IN THE LABOUR COURT OF LESOTHO **LC48/04**

HELD AT MASERU

IN THE MATTER BETWEEN

LIKHANG MAPETJA **APPLICANT**

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **RESPONDENT**

JUDGMENT

The applicant herein filed the present application on the 9th August 2004, following the termination of his fixed term contract on the 31st March 2004. The applicant had originally been employed for a three year contract on the 17th May 1999. The contract was renewed for a period of twenty-two (22) months from the 17th May 2002 to the 31st March 2004. The contract specifically recorded that "no notice of such termination shall be required by either party in accordance with section 62(3) of the Labour Code Order 1992".

On the 28th February 2004 the applicant received a letter ("LM4" to the Originating Application) informing him that "your contract of employment shall not be renewed on its termination date of the 31st March 2004." The applicant filed an application in this court seeking relief as follows:

(a) Declaring that the applicant's dismissal/retrenchment per letter dated 24th February 2004 is unlawful by reason that the said retrenchment was both substantively and procedurally unfair.

(b) Alternatively declaring the retrenchment/dismissal unlawful by reason of unfair labour practice as a result of the unlawful discrimination of the applicant in that he was not retrenched in accordance with the retrenchment policy while others were.

(c) Ordering the respondent to pay applicant six (6) months salary from March 2004 (plus all employment benefits) due and payable as a result of the said unlawful retrenchment.

(d) Payment of all terminal benefits to applicant in accordance with staff separation policy.

In his statement of case which he corroborated in evidence, the applicant averred that he was informed in July 2002 that the staff he supervised was going to be retrenched at the end of March 2003. He averred that they were duly retrenched. He stated further that the staff of the Leribe Trauma Unit who were also employed on fixed term contracts like him were also retrenched at the end of March 2003. All these people were paid benefits in terms of what is called LHDA Staff Separation Policy, he averred.

Subsequently, the applicant heard once more that retrenchments were on the cards, but they did not know who were going to be affected. He testified that on the 10th February 2004, the Lesotho Highlands Water Commission (LHWC) which he says is the body owning and is overall responsible for the operations of the respondent made a general directive that:

"(1) Contracts of LHDA General Managers and Branch Managers expiring before 30th June 2004 (with the exception of Mr. I. Sello) are to be extended to 30th June 2004.

"(2) Contracts of other LHDA staff expiring before 30 September 2004 are to be extended to 30 September 2004."

He averred that pursuant to that directive the Chief Executive of the respondent called a general staff meeting on the 20th February 2004 at the Lesotho Sun where he informed them about the LHWC directive. The LHWC letter is attached to the Originating Application and it is annexure "LM2". The applicant testified further that since his contract was due to expire on the 31st March 2004, he regarded it as extended to 30th September

in accordance with the "directive" of the LHWC and he conditioned himself accordingly. He testified that to his dismay before the end of that month (February) he got a letter that advised him that his contract was due to terminate on its originally scheduled date of termination. He testified that Mr. Fobo, whose contract was due to end on the 31st March like his, was extended in accordance with the directive of the LHWC. He averred that he regarded this as a discriminatory practice against himself. He testified that he was not consulted in accordance with respondent's Staff Separation Policy before he was terminated. He testified further that he had a legitimate expectation of an extension of his contract in accordance with the directive of the LHWC.

In cross-examination Ms. Matshikiza asked the applicant if he was not aware that his contract was due to terminate on the 31st March 2004. He said he was. Clause 3.3 of the applicant's contract provides, *inter alia* that if respondent wishes to renew the contract it shall advise the applicant three months in advance that his services shall be required for the extended specified period. Ms. Matshikiza asked him (applicant) if he was advised in accordance with Clause 3.3 that his services would be required for an extended period. He said he was not. Cornered to say if his contract did not terminate on its due date in the circumstances he said it did. Asked why he says he was retrenched if his contract terminated as it should have. He said his contract was extended and them prematurely terminated. Asked how he fits his case in the Staff Separation Policy if his contract expired on its expiry date, he said his case was peculiar.

The applicant adduced further evidence of PW2 Mr. Topollo Charles Putsoane. He testified that he started to work for respondent as a junior engineer. He moved on to become senior engineer. He progressed to the level of middle management where he was section head. He climbed to senior management where held the position of engineering manager. From August 2002 he assumed the second senior most position after the Chief Executive as an Assistant Chief Executive. This position catapulted him to the level of Executive Management. He vacated the position in August 2004 when his own contract expired. He testified that as Assistant Chief Executive he was the ears and eyes of the Chief Executive and advised him accordingly.

He testified that the other second senior positions i.e. his equivalents were the General Managers. He testified that as second level executive managers they used to meet in what was called Executive Management Meetings where they discussed all problems the orgnaisation had. The witness was shown Annexure "LM2" – letter from the LHWC and asked if he knew it and he said he knew it full well. He said he knew it because it extended staff contracts and that it was from the Commission which is the supreme body in charge of the project. He said it extended everybody's contract except that of Mr. Ikarabele Sello. He averred that they discussed the letter a little in the Executive Management Meeting and that they considered it as an instruction.

Asked if Mr. Sello was indeed terminated he said he was not because they as Executive Management met and agreed to advise the Chief Executive to go back to the Commission and show them the unpalatable repercussions of the non-renewal or non-extension of Mr. Sello's contract at that time. Asked if there was any other occasion that they asked the Chief Executive to request that the Commission's instruction of the 10th February be varied he said that was the only occasion. The witness was shown the letter of termination of Mr. Mapetja's contract and asked if it was in accordance with the Commission's instruction and he said it was not. Asked if he knew the reason for it (the letter) he said he did not and went on to say he was also surprised when Mr. Mapetja showed it to him because as an Adviser to the Chief Executive he had not been party to its drafting.

Under cross-examination PW2 was asked about the instruments that govern the running of LHDA he said those were the Treaty and Protocol VI. Asked what they say about the appointment of staff he said they give the Chief Executive the power to appoint and to terminate. Asked on what basis he suggested that the LHDA was bound to follow the Commission's instruction in respect of staff matters, he said the Organisation and Management (O & M) study which looked at the LHDA's future functions and its future staffing needs was the basis for the Commission's intervention as it (the Commission) was answerable for it. Ms. Matshikiza put it to the witness that despite the O & M study being answerable to the Commission, the appointment and termination of staff remained with the respondent, the witness steadfastly refused and said with the O & M in progress appointments had to be done by the respondent in consultation with the Board which would recommend to the Commission which in turn would

instruct the respondent to effect an appointment. Presumably the same procedure would apply for terminations of such appointments.

The respondent led no evidence to contradict applicant's testimony. It is trite that what is not denied is regarded as admitted. Counsels submitted written heads of argument for which we are most indebted. Mr. Sekonyela for the applicant framed the issues for the court's determination under paragraph 4 of his heads of argument as follows:

(a) Whether LHDA was correct in law in terminating the applicant's contract on the 31st March 2004 contrary to LHWC's directive dated February 2004 and also contrary to its own practice and public announcements by its Chief Executive.

(b) Whether there was legitimate expectation raised on the applicant by the said LHWC directive and by LHDA practice of extending other contracts of other employees as well as the said public announcements.

It was Mr. Sekonyela's contention that the LHWC directive as well as the announcement of the Chief Executive at the meeting of the 20th February 2004 created a legitimate expectation that applicant's contract would be renewed at least up to 30th September 2004. He submitted further that once that expectation had been created the applicant could no longer be terminated without first being given a fair opportunity to be heard. He referred in this connection to the case of Koatsa Koatsa .v. NUL 1991 - 1992 LLR - LB 163 at 169.

Mr. Sekonyela contended further that applicant's legitimate expectation was created by the fact that the contracts of those of his colleagues which were due to expire on the 31st March 2004 like his were infact extended as per the directive of the LHWC. Alternatively, he argued that the failure to extend applicant's contract when those of other employees in a similar position like his were extended constituted an unfair discrimination against the applicant.

It was argued further on behalf of the applicant that since the respondent advances the "exigencies of the work" as the reason for not extending applicant's contract it follows that the applicant's termination was dictated by operational reasons. It was contended that the termination for operational reasons failed the test of procedural fairness in as much as the applicant was

not consulted. It was contended further that since the applicant was terminated prior to the expiry of his extended contract he ought to have been treated in terms of Clause 3.2 of his contract which provides that "if termination is as a result of operational requirements the employee shall be consulted in accordance with the LHDA Separation Policy, before termination is effected."

For their part the respondent have denied that the applicant was retrenched nor that his termination was in any way connected with the operational requirements of the respondent. They averred that any announcement of retrenchment by the respondent related to permanent staff and not contract staff. Applicant's fixed term contract, they contended, terminated by effluxion of time. They relied on applicant's own contract and section 62(3) of the Code. Ms. Matshikiza submitted under paragraph 4.5 of her heads that "there was no duty on the respondent to have consulted with applicant as the reason for termination was not for operational reasons."

Retrenchment is an objective reality. It cannot be surmised or speculated. The applicant's contract was admittedly a fixed term contract. In the circumstances of this case there are only two possibilities with regard to the manner of its termination. It is either it terminated by effluxion of time on the 31st March 2004, or it was extended to the 30th September 2004 but got unlawfully terminated before the revised date of its termination.

The third possibility which is too remote to be the case is that he was terminated for operational reasons. The existence or non-existence of operational requirements for the termination can only be determined by the employer. It is not for the employee to force or to seek to place his own termination within the parameters of operational requirements termination when the employer has other objective grounds that justify the termination; unless evidence point to the contrary. The applicant testified that the respondent had announced that retrenchments were going to come without specifying who would be affected. The respondent in their Answer said the announcement related to permanent staff. We are inclined to agree because those persons who were on contract had the last day of their fixed term contracts to guide them with regard to when they would be terminated. If ever they were to be affected by the announcement they would have to be specifically informed that their contracts would be disrupted before their due date for operational reasons. In the absence of such information or notice, they have no reason to speculate. In his book, Workplace Law 7th edition

2003, p.197 John Grogan avers that retrenchment "normally takes place when jobs become redundant, and is aimed at effecting savings on the Wage Bill." It may be added that it does not exist where a contract of a fixed term duration has expired in accordance with its due termination date.

In the case of Thabo William Van Tonder .v. LHDA LC41/03 (unreported) this court interpreted a similar Clause 3.2 of a fixed term contract as follows:

> *"Clearly the contract does envisage that it may be terminated as a result of operational requirements. But the circumstances in which such a case may arise are clear. It is where a subsisting contract is disrupted."*

We may add here that the disruption must be for operational requirements and not unlawful termination. It is the employer who will say it is for operational reasons. The court is bound by that pronouncement by the employer unless evidence to the contrary shows otherwise. If the applicant says there is evidence to show that his termination is infact an operational requirements termination disguised as something else the court would consider such evidence and decide accordingly. But in casu no such evidence was adduced. We accordingly hold that there is no merit in the submission that the applicant's termination was for operational requirements, and as such merited to be dealt with in terms of Clause 3.2 of his contract or the Staff Separation Policy as the case may be. It follows therefore, that the respondent had no duty to consult the applicant in accordance with the established retrenchment guidelines.

The applicant sought to show that in any event he should have been treated in terms of the Staff Separation Policy because his own subordinates who were retrenched on the 31st March 2003 and the staff of Leribe Trauma Unit were dealt with in terms of that policy. The applicant failed however, to adduce evidence to show that his circumstances were similar to those of his subordinates who were retrenched in March 2003. For instance, there was no evidence to show that those subordinates were contract employees like himself. With regard to the Leribe Trauma Unit Staff applicant failed to adduce evidence to show firstly, that those people were retrenched and secondly, that they were infact treated in terms of the Staff Separation Policy of the respondent. He sought to extract such testimony from PW2 but to no avail as he kept on saying he did not remember Accordingly, claims of discriminatory practice by the respondent in this regard are ill-conceived.

The applicant contended further that he was discriminated against in as much as one Mr. Fobo's contract and those of other staff which terminated before 30th September 2004 were duly extended as directed by LHWC while his was not. He contended that he also had a legitimate expectation that he would be given an extension like the rest of the staff who were extended. Mr. Sekonyela for the applicant referred us to two leading decisions of the Court of Appeal in Koatsa Koatsa .v. NUL 1991-1992 LLR – LB 163 and Attorney General & Others .v. M.S. Makesi and Others 1999-2000 LLR – LB 306 as authorities for two propositions. Firstly, that once a right exist a legitimate expectation exist that it may not be taken away without first hearing the applicant. Secondly, that since the LHWC is the controlling body of the respondent the latter is bound to follow and implement its decisions/directives.

The respondent contents first that the applicant's contract was due to terminate on the 31st March 2004 and it duly terminated on that date in terms of section 62(3) of the Code and Clause 3.1 of the contract itself. Ms. Matshikiza for the respondent argued further that in terms of the instruments that govern the LHDA, the latter is an autonomous body with exclusive powers to appoint and terminate its managerial professional and administrative staff. She referred us to section 8(1) of the LHDA (Amendment) Act No.12 of 2000 which she said confers powers of appointment and termination in the Chief Executive and said such powers which are conferred by statute cannot be taken away by a letter from the LHWC. She also referred to paragraph 38(F) of Protocol VI To The Treaty on the Lesotho Highlands Water Project.

Mr. Sekonyela for the applicant countered by referring to Article 5(11)(a)(i) of the Protocol which says, "The Lesotho Highlands Water Commission shall have the responsibility for strategic overall policies." He contended that issues of structural reform and downsizing of staff fall under strategic policies for which the LHWC would take responsibility over the LHDA. This submission was not contradicted. Infact, PW2 who told the court that he was the Assistant Chief Executive did say as much that whilst the Chief Executive has powers vested in him by section 8(1) of the Act, the O&M study superceded every such powers because the Chief Executive had to exercise those powers through the Board which would recommend to the LHWC and only after the latter's instruction could the Chief Executive act to appoint or terminate as the case may be.

This testimony was not challenged and coming as it did from the person of PW2's standing within the respondent it cannot be taken lightly. Section 9 of Lesotho Highlands Development Authority (Amendment) Act 2000 provides that "the governing body of the Authority shall be the Board of Directors who shall be accountable to the Commission." Section 7(1) as amended provides:

> *"There shall be a Chief Executive of the Authority who shall be appointed by the Board in consultation with the Commission on such terms and conditions as the Board may determine with the approval of the Commission."*

We quote these sections to underscore the point that whatever statutory powers the Chief Executive wields; at the end of the day he is accountable to the Commission through the Board for the exercise of those powers. It is therefore untenable that the Chief Executive can have more powers than his bosses namely the Board and the Commission. Since they vest him with the powers they can also amend or take them away as they see fit within their overall strategic policy setting powers. (See Article 5(11)(a)(i)). Infact the LHDA Act as amended cannot be read in isolation from the Treaty between the two governments of Lesotho and the Republic of South Africa. They must be read in conjunction with each other and the Act must be interpreted in conformity with and not in conflict with the Treaty.

The court's position regarding the powers of the Commission is further fortified by Article 5(11)(b) and (d). Paragraph (d) provides that the Commission shall "…have approval powers on any matters for which no appropriate policy, procedure or expenditure limit is laid down in the Governance Manual." There is no evidence that issues which the O&M study was faced with were laid down in the Governance Manual. Infact if they were, the study would not have been necessary and the proposal which extended staff contracts which the LHWC approved would not have been necessary.

The respondents do not themselves deny the existence of "LM2" or that it was a directive from an authoritative body as testified by the applicants. They merely seek to say they were not bound by it. The Concise Oxford Dictionary defines "directive" as "a general instruction from one in authority." It is a contradiction to recognize the authority and seek to deny to be bound by instructions of that authority. The case of Makesi and others

supra is indeed the case in point. The Chief Executive could not according to "LM2" choose which contracts to extend and which to terminate. It (LM2) was couched in general terms to accommodate everybody. It was specific on who was not to be extended and that was Mr. Sello. He however also got extended after the LHWC was asked to reconsider its position by the Executive Management. At the meeting of the 20th February, the contents of "LM2" were conveyed to the staff without any qualification, thereby confirming its contents. By so doing the Chief Executive also exercised his powers in terms of the LHDA Act to extent the employees' contracts to 30th June and 30th September as "LM2" stipulated.

In the view of the court, the letter (LM2) and the address of the Chief Executive created a right which if it was to be taken away as happened in the case of applicant, gave rise to a legitimate expectation that it would not be taken away without giving applicant a fair opportunity to be heard. Furthermore the respondent acted in a discriminate manner by singling out applicant for termination when others were given an extension per directive of LHWC, and the announcement of the Chief Executive at the Lesotho Sun staff meeting. Alternatively, the respondent infringed a right which applicant had acquired and acted unlawfully by failing or refusing to extend applicant's contract in accordance with the directive of the Commission. (Makesi's case supra at p.315). For these reasons the applicant is justified in holding the respondent to the terms of his extended contract and claiming payment of salary and other benefits from April to end of September 2004 when the contract would have expired. Accordingly, respondent is ordered to pay applicant his salary and other benefits he would have earned but for the unlawful termination for the six months starting April 2004 ending 30th September 2004. This order must be complied with within thirty days from the date hereof and in no case later than 22nd March 2005. Costs are awarded to the applicant.

THUS DONE AT MASERU THIS 8TH DAY OF FEBRUARY 2005

L. A. LETHOBANE
PRESIDENT

P. J. TAU — **I CONCUR**
MEMBER

M. MOSEHLE — **I CONCUR**
MEMBER

FOR APPLICANT: **MR. B. H. SEKONYELA**
FOR RESPONDENT: **MS. MATSHIKIZA**