

**IN THE LABOUR COURT
NO.LC/58/95**

CASE

HELD AT MASERU

IN THE MATTER OF:

LEHLOHONOLO PELEPELE

APPLICANT

AND

**LESOTHO WATER & SEWERAGE AUTHORITY
RESPONDENT**

JUDGMENT

Applicant entered into a fixed term contract of employment with the respondent Authority (hereinafter referred to as the Authority) on the 1st July 1992, as the Managing Director of the Authority. In terms of Clause 3.1 of the contract, the agreement was deemed to have come into effect on the 13th January 1992 and was to run for a period of three years. Clause 3.2 provided that the agreement would be renewed "*....unless either party not less than six months prior to the renewal date serves notice in writing on the other party to the effect that renewal of the agreement shall not be granted or sought.*"

In September 1992, the parties supplemented the original agreement by amending Clause 3.1 of the original agreement. The amendment clarified that unless six months notice is given by either party that the agreement would not be renewed, or that renewal would not be sought, the agreement shall be renewed on the 13th January 1995. A new Clause 3.3 was inserted which provided that:

"3.3 subject to the powers of the Minister under the order and to the provisions of sub-clause 3.2 above, this agreement shall be renewed for a further period of three years as from the 13th January 1998 on terms not less favourable than as provided for in this agreement."

On the 7th October 1994, applicant wrote to the chairman of the Board of Directors of the Authority informing him that he was desirous to have his contract renewed for a further period of three years when it expired on the 13th January 1995, as was permitted under Clause 3.1 of the contract. The chairman reacted by calling a special Board meeting on the 1st November 1994, to discuss the only issue on the agenda, the "*Managing Director's Contract.*" The Board resolved to advise the Minister responsible for Water that:

- "(a) M D be retired in accordance with his contract*
- (b) The post be declared vacant, and*
- (c)it be advertised."*

It is common cause that in terms of Section 7 of the Lesotho Water and Sewerage Authority Order No.29 of 1991, which establishes the Authority, the Managing Director is appointed by the Minister on the recommendation of the Board. It would appear therefore, that the recommendation to terminate applicant's contract was made to the Minister on the basis of the now well known cannon of interpretation that he who has power to appoint also has power to terminate the appointment.

On the 21st November 1994, the Minister wrote two letters. One was addressed to the Chairman of the Board of Directors approving the recommendation of the Board. The second was addressed to the applicant acknowledging that since applicant's fixed term contract terminates on the 13th January 1995, *".....the Authority and Management of WASA are given the authority to process the said termination."* Thereafter several correspondence was entered into between the applicant on the one hand and the Chairman of the Board of Directors and the Minister of Natural Resources on the other hand. However, of particular relevance to this case is applicant's letter of 23rd March 1995, to the Chairman of the Board of Directors. In that letter applicant contended that termination of his contract constituted a repudiation and unilateral breach of his contract of employment by the Authority. He contended further that, *"in these circumstances, I must regard the termination of my contract as a dismissal which, I contend, is unfair and unlawful both in substance and in form."*

In the view of the court, the above quoted letter is relevant to this application because it forms the basis of applicant's claim before this court. The thrust of Mr. Redelinghuys' submission, who appeared for the applicant was that termination of applicant's contract is a dismissal in terms of Section 68(a) and (b) of the Labour Code Order 1992 (the Code). This section provides in part as follows:

"68 Definition of "dismissal"

"For purposes of Section 66 "dismissal" shall include:-

- "(a) termination of employment on the initiative of the employer;"***
- "(b) the ending of any contract for a 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;"***

Mr. Redelinghuys went further to say that the dismissal of the applicant was contrary to Section 66(1) of the Code, because no reason existed for his dismissal. Section 66(1) provides that *"an employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment..."* He concluded by stating that there was an ulterior motive for terminating the applicant.

Mr. Mafisa denied that the Authority had terminated applicant's contract. He contended that the contract was terminated by the Minister in terms of Clause 4.1(b) of

the Agreement. In terms of the said sub-clause the Agreement terminates if:

"(b) the Chief Executive is dismissed or otherwise removed from office by the Minister upon the recommendation of the Board."

Mr. Mafisa contended further that much as the Minister acted on the recommendation of the Board, the decision to dismiss applicant is the act of the Minister for which the respondent is not responsible. He averred that the Minister is not the agent of the Authority and as such the Authority is not bound by his acts.

The Authority's alternative argument was that should the court hold them responsible for the Minister's actions, their liability to applicant is limited to Section 66 of the Code concerning notice upon termination of contract, read with sub-clause 4.1(a) of the Agreement between the parties, which provide that, the agreement shall be terminated if:

"(a) either party (gives) three months written notice of termination or the Authority....(elects) to pay salary in lieu of notice."

Mr. Mafisa conceded, however, that there is confusion regarding the period of notice to be given under the agreement because Clause 3.2 speaks of six months notice while Clause 4.1(a) speaks of three months. He however, submitted that the court should follow Clause 4.1(a) as it is the one that specifically deals with notice, in the event of termination of contract.

At the end of the submissions, Mr. Redelinghuys asked the court to determine only whether applicant's termination is an unfair and unlawful dismissal. He further conceded that they cannot agree with Mr. Mafisa whether applicant's contract had been terminated in terms of Clause 4.1(a) or 4.1(b) of the contract and asked the court to make a determination. Should the termination be found to be unfair dismissal, Mr. Redelinghuys asked the court to leave the question of quantum open for address at a later stage.

It is clear from the papers before court that applicant's contract is regulated by both statute and the Agreement between him and the Authority. In terms of the statute he is to be appointed by the Minister subject to the terms and conditions to be determined by the Board. The Agreement between applicant and the Authority lays the terms and conditions of service of the applicant. One of such terms and conditions relates to the termination of the Agreement viz. Clause 4 of the Agreement. The agreement may be terminated in one of three ways namely;

- (a) if either party gives three months notice of termination or the authority pays salary in lieu of notice;**
- (b) if the Managing Director is dismissed, or**
- (c) if the Managing Director is otherwise removed from office by the Minister upon recommendation of the Board.**

At its special meeting on 1st November 1994, the Board of Directors of the Authority resolved to recommend to the Minister that the Managing Director's contract be terminated by retiring him in terms of his contract. It seems to the court that the Board did not opt for giving applicant notice of termination. In other words they decided not to initiate the termination in terms of Clause 4.1(a) of the Agreement. They decided instead to recommend that the Minister should terminate him and the Minister could only act in terms of the recommendation under Clause 4.1(b) of the Agreement. Applicant's contract having been terminated by the Minister upon recommendation of the Board was therefore terminated under Clause 4.1(b) of the Agreement.

In terms of Section 68 of the Code the ending of a contract of fixed duration where such contract provided for a possibility of renewal, is a dismissal. Accordingly therefore, we hold that the Minister's termination of applicant's fixed term appointment was a dismissal. The question is whether this dismissal is unfair as the applicant alleges. Mr. Redelinghuys contends that the dismissal is unfair because no valid reason existed for the dismissal as is required by Section 66(1) of the Code.

Section 66 of the Code provides:

"(1) 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:

"(a) connected with the capacity of the employee to do the work the employee is employed to do....;

"(b) connected with the conduct of the employee at the workplace; or

"(c) based on the operational requirements of the undertaking, establishment or service".

"(2) Any other dismissal will be unfair unless, having regard to all the circumstances, the employer can sustain the burden of proof to show that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment."

It seems to the court that applicant's contract was terminated without alleging any of the factors stipulated under Section 66(1) of the Code as the basis therefor. It is common cause, however, that applicant attended the Board Meeting of 1st November 1994, which discussed renewal of his contract. He was invited by the Board to make representations as to why his contract should be renewed, after which applicant was asked to leave the meeting. In the discussions that ensued, there is no indication that applicant was accused of any wrongdoing which might render him unsuitable for the position. Instead the Board agreed that applicant had worked hard to make the Authority what it is. What then was the reason for not recommending renewal of applicant's contract? According to Minute 3.16 of the Board Meeting of 1st November 1994,

".....the Board cautioned itself about the Government policy of transparency..."

This is the only reason which can be gleaned from the Minutes regarding the termination of applicant's contract.

The issue is whether this is a valid reason for not renewing applicant's contract. Mr. Redelinghuys contended that this was an irrelevant consideration because the purpose of the Board's meeting was to discuss the new terms of applicant's contract, in particular the Board was to review applicant's salary for the next three years of his contract. With respect we disagree. There is no evidence that the Board met to discuss revision of the salary of the applicant. Available documentary evidence shows that the purpose of the meeting was to discuss the Managing Director's contract. This subject is broad enough to include discussion of any factor that may influence the Board's recommendation to the Minister. We are of the view therefore that the consideration was not irrelevant.

Since the reason that influenced the Board not to recommend renewal of applicant's contract is not any of the three listed under Section 66(1) of the Code, it seems to us that this reason would fall under Section 66(2). In terms of sub-section (2), any other dismissal is unfair unless the employer can sustain the burden of proof that he acted reasonably in treating the reason for dismissal as sufficient ground for termination of the contract. Clearly the onus is on the Authority to prove the validity of the reason they relied upon for terminating applicant's contract. The Authority did not even attempt to discharge this onus. They passed the buck to the Minister of Natural Resources and said he is the one who dismissed the applicant. In short they were saying applicant should have sued the Minister.

Other than to appoint applicant in terms of Section 7 of the Order, the Minister has no contractual relationship with the applicant. Such a relationship exists between applicant and the Authority. Applicant is seeking a relief under his contract with the Authority. The Authority cannot be allowed to run away from liability under the contract by purporting to give powers of termination to the Minister. After all applicant was all along on the payroll of the Authority despite having been appointed by the Minister. It was never contended at any stage that the latter should pay applicant because he was the one who appointed him. Why should it be different when applicant seeks to enforce his rights under the contract?

Furthermore, in terminating applicant, the Minister was exercising his powers under the Order in that he who appoints can also terminate. In terms of Section 53 of the Order the Chairman, Members of the Board, Officers or Servants of the Authority and Officers of Government are indemnified from personal liability in any civil action, suit or any other proceedings in respect of any matter or thing done or omitted by them in good faith for the purpose of carrying out any of the provisions of the Order. Claim of any liability in such a case would have to be directed to the Authority. The Minister could not in the light of this section be called upon to account for the dismissal of the applicant either as an individual or as Minister. It is sufficient to have sued the Authority alone as it is the one that is contractually liable to applicant and whatever the Minister did or failed to do he did or failed to do as the case may be, in good faith.

Mr. Redelinghuys contended further that there was an ulterior motive for the termination of the applicant's contract. The alleged transparency was a mere smokescreen to achieve the dismissal of the applicant, he argued. To support this point he pointed out that despite the recommendation by the

Board, the post was not advertised. Indeed events that followed applicant's termination on the alleged basis of transparency leave much to be desired about the real purpose of not renewing applicant's contract. According to a bundle of documents handed in court by the applicant, in support of this case, it is apparent that the post was not advertised. Furthermore on the 3rd January 1995, the Chairman of the Board wrote a letter to the Board Members in which he advised them that he already made contact with a person who was willing to be employed as Managing Director for two years. He concluded by recommending to the Board Members that the individual be hand picked "...for the position of Managing Director for the period January 1995 to January 1997".

We have emphasized the word "hand pick" because it clearly contradicts the policy of transparency which the Board hid behind when it recommended to the Minister that applicant's contract be terminated and the post be advertised. Even more surprising is the fact that the Chairman's recommendation was made on the 3rd January, approximately two weeks before applicant's contract expired. There was therefore no urgency. The element of urgency is negated further by the fact that the Minister of Natural Resources had by his letter of 21st December 1994, appointed one Mr. Mohosho to act as Managing Director of the Authority with effect from the 14th January 1995. If it was true that the Board wanted transparency it had more than enough time to advertise the position so that potential candidates could apply. Failure to advertise the position without explanation can only lead to one conclusion that the so-called transparency was nothing but a pretext to unfairly dismiss applicant.

Mr. Redelinghuys further argued that applicant had a legitimate expectation to remain in employment until he reached mandatory retirement age or at least until 13th January 2001. The doctrine of legitimate expectation has its roots in English Administrative Law. It was aptly summarised by Corbett C. J. in the case of Administrator of Transvaal & Others .v. Traub & Others 1989 (4) SA 731; (1989) 10 ILJ 823 at 837, when after considering a plethora of English authorities discussing the doctrine the learned Chief Justice said:

"A frequently recurring theme in these English cases concerning legitimate expectation is the duty on the part of the decision maker to act fairly This is simply another, and preferable way of saying that the decision maker must observe the principles of natural justice."

The content of the duty to act fairly has been discussed in several English cases. It will be sufficient for our purposes to cite two English cases on the subject which have been quoted with approval by Corbett C J in Traub's case supra. The first decision is quoted on page 834 of Traub's case. It is the decision of Lord Denning M R in the case of Breen .v. Amalgamated Engineering Union & Others (1971) 1 All ER 1148 at pp 1153 and 1154; where the learned Lord Justice held:

"It is now well settled that a statutory body which is entrusted by a statute with a discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other hand,

or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard...."

Having held further that the same principle also applied to domestic bodies which have as much power as statutory bodies he went further to say:

"Then comes the problem: ought such a body statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given. But if he is a man whose property is at stake, or who is being deprived of his livelihood then reasons should be given why he is being turned down and he should be given a chance to be heard. I go further. If he is a man who has some right or interest or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, accordingly as the case may demand."

On page 833 of Traub's case supra Corbett C J quotes the following extracts from the speeches of Lord Fraser and Lord Roskill in the case of Council of Civil Service Unions & Others .v. Minister of the Civil Service (1984) 3 All ER 935.

"But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. Legitimate, or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue." (per Lord Fraser at pp 943 - 944).

We have emphasized the words "express promise" for reasons that we will make clear later. Lord Roskill at p.954 of the judgment says the following about the doctrine of legitimate expectation:

"The principle may now be said to be firmly entrenched in this branch of the law. As the case may show, the principle is closely connected with "a right to be heard." Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations."

In *casu* applicant had been employed on a fixed term contract of three years. Article 3.1 of the Agreement as amended provided that subject to Clause 3.2 the Agreement

"...shall be renewed as from 13th January 1995 ... for a further period of three years on terms not less favourable than as provided for in this Agreement." (emphasis added)

Clause 3.2 provided that the Agreement would be renewed as provided in Clause 3.1 *"...unless either party not less than six months prior to the renewal date serves notice in writing on the other party to the effect that renewal of the Agreement shall not be granted or sought."* Clause 3.3 provided further that subject to the powers of the Minister under the Order and to the provisions of Clause 3.2, the Agreement shall be renewed for a further period of three years as from 13th January 1998.

In the light of the provisions of the Agreement it seems clear that applicant was guaranteed employment without the Minister's intervention until 13th January 1998, unless either party gave six months notice of intention not to renew or to seek renewal of the Agreement. As from January 1998 the Agreement could be renewed subject to an additional condition, which reserved the Minister's powers under the Order to terminate the appointment. What is clear is that even where the Minister exercises his powers under the Order the applicant would still have to have been notified six months prior thereto, that his contract would not be renewed.

It is common cause that when applicant wrote a letter of 7th October 1994, in which he expressed desire to have his contract renewed, his contract was four months away from expiry. When the Board purported to meet to discuss his contract, the six months by which they ought to have advised applicant of an intention not to renew his contract had long passed. In any event, applicant was not notified that his contract was not going to be renewed. He was invited to make representations at the Board Meeting of 1st November 1994 as if he was being interviewed for the job. But under the contract applicant could have little doubt that his contract was going to be renewed for another three years. Applicant made the representations completely ignorant of the Board's intentions. This far falls short of the requirements of the duty to act fairly.

The contract is unambiguously clear that applicant was assured of the second three year contract. If that was not to be, he had to be given six months notice. Thus as Lord Fraser says in the Council of Civil Service Unions case *supra* applicant's legitimate expectation here arose out of that express promise given in terms of the Agreement between him and the Authority. The six months lapsed without any indication being made to him that his contract would not be renewed. He was shocked with a letter telling him his contract was not being renewed just one month and a few weeks before his contract was due to expire. To aggravate the already bad situation, the applicant had neither been given the opportunity to make representations on the pertinent issue of non-renewal of his contract, nor was he ever given reasons why it

was not renewed. The issue of transparency did not feature in his letter of termination. It is only reflected in the Minutes of the Board Meeting which discussed his contract. We are therefore convinced that applicant had a legitimate expectation that his contract would be renewed on the 13th January 1995. His contract being one of fixed duration he could not reasonably expect to be guaranteed employment until reaching a particular age, because its renewal was subject to certain conditions which might render it not to be renewed. But at each expiry period applicant had a legitimate expectation that his contract would be renewed unless duly notified of the intention not to renew it, and given the opportunity to make representations thereon.

In the circumstances the court comes to the conclusion that the termination of applicant's fixed term contract by the Minister of Natural Resources is an unfair dismissal in that:

- (a) Respondent has not discharged the burden of proof that the alleged reason for the termination of applicant was a valid reason for the termination.**
- (b) In any event the purported reason of transparency has been proved, that it was a pretext to get rid of applicant, because the position was never advertised even though there was enough time to do so.**
- (c) The dismissal contravened the express promises of the Agreement that applicant's contract would be renewed as of 13th January 1995.**
- (d) Applicant had a legitimate expectation that he would be given prior notice of not renewing his contract and to be given the opportunity to be heard on that issue prior to his termination. Failure of the Authority and/or the Minister to do so contravened the well established principles of natural justice regarding the exercise of statutory powers or the powers of domestic bodies namely, that as a statutory body the Authority had to act fairly in terminating applicant.**

Applicant's dismissal is therefore procedurally and substantively unfair.

Applicant conceded that the position is already filled as a result he no longer seeks reinstatement. His attorney however, requested the court to hold the question of quantum in abeyance for arguments at a later date. Council will therefore address the court on the issue of quantum and other terminal benefits on a date to be agreed with the Registrar. The Authority had argued that should they be held to be liable, their liability should be limited to providing three months notice provided in Clause 4.1(a) of the Agreement. We will also leave this point open for further argument because it is

too closely linked to the issue of terminal benefits. It would be practically impossible to decide on it without making inroads into the question of terminal benefits.

**THUS DONE AT MASERU THIS 11TH DAY OF JANUARY
1996**

L. A. LETHOBANE
PRESIDENT

S. LETELE
MEMBER

I CONCUR

M. KANE
MEMBER

I CONCUR