2010).*

4. In concluding the Khule judgment, the Court observed that the second matter "is similar to the appeal in thabo Mohlobo & thirteen others v Lesotho highlands Development Authority (case number LAC/CIV/A/2/2010) whose judgment is to be handed down on the same day as the present appeal." It emerged that the two were not dealt with on the merits but were remitted to the DDPR because they had not followed the procedure of going for conciliation.

GROUNDS FOR RECUSSAL

5. There are argumentative propositions put forward to demonstrate the likelihood of bias. These are that: Firstly, the two judgments in the said matters are a matter of public record. In the first matter the parties were Lebohang Kule, 1st appellant and 4 Others vs LHDA. In the second, the parties were Thabo Mohlobo, 1st appellant and 14 Others vs the LHDA. These are the same parties in the now pending appeal. Secondly, it is argued that in both these matters I *inter alia* directed that the matters were to be remitted to the DDPR for the hearing *de novo* before a different arbitrator. Apparently, both matters start de novo in the DDPR before a new arbitrator as directed.
6. Thirdly, it is argued that, in both matters Honourable Judge Mosito made findings of fact on matters which are very much in issue in the now pending appeal. For instance in the Kule matter in paragraph 1 of the judgment, I made a finding that:"The appellants were employed by the Respondent and were deployed under its project called Katse Lejone

Matsoku Water Supply Sanitation and Refuse Disposal Facilities Programme (KLLM-WATSAN)

7. This quoted paragraph refers to two facts which are in issue in the pending appeal. In particular, it is complained that, I held that the appellants were as a fact employees of the LHDA and that, the KLLM-WATSAN Project was an LHDA Project. Both of these facts are in dispute in the pending appeal. In amplification the LHDA contends that the Respondents in the pending appeal were not employed by the LHDA. Instead on the true facts they are more accurately described as Government of Lesotho employees.
8. Alternatively, it is the LHDA's case that at best for the Respondents they were a special class or type of the LHDA employee who had rules and regulations of their own and who also had contracts of their own, both being different from normal LHDA employee contracts and the LHDA's Human Resources Management Manual (HRMM). Secondly, it is the LHDA's case that the KLM-WATSAN Project was not an LHDA Project. Rather it was a Government of Lesotho Project and the LHDA was merely the Government of Lesotho's implementing agent. Next, at page 7, paragraph 10 of the Kule judgment, I held that the HRMM applies to all LHDA employees. It is contended that this fact is also very much in dispute in the pending appeal. I also found as a fact that: "The reason for this is that the Human Resource Manual clearly provides that all workers of the Respondent who are placed in rural areas are paid M1800.00 per month as the so called mountain allowance."
9. Applicant contends that, this is not what the relevant clause in the HRMM provides. It is contended that Clause 20.3.4 of the HRMM, being the relevant clause to which I was is referring, provides otherwise. It is

also said that that clause does not relate to the "so called mountain allowance". Applicant argues that Clause 20.3.4 relates to "allowances not included in CTC". It is said that my findings of fact in relation to the clauses are wrong. Applicant also argues that the two allowances that clausse 20.3.4 relate to are "deprivation allowances" (not mountain allowance) and "shift-work allowance". The evidence also established that CTC relates to "cost to company" and CTC was the basis upon which the LHDA remunerated its staff. The evidence further showed that KLM-WATSAN employees were not paid according to CTC. They were paid hourly.

10. So the title to clause 20.3.4 itself suggests by obvious implication that only CTC type LHDA employees are covered by Clause 20.3.4 of the HRMM. It does not apply to hourly paid employees. It is contended that, it is wrong for Honourable Judge Mosito to find that the HRMM "clearly provides that all workers of the Respondent who are place in rural areas are paid M1800.00 per month as the so called mountain allowance". The argument runs that, more than this the opening words to clause 20.3.4 themselves suggest that the allowances contemplated in Clause 20.3.4 are not payable to <u>every</u> LHDA employee: instead only "qualifying employees".

11. Also the opening words suggest "qualifying employees" have to occupy "specified positions". It is then contended that, it follows from the above that Honourable Judge Mosito was wrong to interpret the HRMM which was before him as part of the appeal in January of 2011 and to then conclude that the HRMM "clearly provides that all workers of the [LHDA] who are placed in rural areas are paid M1,800.00 per month as a so called mountain allowance.

12. It is also contended that, in the Kule judgment Honourable Judge Mosito also concluded – "had the arbitrator considered all these issues she would have in all probability come to a different view". It is then submitted for the Applicant that a reasonable person will suspect, based on the remarks of Honourable Judge Mosito that she said Honourable Judge has pre-judged material issues up for decision in the now pending appeal and hence would not be able to bring an impartial mind to bear in the pending appeal. This with respect is the suspicion that a reasonable person in the position of the LHDA would entertain.
13. For purposes of dealing with the LHDA's grounds for recusal as set out above, deponent has used some aspects of the Kule judgment to illustrate the LHDA's point because it conveniently sets out the facts that I found in that matter. It is these findings that cause the LHDA to entertain the suspicions referred to above and to hence bring this recusal application.
14. Similar passages are pointed out in the Mohlobo judgment. An example appears in paragraph 13 of the Mohlobo judgment. Here it is said I wrongly referred to the HRMM and then concluded – "had the arbitrator considered all these issues, she would have in all probability to come a different view. Her failure to consider the HRMM which constitutes the law or personnel regulations of the LHDA was a clear error of law which materially affected her decision. This is because she ignored a relevant consideration".
15. Applicant then contends that, the views of Honourable Judge Mosito set out above show that he has arrived at material conclusions that are in the issue in the pending Appeal. It is the LHDA's view that no matter what submissions the LHDA makes in the pending Appeal the LHDA will

have no prospects of persuading him to change his mind. The Respondents' reliance in the pending appeal on Clause 20.3.4. simply does not sustain their case. It does not apply to all LHDA employees, being a further finding which Honourable Judge Mosito made in paragraph 21 of the Mohlobo judgment. Here it is conceded that Honourable Judge Mosito only accepted that the Respondents were employees of the LHDA after Counsel for the LHDA had indicated that "it [is] common cause that the appellants [in that appeal] were employees of the Respondent,……….". but this fact is not common cause in the pending appeal. When Judge Mosito referred the matter back to the DDPR so that the matter should start de novo, fresh evidence was led relating to the employee status of the Respondents. It is submitted that in the light of the fresh evidence it cannot be correct that the Respondents in the pending appeal can properly be called true employees of the LHDA. And in the light of the new evidence the provision in the HRMM that provides that the HRMM applies to "all" LHDA employee, the work "all" can only mean all ordinary LHDA employees, i.e. to the exclusion of special project employees like the Respondents herein.

16. The point is that in the pending appeal I will be called upon to decide afresh at least one matter which was previously common cause before him, this because of a concession made by Counsel for the LHDA that should never have been made. It is unlikely in the circumstances that the Honourable Judge Mosito will be open to find differently on the same issue in the present Appeal. The further point made is that a reasonable person in the position of the LHDA would suspect by reason of all the above that I will never be able to consider the issues afresh and

in an impartial manner. It is further contended that, should I decide again that the Respondents in the pending appeal are LHDA employees and that the HRMM and in particular clause 20.3.4 thereof applies to them and that they are entitled to the allowance of M1800.00 per month, the impression will be unavoidable that I have simply rubber-stamped that which I decided previously.

17. It is then contended that, objectively speaking this is unacceptable. Not only must justice be done but it must also be seen to be done. It is also contended that the LHDA is entitled to have its appeal decided by someone who cannot be said to have pre-decided material issues in the appeal. In all the circumstances it is submitted on behalf of the LHDA that proper grounds for me to recuse myself in the pending appeal have been established. The LHDA accordingly prays for the recusal order as set out in the Notice of Motion prefixed hereto.

THE LEGAL PRINCIPLES ON JUDICIAL RECUSAL

18. The law relating to judicial recusal may appear to many to be an esoteric topic, with not much significance for the administration of justice. Contrary to such a superficial view, this area of law goes to the very heart of the functioning of a robust and liberal democracy operating under the rule of law. Indeed, an essential characteristic of the rule of law is the existence of an impartial and independent judiciary.

19. Impartiality covers "the wisdom required of a judge to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no

sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."(See **The Nature of the Judicial Process (1921) at p. 167** cited by L'Heureux-Dubé and McLachlin JJ above at [34]).

20. As pointed out by the Court of Appeal of Lesotho, in **R v Manyeli LAC(2007- 2008) 377**,

> [9] The generally accepted test for recusal is the existence of a reasonable suspicion or apprehension of bias ***(BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*** **1992 (3) SA 673 (A) at 693 I-J**). Bias in the sense of judicial bias has been said to mean:
>
> > "a departure from the standard of even-handed justice which the law requires from those who occupy judicial office"
>
> (see *Franklin and Others v Minister of Town and Country Planning* [1948] AC (HL) at 103, quoted with approval by Howie JA in *S v Roberts* 1999 (4) SA 915 (SCA) at 922 I-J).
>
> [10]The requirements of the test were elaborated upon as follows in *S v Roberts* (supra) at paras [32] and [33] (pp924 E – 925D).
>
> > "(1) There must be a suspicion that the judicial officer might, not would, be biased.
> >
> > (2) The suspicion must be that of a reasonable person in the position of the accused or litigant.
> >
> > (3) The suspicion must be based on reasonable grounds.
> >
> > (4) The suspicion is one which the reasonable person referred to would, not might, have."
>
> In the above regard, as warned in the *BTR Industries* case (supra) at 695 D-E:

> "It is important……. to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies or the superstition or the intelligence of particular litigants."

[11]In *Sole v Cullinan and Others* LAC (2000 – 2004) 572 at 586 this Court quoted with approval the following passage from *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at 177 B-D:

> "The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of Counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves."
>
> Regard must also he had to the fact that there exists a presumption against partiality of a judicial officer (*S v Basson* 2007 (3) SA 582 (CC) at 606 E-F).

21. The test for judicial recusal is an objective one, namely, whether in the eyes of a reasonable man in the circumstances of a litigant there is a reasonable perception of bias.
22. An apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the Court or

from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. (See ***Bernet v ABSA Ltd [2010] ZACC 28***).

23. In considering an application for judicial recusal, I find myself to be in respectful agreement with the observations of Cameron AJ in **South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing 2000 (8) BCLR 886**. In particular, I agree with him that, in formulating the test in the terms quoted above, two considerations are built into the test itself.

24. The first is that in considering the application for recusal, the Court as a starting point presumes that judicial officers are impartial in adjudicating disputes. This in-built aspect entails two further consequences. On the one hand, it is the Applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires “cogent” or “convincing” evidence to be rebutted.

25. The second in-built aspect of the test is that “absolute neutrality” is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge’s performance of his or her judicial duties.

26. I am, at the same time, also alive to the fact that, colourless neutrality stands in contrast to judicial impartiality. (See**:** ***R v S (RD)*** **(1997) 118 CCC (3d) 353 (SCC)**).I also agree with him that impartiality is that quality of open-minded readiness to persuasion — without unfitting adherence to

either party, or to the judge's own predilections, preconceptions and personal views — that is the keystone of a civilized system of adjudication. Impartiality requires in short "a mind open to persuasion by the evidence and the submissions of Counsel."

APPLICATION OF THE LAW TO THE FACTS

27. I have outlined the grounds of recusal advanced by the Applicant above in order to show that in essence, the Applicant is not complaining about the perception of bias as I understand it as such. What the Applicant is actually complaining about is that it is of the view that I was wrong in the comments that I made as well as the findings of facts that I included in our two judgments. We have also indicated in this judgment that there are principles that govern whether or not one has to grant applications for judicial recusals.
28. The first problem with the present application is that it seems to wish to get rid of one member of the panel. It loses sight of the fact that the Labour Appeal Court sitting as a Court, so functions that decisions of the Court are reached, on matters of fact, by the majority of the Court; and on matters of law, by the judge (See Section 38 (8) of the **Labour Code (Amendment) Act 2000**. This gives the impression that the Applicant's intention is so much as to get rid of the Judge presiding so that the Judge does not sit as part of the panel. I say this because it is clear that issues that are complained about are questions of fact not of law. It means that the other members of Court are clearly free to make their determinations on such questions of fact on the questions complaint about.

29. The other issue worth mentioning is that I had occasion to read through the evidence in the record of proceedings that have been presented before us and which culminated in the judgments that we handed down and as mentioned at the beginning of this judgment. I also had occasion to go through records of proceedings after they have started *de novo* consequent upon the judgments of this Court which referred the matter to the DDPR.
30. I am convinced that there are serious variations not only in respect of the issues on which the parties had agreed in the first proceedings and upon which certain findings of fact were made, but that in the new record factual issues which were common cause in the first record are now disputed. It follows that the findings of fact that were made on the basis of previous record, and the majority of which form the basis of the present application, have undergone such a serious metamorphosis that it is today risky for the Judge that heard the previous case to sit in judgment in the present case.
31. It is on this basis that I consider that it would be improper for me to sit in this case where in the facts that had been presented to the Court as common cause in the first proceedings that resulted in the judgments I handed down, have now been changed so as to paint a completely different picture. My view is that bearing these variations in mind and the determinations of fact which this Court made in the previous judgments, it is only fair that I should recuse myself as I might not be unbiased against the Applicant in the light of those variations. It is against this background that I am of the view that a reasonable person in the position of the litigants would certainly be of the suspicion that I might be biased against the Applicant. It must be remembered that the

issue is not whether I am actually biased, but whether there is a reasonable perception that I might be biased. In my opinion, the reasonable grounds upon which the suspicion would be based would be the suspicion arising from the variations of fact mentioned above. On that basis alone, I consider that it is only appropriate and ethical for me and consistent with my judicial conscience to recuse myself from hearing this appeal.

COSTS

32. When the application for my recusal was first presented before us and the matter was postponed to be heard on the basis of a substantive application, this Court ordered that the costs of the postponement should be argued with the application for recusal. As matters now stand, Adv. Woker informed the Court that he had only received instructions the previous night that I would be presiding over the case and that should that be the case, he should apply for my recusal.
33. This explanation is not satisfactory because when this Court was to sit for the January session, a roll of the cases set down for the session had long been issued which indicated the cases which were going to be heard during that session, it also indicated that such cases would be placed before me and various assessors. It was on the basis of that roll that the present Applicant came to Court and also sought to have the application for my recusal made. It would not be correct therefore to say that the Applicant did not know which judge will be hearing the matter in the light of that roll. On the above basis this Court should exercise its discretion in favour of awarding the costs of this application to the Respondents.

CONCLUSION

34. In the result the following order is made:

    1. The application for my recusal from the appeal is granted.
    2. The costs of this recusal application including the costs of postponement from the January session to the present session are awarded to the Respondents. Such costs are to include costs consequent upon the employment of two Counsel.

35. This is a unanimous decision of the Court.

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K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the Applicant Adv. H.H.T. Woker

For the Respondent Adv. B. Sekonyela with Adv. S. Sharite