IN THE LABOUR COURT OF LESOTHO CASE NO LC 131/95

HELD AT MASERU

IN THE MATTER OF:

NTAHLI MATETE	1ST APPLICANT
LEBOHANG BOSIU	2ND APPLICANT

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	1ST RESPONDENT
THE CHIEF EXECUTIVE - L.H. D.A	2ND RESPONDENT

JUDGMENT

The two applicants are civil servants who were seconded by the Public Service to work for the 1st respondent (the Authority) for an unspecified period. Annexure 1 to the Authority's answer is the letter of secondment of the second applicant. The Court understands that this is a standard letter in terms of which the first applicant was also seconded to the Authority. One of the conditions of applicants' employment was that;

> *"Your Secondment to the Lesotho Highlands Development Authority may be terminated at anytime should the Government so decide without any reason being given".*

LABOUR COURT
REGISTRAR
15 FEB 96
P/BAG A 116
MASERU 100
TEL:

Applicants were required to advise in writing whether or not they accept the offer of secondment on the terms and conditions outlined in Annexure 1. We assume that they did accept the offer, because persuant to their letter of secondment applicants entered into contracts of employment with the Authority; with effect from 2nd April 1992, in the case of first applicant and 15th April 1991 in the case of Second applicant.

Both applicants were offered open-ended contract appointments by the Authority which they accepted. Clause 2 (c) of the contract entitled both applicants to 25% gratuity of the salary drawn after every two years of service. In the event that two years had not been completed the gratuity would be calculated pro rata. Clause 11 of the contract provided for termination of the contract upon giving three calendar months' notice by either party, or payment of one month's salary in lieu of such notice.

On the 1st August, 1995 the applicants were advised by the Principal Secretary of the Ministry of Public Service that their secondment to the Authority was being terminated in terms of the aforesaid condition of their secondment. The termination was to take effect on the 31st August, 1995. Thus the applicants were given exactly one calendar month's notice of termination of their secondment. Subsequent to this notification the 2nd applicant who was employed as the Authority's Human Resources Manager wrote a memorandum to the Financial Controller requesting him to process the applicants' terminal benefits. He went further to list the terminal benefits which he believed were due and they were clearly premised on the assumption that the Authority, not the applicants terminated the applicants' contracts.

Applicants have no difficulty with their recall to the civil service. Their difficulty relates to the terminal benefits which they were paid by the Authority when they left the service of the Authority.

There is clearly a misunderstanding regarding what terminal benefits applicants are entitled to and what the Authority actually paid them. It is clear to the Court that some of the claims ought not to have been brought to Court because they are simply a misunderstanding, which could have very easily been settled through the assistance of a third party like the Labour Commissioner, had his assistance been sought.

In the first place, the applicants claim that they are entitled to be paid one month's salary in lieu of the three months notice which they ought to have been given in terms of clause 11 of their contract. A lot of time was taken by the Authority's legal representative trying to deny liability to pay the notice as claimed. Essentially Mr Sekonyela on behalf of the Authority contended that there was a conflict between applicants' contract with the Authority and the conditions of their secondment by the Government. He pointed out that whilst the contract they had with the Authority required that notice of three months should be given by either party prior to termination of the contract, applicants' condition of secondment stated that the secondment may be terminated at anytime. He went further to say that, it was the applicants who ought to have given three months notice to the Authority or to have arranged with the Ministry of Public Scrvice to give them time to serve their three months notice with the Authority.

Alternatively he argued that, the Authority did not know that one of the conditions of applicants secondment was that the secondment could be terminated at anytime when Government so decided. He contended that should the court hold that the Authority is liable to pay applicants' the one month's salary in lieu of notice, it should declare clause 11 of the contract, which requires that notice of three months be given prior to termination, as null and void ab initio because of misrepresentation. He poiuted out that applicants failure to bring that condition of their secondment to the attention of the Authority amounted to misrepresentation, because if the Authority was aware of it, they would not have contracted in accordance with clause 11 of the contract.

In the opinion of the Court, nothing turns on these arguments. If the circumstances of this case were different Mr Sekonyela's submissions might well have been very good arguments. They are, however, a wasted effort because applicants have infact already been paid one month's salary in lieu of notice, calculated pro rata in accordance with the period of notice that the applicants did not serve. Thus in calculating applicants' terminal benefits which were separate from applicants' August salary, the Authority paid them 1/3 of their one month's salary, because they said applicants served notice for only one month and that was the month of August. The Authority withheld 2/3 of one month's salary, because they contended that applicants failed to serve the other two months of their notice. Applicants' salaries for August were paid by separate cheques, No. 15137/0161 for first applicant and No. 15147/0161 for second applicant. Both these cheques are dated 24th August, 1995 and they are annexure 3 to the Authority's answer.

The applicants further claimed to be paid severance pay in terms of section 79 of the Labour Code, Order 1992 (the Code) . They further contended that it was the Authority's established practice to pay its employees severance pay . To prove this,

the applicants annexed Annexure VI to the originating application which is a memorandum from the Authority's Legal Services Manager to the Chief Executive advising that one Mr Sello should he paid his severance pay in terms of the Code because *"the severance payment is payment that every employee without exception is entitled to on completion / termination of the employee's contract."*

Mr Sekonyela argued firstly that severance pay is only payable to employees who are terminated . He averred that the case of the applicants was different in that they were not terminated, but they were recalled back to the civil service .He pointed out further that termination of secondment is not termination of employment as is envisaged under the relevant provisions of the code. Secondly, Mr. Sekonyela argued that section 79 of the Code is a minimum protection for employees who are not paid anything on termination of contract. He stated that where parties have agreed on better and higher terms as is the case in casu, Section 79 does not apply. He contended that applicants herein have been paid severance pay in the form of gratuity which is by far more than severance pay payable under Section 79 of the code.

In the opinion of the court there is substance in these arguments. Among other international labour instruments that provide for payment of severance pay upon termination of employment can be cited the Termination of Employment Convention No.158 of 1982. Article 12(1)(a) of that Convention provide that;

> *"1. A worker whose employment has been terminated shall be entitled , in accordance with national law and practice, to:*
>
> *"(a) a severance allowance or other separation benefits, (emphasis added) the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions".*

For reasons that will be clear in due course we have emphasized the words *".....or other separation benefits....."*

Article 2(4) of the Convention provides as follows:

> *"(4) In so far as necessary, measures may be taken by the competent authority or through appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide better protection that is at least equivalent to the protection afforded under the convention."*

In line with the letter and spirit of the foregoing Articles of the Convention, Section 79 of the Code provide that employees who have been continuously employed for at least one year shall be entitled to severance pay. Section 4(a) of the Code, which in our view goes hand in hand with Article 2(4) of the Convention provides:

> *"4(a) The standards laid down in the Code are the minimum legally obligatory standards and are without prejudice to the right of workers individually and collectively through their trade unions to request, to bargain for and to contract for higher standards, which in turn then become the minimum standards legally applicable to those workers for the duration of the agreement".* (Emphasis added).

In, our view the words *"severance allowance or other separation benefits"* in Article 12(1)(a) are instructive. It is clear from these words that severance pay as is provided for under Section 79 of the Code is not the only separation benefit that is legally binding to the employer. There is room for payment of other separation benefits in place of severance pay. Article 2(4) allows exemption of an employer from obligation to pay severance pay where such an employer has arrangements which provide for better separation benefits which are at least equivalent to those provided by the Code.

It is common cause that in terms of clause 2 (c) of their contracts with the Authority, both applicants were entitled to *"gratuity at the end of every two years at the rate (of) 25% of the salary drawn over the period".* In terms of Section 79 of the Code, however, applicants would be entitled to an equivalent of two weeks wages for each completed year of service with the Authority. We have no doubt that as Mr Sekonyela submitted, applicants' contracts with the Authority provided better and more lucrative separation benefit than those prescribed under Section 79 of the Code in particular. In our understanding the purport of Section 4 (a) of the Code is that where an individual or a group of workers through representation by their trade union have agreed on higher standards of employment than those provided for under the Code, the agreed higher standard are substituted for the less and lower standards that the Code provides for, hence the words *"... the higher standards ... in turn then become the minimum standards legally applicable to those workers...."*. Accordingly therefore, the Authority is in line with Article 2 (4) of Convention No 158 exempted by Section 4(a) of the Code from obligation to pay severance pay because the 25% gratuity to which applicants are entitled by virtue of their contracts constitutes an alternative separation benefit which is more beneficial to applicants than severance pay payable under Section 79 of the Code.

Assuming however, that applicants were found to be entitled to both severance pay and gratuity simultaneously, would they in the circumstances of this case be entitled to such severance pay? In the light of Article 3 of the aforesaid Convention, the applicants would still not qualify for severance pay in the circumstances of this case. Article 3 of the convention provides that: *"for the purpose of this Convention the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer."*

It is common cause that in terms of Section 79 of the Code termination of employment may be at the initiative of the employer, or the employee. In both instances an employee is entitled to severance pay, as long as he has not been dismissed for misconduct. We are once more of the view that Mr. Sekonyela's contention that termination of applicants' secondment to the Authority did not mean termination of employment as it is envisaged under Section 79 of the Code has merit. Neither the applicants nor the Authority initiated the termination. Some authority above both parties brought the parties' relationship to an end and none of the two parties can be held responsible for the termination in such a case.

The applicants further contended that it is already the practise of the Authority to pay its employees severance pay. The memo of the Legal Services Manager was used as prove of this averment. It is no longer necessary to make any further ruling on this contention in the light of our findings above, save to remark that, clearly the Legal Services Manager was only giving an advice to the Authority's Chief Executive based on her understanding of the Code with regard to employees' entitlement to severance pay. Such an advice arose because, there had probably never been a case of that nature before. If such cases were common cause, the advise would not have been necessary. In short the memo of the Legal Services Manger does not constitute evidence of an established practice; but rather it shows that no practice hitherto existed which could be relied upon as a guide in such cases.

The last leg of applicants claim related to the 2/3 of their notice pay which was withheld by the Authority as salary overpay. It however, came out from Mr Sekonyela's submissions and papers filed on behalf of the Authority that the 2/3 which was withheld represented a proportion of the three months period of notice which the applicants did not serve. We have already held that neither of the parties was responsible for the termination of the contract in this case. Consequently the provisions of the Code with regard to notice to be given by a party terminating the contract do not apply. In the same way the provision of the contract that regulates the period of notice to be given cannot be said to apply as that clause envisages a case where one of the parties to the contract initiates the termination.

It is common cause however, that the Authority volunteered to pay applicants one month's salary in lieu of notice notwithstanding that the nature of the termination of the contract was such that neither party can be said to be liable to the other for non-compliance with the agreement. Government as the authority that seconded the applicants to the Authority and as an overriding authority over the affairs of the Authority had made a decision to withdraw applicants from the Authority. None of the parties could quarrel with that decision.

Section 61 (3) of the Code provides as follows:

> *"(3) No person shall employ any employee and no employee shall be employed under any contract except in accordance with the provisions of the Code. Any contract, whether entered into before or after the commencement of the Code, which contains any term or condition less favourable to the employee than any corresponding term or condition for which provision is made by the Code, shall be construed as though the corresponding term or condition of the Code were substituted for such less favourable term or condition of service in such contract. However, nothing in the Code shall operate so as to invalidate any term or condition or any such contract which is more favourable to the employee, than the corresponding term or condition of the Code".* (emphasis added).

The important words for our purposes in this provision, which we have emphasized are that *"..... nothing in the Code shall operate so as to invalidate any term or condition (of) any..... contract which is more favourable to the employee".* In our view therefore, there is nothing wrong with the employer having offered the applicants one month's pay in lieu of notice notwithstanding that he was not in law obliged to pay it, because of the nature of the termination of applicants' contracts. The issue, however, is whether having made that offer, the Authority was entitled to withhold portion of the money paid as has happened in this case.

Mr Sekonyela argued that, the Authority was entitled to withhold that portion of the applicants pay in terms of section 76 (1) of the Code which provides:

> *"(1) The termination of any contract under the provisions of this part shall be without prejudice to any accrued rights or liabilities of either party under the said contract at the date of termination".*

He contended that the applicants were liable to pay the Authority for the two months notice period that they did not serve. It is important to note three things with regard to this contention.

1. Section 76 (1) of the Code refers to a contract that is terminated "..... *Under the provisions of this part ...*" of the Code. Section 76 falls under Part V which deals with "Contract of Employment; Termination; Dismissal; Severance pay". Once again the termination envisaged under this part is one that is initiated by either party to the contract. Accordingly therefore this part of the Code is of no application in the instant matter.

2. The Authority's purported accrued rights arise out of applicants alleged failure to serve their three months period of notice. As we have already found, there was no way in which clause 11 of the contract could be enforced against either party as neither party initiated the termination of the contract.

3. Annexure V to the originating application is a memo of the Acting Chief Executive to the Deputy Chief Executive dated 24th July, 1995. According to the contents of this memo, it is clear that the Chief Executive knew of the intention to terminate applicants' secondment at least since 12th July, 1995, when he received the letter of the Principal Secretary for the Public Service notifying him of the same. The Acting Chief Executive's memo does not stop at making reference to the Public Service letter of 12th July. It goes further to refer to the discussion held between the Chief Executive and his Deputy on the 17th July, 1995 on "..... *what is required by way of arrangements to effect the request of PS Public Service by the date stated in his letter*". Clearly therefore, the Chief Executive had at least, or close to two months prior notice from the Principal Secretary for the Public Service that the applicants would be recalled at the end of August. On the other hand applicants only knew as of 1st August that their secondment was going to be terminated. Assuming that the Authority had a right to withhold a proportion of applicants notice pay for the period they had not served notice, why did the Authority pretend that they had known of the Public Service's intention to terminate applicants secondment for only one month , namely ; August, 1995?

In our view since neither the Code nor the contract is relevant in the termination of applicants' contracts, there was no basis for withholding part of applicants' pay

either under clause 11 of the contract or under Section 76 of the Code. The Authority having voluntarily offered the notice pay to applicants, it became their right and ought not to have been interfered with without any lawful excuse. We find no justification for the withholding of that percentage of applicants' pay. Even if there was a justification, two months is certainly not the correct period in the light of the prior notification that the Chief Executive got from the Public Service. The onus was on the Authority to disclose exactly when they got to know of the intention to terminate applicants' secondment. They have not discharged this onus. We therefore hold that the Authority improperly deducted 2/3 of applicants' one month's pay in lieu of notice.

It is common cause that after effecting the aforesaid improper deductions from applicants notice pay, the Authority came up with a negative balance of M463.01 in respect of terminal benefits payable to the 2nd applicant. This negative balance gave rise to a counter-claim against the 2nd respondent in respect of the same amount allegedly due and owing to the Authority. Needless to emphasize the finding in favour of second applicant in respect of the withheld 2/3 portion of his notice pay, which is shown in annexure II to the originating application as amounting to M5,099.92, effectively disposes of the Authority's counter claim in the sum of M463.01.

AWARD

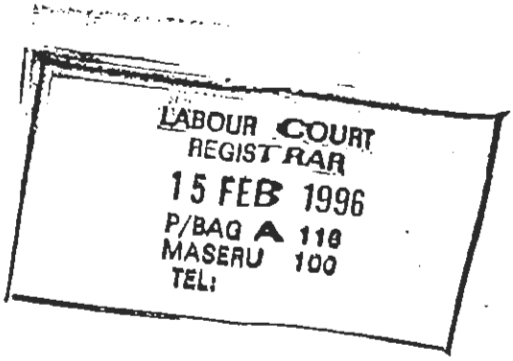
(a) Applicants' claim for M7,649.88 each as payment in lieu of notice is dismissed, for applicants had already been paid notice even though part of it was withheld.

(b) Applicants' claim for severance pay is dismissed because applicants have already been paid gratuity which offers better benefits than severance pay does.

(c) First Respondent's counter claim against the 2nd applicant is dismissed.

(d) First Respondent is ordered to refund applicants 2/3 of one month's salary deducted from their notice pay forthwith.

THUS DONE AT MASERU THIS 9TH DAY OF FEBRUARY, 1996



L. A LETHOBANE
PRESIDENT

S. LETELE **I CONCUR**
MEMBER

M. KANE **I CONCUR**
MEMBER

FOR APPLICANT: **MR VAN TONDER**
FOR RESPONDENT: **MR SEKONYELA**