IN THE LABOUR COURT OF LESOTHO **LC/54/04**

HELD AT MASERU

IN THE MATTER BETWEEN

REMAKETSE MOLAOLI & 9 OTHERS **APPLICANT**

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **RESPONDENT**

JUDGMENT

Dates of hearing: 30/11/04, 09/03/05, 10/03/05, 23/03/05, 24/05/05, 06/07/05.

Employment – whether applicants employees or independent contractors – if employees what governed relationship – Retrenchment or dissolution of community structures – was consultation necessary. Leave – not pleaded – Applicants employees of respondent – Applicants not retrenched – structure dissolved. Application dismissed.

This matter initial started before the President and two learned panellists namely Messrs. Poopa and Makhetha. At the resumed hearing on Wednesday 9th March 2005, it turned out that it was impossible for learned management panelists Mr. Poopa to continue to be available for reasons beyond his control. It was felt imprudent to again postpone the matter which had already been postponed for four months. Counsel were informed of the situation and by agreement with them the matter proceeded to finality in terms of rule 25(2) of the rules of the court which provides:

> *"where during the course of (a) hearing a vacancy arises….in the membership of the court, provided the remaining members constitute a majority of the original membership of the court, the decision of the remaining members shall be the decision of the court."*

The ten applicants have lodged these proceedings against the respondent seeking the following reliefs:

1. Directing that their retrenchment was unlawful and procedurally unfair.
2. Directing the respondents to pay applicants twelve (12) months salary as reasonable compensation for the said unlawful retrenchment.
3. Directing respondents to pay applicants for all leave due and not taken.
4. Payment of applicants terminal benefits in terms of staff separation policy plus overtime worked, mountain as well as incentive allowance in terms of LHDA regulations from date of employment to date of termination.
5. Granting applicants further and alternative relief.

Even before the court can address the reliefs sought, the big question that has to first and foremost be interrogated is whether the applicants were employees of the respondent if so what governed the relationship between the parties.

In their statement of case the applicants trace their employment history to round about 1995. Those of the applicants who were already in the Highlands Water Project at that time and those who came later, were employed by a joint venture called Hunting – Consult 4 (HC4). This joint venture was commissioned by the Lesotho Highlands Water Project (LHDA) to conduct a study of the Mohale Dam Resettlement and Development Programme. The applicants worked with the consultant as Community Liaison Assistants (CLA). In that capacity the applicants 'formed part of the Community Participation Team, charged with the overall responsibility of ensuring effective consultation with the communities affected by Mohale Dam as well as the host communities." (See Unmarked Annexure to the Originating Application dated 25th September 1997).

It is common cause between the parties that the consultant's contract came to an end. There is confusion among applicants exactly when that contract came to an end. It is also common cause that after the contractor's contract came to an end the LHDA took over the payment of the remuneration of applicants. The question that has to be answered is what the respondent paid them as? Was it paying them as its employees or as independent contractors or was it paying them on behalf of another person/body which for reasons of capacity could not fulfil the obligation itself? We shall come back to this question later.

The Originating Application says the contractor's contract came to an end in January 1997 (see paragraph 5 of Originating Application). Julia Moholobela PW1 says the contract came to an end in December 1996. Remaketse Molaoli PW2 says the contract came to an end in September 1997. While noting this discrepancy, the respondent was not helpful either regarding the correct dates of the ending of the consultant's contract. DW2 Mr. Benedict Mateka testified that the contract was to run from 1995 to the end of 1997,but at the beginning of 1997, the contractor wanted to dissolve the Community Participation structures citing shortage of funds. The LHDA felt that the work the community participation structures were doing was important, as such it should continue with them (LHDA) taking over its funding. Accordingly, when the contractor left at the end of 1997 the LHDA took over the financing of the activity the applicants were doing. It should be noted that he too was not exact as to when the contractor left, but his testimony came close to the dates suggested by PW2 in his testimony namely, September 1997. Furthermore, the date of September is confirmed by the unmarked annexure to the Originating application, which is reference letter made by the contractor on behalf of one of the applicants namely Amanda Mapolisi. That letter is dated September 1997.

We are prepared to assume for purposes of this judgment that the contractor left around September 1997. Applicants aver that the contractor did not pay them any benefits and that the LHDA as the new employer to whom they were transferred undertook to pay those terminal benefits. In paragraph 6 of the Originating application it is averred that "the applicants were duly advised about this new arrangements and especially the fact that since their terminal benefits were not paid by the said consultant when he left the country, the respondent had taken over all liabilities concerning the unpaid terminal benefits of the applicants."

The respondent denies that any such undertaking was made or that the applicants were transferred to them as their employees. They filed the supporting affidavit of former manager of Mohale FOB whom applicants had said knew of the arrangements. He denied that he knew of any transfer of liabilities of the consultant to LHDA. PW1 testified that it was announced at a meeting held at Khali Hotel that the consultant was leaving and that all their terminal benefits would be paid by LHDA which was taking them over as its employees. She was supported in this regard by PW2. None of the witnesses who testified for the respondent know of this meeting at Khali Hotel. Mr. Mateka who is alleged to have been at that meeting denies any knowledge of it. Applicants' witnesses have nothing to confirm their assertion that such a meeting took place. In particular, the applicants as it will become clear later had several meetings with the management of the respondent where their employment status was discussed and they even wrote letters. Not once does the issue of the meeting and the alleged respondent's taking over to pay their unpaid terminal benefits appear.

Assuming that applicants had proved the respondent's alleged inheritance or assumption of responsibility to pay their benefits; it would still be impossible to make meaningful progress from that premise because applicants have not pleaded the terminal benefits they are claiming. The only thing which the two witnesses talked about in evidence was leave due but not taken. Even then it is only the leave of those two persons who testified. There are no records annexed showing the leave status of the other eight persons. PW1 testified that from 1996 – 2003 she was not allowed to take leave because it was said she was not an employee. By this she meant she is owed leave from 1996 to 2003.

This evidence cannot possibly be true. Firstly, we have held that all indications are that the contractor whom she admits employed her only left during the last quarter of 1997. She has not averred anywhere that the contractor treated her so badly as to deny her leave. Secondly, as early as February 2003, they wrote a letter to the Mohale Manager complaining about certain employment related issues. She is a third signatory to that letter. If things had been going badly for that long, she and her colleagues would surely have raised that issue in that letter. Thirdly, they contend in their testimony that they reported their problems to the Labour Office. Mr. 'Mako of the Maseru District Labour Office did come to testify that he knows the applicants as they came to his office to complain about their

employment status with LHDA. Leave was not one of the things about which they complained to him. Clearly PW1's testimony in this regard is a fabrication.

While testifying on leave PW2 failed to respond to the court's question asking him how many days he was claiming. Towards the end of his evidence he opined that since he started working for respondent he accumulated 138 days and that he utilized only 42 of those, thus leaving him with a balance of 94 days. He produced no record to substantiate this claim. Infact his own leave form which he handed in as exhibit "4" shows that as of 25th November 2003 he had only a balance of ten (10) days to his credit. He seeks to challenge this form by giving the exaggerated figure of 138 days which he was only computing in court. If there is substance in the claim that applicant had not been taking leave prior to that of September to November 2003, that complaint would long have been made because quite clearly applicant is a person who knows his rights. He has been holding meetings with top management of respondent prosecuting his and his colleagues' labour rights. He could not have sat on his leave claim as he would now want us believe. This is a clear case of an exaggerated claim. We will revert to the remaining days later.

Applicants aver that upon the departure of the consultant they were transferred to the respondent as its employees. The evidence of the two witnesses who testified for applicants differ on how they say they were taken over by the respondent. PW1 says they were informed by the consultant that the respondent would inherit them when their (consultants') contract came to an end. She averred further that as promised by the contractor, a meeting was convened at Khali Hotel where the CLA's, LHDA Management, the committees and the Contractor attended. She averred that it was announced at that meeting that the contractor was leaving and the LHDA would take the CLA's over. She testified that in accordance with that announcement the LHDA took them over as its employees and in particular it gave her an employment number and assumed payment of her monthly salary.

PW2 for his part said from the very beginning he was informed by the person who employed him that he was going to be an employee of the LHDA. He stated that the person who employed him was an officer of the consultant who told him that he was also working for the LHDA and that he (PW2) would work under his supervision. He however, did not recall who that officer was. He testified that the officer further told him that even the

money paying him would come from the LHDA. A question was put to him in chief that the respondent says it never employed him. His answer was "that is surprising and it is a lie because the respondent is the one that paid me all along and had given me an employment number."

Towards the end of his evidence in chief, PW2 was asked how long he worked under the consultant. He answered that it was from the time he was first employed, which he said was March 1997, until the end of 1997, and he specifically said around September or October of that year. He was then asked "what happened?" His response was "LHDA told us that it was taking us over and it would continue with us as our employer and it would continue to accord us all rights, privileges and benefits we had previously enjoyed." He was asked further "why did they have to inherit you?" He answered that the contract of the contractor was coming to an end and the LHDA called a big meeting at Khali Hotel where it announced that it was taking the community participation structures over and that it would take over the responsibility of payment of salaries as it indeed did.

The evidence of this witness is itself contradictory. In one breath he is employed by LHDA in another breath he was employed by the consultant and the LHDA only inherited them upon the former's departure. He was asked by Ms Matshikiza under cross-examination to explain this discrepancy. He said he was saying he was employed by the LHDA because the consultant was employed by the LHDA. This is now his interpretation of the relationship which does not necessarily translate into a fact. The question whether he is employed by the LHDA or the contractor is one of fact not opinion. Accordingly, PW2's evidence is not helpful and it does not advance applicants' case any further.

PW1's evidence as contested factual averrement requires corroboration. The person best placed to corroborate her was PW2. However, PW2's testimony is not only a stand alone, it is also contradictory not only of itself but also of the evidence of PW1. We have already shown that the applicants testimony about the Khali Hotel meeting cannot be relied upon also for lack of corroboration. Clearly therefore, the evidence of PW1 cannot be relied upon. It follows therefore that the relationship between the respondent and the applicants cannot be determined from the applicants' testimony.

For their part the respondents deny any employment relationship and seek to deny any take over theories as well. It seems that the respondent's attempt to deny as they did in the Answer that they inherited and took over applicants from the contractor is not sustained by evidence of respondent's own witnesses. In her evidence DW1 stated that at the time that the respondent was preparing for the resettlement of the communities that were going to be affected by Phase 1B of the Lesotho Highlands Water Project (LHWP) a Resettlement and Development Study was done by Hunting Consult – 4. The study looked into among others how best communities could be involved in the resettlement planning process. The community participation structures of which the applicants were part, were borne out of that study. They were established and operated by the consultant who had a limited period of operation in accordance with the terms of agreement with the LHDA.

When the contractor's contract came to an end it (the contractor) made a report to the LHDA indicating that the study had been completed. The contractor went on to show that for the implementation of the study's recommendations it would be necessary to retain the services of the community participation structures which the contractor had initiated. She testified further that the contractor's recommendation on the retention of the community structures were presented to the Lesotho Highlands Water Commission (LHWC) which approved their retention under certain specified conditions. She averred that the major condition was that the CLA's would be paid honorarium similar to the salary that the contractor paid them. These conditions are specified in what is called the Terms of Reference.

DW2 testified that the community participation structures were proposed by the consultant who had been engaged to carry out a study on how the affected Mohale community could participate in the project study. The aim was to have their input on displacements of communities by the project and what should be done to compensate them. He testified further that the work of the consultant was due to end in December 1997. At the beginning of 1997 the consultant already complained about shortage of funds and sought to disband the community participation structures. It was agreed by the consultant and the LHDA that the structure should not be disbanded and that when the consultant left in December 1997 the LHDA would take over the operations of the structures and be responsible for the payment of allowances and salaries/honorarium to enable them to operate.

DW2 testified further that the consultant had been independent of the LHDA and the CLA's were part of that i.e. the independence from LHDA which the consultant enjoyed. He averred that there was pressure coming from non-governmental organisations which were opposed to the project that the CLA's must not be part of the formal LHDA organizational structure as that would compromise their independence. He averred further that the LHDA then agreed to an arrangement whereby they (LHDA) would assume responsibility for payment of salaries euphemistically called honorarium so as not to be seen to be interfering with the independence of the structure. It was in this context that the Terms of Reference were devised which would govern their relationship with the LHDA.

The witness was asked if the CLA's i.e. applicants were aware of this arrangement and he said they were. DW1 and DW3 also said that the applicants were fully aware of the Terms of Reference which governed their relationship with the respondent. The applicants vehemently denied that they knew the Terms of Reference. Their contention was that they were infact employed in terms of the Personnel Regulations like all other staff of the LHDA. The testimony of DW2 regarding the rationale for devising the Terms of Reference was not shaken. Moreover, the applicants' contention that they knew nothing about the Terms of Reference cannot possibly be true. For instance in their letter of 17th February 2003, which is annexure PM7 to the Originating Application the applicants wrote to the Mohale Field Operations Branch Manager about things that they say they discussed with him and they were not happy with the responses they got from him. One of the items that they list as having been discussed with the Manager is the Terms of Reference.

The letter contradicts applicants' testimony that they never knew about the Terms of Reference . It on the contrary supports DW1 and DW3 evidence who said they had several meetings with the applicants where the Terms of Reference were discussed or were a point of reference. Applicants sought to show that in any event they had not signed the Terms of Reference and that by respondent's letter of 10th July 2003 to the applicants' union the Terms of Reference were not an approved document. Nothing turns on whether the applicants had signed the Terms of Reference or not. There is no rule that requires that for them to be applicable they ought to have been signed by the applicants. In any event they tendered no evidence to prove that they had signed the personnel regulations which they want to govern their

relationship with the LHDA. Furthermore, the fact that a letter was written as alleged can only be attested by the union which is the one to which the letter was written. The two witnesses who testified for the applicants cannot testify on its contents as that is clear hearsay. Accordingly, the evidence of DW1 and DW2 that the Terms of Reference were approved by the LHWC around September 1997 cannot be faulted.

The respondent sought to show that in terms of clause 4.3.3 of the Terms of Reference the CLAs shall be independent contractors (paragraph 7.3 of respondent's Heads of argument). Same is alleged in paragraph 3.1 of the Answer. DW1 and DW3 however alleged that the applicants were employed by the community under what was called CALC Executive (Combined Area Liaison Committees). Of importance is that this evidence is not supportive of the averrement that applicants are independent contractors. It instead introduces a new dimension of employment by community structures which applicants were tasked with establishing. It turned out under cross-examination that these committees including their umbrella body CALC were not registered in law. They accordingly lacked capacity in law to enter into valid contracts.

It is completely surprising how the respondent come to the conclusion that the Terms of Reference make applicants independent contractors. Not a single clause of the Terms of Reference come any where close to suggesting that applicants are independent contractors. If anything the clauses we have read leave us in no doubt that the applicants are LHDA employees whose employment is governed by the Terms of Reference as opposed to the personnel regulations as they (applicants) wanted the court to believe.

A few examples suffice to dispel the myth that applicants are independent contractors. Clause 4.1.1 provides that the CLA system is designed to facilitate effective information dissemination between the affected communities and the LHDA and the CLAs will be sourced from the communities they serve. It concludes by saying "these CLAs shall work for the affected communities….." and it lists what the CLAs shall do. It makes no suggestion that the CLAs shall be employed by the community. They work for those communities by being a liaison between them and the LHDA. Clause 4.3.2 is very instructive. It provides:

> *"The CLAs shall be appointed on a one year renewable contract, subject to an annual performance appraisal conducted by the Phase 1B Community Participation Officer and the CALC Executive as detailed in section 4.8"*

Clause 4.3.3 which the respondents have used to confuse themselves provides:

> *"The incumbent CLAs (i.e. those who were employed under Contract 1012) shall be offered one year independent contracts for the 1997/98 financial year with performance appraisals and new work contract for the next financial year finalized annually in January/February."* (Emphasis added).

The independent contractor contracts were expressly meant for the financial year 1997/98. Thereafter the Terms of Reference are clear that those persons i.e. applicants will be offered "new work contracts" for subsequent financial years which were to be finalized in January/February of each year. The applicants were in terms of clause 4.3.2 to be supervised and appraised annually by the community participation officer who had to work in consultation with a non-formal/unregistered structure called CALC Executive. This is understandable because the applicants had daily dealings with the CALC and they knew their weaknesses and strengths.

In her evidence DW1 said the CLAs were attached to the LHDA structure but were not a formal part of it. Indeed the Mohale Field Operation structure was displayed which showed that the CLAs were attached to the LHDA structure through the office of the Community Participation Officer with a broken line. That in our view is consistent with DW1's evidence that they were not a formal part of that structure because that structure is governed by the personnel regulations which had no application to applicants. It is also consistent with DW2's evidence that the respondent also had this hidden agenda of putting on a public face that CLAs were independent of it. For all intends and purposes the CLAs were employees of the respondent whose employment was governed by the Terms of Reference.

This finding disposes of applicants' claim that they were discriminated against in as much as they were not dealt with in terms of the provisions of the personnel regulations. Similarly disposed of is the contention that the applicants' terminal benefits ought to have been calculated in terms of the

respondent's staff separation policy which is part of the personnel regulations. It follows that applicants' claim before this court must stand and fall by the Terms of Reference which were their personnel regulations.

The applicants contended that during February 2004 they were retrenched without proper consultations being held with them. Both PW1 and PW2 stated that in February 2004, management of the respondents called them and told them that time had come for some departments to downsize. They stated that they told them that they would be retrenched and promised to revert to them to consult with them. They testified further that while they awaited the consultations to start they were served with the notices of termination. The two witnesses' evidence was neatly tailored to suit with the respondent's consultative process as laid out in the personnel regulations.

The respondents denied that they had any obligation to consult with the applicants because they were not their employees. We have already shown that applicants were employees of the LHDA. It follows that if their contracts of employment were to be terminated for operational reasons, they had to be consulted. The respondent further denied that they ever said that they were retrenching the applicants and that they would be consulting with them. They averred that the meeting informed the applicants of the dissolution of the CLA system. The applicants denied that the CLA system is dissolved. They handed in exhibit 8 which is the schedule of meetings of CALC for 2005 spanning from 20th January 2005 to 10th November 2005 as proof that the committees are still working.

Clause 4.9.2 of the Terms of Reference provide as follows:

> *"Involuntary resignation: Where the CLA system is dissolved or where a CLA position is declared redundant before the expiration of the annual work contract the affected CLA(s) shall be given one calendar month notice of the intention to terminate the contract. They shall receive severance honorarium as specified in para 4.10.7. The CALC and the FOT Team Leader and CPO shall be fully involved in any decision to dissolve the system or to declare CLA positions redundant. Where a CLA contract is not renewed during the annual negotiation of contracts as detailed in para 4.3.3, the concerned CLA(s) shall receive a severance honorarium as specified in para 4.10.7."*

The issue to be decided is whether the respondent complied with this obligation that it undertook to follow in the event of involuntary termination of the CLAs. Paragraph 14 of the Originating Application shows that the respondents did comply with the above clause of the Terms of Reference.

Applicants aver that on the 14th February 2004 they were told that they were going to be retrenched. Respondents' witnesses do not deny the meeting of the 14th but aver that it was to inform applicants of the dissolution of the CLA system. We are inclined to believe the respondent's witnesses' version as the more probable version. The applicants' version is most likely to be spiced to suit their contention that they should have been dealt with in terms of the personnel regulations. Applicants aver that on the 16th February they were served with letters of termination which gave them three months notice with effect from 1st March 2004 to 31st May 2004. Clearly the applicants were consulted on the 14th February. Subsequently, they were given far longer notice than the one specified in the Terms of Reference. They cannot therefore complain.

Applicants' other contention that the CALC system is not dissolved only came in response to respondent's contention that they informed applicants of the dissolution of the CLA system as opposed to saying they were retrenching them. Respondents have successfully shown that they have dissolved the CLA system. They never at any stage said they have dissolved the CALC system, the dissolution of which is governed by a different clause namely clause 3.8.2 of the Terms of Reference. It is no surprise therefore that it continues to have meetings because that particular system is not dissolved. Infact PW1's evidence was that the committees which they were responsible for establishing were designed to last for a long time even after the completion of the project activities. If the evidence be true which we take to be it would not be consistent with the initial plan to have dissolved the CALC system upon completion of major project activities.

The only issue that now remains is that of the leave. We have already shown that the applicants have not pleaded the leave that they allege was due and not taken. The two witnesses who testified have not convinced us that they were not allowed to take their leave during their employment by the consultant. According to Exhibit 4 as at 8th September 2003, PW2 had a balance of 10 days to his credit. Respondents have not been able to show that these days were subsequently utilized or that they were paid. For this

reason PW1 is entitled to be given the benefit of the doubt. We accordingly find that the ten (10) days of leave still remain due to PW1. The other leave form is that of Amanda Marorisang Mapolisi which also shows a balance of ten (10) days due to her as of 16th December 2003. However, no evidence was adduced on this annexure and it never got handed in formally as part of the evidence. It is therefore, irrelevant. In the circumstances this application is dismissed with costs with the exception of the ten (10) days leave which remain outstanding to PW2. The respondent shall pay PW2 for those ten (10) leave days within thirty days of the handing down of this award.

THUS DONE AT MASERU THIS 1ST DAY OF SEPTEMBER 2005

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA	**I CONCUR**
MEMBER	
FOR APPLICANT:	**MR. SEKONYELA**
FOR RESPONDENT:	**MS MATSHIKIZA**