IN THE LABOUR APPEAL COURT OF LESOTHO
HELD AT MASERU

Case LAC/CIV/A/23/13

In the matter between:

TUMELO MANONYANE Appellant

and

NATIONAL UNIVERSITY OF LESOTHO Respondent

CORAM: C.J. MUSI, AJA, MR MOTHEPU, MR MOFELEHETSI

HEARD ON: 23 October 2013

DELIVERED ON: 5 December 2013

JUDGMENT BY: C.J. MUSI, AJA

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[1] This is an appeal against the judgment of the Labour Court wherein it dismissed the appellant's application.

[2] The appellant was employed on 22 September 2006, by the National University of Lesotho (NUL), as a lecturer in the Department of Historical Studies for a non-reviewable period of two (2) years. On 28 August 2008 the contract was renewed for one (1) year. The last-mentioned term also expired and the contract was again renewed by letter dated 4 June 2009 for a further period of two (2) years.

[3] On 25 May 2008 the office of the Vice-Chancellor of the respondent wrote a memorandum wherein it stated that the extension of the appellant's contract was made against the strategic planning vote pending the possibility of an established post within the contract period and within the University budget.

[4] On 15 February 2011 the respondent informed the appellant that her contract would come to an end on 20 August 2011 due to financial constraints. The appellant objected to this and by letter dated 17 August 2011 her legal representative set out the grounds for the objection. On 7 September 2011 the respondent wrote a letter to the appellant which reads as follows:

> "RE: REINSTATEMENT
> Our letter to you ref AC/P/200608018 dated 18 February 2011 advising you of your end of contract refers (sic).
> The above-mentioned communication is rescinded and you are to report for duty with immediate effect. You will report to the Head of Department who will in turn advise us of your assuming duty…."

[5] It is significant that the reinstatement letter does not state until when she is reinstated. In an attempt to remedy the situation, the respondent wrote a letter to the appellant on 21 January 2013, which reads as follows:

> "Re: Renewal of your contract – two years

> This letter exclusively serves the purpose of reducing to writing that your two year contract that ended on 20th August 2011 has been renewed by a further period of two years following your reinstatement by our letter dated 7 September 2011. The effective date is 12th September 2011 being the day on which you reported for duty. The end date is the 11th September 2013. The duration of your contract remains that of fixed period of two years because contrary to earlier correspondence between yourself and the University, it has not been possible to create a permanent and pensionable position for you due to currently prevailing financial crisis at the University.
>
> This letter is written with retrospective effect. We profoundly apologise for our inadvertence in delayed communication of the above."

[6] The appellant wrote to the respondent, on 22 January 2013, and denied that she had signed a two year contract or by implication that there was an agreement that her employment, after she reported for duty on 12 September 2011, would be for two years.

[7] On 30 January 2013 the respondent responded by stating that the contract was renewed by default and not expressly. It further stated that the purpose of the letter of 21 January 2013 was to reduce the renewal by default to writing for purposes of record keeping.

[8] The appellant launched an application in the court a *quo* wherein she sought relief to the effect that the respondent be interdicted from breaching the contract of employment between them.

[9] The appellant contended that the renewal of her contract contemplated a possibility of renewal and that the termination of such contract will constitute a dismissal which must be preceded by a fair process. In essence she requested the respondent to follow a fair process before dismissing her.

[10] The Court *a quo* found that the appellant cannot allege that there was a possibility of renewal, because she was informed that the respondent was in financial dire straits. It concluded that the appellant was in the same position as a person who signed a contract for one period of fixed duration. It found that her contract of employment automatically terminated upon expiry.

[11] The appellant argued that the Court *a quo* erred in not finding that the respondent should have consulted with the appellant before threatening to dismiss her for operational requirements. The appellant also contended the Court *a quo* should have found that there was a threatened dismissal that was in breach of the contract of employment entered into by the appellant and the respondent, which entailed a possibility of renewal.

[12] Section 66(1)(c) of the Labour Code Order 1992 reads as follows:

> "An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of

> employment, which reason is based on the operational requirements of the undertaking, establishment or service."

[13] Dismissal is *inter alia* defined as including the ending of any contract for a period of fixed duration or for the performance of a specific task or journey without such contract being renewed, but only in cases where the contract provided for the possibility of renewal. See section 68(b) of the Labour Code Order 1992.

[14] The first question that needs to be answered is whether there was a possibility that the appellant's contract might be renewed. The Court *a quo* correctly found that the appellant "was offered the possibility of the renewal of her contract which commenced by the vice-chancellor's memo of 25th May 2008". Both Mr Teele for the appellant and Mr Molati for the respondent accepted this finding as correct.

[15] It is clear from the letter by the vice-chancellor that if the respondent had funds the appellant's contract would have been renewed. It is therefore beyond cavil that there was a possibility of the contract being renewed. The fact of a possibility of renewal being established, the next question is whether the dismissal was for a valid reason and whether a fair procedure was used to effect the dismissal.

[16] The respondent's case as to the actual reason for the termination of the contract is not clear. On the one hand it alleged that the term of the contract had run its course and

therefore terminated automatically. On the other hand it alleged that it did not have sufficient funds.

[17] The letter of 7 September 2011 does not have any fixed period. She was reinstated with immediate effect and requested to report for duty. It must be remembered that the reinstatement occurred after the renewal period of two years from 4 June 2009 had already expired. There was therefore no fixed term contract in place. It is for that reason that the appellant pointed out to the respondent that she did not sign a two year contract which was to end on 11 September 2013. There was therefore no consensus between the parties that her employment or rather reinstatement would only be for two years. Under these circumstances the respondent had a duty to consult with her in order to end the employment relationship.

[18] Even on the scenario of a lack of funds – which was not pleaded but which the Court *a quo* found to be the reason for the threatened termination of the employment relationship – the respondent had a duty to consult with the appellant in order to facilitate her exit in a substantive and procedural fair manner.

[19] It is common cause that such consultation did not take place. The dismissal of the appellant, which was not preceded by a process of consultation, was unfair and a breach of the employment contract. The Labour Court ought to have found in the appellant's favour.

[20] At the commencement of this matter I enquired from both parties what the status of the appellant is. I was informed that her employment was terminated. She has applied for a post and has been shortlisted. Mr Teele argued that the matter is not moot, because she might have to explain her exit from the University and an order setting aside the Labour Court's order might be of assistance to her in future. Mr Molati argued that the matter is moot, but could not dispute that the matter might in future be relevant for the appellant. We were of the view that it would be in the interest of justice to deal with the matter. Although our order will not now have any practical value, it might assist the respondent in its future dealings with its personnel.

[21] This is essentially an unfair dismissal dispute because it was a proactive measure to prevent an unfair dismissal. In terms of section 74 of the Labour Code no costs shall be awarded in favour of either party unless the party against whom a costs order is made has behaved in an unreasonable manner. Neither of the parties behaved unreasonably.

[21] The following order is made:

21.1 The appeal is upheld with no order as to costs.

21.2 The order of the Labour Court is set aside and replaced by the following:

The respondent is interdicted from breaching the contract of employment between itself and the applicant.

21.3 There is no order as to costs.

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C.J. MUSI, AJA

I agree.

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MR. MOTHEPU (Assessor)

I agree.

_____
MR. MOFELEHETSI (Assessor)

APPEARANCES:

For the appellant: Teele Chambers
LERIBE
Instructed by:

For the respondent: Molati Chambers
Instructed by:

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