IN THE LABOUR COURT ***CASE NO.LC/80/95***

HELD AT MASERU

IN THE MATTER OF:

MARTHA LATI LETSELA ***APPLICANT***

AND

NATIONAL UNIVERSITY OF LESOTHO ***RESPONDENT***

JUDGMENT

Applicant herein was offered a post as Teaching Assistant at respondent University in February 1994. She assumed duty on the 18th June 1994. On the 13th July 1994, the Registrar of the respondent wrote applicant a letter in which she advised her that a special meeting of the Academic Staff Appointments Committee had considered her appointment and had decided; *"... to suspend you from performing any duties in the African Languages because of your past record of involvement in the examinations malpractice."*

The applicant was suspended on full pay until 1st December 1994, when she was again advised by the Registrar of the respondent that the Council of the University had resolved to terminate applicant's appointment, because she did not meet some conditions of Teaching Assistanship. The applicant lodged an application on the 4th January 1995, seeking an order declaring her purported suspension and termination of contract null and void. This application was registered under Case No.LC/2/95. The case was set down for hearing on 23rd May 1995.

On the 22nd May applicant filed a notice of withdrawal of the application, which was

moved by Mr. Mosito on the 23rd May. It may be worth mentioning here that the case had initially been filed on behalf of the applicant by L. Pheko & Co.. It came out on the day set for the hearing that applicant had since changed Counsel, hence representation by K.E.M. Chambers. The respondent was represented by Mr. Sekake of Webber Newdigate and Company. Having moved the application for withdrawal, both Counsel were made aware that in terms of Rule 10 of the Rules of Court; if the applicant withdraws the originating application, the court is mandated to dismiss the application. The application was accordingly dismissed on the 23rd May 1995.

On the 19th June 1995, the applicant launched the present application. There is no dispute that the parties are the same as well as the cause of action.

At the hearing of this matter Mr. Sekake for the respondents raised two points in limine; one based on the special plea of res judicata and the other on Section 71(1)(a) read with Section 75 of the Labour Code Order 1992 (the Code). The court heard the submissions of both Counsel on these points, and at the end, reserved its decision. Counsel were asked to proceed to address the merits of the application. We shall now proceed to pronounce our decision first on the points in limine. Needless to say, should the respondent succeed on one or both of these points, there will be no need for the court to consider the merits of this application.

It was Mr. Sekake's contention that since the court dismissed the application on 23/05/95 in terms of rule 10 of the Rules of Court, any further pronouncement by this court on this matter will be a further pronouncement on what the court has already pronounced itself. He submitted that since the present matter is between the same parties as in LC/2/95; and that the subject matter as well as the cause of action are the same, the special plea of res judicata must apply.

He submitted further that in terms of Section 71(1)(a) of the Code the applicant is excluded from bringing these proceedings because at the time of her termination she was on probation. Section 71(1)(a) of the Code provide:

"(1) Subject to sub-section (2), the following categories of employees shall not have the right to bring a claim for unfair dismissal:

(a) employees who have been employed for a probationary period, as provided under Section 75."

He submitted further that as a general rule probationary employees are not entitled to the same rights as employees on permanent establishment because in the case of the former the contract is not yet established. He referred to the South African case of Kodesh .v. G. Snow & Co. (Pty) Ltd (1989) 10 ILJ 420.

Mr. Mosito for the applicant prayed that the court dismiss both points and proceed to consider the merits. With regard to the first point he argued that since in dismissing the application the court did not make a judicial determination of the issues, the plea of res judicata cannot stand. He supported this submission by referring to Becks' Theory and Principles of Pleadings 1992 Edition at page 165. He went further to submit that the word *"dismiss"* in rule 10 is capable of two meanings and these are:

(a) That the court has heard the merits of the case, in which case res judicata would apply; or

(b) that the case is being struck off the roll, in which case res judicata would not apply because the rights of the parties are not determined.

There is no doubt that Mr. Mosito's submissions have the requisite persuasive force that no court properly advised would ignore. These submissions are however, valid with regard to the judicial courts which the Labour Court is not. The latter is essentially an administrative tribunal which performs judicial functions. This does not make it a court of law. It is therefore subject to the functus officio principle which propagates certainty in administrative decisions by saying that administrative decisions once made

must not just be changed unless *"... it is absolutely essential to the public interest or where it is requested by the individual concerned."* (See Lawrence Baxter, Administrative Law, 1984 at page 377).

It is common cause that the court is empowered by rule 10 of the rules of court to dismiss an application which is withdrawn. Thus its decision to dismiss the application was quasi judicial in so far as it involved the rights and interests of the parties in the matter. Judicial and quasi-judicial decisions are also subject to the functus officio principle in that the body which made the decision has no power to change it. Such a decision once made can only be set aside by a court of law unless the parties affected thereby consent to its abandonment. (See Baxter supra at page 379).

The applicant herein never sought leave of court to have the earlier decision to dismiss the application cancelled. She merely filed a new case as if there has never previously been a ruling on the matter. It seems to us that the respondent is entitled to expect that since the case was dismissed it cannot in future just be dragged back into court about the same matter. The respondent is entitled to seek and get the protection of the special plea of res judicata. That the rights of the parties were not determined is beside the point. The applicant, of her own free will withdrew her case well aware that the rule is that it should be dismissed. By dismissing the case as it did, the court created a right which it can no longer abolish to the effect that there was no further claim of unfair dismissal against the respondent by the applicant arising out of the termination of her contract on 1st December 1994.

Mr. Sekake further argued that in terms of Section 71(1)(a) the applicant cannot bring action for unfair dismissal because she was still on probation. It is common cause that the University's period of probation is two years. However, Section 75 of the Code provides for a shorter period of probation not exceeding four months. Mr. Mosito contended that at the time of her dismissal the applicant had completed four months probationary period prescribed by Section 75 of the Code. She was, he submitted no longer on probation.

In terms of Section 61(3) of the Code;

"no person shall employ any employee and no employee shall be employed under any contract except in accordance with the provisions of the code. Any contract .... which contains any term or condition less favourable to the employee than any corresponding term or condition for which provision is made by the Code, shall be construed as though the corresponding term or condition of the Code were substituted for such less favourable term or condition of service in such contract ..."

In terms of the above Section, the four months probationary period provided by the Code is substituted for the longer period of service provided by the University Rules, because the former is more favourable to the applicant. The applicant is therefore, taken to have been on a four months probation period as opposed to two years. The issue to decide, however, is whether at the time of her dismissal the applicant had completed the four months probation period.

It is common cause that the applicant started to work on the 1st June 1994. She was dismissed on 1st December 1994. At the time of her dismissal she had been six months in the employ of the respondent. It is further common cause that the applicant was suspended from performing her duties on the 13th July 1994. At the time of her suspension she had been in the employ of the respondent for one month and roughly two weeks. She remained on suspension until her dismissal in December.

It appears that much as the applicant had been in employment for six months, at the time of her dismissal, she had however, only served one month of her probation. It would be unfair to rule that simply because the applicant had been employed for more than four months she had completed her probation, and yet she did not serve that probation, because of the suspension. This would be an appropriate case for which application for extension of the probation could be made to the Labour Commissioner in terms of the proviso to Section 75 of the Code. Extension could not, however, be sought because a decision had already been made to terminate the applicant. We are therefore, of the view that the applicant is excluded from bringing the present proceedings because she had not yet completed her probation at the time of her termination.

In the circumstances, we hold that both special pleas succeed. As stated previously the success of these pleas effectively disposes of the matter. There is therefore, no need to consider the merits. The application is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 22ND DAY OF OCTOBER 1995.

L. A. LETHOBANE

PRESIDENT

M. KANE **I CONCUR**

MEMBER

A. T. KOLOBE **I CONCUR**

MEMBER