

**IN THE HIGH COURT OF LESOTHO**

In the matter between

SAMUEL THABO MOKAEANE

APPLICANT

and

MINISTER OF NATURAL RESOURCES

1<sup>ST</sup> RESPONDENT

COMMISSIONER OF MINES AND GEOLOGY

2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL

3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

Delivered by the Honourable Mrs Justice K. Guni  
on the 15th Day of August, 2000

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The applicant herein approached this court by way of an urgent *ex-parte* application on 15<sup>th</sup> October 1996. He obtained a *Rule NISI* in the following terms:-

1. That a *Rule Nisi* be and is hereby issued calling upon the respondents to show cause, if any, on the 15<sup>th</sup> day of October 1996 why an order as set out hereinbelow shall not be made.

- (a) An order dispensing with the normal forms and periods of notice relating to service and filing of papers. This order was granted.
- (b) Purported termination of applicant's employment by 1<sup>st</sup> respondent be declared null and void as 1<sup>st</sup> Respondent acted *ultra vires* his powers.
- (c) Applicant be paid terminal benefits up to the last day of his service should the Honourable Court hold that the contract was lawfully terminated.
- (d) Respondents be ordered to comply with the Court Order prayer (e) in CIV/APN/227/96 should the Honourable Court hold that the termination of contract was lawful.

As shown by the applicant's prayer (d) above, he had previously approached the court in CIV/APN/227/96 where he sought reinstatement or alternatively, payment of his salary for the balance of 72 months extension applied for on his behalf by his Departmental head. In that application he obtained a final court order - Annexure TM1 - attached to his Founding Affidavit. The court order was obtained by agreement of the parties without the hearing of the case. The applicant was subsequently reinstated in terms of the said court order.

The facts of this case as gleaned from the papers filed of record are briefly as follows: This applicant was a public officer in the Public Service. He held a permanent office on pensionable terms which at that time were governed by

sections 11 and 12 of the Public Service ORDER NO 21 of 1970. The relevant portions thereof reads as follows:-

“11. The provisions of this Part apply to each public officer who at the material time holds on permanent terms a public office that is pensionable under the provisions of the law relating to the pensions of the public officers for the time being in force.

12. (1) Subject to the provisions of the other subsections of this section, a public officer shall have the right to retire from the public service, and shall be so retired, on attaining the age of fifty five years.” [My underlining]

On 25<sup>th</sup> October, 1990 the applicant attained the age of fifty five years. This is a compulsory age of retirement. He did not retire. Those responsible for the retirement of public officers in the public service inadvertently or corruptly ignored the fact that the applicant is not legally entitled to remain in the public service after his attainment of 55 years of age. [See section 12 (1) cited above. He managed to convince someone to issue a Casualty Return - Annexure “TM7” attached to the Founding Affidavit, showing, falsely, that this applicant’s service has been extended for a further period of forty-eight (48) months beyond the normal retirement age. According to the personnel officer of the Ministry of Natural Resources, one Mrs M. MOQHALI, this was wrong because no such extension had been granted by the Minister of Public Service as evidenced by

Annexures "TM2 and TM3". In annexure "TM2" it is indicated that this applicant attained the age of fifty five (55) years on 25<sup>th</sup> October 1990 and he was not granted an extension of pensionable service. [My underlining]. An attempt was made even though it was now late, to seek approval for fifty-four (54) months extension. This was solemnly for the purpose of facilitating payment for the period for which this applicant had continued to render his services well beyond his age of retirement. There seems to have been no response to that request. TM3, a further request was made, still, there was no approval. Belatedly, on 10<sup>th</sup> September 1996, a letter was written to this applicant by the Principal Secretary - Natural Resources, one Mr MABOTSE LEROTHOLI. He indicated in this letter, that the applicant's period of pensionable service has been extended retrospectively, ending on or about October 1995. The applicant was to be given terminal benefits up to that date. It was on receipt of this letter that this applicant approached the court and sought the relief stated at the beginning of this judgement. At the age of sixty-one (61) years, he still does not want to go on his retirement.

The applicant in this matter, reached the compulsory retirement age of fifty (55) years on the 25<sup>th</sup> October 1990. Beyond this age of fifty-five years, the public officer shall be retained on permanent and pensionable terms if in the opinion of

the Minister, it is in the public interest to retain such a public officer from time to time for periods which in aggregate shall not exceed five (5) years. [Section 12(4) Public Service Order No. 21 of 1990]. In October 1996, when this applicant filed this application and obtained the *Rule NISI* which he now seeks to confirm, he was now sixty-one years old. The further extensions of his service which he claims were sought on his behalf by his Departmental Head, were in fact not granted.

From October 1995, this applicant claims, that his service was further extended for a period of seventy-two months. He attaches to his Founding Affidavit Annexure "TM3" as proof of the granting of such extension. It is denied that the applicant was ever granted any extension of service as alleged. The perusal of "TM3" clearly shows that it was a document addressed first to the Principal Secretary, secondly, to the Minister. There is a space provided on this document, where both the Principal Secretary and the Minister should sign and date the document, for the purpose of signifying their recommendation and approval respectively. The Principal Secretary did not recommend to the Minister that this applicant's period of permanent and pensionable service be extended. Consequently, the Minister did not approve of any further extensions. Therefore it is fallacious to claim as this applicant does, at paragraph 5 of his Founding Affidavit, that he was granted (72) seventy-two months extension from October 1995.

The mere fact that the extension was recommended or sought does not entitle the applicant to claim that it was granted simply because he was willing to be retained should there be a need for his retention.

Even if the recommendation for the retention of this applicant beyond the compulsory age of retirement was actually granted, it would have been done in direct conflict with the specific provision in The Public Service ORDER No. 21 of 1970 - section 12(4). The provisions of this section, relating to the total length of the period of extensions, is peremptory. The section decrees that the period of the extensions in question "Shall not exceed in the aggregate five years". Therefore it would have been irregular to grant this applicant further extensions of the period of pensionable service once he has reached the age of sixty years. When he first approached the court in 1996 and obtained *ex-parte* the order that he be reinstated or retained in the Public Service when he was then sixty-one years of age, was unlawful because the law governing retirement of the public officers at that time forbid further extensions beyond that age. [Section 12(4) PUBLIC SERVICE ORDER NO. 21 of 1970]. His claim for his retention in the civil service beyond the compulsory retirement age must fail.

Reliance on an alleged contract of employment must be supported by the production before this court, of the copy of the alleged, contract if it is a written contract. (Vorster v Herrselman 1982 (4) SA 857 (0). Before this court, the applicant has produced letters of requests for extension [see Annexure TM2, TM3]. There is no document signed by the applicant and his employer, specifying that there is an agreement between the parties for the extension of the service of this applicant for a further period of seventy-two (72) months. Annexure TM3 on which the applicant relies, there is no agreement between the parties. There is only an express wish of the official who acted on behalf of this applicant. Therefore there is no contract of employment for a period of seventy-two (72) months between this applicant and his employer. His claim based on this ground must fail.

For these reasons, the application is dismissed with costs.

**K. J. GUNI**  
**JUDGE**



For Applicant: Mr E.H. Phoofolo  
For Respondents: Mr T. S. Putsoane