IN THE LABOUR COURT OF LESOTHO **LC/REV/54/13**

HELD AT MASERU

In the matter between:-

MAHAO FRANCIS JOHANE **APPLICANT**

and

CHRISTIAN COUNCIL OF LESOTHO **1st RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

DATE: 13/02/15

Review of an arbitral award - Fixed term contract - Legitimate expectation - Was it reasonable to expect a renewal in the circumstances of this case - Further whether an indication of lack of funds by the employer changed the employee's dismissal from being one based on effluxion of time to one based on operational requirements, a concept regulated by a different set of principles from a fixed term contract - Court finds applicant not to have been dismissed on operational grounds but his contract to have terminated on effluxion of time as envisaged by his contract and Section 62(3) of the Labour Code Order, 1992.

POINT IN LIMINE IN RESPECT OFAUTHORITY TO REPRESENT

1. Applicant's Counsel raised a point ***in limine*** to the effect that 1st respondent's Vice - Chairperson Mr Mokobori lacked authority to defend the matter on behalf of the 1st respondent in these proceedings. According to him, the words ***"l am duly entitled to depose hereto"*** were not sufficient to confer authority on Mr Mokobori to make representations on behalf of the 1st respondent. The latter had averred in a sworn statement that he was entitled to depose to an affidavit on behalf of the 1st respondent.

2. Indeed, an artificial person unlike an individual can function only by passing resolutions in the manner prescribed by its constitution. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution - ***Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347***. The Court,

however, decided in ***Tattersall and Another v Nedcor Bank Ltd 1995 (3) SA, 222*** that a copy of a resolution of a company need not always be annexed. This position was confirmed by renowned authors Herbstein & Van Winsen in ***Civil Practice of the Supreme Court of South Africa, 4th ed., at p. 221***. The applicant did not say that he doubted Mr Mokobori's authority to represent the 1st respondent. He merely challenged the fact he had not attached a resolution of authority to his founding affidavit. In our view, it was sufficient for him to aver that he was entitled to depose to the affidavit, considering his position of being second in command in the hierarchy of 1st respondent.

3. The position would be different if the applicant were to adduce contradictory evidence to the effect that Mr Mokobori was not authorised to depose thereto. In the absence of any contradictory evidence, the Court would be entitled to conclude that the deponent of an affidavit had the necessary authority. It is for the person who challenges the authority to tender proof that the deponent had no authority to act on behalf of a juristic person - see ***Mall (Cape) (Pty) Ltd (supra)***. In ***Central Bank of Lesotho v*** Phoofolo ***LAC (1985 – 1989) 253 at 258 -259*** Mahomed JA., sitting in the Court of Appeal of Lesotho pointed out that:-

> ***The first technical ground was that no resolution, evidencing authority of the Governor to depose to an affidavit on behalf of the appellant or to represent the appellant in the proceedings was filed. This objection was without substance, and was correctly dismissed by Molai J., There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts.***

In our opinion, Mr Mokobori was fairly senior and he could depose to an affidavit on behalf of the 1st respondent, unless the applicant was to prove otherwise, which was not the case. Having disposed this point ***in limine***, we will move to the merits of the case.

MERITS

4. The applicant was at all material times employed as 1st respondent's General Secretary on a four year fixed term contract commencing on 1st November, 2008 and ending on 31st October, 2012. It was one of the terms of the contract that he would be given two months' notice of the employer's intention to renew or not to renew the contract (Clause 2.1) prior to the expiration of the contract. On 16th August, 2012 he received a notice from the Chairperson of the Christian

Council reminding him that his contract would come to an end on 31st October, 2012.

5. This did not go down well with him and he lodged a case of unfair dismissal before the Directorate of Dispute Prevention and Resolution (DDPR), a case he unfortunately lost. He had argued before the DDPR that he had a legitimate expectation that his contract would be renewed because he did not have any record of underperformance and or ill - discipline. Aggrieved by the DDPR decision, he approached this Court to have it reviewed and set aside.

6. His main grounds of review were that he had been dismissed as opposed to the contract having expired by effluxion of time, and secondly, that the learned Arbitrator committed a procedural irregularity by letting him start the proceedings when it was supposed to have been the 1st respondent who started to address her. With these purported irregularities, applicant's Counsel submitted that the learned Arbitrator failed to apply her mind to the case that was before her.

FIXED TERM CONTRACT VERSUS DISMISSAL ON OPERATIONAL GROUNDS

7. It is applicant's case that Mr Mokobori's testimony to the effect that the 1st respondent could not renew his contract of employment because it did not have funds to sustain his position constituted a dismissal for operational reasons. He further averred in his founding affidavit that the DDPR misdirected itself by concluding that there were no funds to sustain his position when it had not heard evidence to that effect. He contended that a finding of this nature ought to have been supported by evidence of 1st respondent's financial status. He argued that if a proper enquiry had been done, the learned Arbitrator would have established that there was overwhelming evidence that the 1st respondent still had funds to sustain his position beyond July, 2013.

8. He cited the following examples in support of his allegations:- that subsequent to his dismissal, the 1st respondent appointed another person in his position on the same terms and conditions as his; that the respondent was funded by an organisation styled ***Evangelscher Entwicklungsdienst e.v*** and had over Two Million Maloti (M2 000 000) in reserves. He concluded that had the learned Arbitrator applied her mind to the evidence that was tendered before her she would have ruled the case in his favour.

9. In reaction, Mr Mokobori averred in his opposing affidavit that the applicant never challenged the evidence that 1st respondent's funds would not carry it beyond July, 2013. He further denied that there was a new person appointed in applicant's place. He argued that, at any rate, the applicant could not raise this point at this stage as it was never raised at the DDPR; otherwise they could have addressed it. He contended that applicant's employment contract was not terminated on operational grounds but by effluxion of time as his fixed term contract had come to an end. Respondent's Counsel argued that applicant had instituted a case of unfair dismissal based on a legitimate expectation of renewal which the learned Arbitrator duly determined and not on operational reasons as he alleges.

10. 1st respondent's Counsel submitted that the applicant had failed to establish any reviewable irregularity. He argued that the issue of funds was raised in the context of combating applicant's expectation of a renewal. The Court is therefore faced with two central questions: - One being to determine whether it was reasonable for the applicant to expect a renewal and secondly, whether the fact that Mr Mokobori alluded to lack of funds in his evidence, rendered applicant's contract of employment liable to be regulated by principles governing dismissals on operational grounds as opposed to fixed term contracts.

THE COURT'S ANALYSIS

11. It is trite that a contract of employment may take three forms ***viz.,*** a contract without reference to limit of time, a contract for one period of fixed duration and a contract to perform some specific work or to undertake a specified journey - ***Section 62 (1) of the Labour Code Order, 1992***. Applicant's contract was to terminate on 31st October, 2012 unless it was renewed. It was clearly a fixed term contract. It provided at paragraph 11.1 that:-

> ***Subject to the provisions of section 66 of the Labour Code*** (Order) ***1992 concerning dismissal this contract automatically terminate***(s) ***on the indicated expiry date and no notice of termination shall be required of either party.***

12. This clause is supported by ***Section 62 (3) of the Labour Code Order, 1992*** which 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.***

Despite these provisions, the 1st respondent decided to give the applicant a notice of termination. His contract provided in paragraph 2.1 that the 1st respondent would give him two months' notice on whether or not it intended to renew the contract. This in our view did not change the contract from being fixed term. We found it only fair to the applicant as it enabled him to prepare himself for the eventuality of the non-renewal of his contract.

13. The 1st respondent complied with this provision by informing the applicant two months prior to the termination of his contract that it would not be renewed. This followed a meeting of 1st respondent's Executive Committee held on 15th August, 2012 in which it was unanimously decided that applicant's contract not be renewed as it was a fixed term contract intended to end on 31st October, 2012 (attached to applicant's founding affidavit). The issue of financial constraints was not raised.

14. In our view, the 1st respondent complied with the letter of applicant's contract. The applicant was told well in advance that his contract would not be renewed. He averred that his expectation arose from the fact that he never had a record of poor performance and ill conduct. The Court held in ***SA Rugby Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another [2008] 9 BLLR 845 (LAC) at para 44*** that the onus is on an employee to establish the existence of a reasonable or legitimate expectation. The test whether or not an employee has discharged the onus is objective, namely, whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his or her fixed term contract on the same or similar conditions. Once it is found that there has been a dismissal, the onus shifts to the employer to justify its fairness. This is in tandem with ***Section 68 (b) of the Labour Code Order, 1992*** which provides that:-

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

15. The issue of applicant's good performance and good conduct were not relevant in his case and could not create a legitimate expectation on his part. It would only be relevant if it would have been raised as a reason for non-renewal of his contract as was the case in ***Lesotho Revenue Authority v `Mamonyane Bohloko and Two Others LAC/CIV/A/01/2014*** where the 1st respondent had been warned of her poor performance on a number of occasions prior to the termination of her contract..

16. The applicant argued that he had been dismissed as opposed to the contract having automatically expired. He based himself on Mr Mokobori's evidence before the DDPR that the 1st respondent could not renew his contract because it faced financial constraints. He contended that this constituted a dismissal for operational reasons and therefore shifted the onus on the employer to prove that the dismissal was fair. As it is, the termination of a fixed term contract and the existence or non-existence of operational grounds are two distinct issues. Dismissals on operational grounds are regulated by ***Section 66 (1) (c) of the Labour Code Order, 1992*** when a dismissal occurring as a result of the expiration of a fixed term contract is regulated by ***Section 62 (3) of the Labour Code Order, 1992*** quoted above.

17. As shown above, applicant's contract was for a fixed term. He was afforded the two months' notice as provided in his contract. The raising of the issue of financial constraints was brought up by Mr Mokobori at the DDPR. This was long after a decision had been taken to terminate his contract and the due notice given. As far as we are concerned, My Mokobori's testimony was inconsequential. There was in fact no obligation on the part of the 1st respondent to give reasons for the termination of his contract because in terms of ***Section 62 (3) of the Labour Code Order, 1992*** no notice of termination was required of either party. This case is similar to that of ***Lesotho Electricity Company (Pty) Ltd v Mbele Hoohlo LC/REV/10/10*** in which the respondent was in a fixed term contract. Parties had agreed as part of the contract that he would be informed six (6) months prior to the expiration of his contract whether it would be renewed or not. The fact that there was provision for notice did not change Mr Hoohlo's terms and in the same vein did not change applicant's.

18. The issue about his dismissal being for operational reasons came for the first time on review, and it is not proper. The record of proceedings clearly reflects that the case the applicant had referred to the DDPR was for unfair dismissal based on legitimate expectation and not one based on dismissal for operational reasons. The question of the contract having been terminated on operational grounds therefore does not feature.

19. In our view, the learned Arbitrator duly applied her mind to the case that was before her. Failure to apply one's mind includes a failure to consider, alternatively, to decide an issue - ***Lynch v Union Government (Minister of***

Justice) 1929 AD 281 at 285. The issue that was before the learned Arbitrator was whether the applicant had a reasonable expectation to have his fixed term contract renewed. She found none existed. Granted, she considered Mr Mokobori's averments that the 1st respondent was in dire straits financially, but in our opinion, it was just an explanation which did not convert termination of applicant's fixed term contract into an operational requirements dismissal. It is our considered opinion that Mr Mokobori's referral to lack of funds at the DDPR was inconsequential because the 1st respondent had duly complied with the terms of applicant's contract.

DUTY TO BEGIN IN TERMS OF THE LABOUR CODE

20. Applicant's case before the DDPR was that he had been unfairly dismissed as he had a legitimate expectation that his contract would be renewed. The learned Arbitrator was therefore faced with an unfair dismissal case. One of applicant's grounds of review was that he had been made to begin giving evidence at the DDPR when it ought to have been the 1st respondent who started. Applicant's Counsel argued that in unfair dismissal cases it is incumbent upon the employer to prove that the dismissal was fair. Hence, he contended that the 1st respondent bore the onus of proof and the duty to begin to show that he acted fairly. 1st respondent's Counsel objected to the point being raised at the review stage. He argued that the 1st respondent had an ample opportunity to have objected to the issue at the DDPR.

21. In terms of ***Section 66 (1) of the Labour Code Order, 1992*** an employer has an obligation in an unfair dismissal case to give a valid reason to dismiss an employee. In other words, he or she bears the burden of proof to prove that he or she acted fairly in dismissing an employee. The Act however does not say who has a duty to begin. As far as we are concerned, it is irrelevant as to who starts to adduce evidence. In our view, it is a matter of convenience. Even if the applicant starts, the employer would still bear the evidentiary burden to prove that he or she acted fairly in dismissing an employee. If the applicant starts he or she lays the foundation for his or her claim to enable the respondent to answer but it does not affect the evidentiary burden which in unfair dismissal cases is cast on the employer. The duty to adduce evidence is merely a procedural device; it ensures that parties give their evidence in the most logical order. Onus may even change in the course of a case depending on the nature of evidence tendered. We find the learned Arbitrator to have committed no irregularity in allowing the applicant to have started first in his evidence.

DETERMINATION

22. It is on the above analysis that we come to the following conclusion that:-

i) Applicant's contract was for a fixed term and expired by effluxion of time. The question of dismissal never arose;

ii) The review application is dismissed; and

iii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 13TH DAY OF FEBRUARY, 2015.

F.M KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

P. LEBITSA **I CONCUR**
ASSESSOR

M. MOSEHLE **I CONCUR**
ASSESSOR

FOR THE APPLICANT: **ADV., S.P SHALE - SHALE CHAMBERS**

FOR THE 1st RESPONDENT: **ADV., N.T NTAOTE - NTAOTE CHAMBERS**