

CIV/APN/344/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABO MOEKETSI

Applicant

and

NATIONAL UNIVERSITY OF LESOTHO

Respondent

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 10th day of February, 1995

This is an application for an order in the following terms:

- (a) Directing Respondent to pay forthwith to Applicant his monthly salary and housing allowance with effect from January 1993 to July 1993;
- (b) Directing Respondent to pay the costs hereof;
- (c) Granting Applicant further and/or alternative relief.

The facts of this case are common cause. They are that at all material times the applicant was in the employ of the respondent as the Senior Assistant Registrar. On or about the 5th September, 1986 the applicant was released by the Academic Staff Appointments Committee to the respondent for a period of two years on secondment with immediate effect. Annexure "TM1" is a letter by the Registrar of the respondent to the applicant informing him that he was seconded to the Civil Service for a period of two years.

The secondment was renewed several times until the 31st day of December, 1993 when the Government of Lesotho terminated the secondment without giving any reasons. On the 28th January, 1993 the applicant informed the respondent that his secondment to the Civil Service had been abruptly terminated and informed the respondent that he was ready to resume his work with it as its employee. On the 22nd February 1993 the respondent's Academic Staff Appointments Committee decided that the applicant should resume his duties with the respondent with effect from the 1st July, 1993.

The gist of the correspondence that followed thereafter was that the applicant was saying that he was entitled to resume his duties with the respondent immediately after his secondment to the Civil Service was terminated. He contended that he was

entitled to his salary as an employee of the respondent who is on permanent establishment. On the other hand the respondent said that the Government of Lesotho and the applicant were under an obligation to give it notice in advance of the termination of the respondent's secondment so that it could make financial arrangements for the re-absorption and relocation of the applicant.

In paragraph 3 of its answering affidavit the respondent's Registrar avers:

"I admit that the Applicant is in the employ of the Respondent. I further admit that the Applicant went to work in the Public Service on secondment. I must state however that the Applicant's secondment to the Public Service has been tacitly renewed without any formalities since September, 1988. There were no set conditions of secondment entered into by the three parties concerned, namely the Applicant, Respondent and the Public Service. However it was an implied term of the secondment agreement that the Public Service would give the Respondent reasonable notice of termination of the secondment to enable the Respondent to make proper arrangements for the re-absorption of the Applicant." (My underlining)

It seems to me that the bone of contention between the parties is whether there is an implied term of the secondment agreement that the Public Service would give the respondent reasonable notice of termination of the secondment to enable the respondent to make proper arrangements for the re-absorption of the applicant.

In *Rapp and Maister v. Oronovsky*, 1943 T.P.D. 68 the headnote reads as follows:

"A term will not be implied by the Court in a contract unless it is necessary to give effect to what was clearly the intention of the parties as disclosed by them in the express terms they have used and in the surrounding circumstances. The mere fact that, if one of the parties or a bystander had suggested it, only an unreasonable person would have disagreed is not a sufficient ground for implying a term.

Respondent had granted an option to H. and G., who had ceded their rights under it to the applicants. Such option was to purchase the shares in a company which was in process of being formed which company proposed to acquire certain lots and to erect thereon certain buildings. The price to be paid for the shares was to

be arrived at on the basis of the cost of erecting the said buildings, which at the date of the grant of the option was unknown. During the course of the option period, but before exercise of the option, the applicants requested the respondent to furnish a statement showing the costs of the buildings erected. Respondent refused and applicants asked for an order upon him to furnish such statement.

Held, that no term could be implied by the Court in the option to the effect that applicants should be entitled to such a statement."

In *Douglas v. Baynes* 1908 Vol. II T.S. 1207 at p.1210 Lord Atkinson said:

"The first question for decision on this appeal, therefore, is whether the contract can be read as if these, or equivalent words, were by implication imported into it. The principle on which terms are to be implied in a contract stated by Kay, L.J., in *Hamlyn & Co. v. Wood & Co.* (1891) 2 Q.B. p. 494), in the following words: "The court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances

under which it is entered into, such an inference that the parties must have intended the stipulation in question that the court is necessarily driven to the conclusion that it must be implied. " In their lordships' opinion there is nothing in the language of this contract, or the circumstances under which it was entered into, to drive them to the conclusion that the parties to it ever intended to stipulate that a portion of the 12,000 shares, sufficient to raise a reasonably adequate working capital, should be reserved for that purpose."

It seems to me that in the present case there is nothing in the language of this contract, or the circumstances under which it was entered into, to drive me to the conclusion that the parties to it ever intended to stipulate that the Public Service must give the respondent reasonable notice of termination of the secondment in order to enable the respondent to make proper arrangements for the re-absorption of the applicant.

It is common cause that on the 5th September, 1986 the applicant was seconded to the Civil Service and the terms of the agreement appear in Annexure "TM1" which is a letter written to the applicant by the Registrar of the respondent. It reads as follows:

"Mr. T.B. Moeketsi
N.U.L.,
ROMA 180,
Lesotho

Dear Mr. Moeketsi,

YOUR RELEASE TO THE CIVIL SERVICE

Further to my letter to you dated the 8th September, 1986, regarding the above issue, I wish to inform you that at its 157th (special) meeting held on the 5th September, 1986, the Academic Staff Appointments Committee agreed to release you for a period of two years on secondment to the Civil Service with immediate effect.

The Committee noted that you were about to proceed on study leave which had already been approved. Section 12 (ii) of your contract with N.U.L. refers.

Yours faithfully,

REGISTRAR

cc: P.S. Ministry of the Public Service
Bursar, NUL".

The terms of the contract are simple and straightforward. They are that the applicant is seconded to the Public Service for a period of two years. The only reasonable inference to be drawn from the language used by the parties in their contract is that at the end of two years the applicant would resume his duties with the respondent. There is no implied term that at the end of two years, or to be more exact, towards the end of the secondment, the applicant was expected to give notice to the respondent that the secondment would expire on a certain date.

I am of the view that the respondent acted in a somewhat unfair manner towards the applicant. In the letter of the 22nd February, 1993 (Annexure "TM5") the Acting Registrar of the respondent informs the applicant that he was authorised to inform the applicant that the Academic Staff Appointments Committee at its meeting held on the 19th February, 1993 decided that the applicant resumes duties in the Administration of the University with effect from the 1st July, 1993. This was a new term of the secondment that was arbitrarily imposed by the respondent without giving the applicant a chance to be heard because it was a decision which directly affected his interests. The respondent was not entitled to impose in an arbitrary manner such an important term which drastically affected the interests of the applicant. I do not agree with the respondent that the re-absorption of the applicant is a purely administrative matter which entitles it to take a decision without first hearing him. The suspension of an employee from work for a period of about six months without a salary is an administrative act which seriously affects the individual's existing 'rights, liberties or privileges'. (See Baxter: Administrative Law, 1989 Reprint).

In paragraph 3 of the answering affidavit the respondent alleges that it was an implied term of the secondment that the Public Service would give the respondent reasonable notice of termination of the secondment to enable the respondent to make

proper arrangements for the re-absorption of the applicant. Although I have already come to the conclusion that there was no such implied term, the assertion by the respondent clearly shows that it (respondent) believed that the contract of secondment was entered into by the Public Service and the respondent. It seems to me that that is the proper and correct interpretation of the contract. The applicant was told by the respondent (per Annexure "TM1") that "the Academic Staff Appointments Committee agreed to release you to the Civil Service with immediate effect."

The agreement was between the respondent and the Civil Service. The applicant was merely ordered to go on secondment the terms of which were not revealed to him. It seems to me that it was the Public Service that had to give notice to the respondent of termination of the secondment because the contract was between the respondent and the Public Service. However I have already said that such a term of contract cannot be implied.

I am concerned about the failure of the applicant to report himself for his duties with the respondent between the 1st January, 1993 and the 27th January, 1993. The secondment was ended on the 31st December, 1992 and for almost the whole of January, 1993 he has not told the Court where he was and what he was doing. He was bound by the terms of his contract with the respondent to report for duty immediately the secondment was

terminated. If he wanted to go on leave, he was under an obligation to make arrangements with the respondent.

In the result the Court makes the following order:

- (a) The respondent is ordered to pay forthwith to applicant his monthly salary and housing allowance with effect from the 28th January, 1993 to the 30th June, 1993.
- (b) The respondent must pay costs of the application.

J. H. KHEOLA
CHIEF JUSTICE

10TH FEBRUARY, 1995

For Applicant - Mr. Pheko
For Respondent - Mr. Matsau