

IN THE HIGH COURT OF LESOTHO

In the matter between:

LIETSISO MOHAPELOA

APPLICANT

AND

**LESOTHO TELECOMMUNICATIONS
CORPORATION**

RESPONDENT

JUDGMENT

**Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 21st day of July, 1998**

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

1. *Directing the Lesotho Telecommunications Corporation, the Respondent herein, to pay the Applicant herein forthwith:*
 - (A) *the sum of M24,719.20 being the balance of Applicant's monthly salary for the period January to June, 1997 totalling M43,794.00 calculated at the rate of M7,299.00 per month and against which Applicant has set off the sum of M29,047.80.*
 - (B) *the sum of M23,100.00 being Applicant's car*

allowance for the period January to June, 1997 calculated at the rate of M3,850.00 per month.

- (C) the sum of M43,794.00 being the taxed gratuity due to the Applicant.*
- (D) the sum of M5,400 being Applicant's allowance for the use of a telephone a facility withheld by the Respondent for the period 13th February to end of June, 1997 calculated at the rate of M1,200.00 per month.*

The facts of this application are common cause and the only issue before Court is the interpretation of the contracts including the contract of secondment of the applicant to the respondent by the Lesotho Government.

Before his secondment to the respondent, the applicant was the Deputy Principal Secretary in the Ministry of Transport and Communications. On the 19th August, 1991 he was seconded to the respondent. Some of the terms and conditions of his secondment were:

- 1. That the secondment could be terminated at any time should Government so decide without any reason being given,*
- 2. That in the event of his secondment being terminated, he will revert to his substantive or similarly graded post in the Civil Service, on the salary and seniority he should have held had he not been seconded.*

The secondment was for a period of twenty-four months. At the end of that period it was renewed by the respondent for another period of twenty-four months.

Some of the terms and conditions of the new secondment contract read as follows:

“6.2 Upon termination of this contract, or your secondment by the Government, before the end of the contract period you will be paid a gratuity equivalent to twenty-five (25%) of the basic salary for the period served under the contract.

8.1 Not less than six (6) months prior to the end of this contract, you shall be notified as to whether or not this contract will be renewed. In the absence of any notification from either party, the contract will be deemed to be automatically renewed. The new contract is to be signed prior to the commencement of the new period.”

The second secondment was to run from the 20th July, 1995 to June, 1997. However this period was interrupted by certain developments which terminated or purported to terminate it before its normal term. On the 31st May, 1996 the Minister of Transport and Communications who is also the Chairman of the Board of Directors of the respondent wrote a letter to the applicant informing him or directing him to proceed on leave with immediate effect to the duration of an on-going audit. The applicant duly complied with that order.

On the 16th December, 1996 the applicant received a letter from the respondent informing him that his contract of service would not be renewed when it expired. He was given six months' notice in terms of clause 8.1 of his contract.

The next letter was addressed to the applicant by the Principal Secretary,

Ministry of the Public Service. It is dated the 24th December, 1996 and reads as follows”

“Dear Sir,

I wish to inform you that by a resolution of the Public Service Commission your secondment appointment as Managing Director - LTC has been terminated.

Your will revert to your substantive or similarly graded position in the Civil Service, on the salary and seniority you should have held had you not been seconded.”

On the 9th January, 1997 the Minister and Chairman of the respondent’s Board of Directors informed the applicant that the Public Service Commission had terminated his secondment to the respondent from the Public Service. He went on to say:

“Consequently since you reverted back to Public Service, your employment as Managing Director, LTC has been effectively terminated with effect from 24th December, 1996.”

It is common cause that as a result of this termination the respondent paid certain moneys to the applicant as terminal benefits up to the 31st December, 1996. The cheque for the terminal benefits was accepted without prejudice to the judgment entered in favour of the applicant against the respondent. On the 9th March, 1998 that judgment was rescinded.

It was submitted by the applicant in his founding affidavit that it is apparent

from a perusal of Annexure "LM5" that the respondent was unilaterally and contrary to applicant's terms of service with it, as referred to in Annexure "LM3", terminating applicant's employment.

It was submitted that the respondent was relying on the Government's termination of the applicant's secondment (Annexure "LM4" which termination was consistent with the terms of the applicant's original secondment and his terms and conditions of service with the respondent inasmuch as, contrary to respondent's interpretation of it, it did not interrupt his secondment.

He submitted that the respondent has assumed that the terms of Annexure "LM4" were that he was immediately reverting to some post or other with Government. That this assumption was incorrect and quite unjustified is borne out by the fact that to date he has not been advised by Government what position, if any, he is reverting to.

He alleges that Annexure "LM5" is not a termination at all, that it is a nullity and that his secondment comes to an end on the 30th June, 1997.

As I said earlier in this judgment, the issue in this case is interpretation of

the contracts of secondment. When the applicant was second to the respondent as its Managing Director it was stated in no uncertain terms that "his secondment may be terminated at any time should Government so decide without any reason being given." The most important words in the secondment are "terminated at any time, without any reason being given." (See Annexure **LM1**" clause 3). On the 24th December, 1996 the Government decided to exercise that right and informed the applicant that it had terminated his secondment. Because the letter did not say with effect from what date, it must be interpreted to mean that termination was with effect from the date on which it was written which is the 24th December, 1996. The letter clearly referred to the past and not to the future. The words "has been terminated", clearly refer to the past. Where the date on which the termination of the secondment shall be effective is not mentioned, then the date of the letter shall be the effective date.

I do not agree with the applicant that Annexure "**LM5**" is a nullity on the ground that Annexure "**LM4**" was a clear termination of the applicant's secondment as Managing Director of the respondent. It clearly stated that on termination of the secondment the applicant shall revert to his substantive or similarly graded position in the Civil Service, on the salary and seniority he should have held had he not been seconded. The applicant has obviously reverted to his

substantive position of Deputy Principal Secretary whose salary ranged between M79,560 and M87,252 per annum. It is for the applicant to find out at what point of Grade 17 he is being paid. As a Deputy Principal Secretary he can be placed in any ministry of Government and there is nothing wrong if after having been seconded to the respondent for well over two years or three years, it takes a little while to find a place for him in the Civil Service. What matters most is that he has reverted to the Civil Service and that he is now drawing a salary from the Government coffers, apparently as a Deputy Principal Secretary within Grade 17.

His second secondment was a renewal of the first secondment which is governed by the overriding clause that the Government can terminate the secondment at any time. This clause was included in the second contract of secondment (See clause 6.2 of the Managing Director's Contract). The applicant signed the original and the second contracts of secondment being well aware of this overriding clause that the Government can terminate his secondment at any time even before the end of the contract period. The Government never agreed that it shall give notice of six months whenever it decided to terminate his secondment. The respondent was acting **ultra vires** when it inserted clause 6.1 in the second contract of secondment that the appointment may be terminated by either party by giving at least three (3) months' notice to the other party. The

above clause 6.1 cannot override the Government's right to terminate the secondment at any time.

Clause 8.1 is also invalid on the ground that it is **ultra vires** because it provides that 'not less than six months prior to the end of this contract, you shall be notified as to whether or not this contract shall be renewed. In the absence of any notification from either party, the contract will be deemed to be automatically renewed. The new contract is to be signed prior to the commencement of the new contract period'. The original contract of secondment was between the applicant and the Government of Lesotho. In renewing that contract the respondent could not change important terms and conditions of that contract, such as that notice of termination shall have to be given. A renewal of an existing contract does not mean drawing a new contract altogether. It must be borne in mind that the original contract was between the applicant and the Government. There were a few things that were specifically mentioned as the responsibility of the respondent. They were salary and other benefits and payment of pension contributions at the end of each month. The respondent did not have the right or power to change the basic terms and conditions of the contract of secondment without the consent of the Government.

It is clear that the respondent changed its mind on the 8th January 1997, when it wrote Annexure “LM5”. It ignored what it said in Annexure “LM3” about the six months’ notice it had undertaken to give to the applicant. It abandoned that part of the contract because it was in direct conflict with the overriding term of the secondment that the Government may terminate the secondment at any time.

The Government terminated the secondment on the 24th December, 1996. It was on that date that the applicant ceased to be an employee of the respondent. In paying his terminal benefits the respondent was kind enough to pay him until the 31st December, 1996. It was only for convenience in calculating the figures that they preferred the end of the month. From the 1st January, 1997 the applicant was no longer an employee of the respondent and was therefore not entitled to any salary or allowances paid by the respondent.

In the result the application is dismissed with costs.


J.L. KHEOLA
CHIEF JUSTICE

21st JULY, 1998

For Applicant - Mr. Sello
For Respondent - Mr Nathane