CIV\APN\225\94

IN THE HIGH COURT OF LESOTHO

In the matter between:

THUSO LAWRENCE RAMAEMA	1st Applicant
GEOFREY MOITSUPELI LETSIE	2nd Applicant

and

THE MINISTER OF THE PUBLIC SERVICE	1st Respondent
THE MASERU CITY COUNCIL	2nd Respondent
THE MINISTER OF HOME AFFAIRS	3rd Respondent
THE ATTORNEY GENERAL	4th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 16th day of March 1995

I have dismissed this Application on the 18th November 1994. In this ex parte application which a rule nisi was granted on the 15th August, 1994 by the Chief Justice, the Applicant had claimed for:

"1.1 The termination of the secondment of the Applicants by the First Respondent to the Second Respondent and the effect of such cancellation of secondment be suspended pending the preparation and implementation by the

Third Respondent of a scheme prescribing the terms and conditions under which officers are seconded for employment to the Second Respondent.

1.2 Interdicting the First, Second and Third Respondents from interfering in any way whatsoever with the employment and day to day duties of the Applicants as officers of the Second Respondent pending the outcome of this Application.

1.3 Authorising and allowing the Applicants to resume their duties with the Second Respondent on a fulltime basis and with the full benefits they enjoyed before the alleged termination of their employment with the Second Respondent.

1.4 That the decision by the First and Second Respondents to put the Applicants on compulsory leave be suspended pending the outcome of this Application.

1.5 That the decision of the 2nd Respondent to terminate the services of the Applicants with it be suspended pending the outcome of an Application to this Honourable Court to review the aforesaid decision of termination and also pending the outcome of this

Application.

1.6 That a Rule Nisi be issued calling upon the Respondents to show cause on a date to be determined by this Honourable Court why the interim should not be made a final Order of Court.

1.7 Directing that paragraphs 1.1, 1.2, 1.3, 1.4 and 1.5 operate with immediate effect as an interim Interdict."

The Applicants were seconded to the Second Respondent during or about April 1989.

It is not quite clear what exactly were the terms and conditions by which the Applicant understood themselves to be bound. But I am convinced that there were such terms and conditions such as one will find in Annexure A (page 26 of the record) and Annexure A (page 28 of the record). All in all there were such terms and conditions with which the Second Respondent run its employees. They may not have been perfect, they may have not been completely satisfactory. Speaking for the Applicants I am satisfied that this question of pension contributions (to be computed and made over to the original Departments on repatriation and withdrawal of the Applicants) and gratuity

payments on repatriation of the officers seem to have been a worry of some kind.

I was able to detect at the earliest stage in Counsel's arguments that a wrong impression was being created that the unsatisfactory nature of the two mentioned items could be a condition precedent to the Applicants being repatriated to their former departments. This impression persisted. I thought it was unrealistic. I feel that the Respondents contributed towards maintaining this impression when regard is had to the following factors:

(a) The granting of compulsory leave to the Applicants to settle unsatisfactory administrative features caused by the inability of the Second Respondent to put its foot down to see that its resolutions were complied with.

(b) The vacillation of the Second Respondent to have impressed on the first and Third Respondents to the necessity take positive steps when effectively and for all intents and purposes the Second Respondent had persuaded the First and Third Respondents that the Applicants had outgrown their usefulness or alternatively when they had not accepted to be re-absorbed by the Second Respondent.

(c) The fact that the termination of the Applicants' secondment was discussed at many levels in the hierchy, and committees of the Second Respondent over considerable time. At certain levels the goings on or deliberations of which the Applicants being privy or alternatively having had access to information or could influence events or decisions times because they were part of the procedures making or had access to information sometimes in good faith.

(d) The impression given to Applicants that certain things

> were negotiable to the extent that fundamental rules of master and servant could be relaxed. One of the rules is that the master is free to post or recall his employees the way he wants.

I am not intending to blame any of the parties for the sorry state of affairs in the Second Respondent's administration. Its administration looks cumbersome. Its decisions need to be well articulated and to filter at many levels including that there has to be consultations where necessary. This may seem dilatory to the ordinary eye at times. There appears to be a lot of trial and error in the decisions of the Second Respondent. One suspects that this is due to absence of a tradition of firmness and the fact that some people manipulate decisions, being motivated by corrupt motives and sometimes not. One of the distinct feature of the Second Respondent's problems is that some people simply get to be too powerful an go about wanting to extract too many advantages. This is the impression I got on the papers in relation to some employees of the Second Respondent.

I must confess that I was inclined to dismiss the application at about the stage when Mr. Mohapi had been midway through this argument. But there were many thing that had to be clarified even at that stage. These are caused by the failure of the Attorney General's office to appreciate the fact that they represent powerful clients, the Government departments. The Government is so powerful that it holds the fate of poor

citizens, its employees in its hands which sometimes results in painful consequences and frustrations if things are not settled well and truly. In these I often refer to the usual interdictions of Civil Servants which go on and on frustrating the officer and milking the coffers of state unnecessarily. That is the reason why I look very closely at the conduct of the clients of the Attorney General as Mr. Mohapi calls them. At the end of the day I could find nothing much against the First and Third Respondents except the criticism that they Respondents took too long to decide things. When I remarked as to what the Applicant would do after the 1st August 1994 and when they would be re-engaged to their former postings, I was assured that all they have to do was to pack their bags and report at their former departments the next day. This I suspect is what are called customs usages and practices of the public service that this Court ought not to comment about more than it has done already.

I am convinced that the Applicants generally wanted certain thing to do with conditions of employment to be streamlined at the Second Respondent's. But I do not agree with the allegation that there were no comprehension terms and conditions of employment that the Applicant accepted and adopted in their daily work since 1989 when they were first engaged a the First Respondent's. I am however agreeable they were entitled to want to know (for themselves) why on their repatriation they could not

be given a 25% gratuity as has been done to a former Town Clerk one Malefetsane Nkhahle when he got re-absorbed into the civil service. If there were no good reasons for this award to Mr. Nkhahle it can only mean that it was unjustified and discriminatory. The Applicants would be entitled to seek recourse in the appropriate manner and seek to negotiate things.

Why did the Applicants come to Court What real relief did they want In my understanding real relief means not only whether their claims are sustainable but whether they are supported by good reasons and grounds. This is what is normally terms by lawyers a cause of action. It has also been held to mean "that particular act on the part of the Defendant which gives the Plaintiff his cause of complaint or the final act on the part of the defendant which gives the Plaintiff his cause of complaint," (see Lyon v SA Railways and Harbours 1930 CPD 276). I agree that Mr. Mohapi is correct to say that the gravamen of the Applicants' claim can be found encapsulated in the following paragraph 32 of the Founding Affidavit of the First Applicant at page 18 of the record. It reads:

"32

I respectively submit that the First Respondent is not entitled to terminate my secondment to the Second Respondent <u>until such time as the Third Respondent has set up a scheme which would regulate the secondment of</u>

> officers to other institutions and which scheme would clearly set out the conditions and benefits of such officers. I have been fighting for nearly five (5) years to formalize my secondment and employment to and with the Second Respondent but have never been able to do so. The Respondents are all trying to prejudice my interests by termination of my secondment without proper consideration to the benefits of my loan or to my position an employee with the Second Respondent". (my underlining)

Again paragraph 4 of the Second Applicant's reads:

> " I respectfully allege that I am entitled to benefits on termination of my secondment to the Second Respondent. The First Applicant have no objection to the fact that our secondment to Second Respondent may be terminated by the First Respondent but we require that the terms and conditions of such termination should be formalized and set out in legislation." (my underlining)

These two quotations contain the whole set of sentiment behind the application. They can be summarized as:

(a) That the Applicants' terms and conditions have always been unsatisfactory and ought to be put right.

(b) That the Applicant's repatriation or withdrawal of their secondment ought not to be proceeded with without the conditions of service being put right.

There were further and better conditions besides those found in letter of conditions of appointment of the First Respondent (see letter dated 14th September 1993 annexure "A" at page 26 of the record) and letter of conditions of appointment of the Second

Respondent (see letter dated 19th August 1993, annexure "A" page 28 of the record). These conditions were served on the Applicants who did not there and then file a formal protest. It is clear that the actions of the First and Second Respondent in wanting to terminate the secondment of the Applicants cannot be faulted. I believe that this letter dated the 10th May 1994 by the Principal Secretary Home Affairs Annexure "F" may have sent the wrong signal to the Applicants that things such as pension contributions could suspend or stand in the way of immediate repatriation of the Applicants. The last paragraph of the letter reads:

> "The Honourable Minister has agreed that the Counsil should pay to government the Pension Contribution using the Contingency Fund. As soon as the Contributions are paid will set in motion the termination of the officers and secondment to M.C.C.." (my underlining)

I believe that it had been effectively and lawfully resolved that by the 1st August 1994 the officers shall revert to their positions and departments in the Civil Service. It is nonsensical to suggest that anything could stand in the way of that decision or resolution. How could this Court assist in the futile exercise

The cause of action of these Applicants is founded on the premise that this Court is capable of asking the Respondents to put right the conditions of service. That a Court of law can order, compel or force people to negotiate good or better

conditions other than those contracted by the parties or prescribed by statute. I have not been shown that in anyway the conditions under which the Applicants worked were in contravention of any statutory framework or a specific provision. What I am quite sure of in that all these peevish complaints were a stratagem to stall the process of repatriation. (See prayers 1.3 and 1.5.) Where has a Court ever been asked to order a party to formalize and set out private agreements by way of or in a statutory provision? This was surely not a reasonable basis for claiming prayers 1.3 and 1.5. Suppose for argument's sake this Court were to believe that the Respondents can be compelled to bring about a machinery to seek to formalize and set out legislation, does this not amount to this Court being asked to compel people to negotiate How can this be enforced I have not been persuaded how the Urban Government (Amendment) Order No.11 of 1990 and the Public Service (Amendment) No.5 Regulation L\N No.9 of 1981 affected the central theme of the powers of the First Respondent and Third Respondent to unconditionally recall the Applicants where the Second Respondent felt the Applicants had outgrown their usefulness or alternative where they could not be re-absorbed for a myriad reasons. There was nothing unusual in the Acting Town Clerk on the 9th August 1994 informing the Applicants that the Principal Secretary Home Affairs has accepted termination of the secondment of Applicants on the 9th August 1994 (see MCC 12 and MCC 13) when the Applicants were on holiday

or compulsory leave. I do not see why the Applicants even approached this Court about suspension of the compulsory leave pending the outcome of this Application (see prayer 1.4). This claim was premised on the hollow ground that the First Respondent and the Third Respondent would not in the circumstances of the allegedly unsatisfactory conditions of the Second Respondent be entitled to repatriate the Applicants.

Even besides definition of a cause of action found in that case of Lyon vs SA Railways and Harbours above cited, there is a further problem or question as to whether the cause of action had in fact arisen. If not whether the Applicants had not prematurely approached the Court In Ngani v Mpanje and Another 1988 (2) SA 649 when a notice of motion an Applicant has sought to eject Respondent on a few days before he was entitled to claim for such ejectment, the learned judge had this to say:

> "It seems to me that the process initiating action in the Court, whether it be by issue of a writ of summons or notice of motion, has the effect of freezing the rights of the parties of the time that it is filed in the registry. So that, if at the time action was instituted a right of action had not accrued the Plaintiff or Applicant as the case may be, then no cause of action is established by the initiating process. Put another way, the Plaintiff or Applicant should, at or before filing the initiating process have a complete cause of action against the Defendant or Respondent." F - H Quoting voet at 5.127 the learned judge said "There can be no cause of action before anything is due and owing said further at 1-J. It follows, therefore that the respondents had no right in law to launch proceedings for ejectment of the appellant before the expiry of the period stipulated in the agreement of sale: South African

Hotels Ltd vs Wienburg 1950(1) SA 516(c) at 520".

By the notice of motion the Applicant actually sought the Respondents to suspend or otherwise forego their legitimate power without having given the Applicants cause for complaint before this Court. That the Applicants succeeded o obtain an interim relief has had that very effect of suspending an exercise of legitimate powers when no good reason was found to give the Applicants a just claim. They were not entitled to succeed then and now

For above reasons the rule nisi ought to be discharged with costs against the Applicants.

T. MONAPATHI
JUDGE

For the Applicants : Mr. S. Buys

For the Respondents : Mr. Mohapi