

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOABI LECHESA

APPLICANT

and

SHADRACK D. KHENA
THE DIRECTOR, TEACHING SERVICE UNIT
THE ATTORNEY-GENERAL

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Before the Honourable Chief Justice B.P. Cullinan

JUDGMENT

Case referred to:

(1) Mothobi vs Minister of Education & Others.
CIV/APN/319/87, Unreported.

The applicant commenced employment as a teacher in 1951. Thereafter he held altogether seven posts as either Head Teacher or Assistant Head Teacher at different schools up to 1972. In that year he took up appointment as a Teacher at Likhakeng Secondary School, which is an African United National Baptist Church School. On 1st January, 1979 he entered into a written contract with that Church, as represented by the Reverent Isaac Khena (now deceased), manager of Likhakeng Secondary School under which contract the applicant was appointed as Head Teacher of that School with effect from that date.

The applicant remained in that post until 1990. In January of that year Rev. Isaac Khenā served him notice of termination of contract. The notice was ineffective, however, as it was not confirmed by the first respondent, as Educational Secretary for the Baptist Church, whose appointment as such had, under section 8 of the Education Order, 1971, been approved by the Minister: such confirmation was required by the terms of regulation 6 (3) of the Teaching Service Regulations, 1986. In any event, the Rev. Isaac Khenā subsequently gave the applicant written notice on 21st March, 1990 stating that he would cease to recognize the applicant's contract of service with effect from 31st March, 1990 due to the applicant's age, that is the age as stated by the applicant in the 1979 contract of service.

I should add that the applicant, when he approached this Court, did not refer to, much less exhibit such contract. Neither for that matter did he state his age. He initially approached the Court *ex parte* seeking, or so the notice of motion reads, "a mandamus". Although expressed in its letter to be *ex parte*, the notice of motion does not seek interim relief in the form of a rule and was apparently intended for service on the respondents forthwith. Therein the applicant seeks the review and setting aside of the decision of the first and second respondents in "purporting to retire the applicant on the grounds of age, and thereafter seeks the payment of his arrears of salary with effect from 1st day of April 1990, to date and thereafter until such time as the applicant shall have been properly retired from the teaching service." I would have thought that

the latter prayer connoted a prayer for reinstatement, yet such prayer is couched in the alternative in the notice of motion.

In any event when it came to grounding the notice of motion, the applicant in his founding affidavit submitted that his retirement was null and void on the grounds that,

- "(a) My age has not been proved.
- (b) I was not given adequate notice.
- (c) I was not paid three months' salary in lieu of such notice.
- (d) In any event such notice ought to have ended in December.
- (e) I ought to have received my full benefits which I have not and these are pension and/or gratuity".

As for the latter point no evidence whatever was introduced by any party in the matter, and I can say no more than that I assume that ultimately the applicant was paid all terminal benefits. As for the issue of notice, if it is the case that the applicant had reached retirement age, then the aspect of notice does not arise, the contract terminating with effluxion of time, upon the appropriate birthday of the applicant.

Which brings me to the applicant's age. In response to the termination of his contract on the grounds of age, he approaches

this Court and deposes to no more than the bald statement, "My age has not been proved". I would have thought that, where he disputed the age stated by the respondents, he would in turn depose to the exact date of his birth. He has not done so, however. On the contrary, the Secretary of the Teaching Service Unit in the Ministry of Education, in an answering affidavit, has annexed thereto a copy of the 1979 contract, in which the applicant, in that part of the contract completed by the applicant, gave his date of birth as "10.10.1924", which means that the applicant attained his 65th birthday on 10th October, 1989. In reply to such evidence the applicant deposes.

"Save to admit that I gave my date of birth as 10.10.1924, I deny the rest of the contents (of certain paragraphs of answering affidavit) and I aver that neither my age nor the (particular) regulations had the effect of extinguishing my age (- presumably the word, 'contract', or 'service', was intended) I deny that annexure "MTI" (the copy of the 1979 contract) is proof of my age"

The Court gave leave to all parties to file supplementary affidavits. The applicant annexed to his supplementary affidavit copies of three contracts of service into which he entered over the years of his career as a teacher. One was completed in 1951 with the Bethany Roman Catholic Mission School, another in 1965 with the 'M'a Mohau Roman Catholic Mission School, and another

in 1972 with the aforementioned Likhakeng Secondary School. In the 1951 contract the applicant gave his age as "March 1920". In the 1965 contract the age is given as either "October 1930" or October, 1920. The year is uncertain, the figure "1930" possibly being an alteration of "1920", that is, with a 'tail' added to the figure "2" below the line of the other figures, to make it "3". Then in the 1972 contract the applicant gave his age as 10.10.25."

The learned Crown Attorney Mr Mohapi submits that the latter contract is a forgery. That is an aspect to which I shall return. For the moment I observe again that on his initial approach to this Court, the applicant never stated his age: thereafter he has blandly placed three documents before the Court in which he has given three different dates of birth. Altogether he is the author of the relevant part of four documents in which he has given four different dates of birth. And yet nowhere in his founding, or replying or supplementary affidavits has he once stated what is his true date of birth.

The applicant seemingly labours under the mistaken impression that the onus falls upon the respondents to prove his age. Quite clearly his age is a matter peculiarly within the applicant's own knowledge, and the onus falls upon him to prove his age, or at least to disprove that which he himself has stated in the 1979 contract.

As the applicant himself has deposed, Likhakeng Secondary School became a grant-aided school (that is, an "aided school" referred to in section 4 (1) of the education Order, 1971, "in receipt of grants from public funds") in 1979. Even assuming that the copy of the 1972 contract is a valid document, the original or copy thereof was not in the possession of the Ministry (as was the 1979 contract, which was date stamped by the Ministry in 1979), and the second and third respondents are entitled to rely upon the date stated by the applicant in 1979. Again assuming that the copy of the 1972 contract is a valid document, the first respondent, who presumably did not possess a copy of any earlier contract with any other school is entitled to rely upon the applicant's revised date of birth, that is, the 10th of October, 1924, as last stated by the applicant in 1979.

The question then arises as to what is the retiring age applicable to the applicant? That is to be found in the legislation, or rather the more recent subsidiary legislation. Initially the Education Rules, '1948' (H.C.N 1/1948) were made under the Education Proclamation 1947, which were followed by the Education Rules, 1965, also made under the Proclamation, followed in turn by the Teaching Service Regulations (L.N. 3 of 1974) made under the Education Order, 1971 and lastly the Teaching Service Regulations, 1986, made under the Teaching Service Commission Act, 1983. The earlier Rules, namely those of 1948 and 1965, contained no provisions as to a teacher's retiring age. Such provision was introduced under regulation 11 of which read,

"11. (1) A teacher shall retire from the Lesotho Teaching Service on attaining the age of sixty years."

The 1974 Regulations were repealed by those of 1986, regulation 29 (1) of which reads,

"29. (1) A teacher shall retire from the Lesotho Teaching Service on attaining the age of sixty five."

It was presumably the latter regulation which caused the termination of the applicant's contract on 31st March, 1990, as by virtue of the date of birth supplied by him, he had reached his sixty-fifth birthday on 10th October, 1989. But as the Secretary of the Teaching Service Unit pointed out in his answering affidavit, the operative retiring age when the applicant signed the 1979 contract, was the age of sixty years to which age the applicant attained on 10th October, 1984, that is, before the retiring age was extended to sixty five years under the 1986 Regulations. It is then submitted that the applicant's contract of service, being contrary to the existing legislation, was illegal and hence invalid and of no effect on and after 10th October, 1984, so that he has no cause of action against the respondents. It is submitted further that, in any event, the applicant's contract of service became invalid on and after 10th October, 1989, when under the 1986 Regulations he attained the retiring age of sixty five years.

The applicant has *inter alia*, raised the issue of estoppel: he submits that the respondents cannot say that his contract of service was invalid, when after 10th October, 1984 and again 10th October, 1989, he continued in service and was duly paid his salary. But of course it is trite law that estoppel cannot act to bar a statutory duty or to validate an illegality.

The respondents also claim that, in any event, the applicant's 1979 contract of service was invalid as he had not been admitted to the Lesotho Teaching Service. The Education Order, 1971 (section 11) established a Teaching Service Board, whose sole function was to deal with appeals in disciplinary action against teachers. The Order itself, in its long title was expressed to be an enactment "to provide for the establishment administration and control of education in Lesotho". Section 21 of the Order empowered the Minister to

"made regulations for carrying into effect the principles and provisions of this Order and in particular and without prejudice to the generality of the foregoing, he (might) make regulations for -

(c) the appointment, dismissal, qualifications, salaries and other conditions of service of teachers in grant aided schools and controlled schools;"

The Teaching Service Regulations, 1974, were made by the Minister under section 21 of the Order. Regulations 3 (1) thereof read,

"3. (1) No person shall enter into a contract of employment as a teacher unless he has been admitted to the Lesotho Teaching Service and has received notice of his admission in the form set out in the ninth Schedule

(2) An application for admission to the Lesotho Teaching Service shall be in the form prescribed in the Eighth Schedule.

(3) The Permanent Secretary may call for such evidence of a teacher's qualifications as he deems necessary in order to arrive at a just decision on any application for admission to the Lesotho Teaching Service".

The application form contained in the Eighth Schedule was a most detailed form indeed, providing for the supply by an applicant of his personal statistics and those of his family, his academic, professional and additional qualifications, his record of service and other general information. Quite obviously the object thereof was to ensure the achievement of a standard of qualification in all persons before admission to the Teaching Service and before appointment as a teacher.

With the establishment of the Teaching Service Commission under the Teaching Service Commission Act, 1983, the Commission was required under section 7 of the Act to "establish and keep a register of teachers" and to "establish and maintain a teaching service adequate for the needs of schools in Lesotho". Thereafter the provision of regulation 3 of the 1974 Regulations were repealed and replaced by those of regulation 3 of the Teaching Service Regulations, 1986, which repeated the earlier provisions almost verbatim, with the exception that the Teaching Service Commission took over the role of the Permanent Secretary in the matter. Those provisions were considered by Sir Peter Allen J. in the case of Mothobi vs Minister of Education & Others (1) where the learned judge, having considered the contents of a circular (circular letter 1/1987) issued by the Teaching Service Commission on 6th February, 1987, with regard to the 1974 provisions, had this to say at pp 6/7:

"The TSC circular quoted above reveals an astonishing situation. It appears that for many years the Ministry of Education and the TSC had simply ignored the requirements of relevant legislation. The TSC Regulations of 1974 which required a potential teacher to obtain admission to the Lesotho Teaching Service before entering into a contract of employment had been ignored in the case of every teacher. These regulations were eventually replaced by the Teaching Service Regulations 1986, which did not come into force until July 1987, and so they are not applicable in this case, since we are here concerned with what happened up until February 1987.

Apparently, according to the Circular, the TSC Act 1983 had also been ignored and there was not even a register of teachers established and kept by the TSC. Nobody in authority evidently realised the seriousness of the situation until early in 1987, hence the above circular issued in an apparent attempt to regularise the positions of all the members of the teaching service, who were all evidently then in possession of illegal contracts of service. These appointments had apparently been made ultra vires since the requirements of the legislation, particularly the TSC Regulations 1974, had not been complied with. But the TSC, like everyone and every organisation in the country was and is required to comply with the law."

The applicant in the Mothobi (1) case had entered into a contract of employment as a teacher in February, 1986, before the issue of the circular letter in February, 1987, and before the issue and completion of the necessary forms of admission into the Teaching Service. The applicant subsequently completed such form of application and was admitted to the Teaching Service on a date which was not specified by the Commission, but which was obviously subsequent to the date of application, namely 12th February 1987. The learned judge then held that such admissions could not rectify the earlier illegal contract. With that finding I respectfully agree.

Leaving aside the 1972 contract in the present case, the applicant entered into a contract of service as a teacher in

1979, during the currency of the 1974 Regulations without having been admitted to the Lesotho Teaching Service. That unfortunately was an invalid contract. The applicant denies the averment by the Secretary of the Teaching Service Unit that he has never been admitted to the Teaching Service. The applicant was apparently of the impression that as Likhakeng Secondary School was a private school in 1974, he was not required by the Regulations of that year to gain admission into the Teaching Service. But it will be seen that the empowering provisions of section 21 of the 1971 Order did not lack for generality and the provisions of regulation 3 (1) of 1974 embraced all teachers in all types of schools, is to say, those persons who might "enter into a contract of employment as a teacher." In any event, the applicant did just that in 1979, without first having been admitted to the Teaching Service. He avers that,

"In 1986 when the new regulations were made I filed the second schedule (i.e. completed the form of admission) and handed it to the then Acting Secretary of the Teaching Service Unit Mr Tente who approved of it".

The 1986 Regulations were issued in July 1987: again the applicant did not exhibit a copy of the notification of such admission. In any event, such admission could not regularize the invalid 1979 contract.

In his replying affidavit the applicant relied upon the 1979 contract deposing,

"I deny the contract of employment as reflected in Annexure "MT 1" (the 1979 contract) was a purported contract and I aver that this was a valid contract within the meaning of the Education Order, 1971 as amended and within the meaning of the Teaching Service Regulations I wish to aver that I have been a teacher since 1951 and that in 1979 when (I) entered into the said contract it was for the purpose of receiving a Government grant and Likhakeng High School then became a Government aided school.

The 1974 and 1986 regulations did not affect the position of persons like myself who were already in the Teaching Service, but were meant for new contracts to the Teaching Service. Announcements in circulars and over the Radio were made to the effect"

Despite all this, the learned Counsel for the applicant, Mr Mosito, adopted the position that the 1979 contract was invalid, inasmuch as it did not indicate thereon the approval of the Educational Secretary: the contract, he submits, was however valid for the purpose of securing a grant (and, I observe, the applicant's salary) for Likhakeng School. An Educational Secretary statutorily required, under section 8 of the 1971 Order, to "organise, co-ordinate and inspect the educational work

of the church," but I can find no statutory requirement that he approve contracts of service, that is, other than a condition contained in the form of contract scheduled to the 1974 Regulations, namely,

"7. This contract is subject as appropriate to the approval of the Educational Secretary and Permanent Secretary".

The scheduled form of contract makes provision thereon for the signature of approval of the Educational Secretary and the Permanent Secretary. In the case of the applicant's 1979 contract, the former signature is not to be found. But then regulation 5 (5) of the 1974 Regulations prescribes that the form of contract may be "subject to such modifications as may be necessary in particular circumstances." Again, the form scheduled to the 1974 Regulations (Sixth Schedule) indicates that the form is "to be completed in quadruplicate and all four copies sent to the Educational Secretary for Church Schools or to the Permanent Secretary for their respective approval." It seems to me that the word, "or", as compared with the words, "as appropriate", in condition no.7 above indicate that the approval of the Educational Secretary is imperative of course in the case of non-aided schools but that when it comes to grant - aided schools, where the government has a direct pecuniary interest, the approval of the Permanent Secretary in a *sine qua non*, rather than that of the Educational Secretary. In Brief I would

consider the latter approval to be directory rather than mandatory.

In any event, the absence of the Educational Secretary's signature on the particular quadruplicate original form exhibited is not conclusive of the latter's non-approval. The applicant never testified that the contract had not been approved by the Educational Secretary. There is no satisfactory evidence on the points and it cannot then be said that the 1979 contract was invalidated on the ground of any non-approval. It was however, as I have said, invalid on the ground that at the time the applicant had not been admitted to the Lesotho Teaching Service. Being invalid, it cannot then be pleaded or enforced by the applicant: *ex turpi causa non oritur actio*.

Mr Mosito then pleads the 1972 contract, submitting that as the 1979 contract was invalid "it couldn't novate the 1972 contract". Mr Mohapi submits, as I have said, that the latter contract is a forgery. Of that there can be no doubt: even the most cursory of examinations reveals that the documents is a forgery.

Although the document purports to contain five different signatures and to have been completed by two different persons, it appears to have been completed throughout by one person: again, although purporting to have been forwarded to the Educational Secretary on 5th January, 1972, it purports to have

been signed by the latter on 1st January, 1972. But apart from that, the form of contract exhibited by the applicant simply was not in existence in 1972, the current Regulations at that time being the Education Rules, 1965. No form of contract of employment was scheduled to those Rules, a form being nonetheless, under rule 13 (4) (a) thereof, approved by the Permanent Secretary. Such a form was exhibited by the applicant in respect of the 1965 contract into which he entered with the 'M'a Mohau Roman Catholic Mission, and the latter form bears no resemblance to that exhibited in respect of the alleged 1972 contract.

That document is entitled (in manuscript) "SIXTH SCHEDULE". There was of course no such schedule to the 1965 Rules. There was a Sixth Schedule to the 1974 Regulations, and the form also makes reference to "Reg. 5 (5)" which coincides with the appropriate 1974 or 1986 regulation, but suffice it to say that the form utilised was taken from the Teaching Service Regulations, 1986. Although it is entitled (in manuscript, as I have said,) "SIXTH SCHEDULE" it is also entitled "CONTRACT OF EMPLOYMENT FOR TEACHERS ON TEMPORARY TERMS". The contents of the form also refer to "This Form (Seventh Schedule)" and again to employment "on temporary terms," so that it is clearly taken from the Seventh Schedule to the 1986 Regulations.

There are a number of reasons for coming to the conclusion. Chief amongst them are those reasons already given, and also the fact that the exhibited form.

- (i) requires completion in quintuplicate rather than quadruplicate, as in the case of the 1974 Regulations;
- (ii) refers to "the Supervisor" (of Controlled Schools), which reference is only found in the 1986 Sixth and Seventh Schedules;
- (iii) refers to the Eleventh and Twelfth Schedules in the matter of transfer of a teacher; those are the appropriate Schedules to the 1986 Regulations; there are no such Schedules to the 1965 Regulations and such Schedules to the 1974 Regulations are inappropriate, the appropriate Schedules being the fourth and fifth Schedules thereto;
- (iv) refers to the Eighth Schedule in respect of a medical certificate, which is the appropriate Schedule to the 1986 Regulations; there is no such Schedule to the 1965 Regulations and the appropriate Schedule to the 1974 Regulations in the Tenth Schedule;
- (v) refers to the first Schedule in the matter of a certificate of admission to the Lesotho Teaching

Service, which is the appropriate Schedule to the 1986 Regulations : there is no such Schedule to the 1965 Regulations and the appropriate Schedule to the 1974 Regulations is the Ninth Schedule;

(v) contains a clause indicating that "the Teacher acknowledges that he has read and understands the Teaching Service Regulations currently in force". That clause is taken directly from the Seventh Schedule to the 1986 Regulations, the equivalent clause in the 1974 Regulations referring to "the Teaching Service Regulations 1974", there were of course no Teaching Service Regulations in existence in 1972;

(viii) refers to "the current Education Act, the Teaching Service Commission Act and the Regulations": that reference is drawn straight from the Seventh Schedule to the 1986 Regulations; the appropriate phrasology in the 1974 Regulations refers to the Education Order 1971 and the Teaching Service Regulations 1974"; The reference to "Act" rather than "Order" dates such reference no earlier than the Parliament Act, 1983; again the reference to "the Teaching Service Commission Act" (and other references to "the Teaching Service Commission") can only connote a reference to the Teaching Service Commission Act, 1983, under section 21 of which Act (and of the Education Order,

1971) the Teaching Service Regulations, 1986 were made.

I conclude therefore that the 1972 form of contract exhibited by the applicant is a forgery and was probably concocted for the purpose of answering the respondent's submission that the 1979 contract was invalid if not also for the purpose of deceiving the Court as to the applicant's age. Nonetheless, it is not disputed that the applicant entered into a contract of employment with the Likhakeng School in 1972, which was of course governed by the Education Rules, 1965, which did not stipulate any retiring age for teachers. The 1974 Regulations, as I have said, introduced a retiring age of 60 years and also the requirement of admissions into the Lesotho Teaching Service. Certainly persons who subsequently entered into a contract of employment as a teacher were bound by such requirements and indeed are such contract so specified. The 1974 Regulations clearly therefore applied to persons who subsequently entered into such contracts.

The question arises as to whether the 1974, Regulations applied to existing contracts of service. If they did, they had the effect of immediately invalidating all existing contracts of service all of which had necessarily been entered into without prior admission to the Lesotho Teaching Service. The object of the Regulations was to further the object of the 1971 Order, namely "to provide for the establishment, administration and

control of education in Lesotho. I cannot see that regulations which nullified all existing contracts of service would achieve those objects and it seems to me that any regulations which had that effect would, to that extent, be *ultra vires*. There is the presumption against retrospectively and I can only assume that existing contracts were not invalidated. In this respect I believe that Sir Peter Allen J. in referring to "all the members of the teaching service, who were all evidently in possession of illegal contracts of service," was not necessarily referring to all teachers as such, but only to those who had, since the 1974 Regulations, entered into contracts of employment. This I believe is the import of the learned Judge's subsequent observation, namely, that,

"These appointments had apparently been made ultra vires, since the requirements of the legislation, particularly the TSC Regulations 1974, had not been complied with". (Italics added)

The authorities may at some stage have formed the view that the 1974 Regulations applied only to future contracts. The applicant indeed filed two affidavits from teachers in receipt of Government salaries aged 68 years and 77 years. Neither deponent states whether or not he has been admitted to the Lesotho Teaching Service. It may be that the deponents are not members of the Lesotho Teaching Service and are not therefore considered to be bound by a requirement that,

"A teacher shall retire from the *Lesotho Teaching Service* on attaining the age of (sixty) (sixty-five) years"

But plainly the intention of the subsidiary legislation was that ultimately all teachers should be members of the Lesotho Teaching Service and that all teachers should retire on reaching the age of sixty years, which age was subsequently extended to sixty-five years. That was the intention of the legislation but regrettably the 1974 Regulations made no transitional provision for existing contracts of service. For example, section 12 of the Education Order 1971 prohibited the opening of any new school, unless it was approved by the Minister and requested under the Order. The section however also provided that all existing schools approved and registered prior to the commencement of the Order would be deemed to have been approved and registered under the Order, unless otherwise ordered under the Order. Quite clearly a comparative transitional provision was required in the Regulations covering the aspects of admission into the Teaching Service and the retiring age. Such a provision might have catered for a moratorium period in respect of such admission, or postponed the coming into operation of the provision as to the retiring age. The absence of any such provision caused grave anomalies.

I do not see that I am called upon to resolve any such anomalies. As Sir Peter Allen J. observed in Mothobi (1) at pp 10/11, "The appropriate cure for such a massive error in the

teaching service would be by further legislation to rectify and regularise the position of all teachers so affected". As for the applicant in this case, different considerations arise. Assuming, on the basis of the presumption of regularity, that he entered into a valid written contract of employment with the Likhakeng Secondary School in 1972, which he is unable to or has chosen not to place before the Court, the question then arises as to whether he can rely on such contract.

I have no doubt that the second and third respondents will say that the Government was never a party to the 1972 contract and was in no way responsible thereunder. As to the Likhakeng Secondary School, represented by the first respondent, the applicant determined his first contract as a teacher with the school by the Act of entering into an entirely new contract, as a Head Teacher under which contract, the Government was responsible for the payment of his salary. Thereafter it could not be said that the 1972 contract, responsibilities, continued to exist. The involved 1979 contract served *de facto* govern the applicant's relationship with the school and government for eleven years thereafter, under which indeed he drew his monthly salary. It must be remembered that under the 1979 contract the applicant agreed to be bound by "the Teaching Service Regulations, 1974, as amended from time to time", that is, that in the present case he agree that the retiring age of sixty years should apply to him. That requirement was never enforced. Now that the respondent's have applied the extended retiring age

contained in the 1986 Regulations, it cannot be said, even if the 1979 contract were enforceable by the applicant, that the respondents have acted uncontractually.

The application is accordingly dismissed. As to costs, in view of the anomalous situation created by the subsidiary legislation, I had given some thought to granting costs to the applicant, despite the Court's decision in the matter. The applicant has however sought to deceive the Court in the matter of the alleged 1972 contract. On the other hand, he is an elderly retired teacher and cannot bear heavy costs. In all the circumstances I consider it equitable that each party bear his own costs, and I so order.

Dated this 18th Day of April, 1995.

B. P. CULLINAN

(B. P. CULLINAN)

CHIEF JUSTICE