

IN THE HIGH COURT OF LESOTHO

In the matter between:

MICHAEL M. TEKATEKA	1 ST APPLICANT
MOTLATSI E. MAKAE	2 ND APPLICANT
SECHABA MONYANE	3 RD APPLICANT
MOREMOHOLO M. MOSHOESHOE	4 TH APPLICANT
LIMPHO A. MARAKE	5 TH APPLICANT
MAKAE J. MAKHORO	6 TH APPLICANT
'MANTOETSI LEJAHA	7 TH APPLICANT
THUSO MOKOTJO	8 TH APPLICANT
MORA MOSOTHOANE	9 TH APPLICANT
P. RAMAHLELE	10 TH APPLICANT
RAMABOSOTHO P. MOEKETSI	11 TH APPLICANT
SETHABATHABA GEORGE	12 TH APPLICANT
B.M. TJABANE	13 TH APPLICANT
LIBE MOSHOESHOE	14 TH APPLICANT
M. 'MABATHOANA	15 TH APPLICANT
S. MOHAPELOA	16 TH APPLICANT
LEKAOTA MOSOANG	17 TH APPLICANT
KHETHISA L. FUMA	18 TH APPLICANT
RAMAILI LESAOANA	19 TH APPLICANT
SEKOATI P. SEETANE	20 TH APPLICANT
LEBENYA MOTŠOARI	21 ST APPLICANT
KANONO KAUSI	22 ND APPLICANT
A. SEROBANYANE	23 RD APPLICANT
TANKI MAJARA	24 TH APPLICANT
NTISA B. MAKETEKETE	25 TH APPLICANT
SELEBALO MAJARA	26 TH APPLICANT
THAKALI MOTLALANE	27 TH APPLICANT
PHEHELLO P. MASEELLO	28 TH APPLICANT
LEFIKA J. LEKHOTLA	29 TH APPLICANT
CHARLES S. MOTHEBESOANE	30 TH APPLICANT

PAKA MAKHABA
 MAJORO MAJORO
 M. MATŠOELE
 R. NTJELANE
 MAHAMO KATISO
 R. LETŠELA
 TANKISO KOLOBE
 'MUSO J. MANYALA
 PUSELETSO THULO
 MONAHENG NTSOELE
 LITABA MAPHATHE
 MOLOANTOA TSOTAKO
 LELAKA MOLISE
 J. MOKUGOBOHELI
 THABANG FONYA
 M.Z. MAHLOKO
 A.M. MOTHEBESOANE
 M. FAKO
 TSEBO THOABALA
 T. LITHAKONG
 P. QOBOSE
 M. LEFASO
 W. NAILA
 T. RALITŠA
 N. NKUNE
 T. MOKOROBORI
 SEKABATHO MAHAO
 MORERO SHALE
 KOLOBA SEKETE
 MPHO MAHLOKO
 SEKOALA MONA
 T.J. KETA
 E.M. TŠENOLI
 M. KHAKHANE
 L.E. LEKAKA
 C.M. MASEELA
 THABO MPHUTHI

31ST APPLICANT
 32ND APPLICANT
 33RD APPLICANT
 34TH APPLICANT
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 62ND APPLICANT
 63RD APPLICANT
 64TH APPLICANT
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 66TH APPLICANT
 67TH APPLICANT

LEEPILE PINDA	68 TH APPLICANT
R. MABOTE	69 TH APPLICANT
THABANG PITSO	70 TH APPLICANT
M.O. MOSHOESHOE	71 ST APPLICANT
MAIME TJAKAMA	72 ND APPLICANT
L. NTAOTE	73 RD APPLICANT
L. LESAKO	74 TH APPLICANT
S. TUKISI	75 TH APPLICANT
P.S. MOSEME	76 TH APPLICANT
M. MADOLO	77 TH APPLICANT
S. MOREMA	78 TH APPLICANT
L. LETŠOARA	79 TH APPLICANT
K. KOTELE	80 TH APPLICANT
P.W. MOKONE	81 ST APPLICANT
PHOKA LUCAS PULE	82 ND APPLICANT
M. RAPALO	83 RD APPLICANT
M. METSING	84 TH APPLICANT
TŠEPO KHALI	85 TH APPLICANT
T.P. MOSESI	86 TH APPLICANT
A.L. MOKONE	87 TH APPLICANT
L. SHAO	88 TH APPLICANT
M. SECHAI	89 TH APPLICANT
N. NKUEBE	90 TH APPLICANT
L. MAKHELE	91 ST APPLICANT
L.J. MOLAPO	92 ND APPLICANT
T. MOSOTHOANE	93 RD APPLICANT
S. MOREKI	94 TH APPLICANT
T. 'MOTE	95 TH APPLICANT
T.N. KHOABANE	96 TH APPLICANT
S. TŠOLO	97 TH APPLICANT
T. NTOI	98 TH APPLICANT
R. MOTHABENG	99 TH APPLICANT
H. MOROJELE	100 TH APPLICANT
S. KHALEMA	101 ST APPLICANT
S. MATŠOARA	102 ND APPLICANT
I. MASHOAI	103 RD APPLICANT
M. MOLEFE	104 TH APPLICANT

M. LEPOTA
 K.E. KHALEMA
 M.L. LETSIPA
 M. SETLOLELA
 M. SELLO
 M. MOFUBETSOANA
 D. POPA
 T. MATSETSE
 M. MATŠOELE
 M.D. SEMOKO
 T.P. MONOGOAHA
 P. LEKETA
 M. THAKHISI
 J. RALIBAKHA
 N. MOHAPI
 S. NKUEBE
 R. LEHOAEA
 P.J. LESUIPI
 C.D. MAKOAQO
 T. MATETE
 T. TŠOLO
 M. THEKO
 S. MOTHEBE
 T.V. HLASA
 M. BOSIU
 T. PHATŠOANE
 M. MARI
 M. LEPOLESA
 M. LEKAU
 L. MOLAPO
 P. MOLATELLE
 M. SEPIPI
 T. HLASA
 M. MOLEFI
 N.A. MOSHOESHOE
 A. MAPHEELLE
 B. MOLETSANE

105TH APPLICANT
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 140TH APPLICANT
 141ST APPLICANT

L. MOLEFI	142 ND APPLICANT
T. 'NEKO	143 RD APPLICANT
M. LEHLOENYA	144 TH APPLICANT
L. NTOKOANE	145 TH APPLICANT
M. KOTELE	146 TH APPLICANT

and

ATTORNEY-GENERAL	1 ST RESPONDENT
P.S. MINISTRY OF WORKS	2 ND RESPONDENT
P.V.P.S.	3 RD RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. G.N. Mofolo
on the 28th day of February, 2001.

From the record of proceedings, with a view to privatizing the Plant and Vehicle Pool Services (P.V.P.S.) the government engaged in 1998 services of Steven Hanglely Consultants and Evaluators to achieve specific objectives among which was Task 3 charged with the development and implementation of a plan for staff retrenchment. In this regard terms of reference appear to have been:

- (a) to establish a database of accurate information relating to P.V.P.S. employees length of service and other conditions factoring into the calculation of

retrenchment packages.

(b) assessment of detailed costs of redundancy packages under (a) above and minimum standards provided for under Lesotho's Labour laws in conformity with severance policy expressed in the privatization policy guidelines and to make recommendations concerning staff retrenchment to the International Steering Committee.

According to paragraph 6 of the Founding Affidavit of Michael Tekateka:

(a) after the said engagement of consultants the 2nd Respondent caused annexure "B" to issue. A meeting was held in accordance with the said annexure "B". At that meeting we were informed that 'we are public officers, we may elect whether to take our retrenchment packages and then pass on with the new company that was to take over 3rd respondent, or to elect not to take the packages and then remain with the government, in which case we would be redeployed within some other ministries and branches of the government.'

- (b) 2nd Respondent indicated that it was obvious that those who had reached the retirement age of fifty-five (55) would have to retire and be pensioned. He then read out annexure “C” hereunto attached in particular, the first page thereof.

Now, annexure “B” is a memorandum from the Principal Secretary, Public Works and Transport to manager, P.V.P.S. inviting employees of P.V.P.S. and Plant Pool situation regarding employment of workers and their future. Annexure “C” is titled

Retrenchment Packages for P.V.P.S.
Explanation of Calculation

Severance/retrenchment calculation appears to have been based on

- (1) every employee being entitled to 6 months salary regardless of period
- (2) every employee who has worked for more than 12 years being entitled to two weeks wages per year in excess of 12 years service.
- (3) In lieu of notice: one month’s salary
- (4) In lieu of days leave, as per P.V.P.S. personnel files.

Then there is postscript to the effect that

no provision calculations have been included in these figures and

we are still awaiting confirmation of data from the Personnel Office of Works and redeployment availability from Public Service.

Annexed to annexure "C" is a verification list reflecting retrenchment/severance packages which include payment in lieu of notice and leave days. Some amounts, taken together, are quite substantial and it would seem, irrespective of whether officers were temporary, on probation or on permanent establishment, they have all be paid retrenchment/severance packages. I do not know what principle was invoked to lump permanent and temporary officers together. What's more, if the allegation that some P.V.P.S. officers are still functioning as civil servants and others have been pensioned off is true, it would seem a big question mark looms as to the propriety of having given established public servants retrenchment/severance packages.

Concerning paragraph 6 of Michael Tekateka's Founding Affidavit, in this regard Bataung Leleka has answered as follows in his paragraph 14:

'It is simply untrue that there was such an open - ended offer for employees to choose what they want. The position was simply that where feasible some limited number of employees of P.V.P.S. could be absorbed elsewhere in the public service depending on availability of suitable positions for such redeployment. That large numbers would have to leave the service as a result of privatizing P.V.P.S. was never in doubt. The very nature of the process of privatisation of public institutions, of necessity, admits of no further intake of the affected employees into other sections/branches of the Government. Universally, there is, inevitably, only one route followed, massive retirements, and/or terminal and/or retrenchments. Thus it is highly inconceivable that the Government would have been so naive as to promise unlimited intake of staff that would be affected by the privatisation of the P.V.P.S., and I state here that it was never so, and applicants are challenged to prove their allegation in this regard.'

Also, at paragraph 9 of his to Founding Affidavit Michael Tekateka has deposed:

I aver that some of the Applicants herein were entitled to

terminal benefits in the nature of:

- (a) gratuities
- (b) pensions

but were not given such benefits in terms of the Pensions Proclamation of 1964, in particular and inter alia, section 2 (3) thereof, read with section 22 of this proclamation.

In answer to this Bataung Leleka for 2nd and 3rd respondents has deposed at paragraph 15 of his Answering Affidavit:

‘I am very embarrassed to have to answer to this paragraph as it is not clear at all what the allegation is. In the event that the allegation is that those applicants entitled to pension and gratuity were not at all given such benefits, my simple response is that there has been delays caused, inter alia, the very conduct of some of the applicants who have flatly refused to fill the necessary forms for processing of payments of these benefits. Those who cooperated, their benefits are being processed; those who refused to cooperate, it is difficult to process their benefits. Annexed hereto are copies of filled forms by a very limited number of applicants -----.’

2nd and 3rd respondents' answer to paragraph 6 of the Founding Affidavit is hardly convincing. I do not understand what the deponent means by 'it is simply untrue that there was such an open-ended offer for employees to choose what they wanted.'

It was as a result of these misunderstandings between applicants and 3rd respondent as represented by 2nd respondent that applicants launched an application with this court seeking an order in the following terms:

1. The purported termination and/or retrenchments of Applicants by 2nd respondent be declared null and void.
2. The applicants be re-instated as public servant.
3. Costs of suit.

ALTERNATIVELY

4. Respondents are directed to pay applicants their pension and/or gratuity entitlements.
5. Costs of suit.

6. Further and/or alternative relief.

As I understand the Pensions Proclamation, 1964 to which reference has been made, the proclamation interprets 'pensionable office' as:-

- '(a) in respect of public service under the Government of Basutoland (now Lesotho), an office which, by virtue of provisions for the time being in force in a notice made by the Resident Commissioner (now Prime Minister or Minister as the case may be) and published in the Gazette, is declared to be a pensionable office; and any such notification may from time to time be amended, added to, or revoked by a notification so made and published; but where by virtue of any such amendment or revocation any office ceases to be a pensionable office, then so long as any person holding that office at the time of the amendment or revocation continues therein, the office shall as respects that person, continue to be a pensionable office;'
- (b) in relation to other public service, an office which is for the time being a pensionable office under the law or

regulation in force in respect of such service;

In respect of retirement of Public Servants, it appears provisions of the Public Service Act, 1995 have to be read together with provisions relating to the Pensions Proclamation, 1964. Thus in terms of the Public Service Act, 1995 sec.29, a public officer is one 'who at the material time holds on permanent terms a public office that is pensionable under provisions of the Pensions Proclamation, 1964. Under sec. or clause 30 (1) of the Act

'a public officer shall retire from the public office, and shall be so retired, on attaining the age of fifty-five years.'

sub-clause (2) is to the effect: -

'a public officer who has attained the age of forty-five may in the discretion of the Commission be retired from the public service.'

As shown above, the Pensions Proclamation above has shown in detail what a pensionable officer is and the means to be employed to revoke the office. Now it is common cause that some applicants were on pensionable office. I am not aware that by reason of privatisation some of these offices were revoked and ceased to be pensionable offices. Even if they were (which I doubt) the question remains whether by reason of their revocation

holders would thereby lose benefits of services already rendered. In so far as this court is concerned, while a public servant can be retired from the service on reaching the age of forty-five (45) years and has to retire on reaching the mandatory age of fifty-five (55 years) barring misconduct, he is entitled to be paid his pension and gratuity on being retired or himself opting to retire. 2nd and 3rd respondents have got a wrong end of the stick. It is not a question of government being open-handed; it is rather a question of government fulfilling its obligations under its own rules. Applicants are not asking for benefits but rather to be paid their due. I am horrified 2nd and 3rd respondents have the temerity to allege 'where feasible some limited number of employees of P.V.P.S. could be absorbed elsewhere in the public service ____'. The government cannot pick and choose as to who to absorb into the public service for this would be blatant discrimination. What's more, this lends credibility to the allegation by applicants' counsel referred to above that government has chosen to retire some applicants while others have been absorbed in the public service.

This court cannot allow double standards and selective morality to be practiced on public servants. While the court acknowledges the good intentions of the government to privatize some of its services, such good intentions are not to be at the expense of established public servants who expect that at the end of term of their service they will, in terms of the law,

be rewarded for offering illustrious and commendable service to government. It has not been explained to me why P.V.P.S. expects established public servants to rough it up and sacrifice while public servants in other ministries and departments of government are going about their duties and expectations in a normal way. The government has an election: to retire P.V.P.S. established public servants or to retain them and deploy them in other government ministries and departments until these have reached their retiring age or opt to retire on their own.

It has been contended on behalf of applicants that if retired, applicants were not heard; against applicants there is also the contention that they have no *locus standi* to have brought this application. There is also the complaint that this court has no jurisdiction for this is a labour issue. With regard to the latter contention, this is a court of first jurisdiction and the legislation under which it is established does not categorise matters with regard to which the court may or may not concern itself. It has been said again and again that for this court to be denied jurisdiction any such law or statute must expressly deny this court jurisdiction. So far as the Labour Code, 1992 is concerned, the tenor of the legislation relates to an inquiry and determination of industrial disputes which are not in issue or under focus. As to exclusive civil jurisdiction of the Labour Court under sec.25 sub-section (1), it does not appear that the phraseology 'no ordinary or

subordinate court' includes the High Court. Accordingly, this court has jurisdiction to entertain this application.

As to whether applicants have *locus standi* to have brought the application, it stands to reason that by reason of applicants being affected complainants in a decision made against them and to their prejudice, being interested parties in the decision complained of they have *locus standi*. This notwithstanding, it has been argued on behalf of respondents that applicants have not established their *locus standi* before this court by failing to file supporting affidavits. Actually, in his Founding Affidavit Michael Tekateka at paragraph 3 has deposed:-

'I have been authorised by all the persons whose names appear in the heading hereof to depose to this affidavit on their behalf. Such persons are also applicants in these proceedings _____'

It has been contended on behalf of the respondents that apart from contents of paragraph 3 above, to have *locus standi* in the proceedings, applicants should have individually filed supporting affidavits by associating themselves with contents of the 1st applicant's affidavit. It is common cause that this was not done. Counsel for applicants has countered that 1st applicant had a mandate from other applicants to depose

as he did on their behalf and from the papers it is clear that 1st applicant had a mandate from co-applicants to depose to the affidavit on their behalf. In so far as this court is concerned, there is established practice for co-applicants or co-respondents to affirm and associate themselves with the contents of a party who deposes to an affidavit on their behalf. In some cases, it would appear it is sufficient for a party merely to allege he is authorised to depose on behalf of other litigants on the same issue and it would appear unless there is the fear that the officer claiming to be authorised may not be authorised, his claim to be authorised must stand. The applicant Michael Tekateka is co-worker with the applicants who have been retrenched and his interests are the same as those of the rest of the applicants and there can be no doubt that he was authorised as he has claimed in his Founding Affidavit. Accordingly, applicants have *locus standi* in these proceedings.

As to whether applicants were heard before they were retrenched, and being public servants, that it is the Public Service Commission that should have heard them, evidence on whether applicants were heard by the Public Service Commission is very scanty.

In his answering affidavit Bataung Leleka (vide paragraph 10) refers to the Public Service Commission having been 'seized of the matter of

applicants' retirement and/or termination of employment ----' and refers the court to annexure "F" of the founding affidavit. He further says copies of relevant memoranda, proposals and decisions of the Public Service Commission in the matter speaks for themselves under the collective bundle "L1". At paragraph 11 of his answering affidavit he also refers to decisions of the Public Service Commission marked "L2".

With respect, annexure "F" is merely a list of appointments and terms of appointment and has nothing to do with the Public Service Commission nor is it proof that the Public Service Commission heard applicants before retiring them. Annexure "L1" is a proposal memorandum requesting 'the commission to consider the recommendation by the Head of Department that officers appearing on the attached list be retired from the Civil Service in accordance with Part 4 sec.30 s.s. 8 (i) of the Public Service Act, 1995 due to closure of the P.V.P.S. The letter proceeds 'officers concerned have been paid cash in lieu of notice from the month of July, 1999. Noticeably, this was recommendation to the P.S.C. not that the P.S.C. heard applicants before retiring them. This becomes even clearer that applicants were not heard having regard to the assertion "all officers concerned have been paid in cash in lieu of notice'. A memorandum dated 29 July, 1999 page 137 in bold letters from the Principal Secretary, Works to the Hon. Minister, Works reads in italics:

The following proposal is being submitted to the Public Service Commission for consideration. Please indicate your concurrence.

‘That officers who appear on the attached list be retired from the Civil Service in accordance with the Part 4 section 30, sub-section 8 (i) of the Public Service Act, No.13 of 1995 due to closure of P.V.P.S. as a result of GOL’s policy of privatization with effect from 1st July, 1999.’

On page 143 in bold letters purportedly from the 4332nd meeting dated 22nd September, 1999, item 1925/99 appears the following note:

‘Arising out of the 4328th Minutes, item 1874/99, having noted that the officers have already received their terminal benefits the Commission resolved that they be retired from the Public Service in terms of section 30 (8) (1) of the Public Service Act No.13 of 1995 due to the closure of P.V.P.S. with the exception of Mrs. C.L.M. Tšoaeli who has been absorbed by the Ministry of Finance.

The Commission further noted that the undermentioned officer had been paid their retirement packages, therefore, requested that they be paid.

Medames J.R.M. Lekau, W. Metsing,
Messrs M.A. Rapalo and M. Mothebesoane.

The same note appears on page 154 in bold letters where the

be rewarded for offering illustrious and commendable service to government. It has not been explained to me why P.V.P.S. expects established public servants to rough it up and sacrifice while public servants in other ministries and departments of government are going about their duties and expectations in a normal way. The government has an election: to retire P.V.P.S. established public servants or to retain them and deploy them in other government ministries and departments until these have reached their retiring age or opt to retire on their own.

It has been contended on behalf of applicants that if retired, applicants were not heard; against applicants there is also the contention that they have no *locus standi* to have brought this application. There is also the complaint that this court has no jurisdiction for this is a labour issue. With regard to the latter contention, this is a court of first jurisdiction and the legislation under which it is established does not categorise matters with regard to which the court may or may not concern itself. It has been said again and again that for this court to be denied jurisdiction any such law or statute must expressly deny this court jurisdiction. So far as the Labour Code, 1992 is concerned, the tenor of the legislation relates to an inquiry and determination of industrial disputes which are not in issue or under focus. As to exclusive civil jurisdiction of the Labour Court under sec.25 sub-section (1), it does not appear that the phraseology 'no ordinary or

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As to whether applicants have *locus standi* to have brought the application, it stands to reason that by reason of applicants being affected complainants in a decision made against them and to their prejudice, being interested parties in the decision complained of they have *locus standi*. This notwithstanding, it has been argued on behalf of respondents that applicants have not established their *locus standi* before this court by failing to file supporting affidavits. Actually, in his Founding Affidavit Michael Tekateka at paragraph 3 has deposed:-

'I have been authorised by all the persons whose names appear in the heading hereof to depose to this affidavit on their behalf. Such persons are also applicants in these proceedings ____'

It has been contended on behalf of the respondents that apart from contents of paragraph 3 above, to have *locus standi* in the proceedings, applicants should have individually filed supporting affidavits by associating themselves with contents of the 1st applicant's affidavit. It is common cause that this was not done. Counsel for applicants has countered that 1st applicant had a mandate from other applicants to depose

as he did on their behalf and from the papers it is clear that 1st applicant had a mandate from co-applicants to depose to the affidavit on their behalf. In so far as this court is concerned, there is established practice for co-applicants or co-respondents to affirm and associate themselves with the contents of a party who deposes to an affidavit on their behalf. In some cases, it would appear it is sufficient for a party merely to allege he is authorised to depose on behalf of other litigants on the same issue and it would appear unless there is the fear that the officer claiming to be authorised may not be authorised, his claim to be authorised must stand. The applicant Michael Tekateka is co-worker with the applicants who have been retrenched and his interests are the same as those of the rest of the applicants and there can be no doubt that he was authorised as he has claimed in his Founding Affidavit. Accordingly, applicants have *locus standi* in these proceedings.

As to whether applicants were heard before they were retrenched, and being public servants, that it is the Public Service Commission that should have heard them, evidence on whether applicants were heard by the Public Service Commission is very scanty.

In his answering affidavit Bataung Leleka (vide paragraph 10) refers to the Public Service Commission having been 'seized of the matter of

applicants' retirement and/or termination of employment ----' and refers the court to annexure "F" of the founding affidavit. He further says copies of relevant memoranda, proposals and decisions of the Public Service Commission in the matter speaks for themselves under the collective bundle "L1". At paragraph 11 of his answering affidavit he also refers to decisions of the Public Service Commission marked "L2".

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The following proposal is being submitted to the Public Service Commission for consideration. Please indicate your concurrence.

‘That officers who appear on the attached list be retired from the Civil Service in accordance with the Part 4 section 30, sub-section 8 (i) of the Public Service Act, No.13 of 1995 due to closure of P.V.P.S. as a result of GOL’s policy of privatization with effect from 1st July, 1999.’

On page 143 in bold letters purportedly from the 4332nd meeting dated 22nd September, 1999, item 1925/99 appears the following note:

‘Arising out of the 4328th Minutes, item 1874/99, having noted that the officers have already received their terminal benefits the Commission resolved that they be retired from the Public Service in terms of section 30 (8) (1) of the Public Service Act No.13 of 1995 due to the closure of P.V.P.S. with the exception of Mrs. C.L.M. Tšoaeli who has been absorbed by the Ministry of Finance.

The Commission further noted that the undermentioned officer had been paid their retirement packages, therefore, requested that they be paid.

Medames J.R.M. Lekau, W. Metsing,
Messrs M.A. Rapalo and M. Mothebesoane.

The same note appears on page 154 in bold letters where the

Commission had noted

The Commission further noted that the undermentioned officers have not been paid their terminal benefits, therefore requested that they be paid namely: Messrs A.T. Machabe, Tumelo, Sehlabaka, M.P. Thaane, V.K. Thamae, N.P. Khamali, J.M. Keletso, K. Mahamo and K.L. Fuma.

and once more at annexure "L2" follow the following letters to some applicants at p.155-179 in bold letters:

'You are hereby informed that the Public Service Commission has resolved that your Temporary Appointment be terminated in accordance with section 30(8) (i) of the Public Service Act No.13 of 1995 due to Privatization of P.V.P.S., etc.'

so that from p.155 - 179 it would seem temporary appointments were terminated.

From p.18 in bold letters to p. 230 in bold letters seemingly established and permanent civil servants were being retired from the Public Service by the 2nd respondent for letters all read:

W/P/18906

Ministry of Public Works
and Transport,

P.O. Box 20,
Maseru.100.
1st September, 1995.

Mr. L.E. Moshoeshoe,
c/o Public Works and Transport,

Dear Sir,

You are hereby informed that the Public Service Commission has resolved that you be retired from the Public Service in Terms of Section 30 (8) (i) of the Public Service Act No.13 of 1995 due to closure of P.V.P.S.

I take this opportunity to thank you for the valued service you rendered to the Lesotho Government and wish you success in your future career.

Yours faithfully,

B. Leleka (MR.)
PRINCIPAL SECRETARY FOR PUBLIC
WORKS AND TRANSPORT

cc. PUBLIC SERVICE
P.S.C.
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Unfortunately, it would appear when the P.S.C. resolved to have applicants retired, they had already been retired by the 3rd respondents for according to the minutes of the P.S.C. dated 22nd September, 1999, it had been 'noted that the officers have already received their terminal benefits' so that the P.S.C. was merely used as a conduit pipe or as it were rubber stamp by the 3rd respondent. I have no particular quarrel with whether the P.V.P.S. was authorised by the P.S.C. to write to applicants informing them of their retirement. The question is whether before retiring the applicants the latter were heard and asked to make representations. When the applicants were engaged by the Public Service Commission, they appeared before the P.S.C. to present their case. It follows that in being retired they should have appeared before the P.S.C. to make representations. I am not satisfied that applicants were heard before they were retired. It was necessary that applicants appear before the P.S.C. before being retired to make representations whether they wished to retire or continue in the service. I appreciate that the P.S.C. would in the circumstances have made its own ruling which would be binding on applicants. The ruling cannot now be binding because applicants were not heard before being retired and it is desirable that they must be heard if they must be retired.

In *Staatsdienshja van Suid-Afrika en Andere v. Minister van Waterwre*, 1990 (2) S.A. 440 (N.A.) applicants were part-time workers

employed by the State receiving full pension rights. It was said the principle of *audi alter am partem* was not applicable to the decision to retrench such workers for such workers did not have more rights than an ordinary worker in private enterprise even if the decision to terminate such services is regarded as an administrative act. The applicants had been discharged from the service of the Department of Water Affairs with one month's notice as a result of a programme of retrenchment. Through their organization applicants had applied to court to have their discharge declared invalid on the ground that the *audi alteram partem* principle had not been complied with. They contended that the existing contract of service created the reasonable expectation that the contract of service would continue and if their services were terminated it would take place in a fair manner and that the rules of natural justice would apply. Held so long as the contract of service provided for termination of services on a month's notice the contract could be validly terminated and government servants on temporary terms of service did not have same rights as public servants and an employee of the state in such circumstances did not have more rights than an ordinary worker in a private undertaking; even if service was terminated by a public official, the employee did not for that reason have any greater right than those accorded by the relevant statute or common law or his conditions of service.

The reasoning in the case has been to relegate public servants on temporary conditions of service to statutory and common law employees liable for their services to be terminated so long as one (1) month notice of termination of service is given. Held further that principles of natural justice were not applicable to the termination of applicants' services as there had been no unfairness to them applicants having all received full compensation from the pension fund. Held further that from the Public Service staff code, it was clear the legislature intended to exclude the *audi alteram partem* rule from the decision to retrench temporary workers who had received pension rights. This judgment equally applies to temporary applicants in the instant application.

A government employee's conditions of service are governed by the statute under which he is employed. Where a government employee functions on permanent basis, his terminal benefits on retirement or retrenchment are governed by the Public Service Act; this goes for servants on probation. It is immaterial under what circumstances a public servant is removed from the service so long as on removal, barring disciplinary proceedings against him, he is entitled to his pension and gratuity if the exigencies of the situation require that he be retrenched. Removing him from permanent service without commensurate benefits enjoyed by other permanent civil servants smacks of gross discrimination which cannot be

allowed.

As I have said, barring misconduct, a civil servant on permanent terms of employment entertains the reasonable expectation that he will retire from the service on reaching retiring age unless he chooses to retire early. He does not have himself to blame should government consider privatisation of its departments and services for that is a government affair having nothing to do with an ordinary public servant who, in any event, is transferrable from one ministry or department to another. If public servants are deemed redundant by reason of privatisation and hence retrenchments, legislation has to be passed to the effect and even if it is passed to declare public servants redundant it does not and cannot be allowed to encroach on public servants' entrenched rights so that, even if they are declared redundant, they cannot be made to forfeit their long toiled for benefits in the form of gratuity and pension.

Restructuring is a government priority and well received in progressive societies for it augurs for lean and efficient government services. In doing so established civil servants cannot be expected to make sacrifices unless they choose to do so.

Civil servants on probation expect that at the end of their probationary

period they will be accepted into permanent establishment barring misconduct or incompetence on their part. They have done nothing not to earn this expectation and it offends a sense of justice and fair-play to be treated differently from other civil servants in other ministries and departments of government.

I have already said that in so far as temporary public servants are concerned, it is enough if they were given notice of termination of their services for they have no greater rights than employees in private enterprises where only, one month's notice of termination of services is sufficient. This reasoning cannot be extended to public servants on probation or permanent establishment for concerning these, it is not enough that they have been served with one month's notice of termination of their services; apart from this, they expect respectively that they will, when time comes, be accepted into the permanent establishment and on retiring be given their pension and gratuity benefits.

Accordingly, the application is granted in its substantive form and to the extend that:

1. The purported termination and/or retrenchments of applicants on probation and permanent establishment is

declared to be null and void.

- 2 Applicants on probation or permanent establishment are to be re-instated.
3. Respondents are to jointly and severally bear costs of this suit.

This court notes that some applicants were paid retrenchment packages. In the event the Public Service Commission retired them, it would seem such applicants would be required to mitigate damages.



G.N. MOFOLO
JUDGE

26TH January, 2001.

For the Applicants: Mr. Mosito
For the Respondents: Mr. Mapetla