

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 32/15

CIV/APN/260/2015

In the matter between:-

THE PRINCIPAL SECRETARY –

MINISTRY OF WATER

1ST APPELLANT

THE MINISTRY OF WATER

2ND APPELLANT

LESOTHO HIGHLANDS WATER

COMMISSION

3RD APPELLANT

THE ATTORNEY GENERAL

4TH APPELLANT

AND

LUCY SEKOBOTO

RESPONDENT

**CORAM : N.J. MAJARA C.J, M. CHINHENGU AJA AND
S. PEETE JA.**

DATE HEARD : 12TH OCTOBER 2015

JUDGMENT DELIVERED: 6TH NOVEMBER 2015

Summary

Contract – Contract of Secondment Renewed – Principal Secretary invoking clause 11.1 (termination of contract upon giving three months’ notice) – Authority to terminate – Lawfulness of termination – Opportunity to make representations – Question of fact.

Jurisdiction of the High Court and of Labour Court – Public Service Act 2005 – Public Officer entering into a contract of secondment with Government of Lesotho. Jurisdiction of the High Court confirmed.

Where, after the Public Service Commission made a Resolution that a public officer be seconded from his Ministry to the Lesotho Highlands Water Commission, the Government of Lesotho enters into a written secondment contract which has a termination clause which either party can invoke, the lawfulness of the termination can be at issue where a Principal Secretary purports to invoke the termination clause without ostensible authority of Government of Lesotho or alleges that he has as a representative of Government authority to terminate the secondment contract.

Where a secondment contract is reduced to writing, parole evidence rule applies when considering the contents of the affidavit of the Principal Secretary wherein he asserts his right to terminate the contract. Contents of an answering affidavit are evidence. The question is whether the affidavit expands the definition of “party” to include “principal secretary”, or whether he can terminate contract as representative of Government of Lesotho.

Held: A public officer on secondment continues to be a public officer and as such the Labour Court has no jurisdiction to adjudicate in a claim arising from a contract of secondment which can be interpreted in accordance with principles of law of contract.

Held: Whether a fair opportunity to make representation was afforded

the employee before the termination clause was invoked, is purely a question of fact that depends on the particular circumstances of each case.

Cur adv vult

Postea (November 6)

JUDGMENT

Peete J.A:

- [1] This is an appeal against the judgment of **Sakoane AJ** delivered on the 14th July 2015. On the 25th of June 2015, the respondent had applied for urgent relief couched thus:-

“1. That the rule do hereby issue calling upon the Respondents herein to show cause if any on a date to be determined by this Honourable Court why:

(a) The ordinary period of notice and modes of service shall not be dispensed with due to the urgency of this matter.

(b) That the decision of the 1st Respondent, dated 16th June 2015 made to terminate the employment contract of the Applicant be stayed and the Applicant be reinstated to her position forthwith pending the finalization of this application.

2. That the decision of the 1st Respondent to terminate the employment contract of Applicant be reviewed, corrected and set aside as being both substantively and procedurally unfair and unlawful.

3. ***Interdicting the 1st respondent from communicating directly with the applicant without going through the Chief delegate of the 3rd respondent.***
4. ***That the Applicant be given any further and/or alternative relief.***
5. ***That the Respondents be ordered to pay costs of suit on attorney and client scale.***
6. ***Prayers 1 (a) and (b) operate with immediate effect as interim orders pending the finalization of this application.”***

[2] To her urgent notice of motion was attached the affidavits by herself and by **Charles Putsoane** then Chief Delegate of 3rd Appellant.

Counsel’s submissions

[3] In his submissions, **Mr Letsika** for the appellants, argued that **LS2**¹ is a “*stand alone*” contract entered into by the respondent and the Government and when **LS1**² expired on the 31st (sic) February 2014 and that this contract was justiciable under the **Labour Code Order 1992**. This argument is untenable because when **LS2** was signed by the Principal Secretary on behalf of the

¹ Duration: 1st February 2014 to 31st January 2017.

² Duration: 1st February 2011 to 31st February 2014

Government of Lesotho, it was clearly a renewal contract – parties are the same, terms and conditions are congruent, and more importantly the respondent continued her functions as an Alternate Delegate and was due to return to her Ministry in January 2017.

- [4] In her founding affidavit, the respondent challenged the power or authority of 1st appellant to terminate the secondment contract as renewed by **LS2**. To these challenges, the 1st appellant asserts that he had the authority to terminate the contract and that he had consulted the relevant authorities.

Jurisdiction of the High Court vs Labour Court

- [5] Jurisdiction has been defined as the power or competence of a court to hear and determine an issue between parties. The preliminary issue of jurisdiction was raised by the 1st appellant in the Court *a quo* upon the ground that the cause of action and relief sought fell within the exclusive jurisdiction of the Labour Court or was otherwise a labour dispute within the jurisdiction of the ***Directorate of Dispute Prevention and Resolution*** (DDPR). This matter involved not an unfair dismissal but lawfulness of termination of contract.³

³ *Ndabeni v Member of the Executive Council for Education* – 2002 (3) SA 103.

The Facts

- [6] In her founding affidavit the respondent stated that she was a public officer in the **Ministry of Water** “*on secondment*” to the **Lesotho Highlands Water Commission** (LHWC) in terms of a **Resolution**⁴ of the **Public Service Commission** dated 25 January 2011.
- [7] In assuming her mandated office at the LHWC, she signed a secondment contract with the Government which reads:-

“LS1”

**“CONTRACT OF EMPLOYMENT TO THE LESOTHO
HIGHLANDS WATER COMMISSION
BETWEEN**

**THE GOVERNMENT OF LESOTHO, REPRESENTED BY
THE HONOURABLE MINISTER OF NATURAL
RESOURCES, MONYANE MOLELEKI**

(Hereinafter referred to as the Employer)

AND

Ms Lucy Sekoboto

(Hereinafter referred to as the Employee)

⁴ 6993rd Meeting – Item 169/11-NR/P/23138 S.N.110/11

1. Tenure of Employment

1. Period

The contract entered into herein shall subsist for a period of three years from the 1st February 2011 to 31st February 2014 and shall be eligible for renewal.

2. Responsibilities and Duties

2.1 In terms of Article 9 of the Treaty between Lesotho and South Africa you will represent Lesothos' interest in the Lesotho Highlands Water Commission as legal advisor and Alternate Delegate.

2.2 The Employer shall ensure the successful implementation of the Treaty and its Protocols and Phase 2 Agreement once successfully concluded.

2.3 The Employee shall ensure successful conclusion of Phase 2 negotiations.

2.4 The employee shall advise the Chief Delegate on all matters related to LHWP in particular, all legal processes pertaining to the Lesotho Highlands Water Project as well as interpretation of the Treaty.

3. Performance Assessment

The employee undertakes to perform the services and duties under this contract with the highest standard of professional competency and ethical integrity.

4. Working hours

- 3.1 *Working hours will be from Monday to Friday from 08.00hrs to 17.00hrs with a one lunch break between 13.00 hours and 14.00 hours.*
- 3.2 *However if circumstances require, the employee shall work longer hours and on Saturdays, Sundays and public holidays.*

5. Remuneration

- 5.1 *The employee's monthly salary shall be that of Divisional Manager LHDA plus 10% and shall be entitled to other benefits as outlined in the LHDA Remuneration Policy as may be amended from time to time.*
- 5.2 *In accepting these terms and conditions of employment the employee hereby authorises the employer to make PAYE deductions per the applicable rate at the time of signing from the gross salary.*

6. Gratuity

- 6.1 *The employee shall be entitled to gratuity, which shall be calculated at the rate of (38%) of the annual salary and shall be payable at the completion of every two years and at the end of the last year.*
- 6.2 *Should the contract be terminated by either party before the contemplated contract period, gratuity shall be calculated and paid on pro rata basis.*

7. Medical and industrial injuries insurance

- 7.1 *The employee together with her spouse and minor children of 18 years or below be entitled to insurance cover applicable to all employees of LHDA.*
- 7.2 *The premium for such insurance shall be paid by the employer.*

8. Accommodation

The employer shall provide the employee with a Government house which will be at the standard of senior officials if available, failing which the employee will rent a compatible house paid for by Government.

9. Cell phone call units

The Employer shall provide cellular phone call units to the maximum of M3000.00 per month at the beginning of the month.

10. Leave

10.1 Annual Leave

The employee shall be entitled to 30 working days annual leave.

10.2 Sick Leave

The employee shall be entitled to sick leave in accordance with the sick leaves policy of LHDA.

11. Accountability and Reporting

The employee shall report and be accountable to the Chief Delegate.

12. Notices and Termination of Contract

12.1 Either party may terminate this contract by giving three months' notice in writing or payment of three months' in lieu of notice.

12.2 The employer shall notify the employee three months prior to the expiry of this contract of the intention to have the contract renewed.

13. Loyalty to the Employer

The Employee shall devote his time and attention to his duties and shall at all times discharge duties assigned to him with due diligence and to remain loyal and faithful to the employer in the performance of his duties.

14. Should the provisions of this contract be found to be deficient or ambiguous or should there be any situation that warrants a review of this contract, the Parties hitherto, shall seek consensus thereon and the same shall be reduced to writing and shall form part of this Agreement upon it being duly signed by both parties and appended hereto.

Thus agreed at Maseru on this the 31st day of March 2011."

- [8] Thus when the Principal Secretary signed the **LS2** on the 28th January 2014, he was acting for the **Government of Lesotho** (*omnia praesumuntur rite esse acta*) and clause 1 of **LS2** provided that

“Period entered into herein shall subsist for a period of three (3) years from 1st February 2014 to 31st January 2017.”

- [9] **LS2** which is very similar to **LS1** in all material respects reads:-

“LS2”

**“CONTRACT OF EMPLOYMENT TO THE LESOTHO
HIGHLANDS WATER COMMISSION (LHWC)**

BETWEEN

***THE GOVERNMENT OF LESOTHO, REPRESENTED BY THE
PRINCIPAL SECRETARY, MINING OF ENERGY,
METEROLOGY AND WATER AFFAIRS***

(Hereinafter referred to as the Employer)

AND

MS LUCY SEKOBOTO

(Hereinafter referred to as Employee)

1. Period

The contract entered into herein shall subsist for a period of three (3) years from the 1st February 2014 to 31st January 2017.

2. Duties and Responsibilities

2.1 In terms of Article 9 of 1986 LHWP Treaty the employee shall represent Lesotho's interest on LHWP legal matters in the Lesotho Highlands Water Commission meetings.

2.2 The employee shall be responsible for the legal affairs of LHWP.

2.3 While giving legal expertise, the employee shall carry out her duties with due diligence and efficiency, in a practical manner designed to accomplish the smooth implantation of the LHWP Treaty and Phase II agreement.

2.4 The employee shall give legal opinion, legal counselling and representation in the courts of law on legal matters relating to the Project.

3. Performance

The employee undertakes to perform the services and duties under the contract with the highest standard of professional competency and ethical integrity.

4. Working hours

- 4.1 *The working hours will be from Monday to Friday from 08.00 hrs to 17.00hrs with a one hour lunch break between 13.00hrs to 14.00hrs;*
- 4.2 *However, if circumstances so require, the employee shall work long hours and on Saturdays, Sunday and Public holidays.*

5. Remuneration

- 5.1 *The employee's monthly salary shall be that of the LHDA Division Manager plus 10%, and shall be entitled to other benefits as outlined in the LHWC Policies as may be amended.*
- 5.2 *The employee authorises the employer to deduct PAYE in terms of the laws of Lesotho.*

6. Gratuity

- 6.1 *The employee shall be entitled to gratuity which shall be calculated at the rate of 38% of the annual salary (CTC) and shall be payable at the completion of every two years and at the end of the last year.*
- 6.2 *Should the contract be terminated by either party before the contemplated contract period, gratuity shall be calculated and paid on pro-rata basis.*

7. Cell phone call units

The employee shall be provided with a cell phone set and call units to the maximum of M4,000.00 per month at the beginning of the month.

8. Annual leave

The employee shall be entitled to 30 working days annual leave.

9. Sick leave

The employee shall be entitled to sick leave in accordance with the LHDA Policy.

10. Accountability and Reporting

The employee shall report to, and be accountable to the Chief Delegate.

11. Notices and termination of contract

11.1 Either party may terminate this contract by giving three months' notice in writing or payment of three months' salary in lieu of notice.

11.2 The employee shall notify the employer three (3) months prior to the expiry of this contract of the intention to have it renewed and the employer shall respond within that period.

11.3 Termination of this contract shall in no way affect or otherwise limit any rights which accrued to either party during the subsistence of this contract.

12. Loyalty to the employer

The employee shall devote her time and attention to her duties at all times discharge duties assigned to her with due diligence and to remain loyal and faithful to the employer in the performance of her duties.

13. REVIEW OR AMENDMENT

Should there be any situation that warrant review or amendment of this contract, parties hereto shall seek consensus thereon and such shall be reduced into writing and duly signed by both parties.

*Thus agreed and signed in Maseru on the 28/01/day of January 2014.” (**our underline**)*

[10] It will be noted that clauses in **LS1** and **LS2** bear striking similarity and congruence – more specially on the following-

- (a) Duration of three years;*
- (b) Responsibilities and Duties (of respondent as Alternate Delegate);*
- (c) Accountability and Reporting;*
- (d) Termination of Contract;*
- (e) Loyalty to the Employer.*

These similarities between **LS2** and **LS1** confirm the inference that **LS2** is not a “*stand-alone*” contract entered into by the respondent and the Government of Lesotho. That is why when **LS1** expired at the end of February 2014, the Principal Secretary immediately renewed it by way of **LS2** on 28th January 2014.

- [11] It later seems that the Government of Lesotho had some problems with the Chief Delegate because by 23 April 2015, **Mr Putsoane** had successfully obtained a High Court Order restraining the 1st appellant from terminating his contract.

- [12] This court order does not appear to have pleased the 1st appellant at all as other developments show. His displeasure is confirmed by the fact that **Mr Putsoane** had to embark on contempt proceedings to ensure that the court order was obeyed unfortunately this came to naught as **Mr Putsoane** was dismissed nonetheless.

- [13] Thus when the respondent lodged her own urgent application on the 25 June 2015, **Mr Putsoane** had already been “*removed*” from office as Chief Delegate by 1st appellant on 23 April 2015 and relations between the 1st appellant and the senior management at LHWC were already frosty.

Chronology of events/ correspondence

- [14] On 13th May 2015, the 1st appellant wrote to the Chief Delegate to advise the respondent to attend at the offices of the 1st appellant on the 18 May 2015.
- [15] On the 1 June 2015, the 1st Appellant wrote a letter directly to the respondent requesting her to report to his offices on the 3rd June 2015. This letter had been preceded by the one dated 13 May 2015 addressed to Chief Delegate requesting him to avail the respondent on 18th May 2015.
- [16] This letter was followed by another letter dated 3rd June 2015. which reads:-

“Madam,

RE: NOTICE TO REPRESENT

Reference is made to clauses 2 and 3 of your Employment Contract. You are referred to the following incidences: (sic)

- *On the 11th ultimo you were instructed telephonically through Mr B.T. Khatibe to report to the office of the Principal Secretary of Water. You failed, without providing reasons, to report;*
- *On the 13th ultimo you were instructed through the Chief Delegate to avail yourself to the office of the Principal Secretary. You failed, without providing reasons, to report and*

- *On the 1st instant you were requested to report to the office of the Principal Secretary of Water on the 3rd instant at 14h30. You failed, without providing reasons, to report.*

The Government views such failures elucidated above as sheer insubordination.

Further your secondment to the Lesotho Highlands Water Commission (LHWC) expired on the 31st December, 2013.

You were then expected back to the civil service however, you continued to function with LHWC as if you were still a civil servant. This is evidenced by your application last month for early retirement from the civil service.

You are therefore to show cause why, within seven (7) working days, of receipt of this letter, clause 11.1 of your Employment Contract to the LHWC cannot be invoked.

In passing it may be noted that **Mr Tšiu Khatibe** has not filed any affidavit supportive to these communications to him from the 1st appellant.

[17] In reply the respondent addressed herself to 1st appellant on the 9 June 2015 thus:-

“RE: NOTICE TO REPRESENT

Ntate I received your letter with the above subject matter. Please note that I have asked the Chief delegate to transmit my response to you so that I follow proper protocol on my side since I am answerable to him and I consider this matter not really confidential but work related.

Let me humbly appeal to you that I did not defy your orders deliberately. My life condition has not been stable lately and I have really sick children. I have been in and out to doctors and on the dates you referred to I was on sick leave and as well as taking children for medical attention.

On the issue of my contract expiry. Ntate I have a valid contract expiring January 2017. The fact that I opted for early retirement does not invalidate my working at LHWC. It is the option that I am exercising after discussion with human resource. Besides, Ntate, I have more than 15 years of service in Government and that cannot go unnoticed Terminating of contract would not be justified.

Yours faithfully,

Lucy Sekoboto”

- [18] On the same day 9th June **Mr Putsoane** wrote an accompanying letter to 1st appellant. That letter reads:-

“RE: NOTICE TO REPRESENT

Ntate Rethabile, my office today the 9th June 2015 is in receipt of ‘me Lucy Sekoboto’s letter with an attachment of you letter on the above subject. I am aware that you have given her an ultimate of seven (7) working days to show cause why Clause 11.1 of her employment contract to the Lesotho Highlands Water Commission (LHWC) cannot be evoked, in other words firing or dismissing her.

Your letter to her is dated 3rd June 2015. This letter got to me late, for me to address/discuss with you fully. I therefore request that you either call me to discuss this issue face to face or extend your

deadline of seven (7) working days so that I can respond/ discuss with you fully.

I am fully aware and knowledgeable about Ms Sekoboto's whereabouts during working hours all the time. I therefore humbly request you to discuss this issue with me before you finally implement Clause 11.1 of her contract with LHWC. (Enclosed is a copy of response to your letter of 3 June 2015 from Ms L. Sekoboto).

Once more Sir, I kindly request you to avoid diagonal communication when dealing with serious staff issues under my supervision because this can cause unnecessary repercussions with undesirable consequences, sometimes. Please Sir, I refer you to my earlier letters concerning communication between your office and my office staff.

Sir, it will definitely be not in the best interest of the Project to terminate 'Me Lucy Sekoboto's contract now and in this way.

'Me Lucy Sekoboto is one of my key people in terms of legal advice and institutional memory in the LHWC.

Ntate Rethabile, I appeal to you that on sensitive issues such as this one affecting people's life, I suggest we follow protocol to the letter."

- [19] These letters were not received by the 1st appellant as shown by **Mr Thuso Koma** in his undated memo in which he confirmed that the letter from **Mr Putsoane** was refused acceptance upon instructions from 1st appellant who had instructed his secretary "not to receive any letters from **Ntate Putsoane**"

- [20] By letter dated 10 June 2015, **Mr Putsoane** complained directly to the Honourable Minister of Water that the 1st appellant was refusing to accept written communication from him.

Termination of the employment contract

- [21] On 16 June 2015, the 1st Appellant finally wrote to the respondent terminating her secondment contract:-

“RE: TERMINATION OF EMPLOYMENT CONTRACT

Reference is made to my MEMWA/P/23138 dated 3rd instant and caption: Notice to Represent.

*Due to your failure to respond to the above communication **Article 11.1** of your employment contract is invoked. The contract is terminated with effect from the 16th June, 2015. You shall be paid three (3) months’ salary in lieu of notice.” (our underline)*

- [22] According to letter dated 16th June 2015, the respondent’s second contract of secondment was being terminated in terms of **Article 11.1**. The reason given was “*sheer insubordination*” on the part of the respondent as demonstrated by her failure to report when requested to do so on 11th and 13th May and 1st and 3rd June 2015.

[23] Thus though still a public officer appointed by the Public Service Commission, her secondment contract within the Government was on a different footing. Its termination was to be in accordance with the provisions of **Clause 11.1** which read:-

“11.1 *Either party may terminate this contract by giving three months’ notice in writing or payment of three months’ in lieu of notice.*”

“Party” in this clause means either the **Government of Lesotho** or **Lucy Sekoboto**.

Fair opportunity (to make representations)

[24] In this case the respondent as the employee and “party” to the contract had a right to be afforded a fair opportunity to be heard prior to the invocation of **clause 11.1** terminating the contract of secondment⁵.

[25] Whether the respondent was afforded a fair opportunity is a matter that should be determined in the context of the fact that during April to June 2015, there existed “frosty” relations between the Chief Delegate, **Mr Putsoane** and the 1st appellant and that this had culminated in an court interdict being ordered against 1st appellant on the 23rd April 2015 and that these developments adversely affected the lines of communication

⁵ **Morokole** (infra) our para 58.

between the office of the 1st appellant and the Chief Delegate – who seemingly was dismissed on the very same day the Court made its order on the 23rd April 2015.

[26] The respondent had been appointed to hold the office of Alternate Delegate by the Public Service Commission and **LS1** and **LS2** are principally contracts of employment between the Government of Lesotho and the respondent. The termination of any of these contracts could be done in accordance with the termination clause which required a three months' notice in writing by either the Lesotho Government or by the respondent.

[27] Under our law, a termination of a contract is a “*jural act*” whose validity depends upon authority. It is important to determine whether the 1st appellant acted under authority of Lesotho Government when he terminated the contract of secondment **LS2** which is by all means a “*high profile*” contract and *sui generis* whose termination must be done expressly in writing.

Authority to terminate contract

[28] There are three main considerations in this appeal. Firstly, whether the termination of the contract of secondment was justiciable in the High Court or in the Labour Court or DDPR, and secondly whether the 1st appellant as Principal Secretary had authority/power under the contract to invoke **clause 11.1**

of the secondment contract to terminate such contract and thirdly assuming he had such authority whether he afforded respondent fair opportunity to make representation prior to the termination of the contract.

[29] The termination clause of the renewed – secondment contract provides that a Party should give a three months’ notice to the other party or pay a three months’ salary in lieu of notice. In the present case, the **Principal Secretary** states in his answering affidavit that “*he*” had the authority to invoke **clause 11.1** to terminate the contract.

[30] In this contract, the **Government of Lesotho** is the employer and the party and the **Principal Secretary** signed the contract on behalf of the **Government of Lesotho** which was the ultimate repository of power under the contract. The power to invoke **clause 11.1** to terminate can only be exercised upon authority of **Government of Lesotho**. The **Principal Secretary** does not have that power vested in himself under the contract. The letter of the 16 June 2015 conveys a clear impression that the **Principal Secretary** was invoking **Article 11** to terminate the contract and in fact he claims to have that power or authority in his detailed affidavit.

- [31] If a renewal of a contract of secondment requires a ministerial consent or recommendation, termination of such contract by Government should require an ostensible authority of **Government of Lesotho**.
- [32] The termination of the contract was precipitated by the lack of communication between the office of the **Principal Secretary** and of the Chief Delegate **Mr Putsoane** whose contract had been terminated on 23rd April 2015 but the respondent still held herself accountable to **Mr Putsoane**; unfortunately **Mr Khatibe** who seems to have stepped in as Chief Delegate has not submitted any affidavit supportive to the 1st appellant's assertions that the respondent refused to attend his offices after being requested to do so during May and early June 25th 2015.
- [33] What is clear though is that the crucial letter from respondent dated 9th June 2015 was "*refused acceptance*" at the office of the 1st appellant. Even assuming the 1st appellant had authority to invoke **clause 11.1** of the secondment contract, in the circumstances of the case, the respondent was not afforded, in fact was denied fair opportunity before her contract of secondment was terminated under **clause 11.1** of the contract **LS2**. This is perhaps the main ground upon which the termination should be set aside; and the reasoning of the learned Judge *a quo* is confirmed on this point.

Jurisdiction

[34] Several recent cases that have been decided by the High Court of Lesotho involving termination of secondment contract all indicate that the High Court has always asserted its jurisdiction to the determination of such cases. Such cases are **Mohafa v Ministry of Foreign Affairs**⁶; **Morokole**⁷ and **Mohapeloa**⁸. The legal framework in Lesotho clearly excludes the Labour Court to adjudicate in matters of secondment contract involving Government and its civil servants. This case is no exception and the High Court clearly had jurisdiction in a secondment contract between the Government and the respondent; and the terms of this contract are clearly stipulated under the **LS2**. Even the ordinary contracts of appointment within the civil service have their own legal framework exclusively under the **Public Service Act 2005, Regulations** and **Code of Good Practice** and are excluded from the jurisdiction of the Labour Court or the DPPR.

[35] In his answering affidavit the 1st appellant candidly admits that he received a report that his office rejected respondents' letter and that from **Mr Putsoane** and he states that his office had "...taken a position..." that since **Mr Putsoane** is no longer Chief

⁶ **Minister of Foreign Affairs and others v Mohafa – C of A (CIV) 2/2015**.

⁷ LAC (1995-1999) 82 of page 86 – in this case clause 5 specially provided "save as may be provided this agreement of employment shall be subject *mutatis mutandis* to the provisions of the 1969 Public Service Regulations.

⁸ LAC (1995-1999) 675.

Delegate he was not entitled to write correspondence in that capacity.

[36] That being the situation it appears that the respondent's letter dated 9 June 2015 also suffered the same fate and was rejected – thus the alleged failure to respond resulted. This created a crisis which resulted in writing of the letter of the 16 June 2015 terminating the secondment contract **LS2**.

[37] Finally assuming in favour of 1st appellant that he had authority, it is clear from the facts of the case that fair opportunity was denied by the refusal to accept the letter from the respondent dated 9 June 2015. In other words it cannot be said that the respondent failed to respond when her response was 'refused acceptance'.

[38] In this case it is important firstly to determine whether the 1st appellant has secured the authority of Lesotho Government authorising him to terminate the **Secondment Contract LS2** or whether he acted on his own as a representative of Government of Lesotho under the contract. Secondly, it is also necessary to determine whether –in fact- in the circumstances of this case the respondent was ever in fact afforded fair opportunity to make representations before the 1st appellant invoked provision in **clause 11** to terminate, as he did, the secondment contract **LS2**.

- [39] In order that termination of the secondment contract can be lawfully done, the Principal Secretary – as representative of **Government of Lesotho** – should have shown ostensible authority under the contract to terminate such contract. When the Contract **LS2** was entered into the 1st appellant as Principal Secretary represented the **Government of Lesotho** in the signing (execution) of the contract and where reference was made to “*party*” the 1st appellant could act on behalf of the Government in the renewal and termination processes duly authorised.
- [40] Termination of a contract is a “*juristic act*” which brings a contract to an end thus affecting rights and obligations of contracting parties. Like its renewal, termination requires proper authority.
- [41] Without casting any aspersions upon the 1st appellant as (representative of Government of Lesotho), the Government of Lesotho as the “**employer**” – and a party is vested with the power to terminate contract. The letter terminating the contract portrays an impression – regard being had to assertions of the 1st appellant’s affidavit – that he the 1st appellant assumed that he had the power to terminate the contract.

[42] Whereas the respondent maintained that the said contract was unlawfully terminated by the 1st appellant without giving her a hearing she admits that on the 3 June 2015 she received “*a notice to represent*” from the [1st appellant] where inter alia [she] was asked to represent why [she] failed to report to the office of the [1st appellant].

[43] Taking herself as still accountable to the Chief Delegate **Mr Putsoane**, she wrote to him informing him about the letter to represent and **Mr Putsoane** undertook to take the issue up with the 1st appellant.

[44] It should be noted that on the 23 April, 2015 the contract of **Mr Putsoane** with the Commission had been purportedly terminated by 1st appellant and a certain **Mr Tsiu Khatibe** was then an acting Chief Delegate and that it is clear that on the 10 June 2015 the respondents’ letter replying “*notice to represent*” was refused acceptance at the office of the 1st appellant. The respondent laments:-

“...I tried all means to reply the [1st appellant] but he refused to accept my response and I could not respond to [1st appellant] without going through the Chief Delegate...”.

[45] She concluded by saying that she was “*...not given a hearing before a decision to terminate my contract was taken in terms of the Public Service Act 2005 and Regulations or Labour Code...*”.

[46] She also alleges prejudice she will suffer as a result of the termination; she also says the 1st appellant does not have statutory power to fire her as he purported to do.

1st Appellants' Answering Affidavit (re: authority to terminate contract)

[47] It is indeed important to quote “*verbatim ipssima*” some firm statements from the 1st appellant’s answering affidavit. He states:-

“2. ...I am entitled to enter into contracts of employment and to terminate such contracts with employees of Government of Lesotho including employees who serve in state agencies such as the third respondent (Water Commission)...”

“4.5 *I then concluded that the applicant was not prepared to represent the interests of Lesotho as contemplated in clause 9 of the treaty between the two countries. In view of her prejudicial conduct and after forming a view that I had accorded the applicant the necessary right to make representations and she was ignoring all the correspondence from my office, I then invoked the termination clause in the agreement after doing the necessary consultations in government.*”

“5.0 ...The Principal Secretary does not enter into contract as the representative of the Minister but as the representative of the Government of Lesotho with the power to terminate should the circumstances dictate....”

“7.3 I deny that before I terminated the contract I did not give the applicant a hearing. I aver that I afforded the applicant an opportunity to be heard, but she failed to make representations to me. She was entitled to make the representations, which I prepared to consider. But for reasons best known to her she decided not to make such representations. I submit that I gave the applicant an opportunity to be heard before I could terminate her employment. I did not just terminate her employment. The termination of her employment was made for a valid reason since the government had resolved, after my representations, that it was no longer in the interest of Lesotho to have her represent the country as an Alternate Delegate.”

“10.6 I vehemently deny I did not comply with the principle of natural justice in dismissing the applicant. She was given an opportunity to come to my office for a meeting several times. She defied my instruction. I had no choice except to report her actions to the relevant authorities. It was then decided that her services be terminated given that her conduct prejudiced Lesotho’s interests in the Commission.”

“11.3...The Government of Lesotho is clear that it no longer wants to be represented by the applicant because she refuses to take lawful instructions and her conduct prejudices its interests in the Commission.”

[48] In this scenario it seems that as from the 23rd April 2015, the communication links between the 1st appellant and respondent were terribly strained if not severed. **Mr Putsoane** continued to steadfastly regard his position as Chief Delegate as unchanged and respondent still held herself accountable to **Mr Putsoane** despite the purported termination of his contract on the 23 April

2015. Accountability and communication go hand in hand and fair opportunity was not possible in the circumstances more especially where the correspondence from the Chief Delegate was refused acceptance at the offices of the 1st appellant.

- [49] What has been said in this judgment in no way attenuates the contractual power and authority of the **Government of Lesotho** under the contract as a party to invoke **Article 11.1** of **LS2** (the contract of secondment) and that the **Government of Lesotho** can at any time give a clear executive mandate to the **Principal Secretary** to give proper notice of three months or offer payment of three months' notice to the respondent having given her fair opportunity to make representations before the **Article 11.1** is invoked.
- [50] **LS2** is indeed a Government contract which has been reduced to writing and signed and therefore binding on the parties clause by clause and parole evidence rule excludes the extra-documentary evidence in interpreting its clause.
- [51] The termination of a secondment contract of high profile as **LS2** requires an executive decision. We note that even a renewal of such contract requires a ministerial recommendation. An unauthorised termination can render Government liable for

undue damages. Privity of contract and parole evidence preserve the sanctity of contract⁹ as a matter of public policy.

- [52] Both the **Government of Lesotho** (represented by the Principal Secretary and the respondent were parties to the contract and equally bound to the letter of each clause. Indeed in this contract **Public Service Commission** had no authority to invoke clause 11.1 to terminate the contract.

Conclusion (*on jurisdiction*)

- [53] (a) For reasons given in this judgment, we uphold the learned Judge *a quo*'s in his finding that the High Court did have jurisdiction to determine this matter principally because the respondent being an employee in both contracts nevertheless continued being a public officer to whom the Labour Code did not apply – hence the Labour Court had no jurisdiction over the matter of termination of contract between the Government of Lesotho and the respondent.
- b) The contract of secondment was also a distinct contract from the principal employment contract as a public officer. The respondent by law reverts to her original office as

⁹ *Privity of contract* – see **RH Christie** – *The Law of Contract in South Africa* – (2nd Ed) 1991 – page 310, 486 See also **J.A.G. Griffith** – *Understanding the Law* – (2000) (3rd Ed)

principal legal advisor in the Ministry of Water at the end of her contract of secondment which *in casu* was renewed on the 28th January 2014 and was due to expire on 31 January 2017.

[54] In the Court of Appeal case of ***Attorney General and Another v Morokole***,¹⁰ the contract of secondment had its own clause 11.1 governing the termination of contract of secondment (for whatever reasons – be they disciplinary or otherwise) and that a minimum requirement of three months’ notice was all that was required to be given by one party to the other party in the contract; and that natural justice also required that fair opportunity be afforded the affected employee to make representations before the invocation of the termination clause could be resorted to.

[55] In the ***Morokole*** case **Kotze JA** has this to say:-

“We have heard extensive argument on both sides. Such argument, in the main, turned on the question whether the respondent was, by reason of the provisions of Clause 11 of the contract of service, deprived of the protection of having recourse to the disciplinary procedures afforded him by the Public Service Regulations imported into the service contract by Clause 5 thereof...”

¹⁰ LAC (1995-1999) 82 of page 86 – in this case *clause 5* specially provided “save as may be provided this agreement of employment shall be subject mutatis mutandis to the provisions of the 1969 Public Service Regulations – see also **Mohapeloa vs Lesotho Telecommunications Corporations** – LAC (1995-1999) 675.

*In the view that I take, the answer to the question referred to in the preceding paragraph is that the disciplinary procedures referred to, do not form part of the agreement. The Public Service Regulations are excluded in regard to termination (which is a concept wide enough to embrace disciplinary procedures) because termination is provided for in Clause 9 and 11 of the agreement. Unless extended, the contract terminates after effluxion of a two-year period or by three months' notice by either party or by payment of salary by the employer in lieu of three months' notice.” (our **underline**)*

We agree.

[56] The learned **Judge Kotze JA** also held that the requirement of prior fair opportunity to be heard had been met because the employer had granted the respondent the opportunity to make representations. Termination of a secondment contract may be grounded upon administrative or even disciplinary reasons and put simply, when she signed the **LS1** secondment contract on the 28 January 2014, the respondent agreed and consented to the contract being liable to be terminated by Lesotho Government having given her a three months' notice or three months' salary in lieu of notice.

[57] The termination of a contract effectively extinguishes the rights between parties whereas renewal of such contract extends the enjoyment of those rights. In our view in as much as Ministerial recommendation is required for the renewal of the secondment contract, there is more reason to require a Ministerial authority

to authorise termination of a secondment contract. The 1st appellant merely states in his affidavit that he had secured the authority of **Government of Lesotho** cloaking him with power and authority to terminate the contract. In his answering affidavit he claims to have that authority and power under the contract.

[58] We hold that the Court *a quo* was correct in its decision that firstly the High Court had jurisdiction over the matter of termination of the secondment contract; secondly that in the circumstances of the case, the first appellant had no authority, direct or ostensible, to invoke **clause 11.1** to terminate¹¹ the secondment contract and thirdly that the respondent was denied fair opportunity to make proper representations before the invocation of **clause 11.1** was made.

Order : The appeal is dismissed with costs.

¹¹ The renewal and termination clauses of the contracts of secondment should be more explicitly drafted as to by whom, when and how these acts were to be performed.

S.N. PEETE

JUDGE OF APPEAL

I agree

N. MAJARA

CHIEF JUSTICE

I agree

M. CHINHENGO

JUDGE OF APPEAL

For Appellants : **Mr Letsika**

For Respondent : **Mr Sekonyela**