IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/473/97**

In the matter between:

ABIA LEUTA MATETE **Applicant**

and

THE PRINCIPAL SECRETARY
(Ministry of Home Affairs) **1st Respondent**
THE PRINCIPAL SECRETARY
(Ministry of Public Service) **2nd Respondent**
THE ATTORNEY GENERAL **3rd Respondent**

For the Applicant : Mr. T. Mahlakeng

For the Respondents : Mr. V. Letsie

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 13th day of September 2002

The Applicant brought his application in December 1997 as contained in a notice of motion. The prayers contained therein are two in number and very brief. Firstly

> "that the Respondent's effect payment of Applicant's terminal benefits on the basis that he was admitted to pensionable establishment on the 1st November 1976 and retired from public service on public interest on 20th December 1995".

and secondly

"That the Respondents pay the costs of this application".

The history of the matter is very simple. It is that Applicant was admitted in the public service on the 1st December 1976 and he was retired on the 6th June 1990 by way of termination "..... under the relevant clause of your letter of appointment. He was to serve a month's notice or be paid cash in lieu of notice" (See Annexure "A"). In between then and the filing of the present proceedings there were various letters of protest by the Applicant as shown in these proceedings.

The basis of his dismissal appeared to have been premised on that he was not on permanent establishment. The thread goes that the reason could have been that he had not filed medical certificate. This protest ended up in his receiving a letter from the Ministry of Public Service on the 20th December 1995. It is that letter on page 17 of the record. The effect of this letter as Counsel agreed was to regularise the employment of this Applicant after the event of his said dismissal.

Counsel agreed that the effect of the letter was that Applicant was deemed to be on permanent establishment but he has been retired under public interest

under 12(9) of Public Service Order. The letter goes:

> "This is to normalize your departure from the service and to enable legal payment of your terminal benefits."

Where parties parted ways is where the Applicant says that the effect of his termination had only been with effect from December 1995 when he received this communication not before. The Attorney General's point of view on the other hand is that although everything has been regularized it can only be up to June 1990.

Respondents Counsel's attitude is that there would be no basis of presuming that the intention of the Ministry of Public Service was to have the cut-off period as December 1995. There was no basis of that presumption because in between 1990 and 1995 as at that the Applicant was not rendering any services to the government. And in between those years he did not offer his services. The calculation of benefits that would be based on the further five years, that is beyond June 1990 would therefore amount to unjust enrichment.

Mr. Mahlakeng on the other side points out that in the absence of specific period having been mentioned in annexure "F" leads to the presumption that

the period which is regularized should run up to the date of the letter. If the contract was intended it should have pointed out in the letter. That there would be no basis for suggesting that the effect should be retrospective.

As Applicant submitted further a wrong was being righted and should have been righted up to the end when this communication was being made. It can only be righted up to the date when this letter of December 1995 in that it has continued from 1990. And indeed if the Applicant had not rendered any services he was not the cause of this absence from the First Respondent's service. His rendering his services was made impossible by the conduct of the employer and the latter's conduct was *prima facie* wrongful. If not there could not have been any re-thinking about the Applicant's situation unless it is suggested that it was gratuitous.

Where the Courts have held that a dismissal of an employee was unlawful, it seems the tendency has been to make an order of payment of arrear salaries effective as from the date of termination to date of institution of the case thereof. The cases of **Koatsa v NUL** 1991-92 LLR 163, and **Lebohang Monyobi v Minister of Justice ad Prisons & Others** 1997-98 LLR 155 (CA); to cite but a few which are instructive in this regard. This date is determinable either from the date of the letter which effects termination or the date at which the claim is

instituted in the courts.

The question as to the effect of the letter in the instant case can be answered simply in the following manner. Why was it necessary to write that letter, and further, had the Applicant actually been "rendering services" until the letter was written to him, would be entitled to compensation? If the answer to the latter question is in the affirmative, then the effect of the letter could certainly not be retrospective. But if the answer is in the negative then there was no need for the letter. In which case it would only be logical to conclude that where the applicant's dismissal was removed and he is reinstated as a correctional remedy, then he is "deemed" or considered to have rendered services as from the time of the alleged dismissal. That is why payment of arrear salaries would cover that period. In the same vein, where his dismissal cannot be effective from the date prior to the final letter of dismissal, then he is "deemed" to have rendered services until that day of dismissal. This appears to be the logic in allowing benefits to cover period ending at the institution of the claim in the above-cited cases.

The word deemed was considered by Coetzee J in the case of **Steel v Shanta Construction Pty (Ltd) and Others** 1973(2) SA 557, who was quoted with approval by Pickering J in the later case of **Traco Marketing v Commissioner for**

the SARS 1998(4) SA 1002 at p. 1009:

> "When "deemed" is used as meaning considered or "regarded" and not in one of its other meanings such as, for instance to "think" it is a very strong word to denote, frequently exhaustively, that something is a fact regardless of the objective truth of the matter. It is an indispensable word, in legal parlance, to convey that enquiry into this truth is irrelevant for the purposes of the particular instrument."

I have underlined, in the above quotation the words "that something is a fact regardless of the objective truth of the matter," to indicate my conviction that for the period 1990 to 1995 when applicant received the letter such as he received, he is "deemed" to have rendered services regardless of the objective or factual truth than he did not. Without the final letter he would neither find alternative employment nor render such services. Suffice it to say that, there was no contention that applicant was engaged in any other renumerated employment in the period 1990-1995 (See **Lebohang Monyobi v Ministry of Justice** (supra).

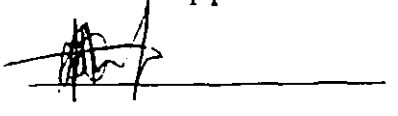
Applicant submitted further still, and correctly in my view, that why this regularization of his benefits is validly sought by Applicant can be compared to the above examples and various situations. Firstly where a public servant has been interdicted and secondly where a public servant has been wrongfully dismissed. He is paid back whatever should have been owed to him and it is presumed that he was in the employer's service although as a fact he was not

because his absence was caused by the conduct of his master in this case the Government.

The above prevails even though the action by Government could have been acting *bona fide*. Even if it was in good faith that a public servant (in the example) was interdicted and even if it was in good faith that he was dismissed (in another example) as soon as it is proved that the legal basis was wrong, then the terminated public servant should benefit. The situation should be corrected up the time when he is informed of the situation. If the basis for Applicant's dismissal in the instant was wrong in 1990 what was done then could only have been null and void even as to the time when it was done.

I do not find any second reason why the present situation is different from those examples which I have specified. In that it is presumed that the conduct of the Government in deciding that the Applicant was on not permanent basis was wrong. Otherwise what was it that was righted if there was nothing wrong?

So that my decision is that this application succeeds as prayed with costs.



T. Monapathi

Judge

13th September 2002