**IN THE LABOUR COURT OF LESOTHO** **LC/REV/10/10**

**HELD AT MASERU**

**In the matter between:**

**LESOTHO ELECTRICITY COMPANY (PTY) LTD.** **APPLICANT**

**and**

**MBELE HOOHLO** **1ST RESPONDENT**
**DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION** **2ND RESPONDENT**

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# *JUDGMENT*

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***DATE: 6th MARCH, 2012***

***Review of arbitral proceedings - Where the employee had been left to work beyond the expiration of his fixed term contract - The Arbitrator awarded compensation which the employer contended had no legal basis - The Court concluded the Arbitrator properly exercised a discretion that was vested in her and the award cannot therefore be disturbed - The review application is dismissed.***

1. This dispute arose out of a fixed term contract of employment entered into between the applicant and the 1st respondent. The 1st respondent occupied the position of General Manager, Engineering on a contract initially running from 1st April, 2006 to 31st March 2009. Upon the expiry of this contract it was extended for a further period of one year ending 31st March, 2010.

2. The problem arose when the 1st respondent was left to discharge his functions beyond the 31st March, 2010, the date of expiration of his contract. The contract contained a clause (clause 13) to the effect that the applicant would notify the 1st respondent six months prior to the expiration of the contract on whether or not it intended extending it.

The clause read;

> ***The employer will pronounce his firm intention to renew or not to renew the contract six (6) months before expiry. Renewal of the contract will be negotiable by both parties. In turn, should the employee wish to have the contract renewed, he shall express such intention six (6) months before the expiry of the contract.***

3. Communication regarding 1st respondent's fate only took place on 27th March, 2010 through a letter in which the company expressed its intention to have the contract renewed by a further three (3) months, an offer the 1st respondent declined, insisting on a one year extension. The parties failed to reach an agreement and in the midst of the impasse the applicant decided to terminate 1st respondent's contract by its letter dated 14th June, 2010, about two and half months after the expiry of his fixed term contract.

4. Aggrieved by this decision, the 1st respondent instituted proceedings before the Directorate of Dispute Prevention and Resolution (DDPR) challenging the fairness of this termination. He contended that the said termination amounted to a dismissal as opposed to a contract that was coming to an end by effluxion of time. Applicants argued, on the other hand, that there was no dismissal as the contract being of a fixed term came to an end by effluxion of time on 31st March, 2010.

5. The learned Arbitrator ruled that there was a material breach of contract by the employer, applicant herein, and ordered that the 1st respondent be paid six months wages, comprising the notice period for failure to comply with clause 13 of the contract of employment and ordered a further payment of three months wages as compensation for the breach of contract. The applicant is dissatisfied with the latter portion of the award and has approached this Court to have it reviewed, corrected and set aside. Applicant's Counsel argued on behalf of the applicant that the learned Arbitrator misdirected herself in granting the three months compensation as it was without a legal basis and unjustified.

## *WHETHER THE REVIEW APPLICATION IS IN ORDER*

6. The facts leading to this dispute are common cause. If we may recap, the gist of this review application is whether or not it was appropriate for the learned Arbitrator to have awarded the 1st respondent three months compensation over and above the six months which she indicated represented the period of six months which the applicant ought to have given the 1st respondent as notice before the

expiration of his fixed term contract. It is applicant's case that the award of ***"further compensation"***, as he put it, was a gross misdirection on the part of the learned Arbitrator which she could not even rationalise.

7. Applicant's Counsel contended further that applicant's contractual obligations stopped on the 31st March, 2010 when the 1st respondent's fixed term contract expired. He in a way, acknowledged, ***albeit***, not expressly that the 1st respondent was entitled to the six months notice as enshrined in Clause 13 of the contract of employment, but failed to get the basis for the three months compensation. Substantiating his argument, he indicated that the letter of 27th March, 2010, constituted an offer which the 1st respondent didn't accept. In a nutshell, he argued that the essential ingredients of ***"offer"*** and ***"acceptance"*** which constitute a legally binding contract were lacking resulting in the non-existence of any obligations on the part of the applicant towards the 1st respondent in the period beyond the expiration of the contract. Acceptance of an offer results in a valid contract.

8. As aforementioned, the basis of applicant's dissatisfaction with the learned Arbitrator's award was that it was grossly unreasonable or irrational. It is trite that at common law, courts can only interfere with decisions of functionaries statutorily vested with power to make decisions, the DDPR in this case, only when the decision is found to be arbitrary, irrational, actuated by malice, an ulterior or improper motive - See ***Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services (2003) 24 ILJ, (LC) 803.***

9. A few questions will help us determine the matter at hand; was the award one which no reasonable Court could have reached in the circumstances of the case? furthermore did the three months constitute extra payment and therefore unjustified? This is a case in which much as this was a fixed term contract the employer had undertaken to give the 1st respondent six months notice prior to the date of termination of the fixed term contract of its intention to either renew or not to renew the contract. As it is the employer decided to terminate the contract when the 1st respondent declined an extension of three months and instead insisted on a one year extension as in the previous one. In terms of Section 68 (b) of the Labour Code Order, 1992 (hereinafter referred to as the Code), dismissal includes;

> ***The ending of any contract for a period of fixed duration for the performance of a specified task or journey without such contract being renewed, but only where the contract provided for the possibility of renewal.***

10. Clause 13 of the employment contract between the parties provided for the possibility of a renewal and the applicant indeed offered a renewal which unfortunately fell through when the parties could not agree on its terms. The learned Arbitrator concluded in her award that applicant's action of dismissing the 1st respondent did not constitute a dismissal but was a breach of contract. As far as we are concerned, because applicant's breach culminated in the termination of 1st respondent's contract, it constituted a dismissal in terms of 68 (b) of the Code, and not just an ordinary breach of contract. Provisions of the Code regarding dismissal therefore kick in.

11. Section 62 (3) of the Code regulates fixed term contracts where there is no provision for notice. Such types of contracts come to an end automatically on the date set as the date of expiry of such a contract. It is a contract that comes to an end by effluxion of time. The Section provides that;

> ***A contract for one period of fixed duration shall set forth its date of termination. Such a contract shall, subject to the provisions of Section 66 concerning dismissal, automatically terminate on that date and no notice of termination shall be required of either party.***

In a case before us, the parties had a fixed term contract which contained a provision for notice. We feel it is only logical that a distinction be drawn between a fixed term contract with a provision for notice and one with none. In the end, surrounding circumstances of each contract of a fixed duration will determine whether the termination was fair or not.

12. By virtue of the contract having been of a fixed duration but with a provision for notice, we deem it appropriate that the provisions of the Code regulating notice be invoked. The contract is unique and should be treated as such. Section 65 of the Code provides that;

> ***If upon termination as provided under sections 63 and 64*** (relating to notice) ***the employer suffers the employee to remain, or the employee without the 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 shall continue as if there had been no termination, unless the employer and employee have agreed otherwise.***

13. It is not disputable that the applicant allowed the 1st respondent to remain in employment beyond the contract period, and that no notice of termination was given prior to the expiration of the fixed term contract. In terms of Section 65 (cited above) by allowing the 1st respondent to remain in employment beyond the contract period, the contract was allowed to continue as if there was no period fixed for its expiry. The question of a fixed term contract coming to an end by effluxion of time therefore does not arise because of the nature of 1st respondent's contract which provided for notice. Had the applicant been diligent enough to have exercised its rights under Clause 13 timeously by engaging the applicant on its proposed terms before the expiration of his contract, this dispute would not have arisen. Parties are urged to abide by terms of employment that they have committed themselves to. With proper data management regarding employees' contracts these kind of problems can be avoided.

14. Coming to the award itself; the issue is whether there was double compensation as suggested by applicant's Counsel? Did the three months constitute extra compensation? Our answer is in the negative. Having determined that the termination of 1st respondent's contract constituted a dismissal, the provisions of Section 73 of the Code come into play. The Section provides remedies in an unfair dismissal case.

15. The learned Arbitrator made a finding that the applicant committed a material breach of the contract between itself and the 1st respondent by failing to give him the requisite contractual six months notice prior to the dismissal. She pointed out in paragraph 22 of the award that the 1st respondent was entitled to the full remuneration package for the period of six months which she felt was due to him in terms of Clause 13 of the employment contract. She further ordered three months compensation for failure to have notified the 1st respondent six months prior to the expiry of his contract whether or not it would be renewed. Granted, the latter portion is rather inelegantly couched. Two distinct issues come out, namely, payment of what is otherwise a legal entitlement which was contractual and compensation for the breach infringement of a contractual term. As it is, the six months payment was for the contractual notice and the three months was compensation for the infringement of the contractual term regarding notice. These are two distinct payments and not double compensation as submitted on behalf of the applicant. This the learned Arbitrator explained in paragraph 22 of her award.

16. The award of compensation is discretionary and depends on the particular circumstances of each case. Section 73 (2) of the Code (as amended) and to the extent relevant to the case, provides that the amount of compensation to be

awarded ***"shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party…"*** The learned Arbitrator decided to award over and above the notice due to the 1st respondent, three months wages as compensation for letting him remain at work beyond the contract period. The learned Arbitrator has exercised a discretion here, and we are not in a position to interfere where there was not even a suggestion that the power was not exercised judiciously.

17. The learned Arbitrator duly applied her mind to the case. The test being whether the outcome can be sustained by the facts found and the law applied - see ***Coetzee v Lebea No and Another (1999) 20 ILJ, 129 (LC)***. The test has been cited with approval in a number of this Court's cases including the recent one, ***Mookho Nkaota v J&S Fashions (PTY) LTD and DDPR LC/REV/78/10***. The Court held in ***Coetzee's*** case that the seeds of the distinction between review and appeal lies in the phrase so commonly used to describe the process failure in the reasoning phase of a tribunal's proceeding - ***"the failure to apply one's mind"***. It was pointed out that the test is different from the one that applies to an appeal, namely, whether another Court would have come to a different conclusion. Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind to an issue before it, it will not interfere with the result even if it would have come to a different conclusion. If we may remind ourselves DDPR awards are only subject to review and not appeal. We find the learned Arbitrator to have applied her mind to the case that was before her and find the decision she made reasonable. In the circumstances, we find no reason to interfere with the learned Arbitrator's finding. The review application is therefore dismissed and the DDPR award is upheld.

There is no order as to costs.

**THUS DONE AND DATED AT MASERU THIS 06TH DAY OF MARCH, 2012.**

**F.M. KHABO**
**DEPUTY PRESIDENT OF THE LABOUR COURT**

**L. MATELA** **I CONCUR**
**MEMBER**

**M. MAKHETHA** **I CONCUR**
**MEMBER**

**FOR THE APPLICANT:** **ADV., R. NTS'IHLELE**

**FOR THE 1ST RESPONDENT:** **ADV., N.T. NTAOTE**