IN THE LABOUR COURT OF LESOTHO

LC/36/06

HELD AT MASERU

IN THE MATTER BETWEEN

MOTUMI RALEJOE **APPLICANT**

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **RESPONDENT**

JUDGMENT

Date of Hearing: 07/09/06

Retrenchment – Employer discovering misconduct after notifying employee of retrenchment – Employer purporting to hold disciplinary hearing after effective date of retrenchment – Employer purporting to summarily dismiss employee after retrenchment – Only employee capable of being disciplined in terms of employer's disciplinary code – Employer ordered to pay employee benefits withheld for alleged misconduct.

Employer's Separation Policy – Employee demanding application of repealed policy – Employee not exhausting local remedies – relief sought dismissed – 2/3 costs awarded to applicant.

1. The applicant filed these proceedings on the 25th April 2006 seeking an order that:

 (a) The respondent be ordered to pay applicant leave and severance pay in the sum of M263,265-35 and all his outstanding terminal benefits in accordance with the law.

(b) The so-called disciplinary proceedings held by respondent against the applicant is null and void.

(c) The respondent pays the applicant special retrenchment compensation in accordance with provisions of respondent's Staff Separation Policy of 1998.

(d) Payment of costs.

(e) Further and alternative relief.

2. The applicant was employed by the respondent on the 1st July 1988 as a permanent and pensionable employee. At the time of his termination the applicant was the Acting Public Relations Manager of the respondent. On the 15th November 2005 the applicant was served with a notice of termination with effect from 31st January 2006. The termination was said to be "…due to the LHDA's restructuring requirements." (See Annexure "MR1" to the Originating Application). Applicant was promised to be paid his separation package "in accordance with the approved Separation Policy and Procedure of 1st November 2003."

3. On the evening of the 27th January 2006 a farewell party was held for the applicant at Likileng in the Butha-Buthe District. At around 21.00 hours that evening, the applicant was approached by the then Chief Executive of the respondent Mr. Elias Liphapang Potloane, who handed him a notice of disciplinary hearing to answer certain charges on the 31st January 2006. The charges were annexed to the notice of hearing.

4. On the 31st January the applicant attended the hearing as stipulated. At the hearing the applicant raised an objection that contrary to clause 27.4.11 of the respondent's Human Resources Manual he had not been given enough time to prepare his defence. The clause in question stipulates that the notice containing the time and place of the hearing must be communicated to the employee at least two working days in advance.

5. While the applicant had been advised of the hearing on the 27th January, the notice was silent on the place and time of the hearing. This necessitated that he be given a supplementary letter which sought to cure the deficiencies. The supplementary letter was dated the 30th January 2005. The applicant's objection that he had not been given sufficient time to prepare was upheld, and the hearing was adjourned to the 8th February 2006.

6. At the resumed hearing, which was on the 8th and 9th February 2006, the panel was chaired by a different chairperson. No objection was raised and in our view rightly so, because the previous hearing had not entered into the merits when it was postponed; save for the accused employee's plea. After the applicant repeated his plea of not guilty he is recorded at page 5 o the record of proceedings (annexure "LHDA3" to the Answer) to have made the following statement:

"Mr. Ralejoe pointed out that he came to the hearing just to show respect to the committee and out of courtesy for the employer, but he felt that LHDA no longer has authority over him since he is no more an employee. He therefore wanted to find out from the committee what LHDA regulations stipulate in this regard."

7. The response he got was that the misconduct and the hearing in respect thereof started when he was an employee as such the hearing would proceed as the LHDA wanted to give him a fair hearing. He was further given a choice whether he wanted to attend and that in any event the hearing would continue regardless of his decision.

8. It is worth noting that the response of the respondent says nothing about the specific request of the applicant namely; what the LHDA regulations say about the situation where the accused person is no longer an employee. It is common cause that the applicant chose to stay.

9. The proceedings were conducted on the 8th and the 9th February 2006. On the 10th February the committee found him guilty as charged and decided that he be summarily dismissed with effect from 10/02/06. The effects of that finding was that applicant forfeited his statutory severance pay in terms of section 79 (2) of the Labour Code Order

1992 and special retrenchment compensation in terms of clause 27.2.4(5) of the LHDA Human Resources Manual.

10. The question that falls to be decided by this court is whether the respondent could disciplinarily charge the applicant as its employee and also purport to dismiss him after the 31st January 2006. The respondent's view is that they had the right to discipline the applicant because the applicant acquiesced to the jurisdiction by choosing to take part in the proceedings.

11. "Acquiesce" is defined by the Oxford Dictionary as to agree especially tacitly. The second definition is to raise no objection. The conduct of the applicant does not fit into these definitions.

12 He expressly put it on record at the start of the proceedings that he was only at the hearing as a show of respect not because he agreed that the respondent had any power to discipline him. This attitude was again expressed at the close of the hearing at page 13 of 14 of the record of proceedings. He said the committee should take into account the honour he had given to it by agreeing to "come to the hearing even though he is no longer an employee." Such a person cannot in our view be interpreted to have acquiesced to the jurisdiction.

13. Mr. Pheko for the respondent argued further that the respondent sought to protect itself against similar acts in the future; where employees would commit misconduct when they realized that they were just a few days from retirement or termination for any reason. Mr. Pheko was asked by a member of the court why the respondent did not withdraw the letter of termination in order to give itself time to apply its disciplinary code on the applicant. He said this was an oversight.

14. Assuming that was the case, the question which the applicant asked regarding what the respondent's regulations said in a situation where an erstwhile employee has since ceased to be an employee; ought to have reminded the respondents of the options open to them. Their response however pointed to a wrong understanding that they can

apply the personnel regulations even on former employees as long as acts complained of occurred while the person was still an employee.

15. The truth of the matter is that once a person ceases to be an employee like was the case in casu, such a person can only be dealt with in terms of the ordinary commercial, contractual or criminal laws of the country and no longer the labour laws. Mr. Pheko was asked further whether for the month of February the applicant was still afforded ordinary benefits that accrued to him as an employee. It turned out that this was not the case, because everybody's understanding was that the applicant's employment came to an end on the 31st January 2006.

16. In the case of Tsepo Tapeang .v. Huckster Home Import and Export (Pty) Ltd LC66/05 (unreported) there was a dispute whether the applicant had been reinstated to his job in accordance with the award of the Directorate of Dispute Prevention and Resolution (DDPR). It was found that the employer had written to the applicant to come for a hearing to answer why he had not reported for work on the date that it had been ordered that he should resume work. The court concluded that that act of the employer amounted to reinstatement because there was no way that the employer could charge and subsequently dismiss a non-employee. (See p.5 of the written judgment).

17. In casu the applicant was terminated by way of retrenchment on the 31st January 2006. He was not subsequently reemployed. There was therefore no way in which the employer could purport to charge him disciplinarily after the 31st January 2006.

18. In Whitehead .v. Woolworths (Pty) Ltd (1999) 20 ILJ 2133 at 2137 the word "employee" was interpreted thus:

"In terms of the definition a person is an employee when such person actually works for another person… In addition to working for another the employee must also receive or be entitled to receive remuneration. The remuneration referred to must correspondingly mean remuneration for work done or tendered to be done."

These decisions lead this court to the conclusion that the question whether the respondent can purport to disciplinarily charge and

subsequently dismiss a person who has ceased to be an employee, must be answered in the negative.

19. The fact that on the 8th and 9th February the applicant could no longer be subjected to the respondent's disciplinary process means that, he could not be found guilty of misconduct on the 10th February 2006. It means further that he could not be summarily dismissed as the respondent purported to do on the 10th February 2006. The applicant was infact retrenched on the 31st January 2006 and he should have been paid his terminal benefits on that date pursuant to section 84 of the Code. In other words his terminal benefits should have been paid on the last day of employment.

20. The applicant further contended that his special retrenchment compensation should be worked on the basis of the 1998 Staff Separation Policy as opposed to the 1st November 2003 policy. The reason for this is that the 1998 policy would entitle him to payment of two weeks wages for every completed year of service calculated at 100% of Cost To Company (CTC) while the 2003 one reviews it down to 60% of CTC. Applicant avers that the 60% of CTC is less favourable and that it was done without consultation with him.

21. In ordinary administrative practice, there are no parallel administrative policies. A latter policy always replaces the old one unless a contrary intention is stated. Neither is an employee entitled to choose which one policy is to apply to them and which one will not. It is the prerogative of the employer to determine an applicable policy. Where employees are unhappy, they are entitled to challenge the offending policy through normal procedures availed to them by the employer's rules or regulations.

22. It is now approximately three years since the 2003 policy was adopted. There is no evidence that employees at any time expressed dissatisfaction with it. Applicant cannot therefore be heard to belatedly challenge the applicability of the policy adopted three years ago when he failed to do so whilst he was an employee. In other words he should have first exhausted the domestic remedies before approaching the court.

23. The 2003 policy provides that it is reviewing "…the approved staff separation policy and procedure dated 16 December 1997…." We take it that this is only a discrepancy in dates but the intention was to refer to the 27th January 1998 policy, which is the one the applicant wants to be applied to him.

24. If it is reviewing the previous policy it is in effect changing it. In clause 3, the 2003 policy provides that "the policy shall apply to all employees of the LHDA excluding persons who are not citizens of Lesotho…" This clause makes it clear that there is no room for choice. The 2003 policy applies to everybody. For these reasons the applicant's claim that he should be treated in terms of the 1998 policy as opposed to the 2003 policy cannot succeed. It is accordingly dismissed.

25. We accordingly make the following order:

25.1. The disciplinary hearing held against the applicant on the 8th, 9th and 10th February 2006 are held null and void.

25.2 The respondent is directed to pay applicant his terminal benefits in accordance with the contents of "MR1" to the Originating Application. "Notice of Termination of Permanent Employment Contract dated 15th November 2005.

25.3 Given the extent of applicant's success and failure in this Application, the applicant is awarded two thirds of the costs.

25.4 The order in 2 above must be complied with within thirty days from the handing down of this award.

THUS DONE AT MASERU THIS 12TH DAY OF SEPTEMBER 2006

<u>L. A. LETHOBANE</u>
PRESIDENT

L. MATELA **MEMBER**	**I CONCUR**
D. TWALA **MEMBER**	**I CONCUR**
FOR APPLICANT:	**MR. B. H. SEKONYELA**
FOR RESPONDENT:	**MR. T. PHEKO OF LHDA** **LEGAL DIVISION**