

**IN THE LABOUR COURT OF LESOTHO**

**LC/35/02**

**HELD AT MASERU**

**IN THE MATTER BETWEEN:**

**MANTSAU RAMOEKETSI**

**APPLICANT**

**AND**

**LESOTHO INSTITUTE OF ACCOUNTANTS**

**RESPONDENT**

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**JUDGMENT**

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The cause of action herein arose in May 2002. It arose out of the restructuring and consequent retrenchment of the applicant on the 31<sup>st</sup> May 2002. The dispute was referred to the Directorate of Disputes Prevention and Resolution. It came before Arbitrator M.F. Mochekoane who having failed to secure settlement by conciliation referred the dispute to this court for adjudication on the 18<sup>th</sup> July 2002.

The Originating Application was filed out of the Registry of this court on the 15<sup>th</sup> October 2002. The respondent failed to file an Answer within the time provided by the rules which resulted in the applicant applying for default judgment. The respondent opposed the application and filed an application for condonation of the late filing of the Answer. The applications were heard on the 15<sup>th</sup> May 2003. Having heard counsels on both sides the court disallowed the default application and granted the respondent condonation of the late filing of their Answer.

Neither side led oral evidence. However it seems that the events leading to this dispute are largely common cause between the parties. Applicant was

first employed by the respondent in 1986 as a Secretary. In 1994 she was promoted to become Administrative Assistant. In July 1999 she was again promoted to the position of Finance and Administrative Manager. The head of the administrative staff of the Institute is the Registrar, commonly referred to as the Chief Executive Officer.

It is common cause that the Institute is established by an Act of Parliament viz. Accountant Act No.9 of 1977. The Institute is managed by a council, which has powers among others to appoint at its discretion staff and agents as it deems fit. On the 14<sup>th</sup> December 2000, the Council resolved to hold a workshop “to look into strengthening administrative issues in the Secretariat and staff rationalisation.” This resolution followed the President’s report which had shown inter alia, that, accounting and administrative procedures were poor, staff were not disciplined and that the Chief Executive Officer had had a conflict with the Finance Officer and subsequently resigned. (See Annexure “MR5” to the Originating Application).

On the 18<sup>th</sup> January 2001 the Council appointed the applicant to act in the vacant office of Chief Executive Officer “...until the issue of office restructuring has been sorted out.” The planned workshop was held although it is not clear from the record when it was held. At the meetings of 21<sup>st</sup> June and 16<sup>th</sup> August 2001 the Council emphasized the need for urgent restructuring as recommended by the workshop. On the 15<sup>th</sup> June 2001 the President of the Council wrote to the applicant as Acting Chief Executive to suggest to Council how “you propose the new structure to be like e.g. the size of the staff, the duties and strategy to retrench if you think it is necessary.”

The applicant obliged by suggesting that the new structure be made of three fulltime officers and that the then present two employees might need to be retrenched. In paragraph 6.7 of her Originating Application, the applicant avers and the same is admitted by respondent in their Answer that the suggestion was never presented before Council for approval. It can be safely inferred therefore that the proposal was never accepted. However, at the meeting of 21<sup>st</sup> June 2001 the Council resolved that “the Presidential Committee should handle the matter (of restructuring).” No attempt was made by either side to inform the Court of the composition and membership of the Presidential Committee.

Applicant avers and same is not denied by respondent that the President directed that the position of Chief Executive Officer be advertised. This is the position which had been substantively vacant since its incumbent resigned. The applicant, who was acting in it together with two other persons applied. By letter of 17<sup>th</sup> October 2001 (Annexure “MR12”) the applicant was advised that her application had not been successful. The letter was written by the President.

Applicant contends that in terms of the Act the Registrar (Chief Executive Officer) is appointed by the Council. She averred that no delegation had been made by the Council to the President to exercise its power of appointment. She contended further that even assuming such delegation existed it could not be correctly effected without being published in the gazette in terms of Section 36(1)(d) of the Interpretation Act 1977. The question of delegation is one of fact. As we said earlier neither side adduced oral evidence or any other form of evidence whatsoever. The court cannot in the circumstances make any finding of fact in a situation where no evidence was adduced to support the version being put forward.

It is again common cause between the parties that the post (Chief Executive Officer) was readvertised. There were two applicants who tendered their applications. The applicant did not by her own admission (paragraph 6.11 of Originating Application) apply again. One of the two applicants; Mr. Maurice Thamae was appointed. Applicant contends that her “application was unexplainably, not considered when these other applications were considered. She further averred that her application was not considered either because she was a female or because respondent was seeking a way of getting rid of her. She submitted further that she was infact better qualified than the said Mr. Thamae.

With regards the first contention that applicant’s application was unexplainably not considered, the applicant is clearly misleading the court. By her own admission, the application which she submitted for the post was not successful. Again by her own admission she did not re-apply when the post was readvertised. When the position was freshly advertised as it was, fresh applications were clearly being called for because the previous applications had been rejected. The respondent was under no duty to reconsider an application that it had already rejected. We therefore find no merit in this submission. All the other contentions namely that she was discriminated against because of her gender, that respondent wanted a way

of getting rid of her and that she was better qualified than the person who has been appointed are bound to fall away for the reason that they are baseless in as much as the applicant had not submitted any application to compete with Mr Thamae's application. They are accordingly dismissed.

The applicant contended further that she was later retrenched without any prior consultation with her regarding alternatives notwithstanding that her post was not abolished. She specifically referred to the office of the Chief Executive Officer which she said remained unaffected. (Paragraph 7.1 of the Originating Application). In paragraph 7.2 of the Originating Application applicant refers to a letter by the new Chief Executive Officer to staff ("MR15"). It is significant to quote it in full. It went thus:

*"To: All members of staff*

*From: Chief Executive*

*Copy: President LIA  
Deputy President*

*Signed: \_\_\_\_\_  
Maurice Thamae*

*Date: May 02, 2002*

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*RESTRUCTURING OF LIA SECRETARIAT*

*You will recall from previous correspondence of 10/10/2000 from my predecessor advising you of the Council's decision to restructure the secretariat. I therefore wish to formally advise you that this process has now began i.e. from 04/05/2002.*

*Below are the reasons that compel the Institute to re-structure its Secretariat;*

- 1. Organizations financial stress*
- 2. The current structure, which does not meet current and future organizational requirements.*

*The Process*

*It is my aim to implement this process as quickly as possible and to make you part of it, I therefore invite anyone of you to raise any matter which maybe of your interest or just requesting clarification. This you can do as a collective or individually at any stage of the process, I will however also keep you abreast of the developments at all times.*

In the view of this court this letter constituted consultation. The applicant was at liberty in terms of the letter “to raise any matter which may be of interest ...” This would of course include possible alternatives, which she would be in the best position to suggest given that she had for some time acted in the office of Chief Executive and had even herself been required to suggest how she envisaged the new structure to be like. It follows that the contention that applicant was not consulted ought to fall away.

It is factually incorrect for her to say the office of the Chief Executive was unaffected because her own originating application says Mr Thamae was appointed to the position in line with the restructuring process. In argument Mr Mosito for the applicant contended that he was not contesting the position of the Chief Executive but that of Finance and Administrative Manager. Mr Molapo for the respondent objected on the ground that the applicant came to court contesting the position of Chief Executive as such he cannot somersault midair. We agree. It is trite law that a litigant must stand and fall by his pleadings. There is sense and logic in that principle as to allow changes to pleadings without applications to amend would be tantamount to allow applicant to move the goal posts when it is clear that the respondent is about to score a point. That cannot be tolerated as it would visit prejudice and unfairness on a respondent who came to court to answer a particular case only to be told the case has changed without any prior notification.

Mr Mosito contended further that the applicant was in fact dismissed for inefficiency which dismissal was covered as a retrenchment. He developed this argument from the respondent’s averment in paragraph 6.14 of the answer where the following was said:

*“Applicant was later retrenched in as much as the office restructuring and staff rationalization entailed or meant that only those staff members that proved efficient would not be retrenched and applicant was not efficient and this she had full knowledge of because applicant*

*knew that respondent was already showing concern for her poor performance”.*

This averment does not in any way support Mr Mosito’s submission. It instead supports the contrary namely that the applicant was retrenched and that the criteria for her selection was poor performance. They aver that she knew this fully well. The applicant has not challenged the fairness of that criteria and it can therefore not be faulted. For these reasons we find no merit in this application and it is accordingly dismissed with costs.

**THUS DONE AND DATED AT MASERU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2003.**

**L.A LETHOBANE**  
**PRESIDENT**

**C.R. MOTHEPU**  
**MEMBER**

**I CONCUR**

**M.E. MOSEHLE**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT: MR. MOSITO OF K.E.M CHAMBERS**

**FOR RESPONDENT: MR. MOLAPO OF G.G.  
NTHETHE & CO.,**