

IN THE HIGH COURT OF LESOTHO

In the matter between:-

M&C CONSTRUCTION INTERNATIONAL (PTY) LTD

APPLICANT

and

GOVERNMENT OF THE KINGDOM OF LESOTHO  
(MINISTRY OF HEALTH - RURAL HEALTH SERVICES  
PROJECT)  
ATTORNEY GENERAL

FIRST RESPONDENT  
SECOND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete  
on the 25<sup>th</sup> day of January 2000

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On the 30<sup>th</sup> April 1998, an application was filed in court by M&C Construction International (Pty) Ltd for an order that the Award made by Arbitrator Mr Eyvind Finsen on the 26<sup>th</sup> March 1998 be declared an order of this Honourable Court and in particular judgment be granted against the Respondent for-

“(a) Payment of sum of £152 876.81 (one hundred and fifty two thousand eight hundred and seventy six point eight one pound sterling);

- (b) Payment of the sum of M1868 496.08 (one million eight hundred and sixty eight four hundred and ninety six point zero eight maloti)
- (c) Payment of the sum of £76 878.54 (seventy six thousand eight hundred and seventy eight point fifty four pound sterling)
- (d) Payment of the sum of M864 537.65 (eight hundred and sixty four thousand five hundred thirty seven point sixty five maloti)
- (e) Interest on each of the aforesaid amounts at the rate of 22% p.a. calculated from 26 March 1998 to date of payment.
- (f) The respondent is ordered to return forthwith to the applicant, for cancellation, the performance guarantee furnished by it in respect of the Mokhotlong Contract as well as the performance guarantee and the retention fund guarantee furnished by it in respect of the Quthing Contract.
- (g) The respondent is ordered to pay the costs of the arbitration, including the Arbitrator's fees and expenses, hire of premises for the hearing, refreshments during hearings and the recording and transcription of the proceedings, as well as the Claimant's costs on a party and party scale as applicable in proceedings before the High Court of South Africa, and shall include the qualifying fees and expenses of the applicant's expert witness Mr Woodard.

- (h) Costs of this application on the scale referred to in g above
- (i) Further and/or alternative relief.”

Copies of the notice of motion and accompanying affidavits and documents were served upon the office of the Attorney General who had been cited as the second Respondent, the Government of Lesotho being the First Respondent. The relevance of citation will become apparent in this judgment, and most pertinent will be the proper interpretation of section 3 (2) of the Government Proceedings and Contracts Act 4 of 1965.

### **History of the case**

It is common cause that the Government of the Kingdom of Lesotho through its Ministry of Health and Social Welfare entered into building contracts with the M&C Construction (International)Pty Ltd wherein the latter was employed to perform certain construction work and to rehabilitate the Quthing and Mokhotlong Government Hospitals, on the 25/9/91 and 14/2/94 respectively. It is common cause that the construction contracts for both hospitals are almost similar clause by clause, and clause 26 of each contract provided for the settlement for disputes between the parties to be determined by arbitration.

The arbitration award which is being sought to be made an order of court under section 32 of the Arbitration Act of 1980 is the result of certain disputes that arose between the contracting parties following unsuccessful attempts at mediation. Section

29 of the above quoted Act provides that-

“Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.” (My underlining)

Section 34 of the Act however provides that-

- “(1) Where -
- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
  - (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
  - (c) an award has been improperly obtained, the court may, on the application of any party or parties, make an order setting the award aside.
- (2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties provided that when the setting aside of the award is requested on the ground of corruption, such application be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.
- (3) The court may, it considers that the circumstances so require, stay enforcement of the award pending its decision.
- (4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.”

**Mr Eyvind Finsen**, the sole arbitrator, delivered his award which dealt with the disputes under both contracts on the 26<sup>th</sup> March 1998. Any application therefore for the setting aside of the award had to be made within six weeks after the publication of the award. Computation of these six weeks (or forty-two days) renders the 7<sup>th</sup> May 1998 as the last day of the six-week period. On the 8<sup>th</sup> May 1998 a counter - application whose applicant is “Ministry of Health of the Government of Lesotho” citing the M&C Construction International (Pty) Ltd and Mr Finsen as respondents was filed in the office of the Registrar of the High Court.

This counter-application sought an order of this Court reviewing and setting aside the arbitrator’s award, and was supported by the affidavit of Dr. Makhetha Mosotho. It is clear that this counter-application was a day late in terms of the provisions of the section and the facts of this case. It is common cause that the notice of application was signed not by the Attorney General but by attorney **Mr N. Mphalane**. There was no special power of attorney attached to the papers to evidence any mandate from the Attorney General.

On the 3<sup>rd</sup> August, 1999 **Mr Mphalane** for the Ministry of Health and **Mr Goodman S.C.** for the M&C Construction International (Pty) Ltd appeared before court. It was agreed by both parties that it was important to deal with the application for condonation for the late filing of the counter-application before the merits of the counter-application could be gone into. **Mr Goodman** made it abundantly clear that he was questioning the **locus standi** of the applicant in the counter-application and the authority of **Mr Mphalane** to sign the notice of application.

The Government Proceedings and Contracts section 3 (2) reads:

“Save as many otherwise expressly be provided by law, actions or other proceedings by His Majesty in His Government of Lesotho shall be instituted by and in the name of the Attorney General.”

The provision is peremptory and clear. In my view the words “other proceedings” are not limited to civil proceedings instituted in a court of law but should be interpreted widely to include even arbitration proceedings related to contracts in which the Government of Lesotho is a party; **Prudential Shippers SA Ltd vs Tempest Clothing Co. Ltd** 1976 (2) SA 858. The reason is clear the substantial interests of Government must be protected at all stages. It was necessary therefore that once a real dispute surfaced regarding performance of the contracts and or other breaches, the Attorney General ought to have been briefed as soon as practically possible. The Principal Secretary for Health seems to have laboured under a misconception which was ill-advised and rather unfortunate in that - he states in his **found**ing affidavit on oath:-

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... “Lesotho Government has never been a party to the arbitration proceedings. The Ministry of Health of the Government of Lesotho was a party and therefore Lesotho Government has been wrongly cited herein.”

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“I further wish to state that Ministry of Health is an independent Ministry which can be sued and which can sue on its own without suing the government as a whole.”

The incorrectness of these statements is very clear and though they seem ill-advised, they convey a rather dangerous misconception that must be duly corrected timeously before a bad precedent may set in. The facts of these case show clearly that the Principal Secretary for Health consciously ignored the important memoranda of **Mr Tampi**, Deputy Attorney General dated 4<sup>th</sup> May 1998 and **Mr Makhethhe**, Chief Attorney, dated 8<sup>th</sup> May 1998. It is worth noting with deep concern that on the very same 8<sup>th</sup> day May 1998 the counter-claim was at once lodged in the High Court praying for the setting aside of a award which the Attorney General had advised that it be accepted. One can even say it was not only ignored but it was defied. Section 98 (2) (a) of the Constitution of Lesotho reads as follows:-

“It shall be the duty of the Attorney General-

- (1) to provide legal advice to Government
- (2) .....
- (3) .....
- (4) In the exercise of the functions vested in him by subsection 2 (a) ..... of this Constitution, the Attorney General shall not be subject to the direction or control of any other person or authority.”

It may be useful to quote in full the Office of Attorney General Act. It reads:-

**“Act No.6 of 1994**

An Act to provide for matters connected with the office of Attorney General established under section 98 of the Constitution.

Enacted by the Parliament of Lesotho.

**Short title**

1. This Act may be cited as the Office of Attorney General Act 1994.

**Principal Legal Adviser**

2. The Attorney General is the principal legal adviser to the Government of Lesotho.

**Functions of the Attorney General**

3. In addition to the duties vested in the Attorney General by the Constitution of Lesotho, the Attorney General shall represent the Government of Lesotho in all legal proceedings in which the Government is a party.

**Defence of matter at public expense**

4. (1) Where the Attorney General is of the opinion that it is in the public interest to do so, he may direct that any matter before a court be defended at the expense of the State.  
(2) A direction under subsection (1) is authority for the withdrawal of money from the Consolidate Fund for that purpose.

**Staff**

5. (1) In the exercise of his functions, the Attorney General shall be assisted by staff appointed or employed under the Public Service Order 1970.  
(2) For the purposes of the Public Service Order 1970, the staff of the Attorney General shall be regarded as a department called the Attorney General's Chambers.

**Legal Cadre**

6. (1) Public officers whose duties include the provision of legal service to the Government or government agencies shall at all times be accountable to the Attorney General in the discharge of those duties.



- (2) In respect of the provision of legal services to the Government or government agencies, the Attorney General may issue general or special instructions to those officers referred to in subsection (1).

“GOVERNMENT NOTICE NO.48 OF 1994

**Explanatory Memorandum to the  
Office of Attorney General Bill 1994  
Introduced into the National Assembly on 4 May 1994**

**(Circulated by authority of the  
Minister of Law and Constitutional Affairs  
Hon. K.A. Maope)**

**OUTLINE**

1. The purpose of the Bill is to provide for matters relating to the Office of Attorney General established under section 98 of the Constitution. That section establishes the Office of Attorney General as an office in the Public Service and imposes on the holder of that office a number of duties. The principal duty of the Attorney General under that section is to provide legal advice to the Government. This Bill contains provisions that are intended to assist the Attorney General in the performance of these constitutional functions.
2. The Bill also repeals earlier legislation dealing with the Office of Attorney General that is now inconsistent with the Constitution.

NOTES ON CLAUSES

**Clause 1 Short title**

3. This clause provides for the citation of the Office of Attorney General Act 1994. By virtue of section 16 of the Interpretation Act 1977, this Act will come into operation on the date on the date of its publication the Gazette.

**Clause 2 Principal Legal Adviser**

4. This clause emphasises that pursuant to the Constitution, the Attorney General is the principal legal Adviser to the Government. In practice this would mean that is where is a conflict of opinion within Government on a legal issue, the opinion of the Attorney General will be the definitive answer.

**Clause 3 Functions of the Attorney General**

5. This clause gives the Attorney General an additional duty to those set out in section 98 of the Constitution. This is the duty to represent the Government of Lesotho in all legal proceedings in which the Government is a party. Thus for example if the Government is being sued for breach of contract, it is the Attorney General who must represent the Government. In the performance of this function the Attorney General will be assisted by staff who will appear on his behalf.

**Clause 4 Defence of matter at public expense**

6. This clause gives the Attorney General a discretionary power to direct that a matter before a court be defended at the expense of the State. The Attorney General may only exercise that power if he considers that it is in the public interest to do so. Subsection (2) provides that a direction under this section is authority to withdraw money from the Consolidated Fund. An example of a matter that the Attorney General may direct be defended at public expense under this section would be a case involving important constitutional issues.

**Clause 5 Staff**

7. This clause provides that the Attorney General will be assisted by staff who for public service purposes will be regarded as a department called the Attorney General's Chambers.

**Clause 6 Legal Cadre**

8. This clause provides that the legal officers in the Ministries shall be accountable to the Attorney General in respect of the provision by them of legal services to the Government of government agencies. This is an important provision as the Attorney General has a constitution responsibility for the provision of legal services to the Government but without a provision such as this, has no real means of controlling legal officer outside the Ministry of Law.

The standard of legal advice given by these legal officer is often very poor and has the potential to lead the Government into considerable expense and embarrassment and so it is essential that they have the quality of their advice monitored by the Attorney General.

9. To allow the Attorney General to perform this function subsection (2) provides that the Attorney General may issue instructions. These instructions must be followed by legal officers.

#### **Clause 7 Repeal**

10. This clause repeals the 1985 Act and the 1990 Order dealing with the role of the Attorney General. Both of these Acts are now inconsistent with the Constitution and the substance of them is now dealt with in this Act.”


The advice to Government includes advice to Ministries. It is not the function of the Principal Secretary of a Ministry to question or challenge, let alone, defy the advice of the Attorney General (see Explanatory Memorandum - Clause 2 which clearly states that the opinion of the Attorney General is final). I go on to say that in all proceedings, civil or criminal, the attitude or opinion of the Attorney General, though not conclusive in itself in judicial proceedings, carries considerable weight before our courts. The court is aware that the Office of Attorney General is indeed a constitutional and statutory one and that its independence is also enshrined in the Constitution of Lesotho. The main purpose of these provisions is to ensure good governance and government within the rule of law. A Government of the State is a single entity and constitutes one legal **persona** with several Ministries and departments. The fact that the Ministry of Health administered the funds of The African Development Fund through the Rural Health Services Project did not give it the right to participate in any proceedings be they arbitral or judicial, without first

consulting the Attorney General. Since the Government of the Kingdom of Lesotho was the contracting party in the two contracts, the real party to have been cited in all such proceedings was the Government of the Kingdom of Lesotho. (cf Richards & Another vs Port Elizabeth Municipality & Others - 1990 (4) SA 77; Groenewald vs Minister van Justisie - 1972 (3) SA 596 (o) at 602). Not only the Ministry of Health and the Project had direct interest in the construction and rehabilitation of the two hospitals, but also the Government of Lesotho which had a national and substantial interest. It must again be clearly stated that members of the legal profession in Lesotho, attorneys and advocates alike, being expected to know the law, should not accept instructions from Ministry officials without first having secured a special power of attorney from the Attorney General. Failure to do so and with full knowledge of the provisions of the Government Proceedings and Contracts Act 1965, will render such practitioners liable to be mulcted with costs **de bonis propriis**.

When the court reconvened on the 6<sup>th</sup> August 1999, **Mr Mphalane** handed in a Special Power of Attorney duly signed by the Attorney General mandating him, **Mr Mphalane**, to represent the Attorney General and the Government of Lesotho in the applications for condonation and for the setting aside of the award; the Attorney General had also applied to be granted leave to substitute the Lesotho Government and the Attorney General as applicants in the two applications. **Mr Goodman** had no objection and the court granted leave for the substitution. **Mr Goodman** also withdrew his opposition to the application for condonation thus paving way for full argument on the merits of the award. The issue of wasted costs of four days was deferred till end of the proceedings.

As I was in the process of writing my judgement, I was informed by **Mr Makhetha** for the Attorney General that the parties had reached a settlement to the effect that it was mutually agreed that the application for review was being withdrawn and that the M&C International (Pty) Ltd would be paid a sum of ten million Maloti M10,000.00 in full and final settlement and that this would include legal costs due. The court file is therefore endorsed "Matter settled".

I sincerely hope that the Attorney General will sensitise the Government Secretary about the comments above in order that the Principal Secretaries of Government Ministries know the full import of the provisions of the office of Attorney General Act and of the Government Proceedings and Contract Act. Unfortunate institution of proceedings without authority of the Attorney General could perhaps be avoided.



**S. N. PEETE**  
**JUDGE**

**For Applicant: Mr Goodman SC.**

**For Respondent: Mr Mphalane**