

HELD AT MASERU

In the matter between:

TS'EPANG TUMAHOLE

APPLICANT

and

BOLIBA MULTI-PURPOSE CO-OPERATIVE

RESPONDENT

JUDGMENT

Date: 04/04/13

Terms and Conditions of Employment - Secondment - Whether the decision to retrench applicant was appropriate - Answer dependent on the terms of applicant's employment contract - Applicant contending that he could not be retrenched as he was employed on secondment terms but had to revert to his former position - Therefore, he contended the decision to retrench him was tantamount to an unfair dismissal - Court finds the dismissal unfair.

1. At the heart of this dispute is whether the applicant was appointed on secondment terms and if so on encountering problems in his other job had to assume his substantive position instead of being retrenched.
2. It is common cause that the applicant was engaged by the respondent on permanent terms initially as a Deposits Consultant/Clerk. It was also indisputable that he was transferred on promotion to Accounts and Finance on 1st November, 2008 as an Accounts Assistant. On 17th December, 2008 he was appointed to the position of acting Manager of Boliba Hardware, the precursor of Boliba Farmers' Co-op.
3. The applicant testified that around May, 2009 there was an internal advertisement for the position of Manager, Boliba Hardware, a subsidiary of Boliba Multi-Purpose

Co-operative, the mother body comprising Boliba Farmers' Co- op and Boliba Savings and Credit. He averred that he tendered his application for the job and was successful. In the course of his employment at Boliba Hardware he received a letter dated 1st July, 2010 informing him of the closure of Boliba Hardware and further terminating his employment with effect from 30th July 2010. It was communicated in the letter that the termination was for operational reasons on grounds that Boliba Hardware was not viable. The dispute between the parties arose here. Applicant's contention is that he was appointed to Boliba Hardware on secondment terms and could not be retrenched whereas the respondent insisted that his appointment to Boliba Hardware was an ordinary transfer, and he could be retrenched.

4. The applicant contended that he ought to have been absorbed into any suitable branch within Boliba Multi - Purpose Co-operative. The then acting Chief Executive Officer (CEO) of Boliba, Mosehle Khalema, insisted that the termination on retrenchment terms was appropriate in circumstances under which the applicant was engaged at Boliba Hardware. The applicant contended, on the other hand, that he could not be retrenched but had to revert to his substantive position, and as such the purported retrenchment was tantamount to a dismissal which he deemed unfair. The applicant testified that he tried unsuccessfully to impress upon the CEO that he could not be dismissed as he was employed on secondment terms. The applicant further testified that some employees such as Lebalang Lints'a who was a Cashier at Boliba Hardware were accommodated back into Boliba Multi- Purpose Co-op. He maintained that his dismissal was motivated by nothing else but the sour relations that existed between him and the acting CEO.

5. The applicant seeks relief before this Court in the following terms:

- (i) That the dismissal be declared both substantively and procedurally unfair;
- (ii) Reinstatement;
- (iii) Compensation equivalent to thirty-six months' salary amounting to Three Hundred and Fourteen Thousand, Three Hundred and Fifty-Two Maloti (M314,352.00);
- (iv) Payment of bonus pay equivalent to Twenty-Six Thousand, One Hundred and Ninety- Six Maloti (M26,196.00);
- (v) Costs of suit;

(vi) Further and/or alternative relief.

6. Respondent's case through its then acting Chief Executive Officer was that the applicant's engagement with Boliba Hardware did not satisfy the requirements of secondment as stipulated under Clause 4.4 of Boliba Multi-Purpose Co-operative Human Resource Policy of June 2007, 1st Edition. In essence, he averred that the purported secondment did not comply with respondent's internal regulations. Indeed, Clause 4.4.1 of the Boliba Multi-Purpose Co-operative Human Resource Policy reads that "***BMC may engage a seconded employee, and may also second its employees to other institutions, subject however to clearly specified terms and conditions of secondment, and upon approval per resolution passed by the Board in a general or special meeting.***" He argued further that secondment could not apply to employees who work within the same institution. As far as he was concerned, the applicant was engaged at the then Boliba Hardware (now Boliba Farmers' Co-operative) as a substantive manager and not on secondment terms as his appointment fell short of the requirements of a secondment contract under the Boliba Human Resource policy.

THE NOTION OF SECONDMENT

7. The term 'secondment' generally applies to the temporary transfer of a member of staff from one department to another within the same organisation or between two organisations be they private or public. The loan period is normally for a fixed period of time and for a specific role.

8. The notion of 'secondment' was aptly captured by *Kotze A.J.*, in the Court of Appeal case of *National University of Lesotho v Thabo Moeketsi 1995-1996 LLR - LB 100* at pp.102-103 in the following words: "***The word secondment means transference of a person from one post of employment to another or to render available the services of a person from one department to another. Implicit in a contract of secondment is that when it terminates the contract of employment between the seconder and the person seconded resumes.***"

WAS THE APPLICANT ENGAGED ON SECONDMENT TERMS?

9. This is a question of evidence. The operational reasons for closing down Boliba Hardware were not an issue as both parties were in agreement that the entity was not profitable, but what was at stake was applicant's fate after the said closure. The applicant wished to be absorbed back to the position he held at Boliba Multi-Purpose Co-operative prior to his engagement at Boliba Hardware or to any suitable position within Boliba structures.

10. The letter appointing the applicant to Boliba Hardware was couched in the following terms:

30 May 2009

*Mr. Ts`epang Tumahole
C/O Boliba Multi-Purpose Cooperative
Boliba House
Main South 1, Maseru*

Dear Mr. Tumahole,

APPOINTMENT AS BOLIBA HARDWARE MANAGER

I am pleased to advise that you have been appointed as Boliba Hardware Manager with effect from 01 June 2009 on second-mend (sic) (underlining mine).

You shall be charged with the responsibility of effective and efficient supervision of staff and management of the entire business operations of Boliba Hardware, and shall furthermore report directly to the Chief Executive Officer of Boliba Multi-Purpose Co-operative. A copy of your detailed job description is attached.

Your gross monthly salary shall be M8,732.00 (Eight thousand, seven hundred and thirty two Maloti),which is Grade E Notch 2 of our Salary Structure. Your other terms and conditions of employment shall remain the same as stipulated in the BMC Human Resource Policy.

Please indicate your acceptance of this offer by completing and signing on the spaces provided below.

Yours sincerely,

_____ (signature)

**TR SOPENG
Chief Executive Officer**

11. From the language of the 1st paragraph of this letter, which I find very straight forward, it says in no uncertain terms that the applicant was on secondment terms with Boliba Hardware. It is evident that the management of Boliba intended the position to be on secondment terms. Firstly, it was not disputable that the position of

Hardware Manager was advertised internally in an advert captioned “**SECONDMENT APPOINTMENT.**” Secondly, the applicant annexed (T15) to his originating application a copy of a memo from the then Chief Executive Officer Teboho Sopeng. The memo read;

Dear Colleagues

I attach advert (sic) and you are to ensure that your staff at Check-Clerk level upwards are made aware of it. Manager BSC should then arrange a meeting for clerical staff of levels mentioned to be held at BSC; in which meeting the issue of secondment will be clarified by management.

The meeting is to be scheduled for Tuesday, 04 May at 1600.

By the Grace of God;

Teboho Raymond Sopeng (Mr)

Chief Executive Officer

Boliba Multi-Purpose Co-operative

Private Bag A38, Maseru 100.

Contacts: (266 22320683(O), +266 22336878 (h), +266 62855152(cell)

Email: sopengtr@bmc.co.ls

12. Sopeng even filed a supporting affidavit to applicant’s originating application and testified on behalf of the applicant in Court to confirm applicant’s position that he had been engaged on secondment terms. Clearly, the then management preferred the position of Boliba Hardware Manager to be on secondment. Even if the subsequent manager was not happy with the arrangement, the applicant had already acquired the position on secondment terms and the new manager had to align himself with the decision that had already been made. As it were, Sopeng had acted on behalf of Boliba Multi-purpose Co-operative and whatever decision he made in his official capacity committed it.

13. Respondent queried applicant’s appointment on the basis that it was unprocedural as it did not comply with the Boliba’s Human Resource Policy. He contended, among others, that the Board had not been consulted to approve of the said secondment. Again, that the letter of applicant’s appointment did not stipulate a time frame for the secondment. Assuming this was the case, one pauses to ponder: whose fault was it that Clause 4.4 of the Boliba Human Resource Policy was not followed to the letter? It was definitely not the applicant’s. The applicant cannot be made to bear the brunt of someone who did not do his or her duty to ensure that all

was in order, perhaps someone in the Human Resource Section. Surely this cannot vitiate or nullify the whole contract of secondment. As *Schalk Van De Merwe et al.*, put it in *Contract- General Principles 5th ed., 1999* at p.11 “*The basis of a contract is either consensus, that is an actual meeting of the minds of the contracting parties, or the reasonable belief by one of the contractants that there’s consensus.*” From the papers filed of record and the evidence led, the applicant appeared to have genuinely been operating under a belief that his secondment appointment was in order. We find this belief to have been reasonable in the circumstances of this case.

14. The facts surrounding this case point to the fact that the applicant was engaged with Boliba Hardware on secondment terms. Relying on the definition of secondment as enunciated in the case of *National University of Lesotho (supra)* that implied in the contract of secondment is that when the secondment terminates, the contract between the seconder and the person seconded resumes, it therefore followed that as soon as management made a decision to close down Boliba Hardware, it became obliged to facilitate applicant’s resumption of duty within Boliba Multi-purpose Co-operative structures. Secondment is just the freezing of conditions of service and the entitlements attached to the original position until the end of secondment. The applicant remained a substantive employee of Boliba Multi-purpose Co-operative.

15. Respondent’s arguments challenging the propriety of applicant’s secondment are misconceived and therefore do not hold water. The respondent acted unreasonably in retrenching applicant particularly when he brought to their attention that he had been seconded. His letter of appointment to Boliba Hardware had been written in a very clear and unambiguous language that it was on secondment terms. His application therefore succeeds. The Court is not ordering reinstatement due to the time lapse between applicant’s termination of employment in July, 2010 and the disposal of this matter.

The Court makes the following order:

- (i) It declares applicant’s retrenchment unfair;
- (ii) The claim for bonus payments is dismissed. The reason being that a bonus is earned. It is for services rendered and is based on an incumbent’s performance during the relevant period. Since the applicant was not at work he cannot be granted bonus pay;
- (iii) The Court awards the applicant compensation equivalent to twelve

months' wages based on his salary when the contract was terminated. In mitigation, the applicant intimated to the Court that he unsuccessfully looked for a job and ultimately set up his own business venture (LES AGRI) in August, 2011 and accumulated Nine Thousand, One Hundred and Ninety-Three Maloti (M9,193.00). This is to be deducted from the total compensation amount.

- (iv) This amount is to be paid within thirty (30) days from the handing down of this judgment;
- (v) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 04th DAY OF APRIL, 2013.

F.M. KHABO
DEPUTY PRESIDENT

L.MATELA
MEMBER

I CONCUR

R.MOTHEPU
MEMBER

I CONCUR

FOR THE APPLICANT : ADV., T. MAHAPANG - SEPIRITI

**FOR THE RESPONDENT : H. SEOAHOLIMO - INDUSTRIAL
RELATIONS OFFICER (Boliba
Multi - Purpose Co-operative)**