

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MORAPELI MOTAUNG

APPLICANT

and

**ATTORNEY GENERAL
PUBLIC SERVICE COMMISSION**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 27th June, 2001

On the 26th October 1998 the applicant lodged an urgent application on notice to the respondents in which he sought an order couched in the following terms:-

- “1. Directing second respondent to deliver within fourteen (14) days of service upon hereof, a full record of its proceedings, decision and reasons for its refusal to accept the applicant’s retirement from the Public Service.

2. A Rule Nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why:
- (a) The retirement of applicant from the Public Service shall not be declared to have been lawful and effective as of the 31st of March 1998.
 - (b) Section 30 (6) of the Public Service Act 1995 shall not be declared unconstitutional as being **ultra vires** section 136 (11) of the Constitution of Lesotho 1993.
 - (c) The applicant shall not be declared pensionable as from the 31st March 1998.
 - (d) Respondents shall not be directed to pay applicant's pension with effect from the 31st day of March 1998.
 - (e) Respondents shall not be directed to pay costs hereof.
 - (f) Applicant shall not be awarded such further and/or alternative relief
 - (g) The purported dismissal of applicant from Public Service be declared null and void and of no force and effect."

In his founding affidavit the applicant states that he was first employed as a public officer on the 13th February 1967 and has since held various government positions including those of Principal Secretary and Director of Sports.

He states that on the 18th February 1998 he wrote a letter tendering his retirement from the civil service. He was fifty-four (54) years old then having been born on the 12th March 1954. His letter reads:-

“P.O. BOX 52,
MASERU 100

18 February 1998

The Principal Secretary,
Ministry of Tourism Sports and Culture,
P.O. Box 52
MASERU
Lesotho

Dear Sir,

RETIREMENT FROM THE CIVIL SERVICE

Pursuant to Section 30 (3) of the Public Service Act of 1995 I hereby tender my early/optional retirement from the civil service.

I have sixty-eight (68) days of leave due to me. I will be on leave starting from 19th February 1998 to the 31st March 1998.

I submit my other thirty (30) days of leave in lieu of one month notice for my retirement starting from 1st April 1998.

Yours sincerely,

A.M. MOTAUNG
DIRECTOR OF SPORTS.”

He states that he went on leave and had no response from the second respondent until the 28th May 1998 when he received a letter from the Principal Secretary - Tourism which informed him that his retirement under section 30 (3) of the Public Service Act 1995 had not been accepted and that since his leave ending March 31 had expired he was expected to be on duty. The letter reads as follows:-

“07 MAY,1998

Mr A.M. Motaung
P.O. Box 52
MASERU

Dear Sir,

Reference is made to your letter dated February 18, 1998 in connection with proposed retirement from the Public Service in terms of Section 30 (3) of the Public Service Act No. 12 of 1995.

Arising out of the 4004th Minutes dated May 4, 1998, Item 1029/98, the Commission having looked into the legal opinion from the Ministry of Law and Constitutional Affairs, the Commission resolved that your retirement under Section 30 (3) of the Public Service Act 1995 has not been accepted.

You are further reminded that your leave/annual Holidays which started from February 19th 1998 up to and including March 31, 1998 has expired, but you have not reported for duty.

Yours faithfully

M.T. MOHAPELOA
PRINCIPAL SECRETARY”

He further states that according to the minutes of the Public Service Commission at its 4004th Meeting held on the 4th May 1998, the Commission held that

“Arising out of the 3978th minutes, item 579/98, having looked into the Legal Opinion from the Ministry of Law and Constitutional Affairs resolved that the officer’s retirement under section 30 (3) of the Public Service Act 1995 be not accepted.”

This “Legal Opinion” stated in part-

“... I would advise that where officers are facing disciplinary proceedings and they apply for an early retirement (between 45 and 55) during the pendency of such proceedings, such application should be refused on the same ground that there are disciplinary proceedings pending against them. Thus Mr Motaung’s application for early retirement should be refused accordingly. Even if permitting his early retirement would have no effect on the disciplinary proceedings against him (question which is debatable at this stage) I consider that it is better to err on the side of caution.”

It is not in dispute that when he tendered his retirement on the 18th February 1998, the applicant knew that was facing certain disciplinary charges involving some monies allegedly used by him without authority.

He states on the same day 28th May 1998 he again received a letter from Principal Secretary -Tourism which read as follows:-

“22ND MAY, 1998.

Mr M. Motaung,
P.O. Box 52,
MASERU. 100

Dear Mr Motaung,

I wish to refer you to my letter of 7th May, 1998 in which I informed you that your application for early retirement has not been accepted by the Public Service Commission and that your leave period comes to an end on 31st March 1998.

We note that up to now you have not reported to work or even provided us with any explanation for your absence. Neither have any arrangements been made for this absence.

We further note your continued involvement in politics as a Civil Servant and in this respect I would like to remind you of the provisions of Section 14 (I) (K) (i) (ii) (iii) and (iv) and Section 14 (1) (d) of the Public Service Act 1995.

Given the contents of paragraphs 2 and 3 above you are required to respond within 7 days why disciplinary action cannot be taken against you.

Yours faithfully,

M. MOHAPELOA
PRINCIPAL SECRETARY”

He maintains in his affidavit that the resolution by the second respondent not to accept his retirement is unlawful in that it violates the spirit of section 30 (6) of the Public Service Act 1995 in that upon its own admission the second respondent acted

on the basis of a “legal opinion they had received from the Ministry of Law and Constitutional Affairs” and not having looked into “the conditions in the Public Service” as required by section 30 (6) of the Public Service Act. He further states that the resolution was actuated by malice and sought to victimise him for having engaged in party politics and standing as a candidate for the Basotho National Party at the Lithabaneng Constituency No.35.

He further contends that the second respondent omitted to call upon him to make representations in contradiction to the legal opinion upon which the commission based its decision.

He goes on to state that on the 18th August 1998 he received yet another letter which read as follows:-

“18TH AUGUST 1998

MR MORAPELI MOTAUNG
C/O MINISTRY OF TOURISM,
SPORTS & CULTURE
P.O. BOX 52
MASERU - 100

Dear Mr Motaung;

Per your letter dated 18th February 1998, you had applied for an early retirement, simultaneously taking leave which was to end and did end on the 31st March 1998. You are aware that at the end of your said leave you failed to report for duty notwithstanding that the results of your application for early retirement were still pending and unknown.

You have now started to be seen and heard in public places in the country vehemently campaigning under the banner of a political party to be elected to the National Assembly in the past general elections. Thus you eventually contested the elections standing as a party candidate in the Lithabaneng Constituency.

On the 07 May, 1998, you were notified of the refusal of your application for early retirement and warned to attend to your official duties. To - date you have ignored the warning and you continue unabated your said political activities, without any word whatsoever as to your responsibilities as a public officer.

All the above considered, I am considering making a proposal to the Public Service Commission to remove you from office in the public interest. If you have anything to say in relation to the above proposal, do so in writing and submit the same to my office within three (3) days of the receipt hereof.

Yours sincerely;

M.T. MOHAPELOA
PRINCIPAL SECRETARY”

In response to these allegations, the respondents filed their notice of intention to oppose the application and attached the answering affidavits of Mr Mohapeloane Teboho Mohapelo (Principal Secretary - Tourism) and Mr Lillo Mosala, the Chairman of the Public Service Commission. In his lengthy affidavit, the Principal Secretary states that the applicant, having applied for an early retirement in March, deserted the civil service even before he got a response from the Public Service Commission and (a) failed to resume his duties when his leave expired at the end of March, thus repudiating his contract and (b) began active party politicking as Basotho National Party Candidate in contravention of the Public Service Act 1995 Section 14 (1) (k) which reads:-

“(k) a public officer shall not

- (i) be an active member of a political party,
- (ii) speak in public on any party political matter,
- (iii) take an active part in the support of any candidate in an election,
- (iv) do anything by word or deed which is calculated to further the party political interests of any political party.”

He states that in view of the fact that the applicant knew that at the time of lodging his notification to retire, there were serious disciplinary charges “of the nature of embezzlement of public funds,” notice to retire was a mere ruse to escape and evade those disciplinary proceedings then pending against him.

He states that before it exercised its discretion under section 30 (6) of the Public Service Act 1995, the Public Service Commission was entitled to seek legal opinion which opinion it could consider in applying its mind to the issue of retirement of the applicant. He states that the decision for rejecting the early retirement was, in all the circumstances reasonable; he refutes the applicant’s contention that he ought to have been granted a hearing before the commission come to a decision on the retirement issue because, so he argues, the decision not to accept retirement in no way prejudiced the applicant vis-a-viz his status as a Director of Sports or his emoluments.

In his supporting affidavit, Mr Lillo Mosala, the Chairman of the Public Service Commission briefly states:-

4.

“Basically, the driving force behind the Commission’s decision to turn down applicant’s retirement was considerations of public policy and national interest, in that as the Commission we viewed it as undesirable that applicant should be allowed to retire in circumstances where he was facing such serious disciplinary charges involving substantial public funds. We considered that if we had allowed applicant’s retirement in all the circumstances, we would have set a very dangerous precedent as it would open a way to delinquent public officers taking refuge into early retirement when facing disciplinary charges. Simply put, applicant’s early retirements was viewed, in all the circumstances of the case, as clearly fully stated in the answering affidavit, as an attempt to defeat the ends of justice and to avoid facing disciplinary proceedings. We could not be a party to that. Consequently, the application was rejected. Experience has taught us that once in retirement, an officer’s whereabouts and guarantee that he will attend to disciplinary cases pending against him become a problem, in as much as there is no machinery in the law to ensure attendance in such circumstances. Incidentally it was not revealed in the application the reasons for early retirement. We arrived at this decision in good faith as the Commission. The Ministry of Tourism, where applicant was attached, was accordingly informed of the decision and they in turn informed applicant.”

He goes on to state that-

“once legally advised, we had a choice either to take the advise or to reject it. We had debated the opinion and the advice and the matter generally and at the end of the day adopted it and decided accordingly. We acted wholly within our rights.”

In his replying affidavit the applicant contends that-

“The conduct of second respondent in keeping quiet until today has been of such a character as to lead me to believe that he had accepted my suggested retirement ... thus, the second respondent is estopped by conduct from raising the issue that I just took a French leave.”

“...It was in law incumbent upon the second respondent to advise me timeously, that is before I retired whether or not they accepted or had a problem with my retirement for early retirement I must emphasise, I was not applying for early retirement but I was notifying the commission of my said retirement. The Commission having not objected to my said notification, I was entitled to proceed on retirement as I did.”

According to the applicant therefore he began his retirement on the 1st April 1998 and that he did so before and without knowing whether the second respondent had come to any decision (negative or positive) upon his notification for retirement.

The Law - Public Service Act No.13 of 1995

“Retirement at prescribed ages or in prescribed circumstances

30. (1) Subject to the provision of this section, a public officer shall retire from the public service, and shall be so retired, on attaining the age of fifty-five years.
- (2) A public officer who has attained the age of forty-five years may in the discretion of the Commission be retired from the public service.
- (3) A public officer may at any time before or after attaining the age of forty-five years retire from the public service and shall give written notification to the relevant Principal Secretary of his wish to be retired from the public service.

- (4) Where notification is given under subsection (3)-
- (a) at least six calendar months prior to the date on which the officer attains the age of forty-five years, the officer shall be retired on attaining that age; or
 - (b) less than six calendar months prior to the date on which the officer attains the age of forty-five years, the officer shall be retired on the first day of the seventh month following the month in which that notification is received.
- (5) Notwithstanding subsection (2), the Commission may having regard to the conditions of the public service and after consultation with the Minister, retire a public officer from the public service before or after the public officer attains the age of forty-five years.
- (6) The Commission may, having regard to the conditions of the public service, not allow a public officer from retiring from the public service under subsection (3).
- (7) If in the opinion of the Minister it is in the public interest to retain a public officer in office beyond retiring age, the officer may if willing, be retained from time to time by the Commission for further periods that shall not exceed in the aggregate five years.” (My underlining)

In my view the following position obtains:-

- (a) Upon reaching the age of fifty-five a public officer shall retire from the public service unless retained under subsection (7) of section 30 of the Public Service Act 1995.

- (b) An officer who has attained the age of forty-five and above (but below fifty-five) may in the discretion of the Public Service Commission be retired from the public service.
- (c) An officer who has attained the age of forty-five who wishes to retire from public service must give a written notification to his Principal Secretary.
- (d) An officer who wishes to be retired on his attaining forty-five must lodge his notification six (6) months prior to his retirement date.
- (e) An officer who gives his notification less than six months before his attaining forty-five, shall be retired on the first day of the seventh month following the month in which that notification is received.
- (f) The Public Service Commission at its discretion and after consultation with the Minister (Public Service) retire a public officer from public service before or after the officer attains the ages of forty-five.
- (g) Having regard to the **conditions of the public service**, the Commission may not allow a public officer from retiring from the public service under section 30 (3).

Coming to the facts of the instant case the following are salient features:-

- (a) The applicant was fifty-three (53) years 11 months when he tendered his resignation.
- (b) He would turn fifty-five on the 12th March 1999.
- (c) There were pending disciplinary proceedings against him at the time. - see **Motaung vs Principal Secretary - Tourism** - 1997-98 LLR 317.
- (d) Applicant was informed of the decision of the Commission not to accept his retirement on the 28th May 1998 (some 99 or 100 days after his February letter for retirement)
- (e) That the Commission in resolving not to accept the applicant's retirement "looked into the legal opinion from the Ministry of Law and Constitutional Affairs". No mention being made of "having regard to the conditions of the public service."

Advocate Mosito, for applicant, contends that in paying regard to the legal opinion as it purported to do, the Commission misdirected its discretion and considered a non-jurisdictional fact. He submits therefore that in failing to have regard to the "conditions of the Public Service," the resolution was improperly arrived at and must be struck down as null and void as being **ultra vires** section 30 (6) of the Public Service Act 1995.

The legal opinion which was looked into by the Commission opined that applicant's retirement should be refused because applicant was then facing disciplinary charges and this was adopted by the Public Service Commission. Was this consideration a condition of the public service? The 1995 Act does not define what these conditions are. Concise Oxford Dictionary defines "**condition**" as

"state of being or fitness of a person".

"Circumstances esp. those affecting the functioning or existence of something."

On the other hand, conditions of public service in my view must necessarily and purposively mean circumstances pertaining to the employment status of the public servant. See **Wholesale Coal Supplies vs Goodman** - 1933 TPD 330; **Goodwin vs Minister of Labour** 1951 (2) SA 611; **Dental Association of South Africa vs Viljoen** - 1970 (3) SA 733 A.D; 1970 (1) SA 537. If a public servant is facing disciplinary charges which are already pending, his employment status is in balance and that fact must certainly be taken into consideration in deciding whether to retire him or not. Whilst the applicant had at his age, an equitable right to expect that he could be retired, things being normal, he knew that serious disciplinary proceedings were pending against him at the time. Until these disciplinary proceedings were finalised, the Public Service Commission had a legitimate interest to see that the applicant continued being a civil servant in order that if found guilty, appropriate punishment could be prescribed. This is so because section 137 of the Constitution of Lesotho vests in the Commission the power to exercise disciplinary control over

civil servants and an early retirement would pre-emptively defeat the exercise of the disciplinary proceedings. I am also of the view that the provisions of section 23 of the Public Service Act do not apply to cases of retirement, but only to those of resignation. Resignation is a somewhat unilateral act of the employee (**Ex Parte Moodley** - 1968 (4) SA 622) whereas retirement requires by law acceptance of the Public Service Commission.

I cannot, in the circumstances of this case, hold that the second respondent in exercising its discretion not to accept the applicant's retirement acted wrongly or improperly or was actuated by malice towards the applicant nor can it be said that regard to the legal opinion misdirected the exercise of its discretion under Section 30 (6) of the Act. "Conditions of public service" are multitudinous and indeed, in my considered view, include discipline of the public servants. To retire a public servant against whom the Commission had preferred charges (as yet not adjudicated upon) would be an exercise in futility because section 23 of the Act would not come to the aid of the Commission after applicant had retired. In fact the applicant could successfully challenge the jurisdiction of the adjudicator in any post-retirement proceedings. Retirement **per se** involves the drastic alteration; it is in fact an extinction of conditions or terms of employment. On retirement, a civil servant relinquishes his status as such, along with its rights and duties, he becomes eligible to pension and other benefits. Indeed he ceases to be under the effective control of the Public Service Commission, and no disciplinary punishments can be meted to him.

In my view, the Public Service Commission is by law the constitutional and statutory repository of the discretion to determine the conditions of the public service or its

state of affairs. (**SA Defence and Aid Fund vs Minister of Justice 1967 (1) SA 31**. I don't think it is the function of the court to determine whether the requisite conditions of service or state of affairs existed in an objective sense without usurping the functions of the Commission. But if, for example, the Commission based its refusal upon the fact that the applicant was engaged in party politicking, I would say it acted **mala fide** or perhaps unreasonably. But that is not the case here. Retirement, unlike resignation, is not a unilateral act and in the circumstances of this case, the applicant could only lawfully retire after the Commission had accepted his retirement. That the Public Service Commission delayed its final decision, while not worthy of any praise, could not entitle the applicant to assume that his retirement had been accepted. He took no active steps to ascertain the position and individually came to assume that he had been retired. It was a risk that he took whereas prudence could have made him to inquire from the Commission the outcome of his case so that he could begin a new life elsewhere.

Assuming that his retirement was not as effective as from the 31st March 1998 - as he claims - the retirement of the applicant could only have begun on the 13th March 1999 when he turned fifty-five. By that date the applicant was, through his own choice and election, no longer in the civil service.

What remains next to be determined is whether the summary dismissal of the applicant by the Commission on the 17th November 1998 was in the circumstances of the case lawful. The relevant letter reads-

“Ministry of Tourism, Sports & Culture,
P.O. Box 52,
MASERU 100
17th November, 1998

TSC/P/4313

Mr A.M. Motaung,
P.O. Box 52,
MASERU 100

Dear Sir,

You are informed that the Commission resolved that you be removed by way of dismissal without disciplinary proceedings with effect from 1st July 1998 in terms of Public Service Commission Rule 6-01 (e) of 1970 reads together with section 14 (1) (d) of the Public Service Act 1995.

Yours faithfully,

M.T. Mohapelo

Principal Secretary”

Rule 6-01 (e) reads-

“(1) A head of department may propose in writing to the (Government Secretary) for reference to the Commission the removal of an officer from office or his reduction in rank or salary on one or more of the following grounds-

- (a)
- (b)
- (c)
- (d)
- (e) that the public interest so requires”

The 1970 Public Service Order was repealed by the Public Service Act 1995 whose Section 14 (1) (d) reads-

“General rules of conduct

14. (1) A public officer shall comply with the following general rules of conduct

- (a)
- (b)
- (c)
- (d) a public officer shall not be absent from official duties during office hours without leave or valid excuse.”

Section 27 of the Act states-

“(1) The following punishments may be imposed on a public officer who has been proved to have committed a breach of discipline.

- (a) dismissal from office;
- (b) removal from office by compulsory retirement;
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)

(2) The imposition of a punishment under subsection (1) may be postponed for a period not exceeding 6 months.”

It is not in dispute that when the applicant’s leave holiday expired on March 31, 1998, the applicant never again reported for duty since 1st April, 1998.

It is also not in dispute that the letters dated 7th May 1998 and 22nd May 1998 were received by the applicant, and that the latest letter was written on 18th August 1998 advising applicant that a proposal would be made to the Commission to remove him from office in the public interest and was invited to respond in writing within three days. He did not make any response.

It seems to me that dismissal from office can only come about under section 27 of the Public Service Act of 1995 and that the breach of discipline must be proved under Part 3 of the Act dealing with disciplinary proceedings which involve a charge

(section 19), and an inquiry (section 21) during which the officer shall have the right to be present and to be heard either personally or through his representative, to cross-examine any person called as a witness in support of the charge and to give evidence himself or call other persons as witnesses. In the present case, none of these occurred in the summary dismissal of the applicant. He was not served with the charge upon which his ultimate dismissal was premised. He only received the letter of dismissal dated 17th November 1998. I cannot sensibly reconcile the provision of Rule 6-01 of the Public Service Commission Rules 1970 with the clear provisions of the Public Service Act 1995. The applicant, despite his absence from office, could still be contacted and should have been served with a formal charge. He ought to have been given a fair hearing as mandated under section 21 of the 1995 Act - See **Nthejane vs National Motors Co.** - 1991-96 (2) LLR 833; **Bongani Tsotsi vs IDM** - 1985 - 1990 LLR 384.

“Valid excuse” under section 14 (1) (d) imports an explanation of some kind from the absconding officer. See **Matebesi vs Director of Immigration** - 1997-98 LLR 455 which however considered the repealed Public Service Order 1970 (section 6 (3) thereof). It is clear however that in the 1995 Act there is no clause limiting the right to be heard before being dismissed.

Speaking about section 6 (3) of the 1970 Public Service Order **Gauntlett JA** had this to say-

“This provision would appear to be underpinned by the practical difficulty which will often arise in an instance of protracted absenteeism or desertion. Either undermines the capacity of the employer to investigate the situation properly and expeditiously. The ability of the employer conveniently and swiftly to ascertain from the absentee employee why she is absent must nearly always be difficult; if not impossible. On the facts of this matter, that was indeed the case here.”

Under the Public Service Act of 1995, it seems to me, that an absconding or deserting officer cannot be summarily dismissed without a hearing as was the case under the 1970 Public Service Order. I therefore hold that the purported summary dismissal of the applicant under Public Service Rule 6-01 was inconsistent with the provisions of the Public Service Act of 1995. In passing it must be mentioned that the Minister responsible for the Public Service should be advised to make appropriate regulations under the Public Service Act of 1995. Old rules and regulations made under a repealed legislation are usually not always consistent with a new legislation. This is important because the 1995 Public Service Act was passed after the promulgation of the 1993 democratic Constitution of Lesotho.

I do not find it necessary to make a declaration on the constitutionality or otherwise of section 30 (6) of the Public Service Act 1995 because the section in no fetters the powers and discretion of the Public Service Commission. It is a general sub-section which seeks to facilitate the work of the Commission. It is advisory and permissive and in no way seeks to direct or control the Commission in the exercise of its functions (Section 137 (11) of the Constitution).

The application is therefore dismissed with costs regarding prayers 2 (a) (b) (c) (d).
Prayer 2 (g) of the application succeeds with costs.



S.N. PEELE

JUDGE

For Applicant : Advocate Mosito

For Respondents : Advocate Masoabi