

IN THE HIGH COURT OF LESOTHO

In the matter between.

PAAVO RUOTSALAINEN

Applicant

and

PRINCIPAL SECRETARY FOR MINISTRY
OF HEALTH

1st Respondent

ATTORNEY GENERAL

2nd Respondent

JUDGMENT

Delivered by the Honourable Mr Justice J.L. Kheola
on the 7th day of March, 1994.

This is an application for an order in the following terms -

- (a) Dispensing with the periods of notice required by the rules on account of urgency of this matter
- (b) Directing First Respondent herein to pay Applicant's payment in lieu of leave days unlawfully deducted forthwith
- (c) Interdicting Respondents from making any other unlawful deductions to Applicant's entitlements
- (d) Directing Respondents to pay costs hereof
- (e) Granting Applicant such further and/or alternative relief as this Court may deem fit.

The facts of this application are common cause. On the 26th March, 1988 the applicant was employed by the Lesotho Government on two-years contract which was extended several time and the last extension being on the 27th March, 1992. Some time in November, 1993 the applicant was informed by letter from the first respondent that at the end of the present contract it will not be renewed.

In February, 1990 the applicant talked with his then Project Coordinator, Mr P J. Ranteamen, about his going on leave after the expiration of his first contract on the 26th March, 1990. Mr Rantamen told him that he could not go on leave because of the work-load. Indeed the applicant did not go on leave and his sixty-nine leave days were carried forward to his next contract with the approval of the then Chief Planning Officer, one Mrs Matsau (See Annexure "PR2" to the founding affidavit).

The applicant's second contract commenced on the 26th March, 1990 and was to expire after two years. Around February, 1992 the applicant discussed his leave and renewal of his contract with Mr Mc Cloy, the Project Coordinator, Mr Matsau, the Chief Planning Officer, and the then Deputy Principal Secretary, Mrs Ntholi.

During the discussions Mrs Matsau told him that he could not

go on leave because their new Project Coordinator was still learning his job and that the applicant's assistance would be needed. Indeed he did not go on leave despite the arrangements he had made. He then had seventy-six days

Around March, 1992 the applicant was paid the sum of M28,827-60 as cash in lieu of his said leave days with the approval of the Project Coordinator and the Chief Planning Officer (See Annexure "PR3" to the founding affidavit)

The applicant's third contract with the Lesotho Government commenced on the 27th March, 1992 and was for a period of twenty four months. At the present moment he has forty-nine days outstanding leave days to his credit

As I have stated above the facts of this application are common cause. The respondents contend that the carrying forward of the applicant's leave days as per Annexure "PR2" was contrary to Regulation 2022 (3) of the Public Service Regulations 1969 which provides that

"Officers who are re-engaged for a further tour may, with the approval of their head of department, carry forward not more than one third of their leave entitlement outstanding

at the end of one tour to be taken within twelve months of the commencement of their next tour. Leave carried forward and not taken within twelve months will be forfeited."

Unfortunately the respondents were not aware that in 1971 Regulation 2022 (3) was extensively amended and now reads as follows'

3 (a) Officers who are re-engaged for a further tour of duty may, with the approval of the Permanent Secretary responsible for the Public Service carry forward all of their leave entitlement outstanding at the end of their previous tour. leave thus carried forward and not taken prior to the date of expiration of such further tour of duty shall be forfeited.

(b) The Permanent Secretary responsible for the Public

Service may, however, in extremely exceptional cases, authorise that leave carried forward in accordance with subparagraph (a) and not taken prior to expiration of an officer's further tour of duty, due to the exigencies of the service be again carried forward into the following contract period. Leave thus carried forward must, however, be taken within twelve of the commencement of the latter tour of duty otherwise it shall lapse, and under no circumstances shall there be a departure from this part of the regulation."

After the Court had drawn the attention of the counsel for both parties to the 1971 amendment a settlement was reached to the effect that the respondents should pay the applicant cash in lieu of leave for forty-six days instead of sixty-nine days and that they must contribute M750 as costs.

A few days later the judgment entered in terms of the deed

of settlement was rescinded by consent of the parties

The matter was argued on entirely different grounds which do not appear in the affidavits. Mr. Mapetla, counsel for the respondents, submitted that the carrying forward of the leave days as per Annexure "PR2" was contrary to the provisions of Regulations 2022 (3) of the Public Service Regulations 1969 (as amended) in that the approval of the Principal Secretary for Public Service was not obtained. There is no evidence that such approval was not obtained. The leave days were carried forward by the senior officers to whom the applicant is directly responsible. All the correspondence between the applicant and the first respondent is through these senior officers. These officers are the Project Coordinator and the Chief Planning Officer.

The payment of the leave days which were carried forward was done by the Project Coordinator and the Chief Planning Officer (See Annexure "PR3"). There was no way the applicant could have known that the approval of the Principal Secretary for Public Service was not obtained. He could not have known that the carrying forward of his leave days was not approved by the proper authority.

The letter which recovered the monies allegedly overpaid was

also written by the Project Coordinator (See Annexure "PR3")

The payment voucher which made the terminal benefits of the applicant was made by the Project Coordinator (See Annexure "PR7")

I am referring to all these correspondence between the applicant and the Lesotho Government to show that it was a regular procedure that the applicant dealt directly with the *senior officers* mentioned above. He could not have known that where these officers had to obtain the approval of the Principal Secretary for Public Service they had not done so. In any case there is no evidence by the Project Coordinator and the Chief Planning officer that they did not obtain the approval of the proper authority when they carried forward the leave days of the applicant

Under the presumption of regularity, if an official purports to have exercised a power which is effective upon compliance with certain formalities, it will be presumed that all the necessary formalities have been observed (See *Rex v Naran Samy*, 1945 A.D 619)

In *R v. Zondo*, 1954 (1) S A 209 it was held that the provisions for the posting of notices in Regulation 6 (1) of

Proclamation 12 of 1945, promulgated under the provisions of section 25 of Act 38 of 1927 and section 21 of Act 18 of 1936, are peremptory. In the absence of evidence to the contrary there is room for the presumption that the formalities required to be carried out in terms of the Regulation have been satisfied.

In the present case the formalities required to be carried out before the leave days were carried forward were that the officers concerned had to seek the approval of the Principal Secretary for Public Service. When they informed the applicant that his leave days were carried forward it must be presumed that the formalities required to be carried out in terms of Regulation 2022 (3) had been satisfied, unless the contrary is proved. In other words the onus is on the respondents to prove the contrary.

The answering affidavits of the Principal Secretary for Health and the Acting Project Coordinator do not address this point at all. In any case the people who could address this point are the then Chief Planning officer and the then Project Coordinator. In the absence of the evidence in the contrary the presumption of regularity must operate in favour of the applicant in the present application.

In the result the application is granted in terms of prayers (b), (c) and (d).

J. L. Kheola
J. L. KHEOLA
JUDGE

7th March, 1994

For Applicant - Mr Malebanye
For Respondents - Mr Mapetla.