CIV/APN/326/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

ALBERT MOLEFI TLALI **Applicant**

and

THE ATTORNEY GENERAL N.O **Respondent**

Judgment

For Applicant : Mr. S. Phafane

For Respondent: Mr. M. Masoabi

Delivered by the Honourable Mr. Justice T. Monapathi
on the 6th day of March 2002

In this application the Ministry of Justice, Law and Constitutional Affairs of Lesotho Government is represented by the Respondent. Hence "the Ministry" and "the Respondent" will be used interchangeably in this judgment.

In November 1994, the Applicant was told by the Principal Secretary of the Ministry that his services in a "normally" fixed two years contract were terminated there and then. And Applicant had to leave office immediately. The Applicant then felt in the circumstances that he had been unlawfully "thrown out of office" in contravention of both the letter and the spirit of his contract of employment with the Respondent. He had since then been pursuing the matter with the authorities in the said Ministry. That was in vain as he said.

In September 1996 Applicant filed a notice of motion in which he applied the Court for an order in these terms:

" 1. Declaring the termination of Applicant's engagement contract with the government of Lesotho null and void and of no legal force and effect.

2. Directing the Respondent to pay Applicant's full emoluments from November 1994.

3. Granting the Applicant further and or alternative relief.

The historical background of the dispute was a fairly simple one. The Applicant who was a retired civil servant had on or about the 24th August 1988 entered into a written contract of employment with the Government of Lesotho. The contract was however signed on the 14th August 1989 when he was already in active service with the government. A copy of the employment contract was annexed to the proceedings and was marked "A".

The said contract of employment was renewed from time to time in accordance with Article 11 thereof which read:

> "Five months prior to the completion of his terms of engagement the person engaged shall give notice in writing to the Government whether or not he desires to be offered further employment (the) re-engagement will be on such terms and for such period as may initially be agreed upon."

There was no dispute that the said contractual arrangements were renewed from time to time in accordance with the provisions of the said Article 11. The last extension was up to August 1994. This last extension had by Applicant's own admission (see annexure "B") been for a period of 12 months. I noted therefore that an extension of 24 months could not be taken for granted although the

Applicant spoke of expecting an extension of that period.

It was common cause that prior to Applicant's completion of that terms of engagement that ended on the 11 August 1994 he gave due notice of his desire to be offered further employment in accordance with the aforementioned Article 11. A copy of the letter of intention was annexed to the proceedings and marked "B".

Applicant then continued to work as had been the case in respect of all other previous engagements all of which were acknowledged or accepted and signed later on account of red tape. He was paid his salary for the months of September and October 1994. Only for the month of November 1994 was his salary withheld but it was eventually paid to him.

Applicant averred that having given the Ministry notice in terms of the said Article 11, the Ministry could not just keep quite thereby giving the Applicant the impression that his contract was going to be renewed later like in the past only to suddenly and abruptly terminate his services. This was moreso when the Ministry continued to pay Applicant after the said contract had come to an end in August 1994.

Applicant accordingly averred that he had had legitimate expectation that he would remain in the service of Government. And that the purported summary termination thereof in November 1994 (as aforesaid) was unlawful and highly prejudicial to his social and financial management. Applicant charged that the Ministry had also ignored provisions of Article 10 of the contract in its purported termination as aforesaid.

Applicant further averred that in letting him work for months after August 1994 and only to terminate the contract mid-stream was a clear breach of the parties agreement by the Ministry and that conduct was a flagrant violation of Applicant's rights and expectations. Hence the Applicant approaching the Court as he did. That this breach was in the extreme, as alleged, was reflected in the Ministry having violated the provisions of Article 7(1) of the usual or standard form of written agreement which reads:

> "The Government may at any time determine with no reason assigned the engagement by giving him three months' notice in writing or on paying him three months salary."

This stipulation should, at least, have been heeded by the Respondent as Applicant correctly submitted..

While the Respondent agreed that several periods or contracts of engagement had previously been agreed upon, Respondent did not agree that the effect of the offer for service (in annexure "B") for a further period, would bind the Government in the absence of consent or acceptance specifically expressed by the Ministry. This offer was being made in consonance with Article 11 of the standard agreement form of which incidentally is written as follows:

> "Five months prior to the completion of engagement the person engaged shall give notice in writing to the Government whether or not he desires to be offered further employment, the re-engagement will be on such terms and for such periods as may be mutually agreed." (My emphasis)

When faced with the challenge that there had been no such mutual consent nor express renewal the Applicant replied to say that by acquiescence the Ministry had agreed to have the Applicant engaged. In this regard as the Applicant contended, it had actually occurred in the past that when a letter offering service was regularly written by the Applicant, it was only afterwards and beyond the limit of the contract period that the Respondent would respond by way of acknowledgement or acceptance. The Applicant had therefore expected a similar reaction albeit being behind schedule. This was so even though a timeous reply was reasonably expected by the Applicant from the Ministry.

Hence the Applicant submitted that there had been by conduct tacit acceptance of the offer in the circumstances. That the Applicant was "chased out" in November 1994 (three months after resumption of service) was wrongful and could only be right and lawful if it had been accompanied by an offer of a proper amount of damages or compensation. This was so because the opposite would be a breach of contract according to law. In this regard (in connection with compensation) the Court was even referred to sections 73(1) and (2) of the Labour Code Order 1992.

I thought that there were three issues raised in this dispute both which ought to be responded to different effects. First it was this issue of the Applicant's offer as contained in annexure "B" having not been accepted nor acknowledged. Secondly, the fact that in the circumstances the Respondent had (as in the past) continued to suffer Applicant to remain engaged on receipt of month's salary. Thirdly, what the Respondent's approach or attitude should have been in the circumstances with regard to his intention to terminate the Applicant's engagement. In this regard we have useful guidance from the work of the learned authors of Farlam and Hathaway in **Contract Cases, Materials and Commentary** 3rd edition (G. Lubber/C. Murray) (Farlam and Hathaway) which follows.

Farlam and Hathaway at pages 40 and 41 of their work (supra) have this to say at page 41:

> "3. Wessels Contract states in paras 270-7 that silence on the part of the officer cannot be ordinarily taken as acceptance. However, he suggests that there may be situations in which a different approach should be adopted.
>
> "If ..... from the business relationship between the offerer and the offeree the court finds that the circumstances are such that the offeree could reasonably and fairly be expected to reply, then it may infer that by remaining silent the offeree did in fact intend to accept." (My emphasis)

Several cases are then mentioned after this quotation. And then the learned authors pose a question as follows: "Is liability in cases in which this principle applies based on that acceptance of the offer, or on the outward appearance of such acceptances in the circumstances?" I would say on the latter on the following grounds.

One has to look at the perception of the offeror (in this case the Applicant) in relation to prior conduct of the parties. Most particularly was this factor (which could not be disproved) that extensions had been made in the past without

response to a specific offer as reflected in the attitude that "..... the Respondent continued to pay me after the said contract which came to an end in August 1994."

Why I speak of the Applicant's perception is because for proof of agreement (where no written one exists) and in order to determine what the true agreement is what the learned author R H Christie in his **The Law of Contract in South Africa** (2nd Edition) at pages 21-23, having analysed the problem, concludes by saying at page 23:

> "In the result it is correct to decide whether a contract exists one looks first for the true agreement of two or more parties and because such agreement can only be revealed by external manifestation one's approach must of necessity be generally objective."

That is why, when guided by above paragraph, it became easy to determine and conclude that there had been a contract between the two parties existing at the time of the Applicant's dismissal in terms of the common law. What was important therefore was not to decide whether it was for a period of a year or two years. In my opinion the Applicant should certainly have expected at least a year's contract period judging by prior conduct of the parties. What was important was what the Respondent's obligations were and what the Applicant's rights were once the former resolved to dismiss the latter.

I took the view that Respondent's dismissal of the Applicant was defective. It was not because Respondent had had no right to dismiss but it was because Respondent should have been guided by what would have been reasonable in the terms of the standard written contract were if adopted and followed. This is to be found in the provision of Article 7(1). It reads:

> "The government may at anytime determine with no reason assigned the engagement of the person by giving him three months notice in writing or on paying him three months salary." (My underlining)

Only to the extent of the non-compliance with the above article did I find that the termination was irregular.

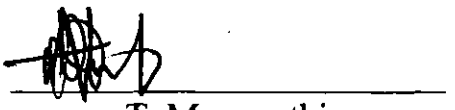
If Respondent's attitude in his defence had been to accept having failed to comply with the said article 7(1) and offering damages in that regard that would have settled the matter in my view. While I certainly would still have pronounced the dismissal as null and void and of no legal effect, in that event however, I would have not made a full order for costs against the Respondent. In addition I became of opinion that the Applicant was not entitled to full emoluments by way of one year or two years salary from November 1994 as compensation.

Having concluded that the Applicant has substantially succeeded I decided

that a proper order would be as follows:

(a) That the Applicant be paid damages or compensation equal to three months salary.

(b) That the Respondent shall pay Applicants the costs of this application.



T. Monapathi
Judge

6th March 2002