IN THE LABOUR COURT OF LESOTHO

CASE NO LC 100/95

HELD AT MASERU

IN THE MATTER OF:

LIPHAPANG ELISHA VAN TONDER APPLICANT

AND

MASERU CITY COUNCIL RESPONDENT

JUDGMENT

This is an application in which the applicant has approached this Court seeking an order declaring the termination of his services with the respondent municipality unfair and therefore will null and void. As a result of that nullity he claims reinstatement to his former position effective from the date of his purported dismissal and payment in lieu of leave. Alternatively, the applicant requests relief in the form of payment in lieu of leave; severance pay; payment in lieu of notice; and compensation in lieu of reinstatement persuant to section 73(2) of the Labour Code, in the sum of equal to what applicant could have received, as salary, since the purported dismissal to the date of this Court's decision.

It is common cause that the applicant was employed as a daily paid worker by the respondent on the 12th August, 1992 at the rate of M24 per day payable fortnightly. The respondent was represented by the Hlalele Motaung who was the head of the section charged with the maintenance of parks and gardens. Applicant's contract with Motaung on behalf of the respondent was verbal, and the mode of payment was cash until sometime in 1993 when the respondent unilaterally altered the made of payment to monthly basis and by cheque. The applicant contends that payment by cheque signified that he was now on permanent appointment, while the respondent maintains that the changed mode of payment in no way affected the

terms of the contract and did not detract anything from the fact that the contract was for a specific job and the applicant was paid on daily basis.

There is no dispute that initially the applicant was engaged to fence in the cemeteries and such sites were in various villages which fell under the jurisdiction of the respondent. Usually people employed for that purpose were recruited from the local people in those villages, who were discharged when the work was completed. But the applicant was treated differently because he continued to work from site to site until the whole project was completed. Even before such completion was realised, he was offered another job where he was required to build the stable for horses, and which job he did without any incident. Perhaps it should be mentioned that before the stable was completed Mr. Motaung was already promising him a transfer to civil works section of the respondent, where he would work with one Lesole Sebatane who was in charge of that section.

In contradistinction respondent's view is that the applicant was employed to do specific jobs and contract came to an end whenever the job was completed. it however admitted that no new formal arrangement was entered into with respect to each piece of work he did, but continued as if he was employed to do whatever work the respondent demanded of him. Indeed Mr. Motaung conceded that an impression might have been created in the mind of the applicant that he was now on permanent appointment.

Before we come to a specific conclusion on the nature of the contract which subsisted between the parties, it would be beneficial to briefly sketch the events which precipitated the present dispute. As already mentioned earlier in this judgment, Mr. Motaung had promised the applicant a new job in the civil works section headed by Mr. Sebatane even before the stable was complete. Mr. Sebatane had himself enquired of the applicant when he would move to his section and the latter had assured him that he would move as soon as he had finished the finishing touches with which he was committed at that stage at the stable.

Messrs Motaung and Sebatane gave us the impression that they had agreed on the transfer of the applicant to civil works and apprised him of the arrangement, but he remained recalcitrant despite the former's entreaties and cajoling until the latter filled the post reserved for applicant when it was clear that he was not interested to work in the new section. Both gentlemen were emphatic that the applicant was desperate to continue working because he depended on the job for survival. So it came as a surprise to them as indeed to this court that the applicant rejected the job when it fell due, but decided to lay a complaint with his union and ultimately this Court against the respondent for unfair dismissal. The slightest inkling for this strange behaviour, as espoused by Mr. Motaung, is that the applicant was reluctant to work under novices in the civil works section. But if the evidence of Mr. Sebatane is to be relied upon, the applicant would work under him and he was by no means a novice, having joined the respondent in 1983, long before the applicant

who was recruited on the 12th August 1992. Hence the complaint of the applicant would be most bizarre if not absurd. In my view a hungry man would hardly display such arrogance and the reason given for his failure to take up the appointment, if it was ever available is most improbable and illogical to deserve our total rejection and we do so.

Reverting to the evidence adduced for the parties on how the applicant ceased to work for the respondent, their respective versions are as far apart as the North pole is to the South pole. The applicant says he was retrenched by the respondent's Mr. Motaung on the ground that there was no more work available to him, but would be recalled when the opportunity for such work presented itself. The respondent on the other hand avers that the applicant deserted from the job he was offered and only has himself to blame. We have already rejected the contention that the applicant declined the job that was proffered and we have problems with the argument that the applicant deserted his job because he had not taken up the job in civil works, as respondent's contention was that each piece of work constituted a separate contract. Hence the completion of the stable released the applicant from his obligations to work for the respondent and the argument that the applicant deserted his duties is neither here nor there and self-defeating.

In my view it is necessary to make a finding on whether the applicant was retrenched or not for reasons which will become apparent anon. The Labour Code Order, 1992 in section 65 provides:

Form of Notice: Cancellation

1. **.....**

2. ***"If upon any termination as provided under section 63 and 64 the employer suffers the employee to remain, or the employee without express dissent of the employer continues in employment after the day on which the contract is to terminate, such termination shall be deemed to be cancelled and the contract continue as if there had been no termination, unless the employer and the employee have agreed otherwise."***

The contract between the applicant and the respondent was without reference to limit of time as the applicant continued to work after he completed the specific work he was initially assigned to do, and in terms of section 65 (2) above, such termination is deemed to be cancelled and the contract continued as if there had been no termination. This view is also consistent with that which was expressed in Sithole .v. Lipton SA (Pty) Ltd. (1992) ILCD 257. (1C) where the facts were as follows:

The applicant was employed by the respondent as a temporary employee to assist it in maintaining the production required to meet seasonal demand. The applicant

was told that he would be made a permanent employee if a vacancy arose in the ranks of permanent employees. When other temporary employees were dismissed the applicant was retained to assist the permanent employees with normal non-seasonal production. His employment was later terminated in lieu of notice. The applicant complained that the termination of his employment was an unfair labour practice.

However, the Court saw his dismissal differently and concluded thus:

> ***"The respondent had forfeited its right to terminate the contract on the ground that the task had been performed when it failed to terminate for that reason. The applicant remained in employment. The contract of employment was no longer temporary but indefinite but on the same terms and conditions as previously temporary employment. The terms and conditions of the respondent's permanent employees were not applicable. As, however, the contract was indefinite and not temporary good reasons was required for termination of that contract. The only good reason which existed was that the respondent satisfied itself that it did not need the applicant's services to cope with the standard non-seasonal production. The applicant was in effect redundant. The applicant should therefore have been entrenched and not dismissed as if he were still a temporary employee.***

Likewise, in the instant case the contract between the parties fell within the ambit of an indefinite contract as the applicant was in the first place employed to fence in the cemetery sites, but when the work was completed the respondent retained him to do other jobs as if he was in regular employment. So when the applicant was told by Mr. Motaung that there was overstaffing in the section of the respondent in which he worked he was in effect being told that he was redundant. In the same way the respondent could not give as a good reason that job for which he was originally engaged was completed.

That being the case, section 63(1) (a) of the Code prescribes that such employment may be terminated by either party by giving one month's notice in view of the fact that the applicant had completed more than one year of continuous service. In addition, since retrenchment is no fault situation, as correctly submitted by counsel for the applicant, we take the view that consultation between the parties to avert harmful consequences or to lessen their impact was essential. In this respect we echo the observation of this Court in National Union of Retail and Allied Workers .v. Zakhura Brothers (Pty) Ltd. LC 92/96 and LC 93/96, where the Court referred with approval to the case of NUMSA .v. ATLANTIS DIESEL ENGINES (1993) 4 (9) SALLR 62 wherein it was held that consultation is necessary because the rules of natural justice in particular the audi alteram partem rule require it. The whole purpose of such consultation is to inform the employees of the pending retrenchment.

In the present case, the applicant was merely told to pack and go without being afforded an opportunity to be heard. In fact, the decision to retrench him was conveyed to him by Mr. Motaung as early as December, 1993 (see paragraph 5 of respondents answer), but it was not executed until the 28th March, 1994 in terms of the applicant's version which is supported by annexures " MCC 3" and "MCC 4" to the extent that they both state that he was last at work on the 28th March, 1994. Even at this stage one is puzzled by the lapse of the three months between when Mr. Motaung told the applicant that the completion of the stable marked the end of his services with the respondent and the actual date on which he was dismissed.

In the result we come to the conclusion that the applicant's retrenchment did not follow the correct procedures and was therefore unfair.

AWARD

In view of the fact that more than four years have been elapsed since the applicant was dismissed and there is undisputed evidence that the position he held has been filled, there is no possibility of reinstatement at this stage and the only alternative is to award compensation which, too, has to be greatly reduced as the applicant made no effort to find alternative employment to mitigate damages. In the circumstances we make the following award:

(a) **Payment in lieu of one month's notice to which the applicant was entitled;**

(b) **Payment in lieu of leave to which the applicant was entitled, calculated at the rate of one day in each month he worked;**

(c) **Severance pay in respect of one year he completed in the respondent's employment;**

(d) **Payment of three month's salary as compensation in lieu of reinstatement.**

THUS DONE AT MASERU THIS 6TH DAY OF JULY, 1998.

L.S. MAPETLA
PRESIDENT

A.T. KOLOBE
MEMBER **I AGREE**

P.K. LEROTHOLI
MEMBER **I AGREE**

FOR APPLICANT : **MR VAN TONDER**
FOR RESPONDENT: **MR MOHLOMI**