

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

In the matter between:

SAKHELE SAKHELE

Appellant

And

PRINCIPAL SECRETARY NATURAL RESOURCES 1st
Respondent

PUBLIC SERVICE COMMISSION 2nd
Respondent

ATTORNEY GENERAL 3rd
Respondent

CORAM: Ramodibedi, JA
Melunsky, JA
Kumleben, AJA

(26 March, 7 April 2004)

SUMMARY

Public Service Act 1995 – appellant, an employee in the public service, reaching compulsory retirement age of 55 – Departmental Head requesting extension of his employment for 48 months – such request not dealt with by Minister or second respondent – no legal basis for compelling second respondent to extend employment contract in terms of section 30(7) of Public Service Act 1995.

JUDGMENT

MELUNSKY JA

[1] The appellant was employed by the Government of Lesotho from 1970 until his resignation some years later. He rejoined the public service on 16 March 1985 as a senior technical officer in the Department of Mines and Geology (“the Department”) which is within the Ministry of Natural Resources (“the Ministry”). He reached the age of 55 on 2 August 2000. In terms of **S 30 (1) of the Public Service Act 13 of 1995 (“the Act”)** he should then have retired from the service. The sub-section reads:

“Subject to the provisions 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] Some months before August 2000 Ms Mpatuoa, the Commissioner of Mines and head of the Department, informed the appellant that his services would be required for an additional 48 months from his retirement date and that she would seek an extension of his employment contract for this period. With the appellant’s agreement she requested such an extension in a savingram dated 18 May 2000. She showed this document to the appellant.

[3] The extension of the appellant’s service contract required the approval of the Public service Commission (the second respondent) in terms of **S 30 (7) of the Act** which reads:

“If in the opinion of the Minister (responsible for the Public Service) 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 (Public Service) Commission for further periods that shall not exceed in the aggregate five years.”

In accordance with departmental practice Ms Mpatuoa’s recommendation

had to be submitted, in the first instance, to the Principal Secretary in the Ministry (the first respondent). This, according to Ms Mpatuoa, is what she did. She also requested Ministry's human resources officer to see to the processing of her recommendation and received the assurance that the matter was being attended to. She passed on this information to the appellant who confidently expected the matter to be dealt with.

[4] The appellant remained in his employment after 2 August 2000, and continued to receive his remuneration, including increments, notwithstanding the absence of any notification from the second respondent. He remained in employment until 31 October 2001.

[5] It is not clear how far Ms Mpatuoa's savingram proceeded along the official channels. Mr Leleka, the present Principal Secretary in the Ministry, did not hold that position during May 2000. He stated that the relevant document was not in the file of the appellant and that he did not know whether it was ever received in his office. The second respondent denied ever receiving a request for the extension of the appellant's term of service. What is crucial, however, is the fact that the second respondent did not retain the appellant in service for any period beyond his retirement age. However, on 28 November 2001 the second respondent did confirm the appellant's appointment retrospectively "to the permanent and pensionable establishment with effect from 16-03-87 and 18-03-85 respectively." It also noted the appellant's retirement from the Public Service in terms of **S.30 (1) of the Act** with effect from 2 August 2000.

[6] The appellant on motion obtained a rule nisi from the High Court which, **inter alia**, directed the second respondent to reinstate the appellant for the remainder of "his extended 48 months service", alternatively, to pay

his salary and benefits for the remainder of the 48 months period. On the return day the application was dismissed (presumably Maqutu J, who made the order, intended to discharge the rule, although he did not say so). In the court **a quo** the appellant appeared to base his right to relief on the ground that he had the legitimate expectation of receiving the extension of his service for 48 months, while in his counsel's heads of argument on appeal, the appellant's main contention was that the decision to terminate his employment was a nullity as the respondents failed to consider the request contained in Ms Mpatuoa's savingram as they were obliged to do.

[7] In this court the appellants' counsel conceded, quite correctly in my view, that if the appellant's period of employment was not extended beyond 2 August 2000, the appellant was not entitled to relief. This concession makes it unnecessary to deal with any of the submissions contained in the heads of argument or in the appellant's affidavit. It is also not necessary to express any views on the reasons given by Maqutu J for dismissing the application and I refrain from doing so.

[8] In terms of **S 30 of the Act** and, in particular, under sub-section (1), a public officer is obliged to retire on reaching the age of fifty-five years. His period of service can be extended only in terms of sub-section (7). The sub-section provides, moreover, that the second respondent may retain a public officer only if, in the opinion of the Minister, it is in the public interest to do so. There is no evidence that the Minister ever expressed, or even entertained, such an opinion. To the contrary the Minister was not called upon to consider the question. Consequently the second respondent cannot be compelled to re-instate the appellant or to pay him his salary as if he had been re-instated as the statute does not permit it to do so. Nor can this Court compel the second respondent to do something which the Act does not allow it to do. (**cf. Hoisain v Town Clerk, Wynberg 1916 AD 236 at 240**). In

the result the appeal cannot succeed.

[9] There was a submission on the appellant's behalf that there should be no order as to the costs of this appeal. In the circumstances of this case there seems to no reason for depriving the successful parties of their costs.

[10] It is therefore ordered that the appeal be dismissed with costs.

**L.S. MELUNSKY
JUDGE OF APPEAL**

I agree

**M.M RAMODIBEDI
JUDGE OF APPEAL**

I agree

**M.E. KUMLEBEN
ACTING JUDGE OF APPEAL**

Delivered at Maseru this 7th day of April 2004

For Appellant : Mr. E.H. Phoofolo
For Respondent : Mr. T. Putsoane