C of A (CIV) 2/05
CIV/APN/418/04

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MINISTER OF HOME AFFAIRS	**1st APPELLANT**
MINISTER OF PUBLIC SERVICE	**2nd APPELLANT**
COMMISSIONER OF POLICE	**3rd APPELLANT**
ATTORNEY GENERAL	**4th APPELLANT**
and	
MAMPHO MOFOLO	**RESPONDENT**

11 and 20 April 2005

CORAM :
STEYN P
GROSSKOPF JA
MELUNSKY JA

Summary

Police officer – retirement of – whether retired under regulation 11(1) or 11 (2) of regulations made under Police Service Act, 1998 – regulation 11(1) does not contemplate a prior hearing - whether regulations ultra vires – rights of the officer to be heard prior

to retirement - regulation 11(1) interferes with existing rights – presumption against retrospectivity – regulation 11(1) does not apply to police officers who had acquired rights to retire at age of 55.

MELUNSKY JA:

1] The main issue that has to be decided in this appeal is whether the respondent, an inspector in the Lesotho Mounted Police Service ("the LMPS"), was obliged to accept compulsory retirement on reaching the age of 50, as the appellants contend, or whether, as she maintains, she is entitled to remain a member of the LMPS until she becomes 55 years of age. The respondent was 50 years old when she deposed to her founding affidavit on 16 August 2004 but the date when she reached that age does not appear from the record. The parties are in agreement that before the promulgation of regulations made under the Police Service Act, 7 of 1998 ("the Act"), the respondent would have retired at the age of 55 years but there is a dispute whether this retirement age arose out of a practice that had evolved or whether it was based on a statutory right. The interpretation, application and validity of the regulations, insofar as they deal with the retirement of members of the LMPS, are therefore crucial to the outcome of this appeal.

2] The regulations were published under Legal Notice 202 of 2003 ("the

2003 regulations"). Regulation 11, which deals with the subject of retirement, was amended by regulation 3 of regulations promulgated under Legal Notice 95 of 2004 ("the 2004 regulations"). The relevant provisions of regulation 11, as amended, read:

> "11 (1) Subject to this regulation, a Police Officer shall retire from the Police Service, and shall be so retired on attaining the age of 55 years in the case of a Senior Officer and the age of 50 years in the case of a subordinate officer and other ranks.
>
> (2) The Commissioner may, having regard to the conditions of the Police Service and after consultation with the Police Authority, retire a member of the Police Service before or after the member concerned –
>
> (a) in the case of a senior officer, attains the age of 55 years; and
>
> (b) in the case of subordinate officer attains the age of 50 years.
>
> (3) ……
>
> (4) ……
>
> (5) Where the Police Authority is of the opinion that it is in the public interest to retain the services of a police officer beyond retiring age, the officer may if so willing, be retained from time to time by the Commissioner, for further periods that shall not in the aggregate exceed 5 years".

Two matters require to be noted : the first is that the only material amendments introduced by the 2004 regulations relate to the ages for retirement. Before amendment the ages for retirement were considerably lower – 45 years in the case of a senior officer and 40 years in the case of a

subordinate officer and other ranks. Secondly, at all material times the respondent was a subordinate officer for the purposes of the regulations.

3] The respondent was appointed to the Police Service in 1975, apparently on a temporary basis. Her appointment became permanent in 1984 and consequently she became entitled to a pension on her retirement. On 17 June 2004 the respondent was informed of the contents of a wireless message sent to Superintendent Sehlabo of the LMPS instructing him to make his subordinates

> "……..aware of the contents of regulation 3(b) of the LMPS Administration (Amendment) Regulation 2004 which provides that such officers shall retire at the age of 50".

The message added :

> "Officers who are going to be affected by this regulation are those who have or will attain 50 years of age after this regulation (amendment) became effective as the law doesn't apply retrospectively".

Regulation 3(b) of the 2004 regulations was substantially a re-enactment of regulation 11(2) of the 2003 regulations, the only important difference being the alterations to the ages of retirement, which I have already noted.

Consequently the message might more appropriately have referred to "regulation 11(2) of the LMPS regulations, as amended. It may also be noted that regulation 3(a) of the 2004 regulations did nothing more than delete the ages of 45 years and 40 years in regulation 11(1) and replace them with the ages of 55 years and 50 years respectively.

4] On 30 June Superintendent Sehlabo was instructed by wireless to inform the respondent that she should

"……proceed on leave pending retirement w.e.f. 23.07.04 to 24.11.04"

and that a "formal letter" would follow. Subsequently the respondent received the letter written on behalf of the Commissioner of Police ("the Commissioner") on 29 June. In the letter the respondent was informed that she should proceed on 85 days' leave "pending retirement" with effect from 23 July to 24 November 2004, which would be her last day of service.

5] As a result of the communications mentioned above, the respondent instituted proceedings on motion. On 3 September 2004, Peete J granted an order which in para 1 called upon the appellants to show cause, if any why:

"(a) The ordinary rules of this Honourable Court pertaining to periods and mode of services shall not be dispensed with on account of the urgency of this matter.

(b) An order shall not be made declaring the applicant's purported compulsory retirement from the police service null and void.

(c) An order shall not be made reinstating applicant to her position in the Lesotho Mounted Police Service.

(d) An order shall not be made declaring respondents' failure to give applicant reasonable notice of the intention to retire her compulsorily an illegal act.

(e) Respondents or their servants shall not be restrained and interdicted from withholding applicant's salary pending the finalisation of this application.

(f) Alternatively, directing the respondents to determine and pay applicant's pension as if she retired at the age 55 years.

(g) Respondents shall not be directed to pay the costs of this application.

(h) Granting applicant further and/or alternative relief."

Para 2 of the order directed that para 1(a) and (e) thereof were to operate as interim relief with immediate effect.

In her founding affidavit the respondent made it clear that she was under the impression that she was being retired by the Commissioner in terms of regulation 11(2) (as amended) and that this belief was induced by the reference to regulation 3(b) of the 2004 regulations in the first wireless message. It was only on 14 September that the Commissioner (the third appellant in this appeal) wrote to the appellant advising her that her

retirement with effect from 24 November was in terms of regulation 11 as amended by regulation 3(a) of the 2004 regulations. That is how matters stood when the application came before Majara AJ on the extended return day. For various reasons, some of which will be referred to in this judgment, the learned judge granted the respondent's application with costs, thereby impliedly confirming the rule *nisi*. It is against that order that the appellants appeal to this court.

6] The learned judge decided to deal with the application on the basis that the respondent had been retired by the Commissioner under the provisions of the amended regulation 11(2). She considered that in terms of this regulation the respondent was entitled to a hearing or the right to make representations before the Commissioner retired her but was afforded no such right. The learned judge was undoubtedly correct in holding that the *audi alteram partem* maxim had to be applied before the Commissioner acted in terms of regulation 11(2). This much was conceded on the appellants' behalf. Counsel for the appellants submitted, however, both before us and in the Court *a quo* that the respondent, having reached the age of 50, was obliged to retire in terms of regulation 11(1) ; that the reference to

regulation 3(b) in the first wireless message was clearly erroneous; that the error who obvious if regard was had to the wireless communication as a whole ; and that the error was corrected by the letter of 14 September 2004.

7] The Court *a quo* rejected these submissions, mainly on the ground that it would be unfair to the respondent to permit the appellants to "change their stance at this stage," i.e. after the rule *nisi* had been granted. The learned Judge added :

> "……to allow a decision maker to wait until after an employee has approached the Court and been granted an interdict and only then purport to make a new case would be a grave injustice to such an employee."

I have a different view of the matter. The appellants were not before Peete J when he granted the rule, although service of the papers had been effected on them some five days earlier. They filed their opposing papers on 21 September. In the opposing affidavit the Acting Commissioner made it clear that the reference to regulation 3(b) in the first wireless message was "a mistake" and that the relevant regulation was intended to be 11(1) as amended. It is important to note that the appellants did not change their stance or alter the basis of their defence during the course of the litigation.

What they did was to attempt to correct an erroneous impression that might have been created by a wireless message which was sent before the litigation commenced. There is no reason why they could not do so. What the learned Judge should have done was to have had regard to the affidavit of the Acting Commissioner and not, in effect, to treat it as *pro non scripto*.

8] The wireless message in question contained two inconsistent statements – that regulation 3(b) (regulation 11(2) as amended) was of application and that in terms of the regulation the respondent was obliged to retire at the age of 50 years. But regulation 11(2), as amended by 3(b), does not provide that an officer *shall* retire at the age of fifty. Compulsory retirement on the grounds of age is provided for only in regulation 11(1) as amended by 3(a) in 2004. This provides ample support for the Acting Commissioner's assertion that the incorrect section was quoted in the message. I add that when faced with the inconsistencies which are so apparent in the wireless communication, the respondent could have sought clarification from the Commissioner before commencing legal proceedings. More importantly the respondent suffered no real prejudice once she became aware of the Commissioner's error. She had the right to respond to the

Acting Commissioner's allegations in her replying affidavit and she did so.

Moreover she was, in the circumstances, entitled to expand upon the averments contained in her founding affidavit and, if so advised, she could have applied to amend the notice of motion. I do not agree that the respondent was subjected to unfairness or that she suffered an injustice – much less an injustice that was grave – due to the appellants' desire to put their defence properly before the court, nor did her counsel, in argument before us, point to any respect in which she was prejudiced. It was and remains the appellants' contention that the respondent was obliged to retire by the operation of law in terms of regulation 11(1) as amended on reaching the age of 50 years. What will be considered in due course is whether this contention is correct.

9] On the respondent's behalf it was argued that even if regulation 11 (1) applies to the case, considerations of fairness required that she should have been given the opportunity to make representations before the regulation was implemented or made applicable to her. This submission was predicated on the assumption that immediately before the regulations came into operation the respondent had a statutory right to remain in service until she reached the age of 55 years. Whether she had such a right or merely an expectation, as the appellants submit, is also a matter that will be adverted to later, for even if the respondent's retirement age had previously been governed by statute, principles of fairness or natural justice cannot be imported into regulation 11(1) in the manner suggested by the respondent's

counsel. Principles of fairness arise where a statute confers administrative powers on a functionary, particularly the right to make a decision that might adversely affect a person. In such circumstances, as Lord Mustill aptly put it in *Doody v Secretary of State* [1993] 3 All ER 92 (HL) at 106 :

> "Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against him, he is informed of the gist of the case he has to answer."

10] The well-known maxim of *audi alteram partem* is frequently invoked. It was described as "sacred" by Stratford ACJ in *Sachs v Minister of Justice* 1934 AD 11 at 38 and so it is in its proper setting, namely, when a statute empowers a public official to give a decision which may prejudicially affect the property or liberty of an individual. The maxim does not apply where no administrative action is contemplated or where no decision needs to be given by an official or body. No administrative action is envisaged in regulation 11(1), nor does the regulation make provision for a decision to be given whereby its terms are to be implemented or applied to a member of the LMPS. The regulation simply prescribes the retirement ages of members of the police service and, according to its provisions, retirement becomes

effective by the operation of law and not due to the action of an official. Consequently the argument put forward by the respondent's counsel cannot succeed on this point.

11] A further argument put forward by the respondent's counsel was that the first appellant ("the Minister") was not authorised by an Act of Parliament to regulate on the ages of retirement of members of the LMPS. This argument was upheld by the learned judge a *quo*. The enabling provision which is applicable to this appeal is section 84 of the Act which, under the heading Regulations, reads:

> "84 (1) The Police Authority may, after consultation with the Commissioner, and, in respect of matters concerning pay, allowances, leave entitlement, pensions and compensation for death or injury on duty, the Minister responsible for the Public Service and the Minister of Finance, make regulations relating to the government, administration and conditions of service of the Police Service.
> (2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to all or any of the following matters
>
> (a) the ranks to be held by police officers;
> (b) the qualifications for appointment and promotions of police officers;
> (c) the definitions of offences against discipline and the penalties therefore;
> (d) pay, allowances and leave entitlement of police officers;
> (e) pensions and compensation for death or injury while on duty; and
> (f) the issue, use and return of police uniform, equipment and accoutrements;

Provided that Regulations in relation to appointments and promotions shall provide that all such appointments and promotions shall be on the basis of merit".

12] The argument advanced on the appellant's behalf, as I understood it, was that subsection (1) deals with the general power to make regulations but that subsection (2) specifies the particular subjects or items that could be covered by such regulations, in other words that the Police Authority, being the Minister, could make regulations only in respect of the matters set out in section 84(2). This submission appears to ignore the clear grammatical words used in the section. Subsection (1) provides that the Minister may make regulation under three main headings –

> "the government, administration and conditions of service of the Police Service".

Subsection (2) does not, however, in any way limit the general powers given, to the Minister under section 84(1). The opening expression in subsection (2) – "without prejudice to the generality of subsection (1)" - makes this quite clear. There is no need to consider this argument any further.

13] The learned judge a *quo,* however, held the regulations were, in effect, *ultra vires,* not because subsection (2) limited the Minister's power to regulate only to the specific subjects in that subsection, but on the more general ground that

> "nowhere in the regulations [presumably, the Act] has the Minister either expressly or impliedly, been authorised by Parliament to make regulations relating to the age [of] retirement of Police Officers."

A similar approach was adopted by the respondent's counsel in his heads of argument but this was not, quite correctly, pursued with any vigour at the hearing of the appeal. The expression "conditions of service" in subsection (1) is obviously intended to be a reference to conditions of service of members of the LMPS. Moreover the phrase clearly means the terms of the contracts of employment of police officers and not the physical conditions or circumstances surrounding officers during such employment (cf. The construction placed on " conditions of labour " and "conditions of employment" in *Wholesale Coal Supplies Ltd v Goodman*, 1933 TPD 321 at 329-330). The duration or term of period of a service contract is an element, if not an essential requirement, of such a contract (see Joubert (ed) *Law of South Africa* vol 13 (first reissue) Part I, paras 87 and 100). It must

follow, therefore, that once the Minister is given the power to regulate on the conditions of service of police officers, he has the right to specify for how long the contract is to endure and when and under what circumstances it may terminate. In *Wholesale Coal Supplies Ltd v Goodman (supra)* it was held that where the Minister had power under the statute to provide for conditions of employment, he could lawfully prescribe the period of notice to terminate it. Similarly, and pursuant to section 84 of the Act, the Minister may by regulation prescribe when and under what circumstance members of the police service may be required to retire. In the result regulation 11 (as amended) is not *ultra vires*.

14] The way is now clear to consider the most critical aspect of this appeal which is whether regulation 11(1) applies to police officers who were entitled to a pension by statute when the regulations became effective. It is not strictly necessary to deal with regulation 11(2) in this regard for the simple reason that the Commissioner did not retire the respondent in terms of that provision. The application of regulation 11(1) needs to be considered in the light of the presumption against the retrospective operation of the law. The presumption may be applied in two different contexts: first,

where a statute operates backwards, i.e. if an Act provides that at a past date the law shall be taken to be that which is not, sometimes referred to as retroactive operation, and second, when a statute interferes with existing rights and obligations (see V*an Lear v Van Lear* 1979 (3) SA 1162(W) at 1164 E-F). We were referred by the respondent's counsel to section 27C of the Interpretation (Amendment) Act, 4 of 1993, which reads :

> " Subsidiary legislation shall not be expressed to take effect from a date before the date of its publication in the Gazette where if the legislation so took effect –
>
> (a) the rights of a person (other than the Government of Lesotho or a statutory corporation) existing at the date of publication would be affected in a manner prejudicial to that person; or
>
> (b) liabilities would be imposed on a person (other than the Government of Lesotho or a statutory corporation) in respect of any act or omission before the date of publication,
>
> and where any subsidiary legislation contains a provision in contravention of this section that provision is void and of no effect".

15] The regulations now in issue are subsidiary legislation and for this reason it was argued on the respondent's behalf that

> " their retrospective effect is of no effect and void in as far as appellants purport to apply them to the respondent retrospectively".

Section 27C deal with only the first sense in which retrospectivity is used,

i.e. where it is *expressed* (my emphasis) to take effect from a date before the date of its publication in the Gazette. No such expression appears in regulation 11. Thus section 27C is of no application to this matter but what still remains to be considered is whether regulation 11(1) interferes with or takes away a vested right acquired by the respondent.

16] This is the stage at which it becomes necessary to decide whether, before the regulations were promulgated, the respondent had a statutory and legal right to retire at the age of 55 years or whether, as the appellant contends, she did not have a right but merely an expectation arising out of a practice that had developed. To decide the matter, it is necessary to have regard to some of the more important statutory provisions which, where practicable, I shall attempt to summarise as briefly as possible. These provisions are :

(i) The Pension Proclamation, No 4 of 1964 provides in section 6(1) (a) (i) for the payment of a pension to an officer if *inter alia* he retired from public service under the Government of Lesotho on reaching the age of 55 years. Section 8 of the Proclamation provided for compulsory retirement at the age of 55 or at the age of 45 on six months' notice.

(ii) Both of the aforesaid provisions were repealed, the former by Pension (Amendment) Order 39 of 1970 which provided for payment of a pension if an officer retired from public service under the Government of Lesotho "on or after he attains an age at which an office is, by any law to be vacated." Section 8 of the 1964 Pensions Proclamation was eventually replaced by section 12(1) of the Public Service Order 21 of 1970 which read:

> "Subject to 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".

I shall advert to the other subsections later. All that needs to noted now is that section 2(1) of the Public Service Order defined a public officer as " a person holding or acting in any public office."

(iii) Subsequently the Police Order, 26 of 1971 came into operation. No retirement age was prescribed under this Order but the Commissioner did have the power to retire a member of the Force on certain specified grounds such as a "reduction of establishment", medical grounds, habitual inattention to orders or general incompetence (section 29).

(iv) The Lesotho Mounted Police Regulations 1972 were promulgated

under the Police Order 1971. Regulation 14 read :

> "The grants of pensions and gratuities to all members of the Force shall be governed by the Pensions Proclamation 1964."

17] I pause here to make the following observations:

(i) When the respondent joined the Police Service in April 1975, her conditions of service were governed by the Police Order. Her retirement age, however, was not dealt with in the order but regulation 14 applied the provisions of the Pensions Proclamation 1964 to "all members of the Force."

(ii) Notwithstanding the provisions of regulation 14, most of the relevant provisions of the Pensions Proclamation 1964, had already been repealed. It may be noted that regulation 12 of the 2003 regulations also applies the Pensions Proclamation 1964 to members of the police service.

17] The Public Service Order 1970 was repealed by the Public Service Act 13 of 1995. Sections 30(1) and (2) of this Act read:

> "(1) 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) 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."

These sections are similar to the provisions contained in the sections 12(1) and (2) of the repealed statute.

18] The final statute which needs to be mentioned is the Act (the Police Service Act 1998) which repealed the Police Order of 1971. Section 85(2)(a) of the Act provides that a serving member of the LMPF shall continue to be a member of the Police Service "as if he had been appointed under the provisions of this Act." Section 31 of the Act gives the Commissioner the right to retire police officers on grounds similar to those contained in section 29 of the Police Order 1971.

19] The appellants' counsel submitted before us that the Public Service Order 1970 and its successor, the Public Service Act 1995, did not apply to members of the LMPS once the Police Service Order 1971 came into force. The reason is the following, according to the argument: the Police Service

Order 1971 and its successor, the Police Service Act 1998 are self-contained Acts dealing only with the police services; and that while police officers are "public officers" for the purposes of both the 1970 Public Service Order and the 1995 Public Service Act, they are no longer treated in the same way as other public servants, as their conditions of service are governed by separate legislation, i.e. the Police Service Statutes. As such the respondent had no legal right to retire at the age of 55 and the question of restrospectivity was irrelevant. We were not, however, referred to any provision of the Police legislation that expressly excluded members of the police from the operation of the retirement enactments of the Public Service Acts. There is nevertheless considerable force in these submissions and they are strengthened by some of the provisions in the Public Service legislation relating specifically to retirement. These are referred to in para [20] below.

20] In terms of the police legislation certain important rights and powers are reserved for the Commissioner and the Minister. Thus in terms of this legislation it is the Commissioner, subject to the direction of the Minister in certain instances, who has the general control of the administration of the Police Service in his hands (see section 5 of the Police Order, 1971 and

section 13 of the Act) and there is certainly no indication that any other Minister, person or body may be involved in the affairs of the Police Service. But under the retirement provisions of the Public Service statutes certain powers and duties in relation to the retirement of officers are given to the Minister responsible for the public service, the Principal Secretary and the Public Service Commission (see sections 12(4), (5), (7) and 10 of the Public Service Order, 1970 and sections 30(2) to 30(8) of the Public Service Act, 1995). These provisions, while not in conflict with the powers of the Commissioner and Minister under the Police legislation, do encroach upon the administrative powers and functions of these officials.

21] On the other hand the compelling argument advanced by the respondent and expressed in the judgment of the learned judge a *quo* is that the retirement date of members of the Police Service since 1971, if not earlier, would have had no statutory basis unless the Public Service retirement laws applied to them. Furthermore, police officers, in respect of retirement provisions, would be treated differently to all other public officers. Effectively this would mean that police officers would, as counsel for the appellants put it, have nothing more than an expectation to retire at

the age of fifty-five. What is more, there would be no general statutory power by the responsible authority to compel a member of the LMPS to retire before reaching that age or the right to extend the retirement age. There may be substantive reasons for compelling a police officer to take early retirement (see sections 30(5) and (8) of the Public Service Act 1995) or for extending the retirement date beyond the age of 55 years (see sections 30(6) and (7) of the said Act).

22] In weighing up the respective arguments I have come to the conclusion that the submissions of the respondent should prevail for the following reasons:-

1. The provisions of the Public Service statutes are wide enough to apply to all "public officers", including police officers, according to the definitions and the ordinary grammatical meaning of the words. This is accepted by the appellants.

2. It is unlikely that the legislation would have excluded police officers for over 30 years from the retirement provisions that applied to all other public officers. *Prima facie* it may be assumed that the legislature intended to treat all public officers on the same footing in the absence of specific provisions to the contrary. In fact the Pension

Proclamation 1964, although repealed, was expressly applied to police officers (see paras [16(iv)] and [17]above.

3. Had it been the intention of Parliament to exclude police officers from all of the provisions the Public Service Act this would probably have been clearly stated in the enactments. It is not sufficient, in my view, to hold that the retirement provisions were excluded by implication or inference. Although it may be possible to imply or infer such an exclusionary term, the implication is not a necessary one and the inference falls far short of being irresistible.

4. The retirement provisions exist not only for the benefit of the public officer but also for the benefit of the Ministers and senior officials in the control of the departments, as I have pointed out. It is therefore reasonable to assume that the legislature, apart from giving adequate protection to members of the public service, would also have had regard to the reasonable requirements of the officials in control of the administration of the Government of Lesotho by permitting such persons also to have some say in the retirement ages of employees.

23] All of these considerations lead to the conclusions that police officers did have statutory rights in respect of retirement before the 2003 regulations became of force and effect and that the retirement provisions did not have obscure origins in an undefined practice. Incidentally this, too, seems to have been the view of the Principal Secretary for Home Affairs according to a circular issued on 7 September 1998.

24] The final question is whether regulation 11(1) applies to all police officers, including those with a statutory right to a pension before the 2003 regulations (as amended) came into effect. This is where the presumption against retrospectivity in the second sense in which I have used it in para [15] above needs to be considered. In this sense, as I have mentioned, a statute is said to be retrospective when it takes away or interferes with an existing right (see the discussion in *Cape Town Municipality* v *F Robb & Co Ltd* 1996 (4) SA 329 (A) at 350G – 351D). The presumption is based on notions of fairness but it nevertheless remains a presumption – albeit it a "strong presumption" as Baxter points out in *Administrative Law* at 355. It is so fundamental a principle and has been so frequently applied that it

would be an act of supererogation for me to say more than that the scope of legislation which seeks to remove vested rights should be restrictively interpreted. Important as the presumption is, however the legislature in general is free to depart from it either expressly or by implication. The right to enfringe would seem to apply to regulations in addition to Acts as section 24 of the Interpretation Act, 19 of 1977 provides:

> "Subsidiary legislation shall have the same force and effect and shall be as binding and shall be constructed for all purposes as if it had been contained in the Act under which it was made."

25] Counsel for the appellants submitted that the presumption was rebutted by the very words employed in regulation 11(1). This was so, he argued, because of the peremptory nature of the provisions. The fact that the regulation enacts that a police officer "shall retire from the Police Service, and shall be so retired" does not address the question. Those words do not mean the regulation should be construed so to apply to all police officers, irrespective as to whether the officer had already acquired a right to retire at a later date. Nor are there any other provisions, either in the Act or in the regulations, which, whether expressly or by implication, would justify this Court in holding that the presumption against

retrospectivity has been excluded in regulation 11(1). This leads inexorably to the conclusion that the regulation does not apply to the respondent and that she was not obliged to retire on reaching the age of 50 years. This conclusion is not affected by the fact that the respondent's right to remain in employment under the earlier legislation was not unqualified : for although she could have been required to retire earlier in terms of section 30(2) of the Public Service, 1995, this did not occur.

26] I am not convinced that I would have reached a different conclusion even if the respondent had a legitimate expectation, based on a practice, and not a statutory right, to retire at the age of 55 years. While it is not strictly necessary to decide the point, the following factors seem to be relevant:

1. Although the Supreme Court of Appeal in South Africa has held that a legitimate expectation relates to procedural matters only (see *Meyer* v *Iscor Pension Fund* 2003 (2) SA 715 at 732 A-E and the authorities referred to therein), it has also been held and, in my view, not without merit, that

   "the legitimate expectation refers to the rights sought to be taken away and not the right to a hearing." (see *Mokoena* and O*thers* v

Administrator, *Transvaal* 1988 (4) SA 912 (W) at 918 D)

2. In English law the doctrine of legitimate expectation includes the right to a claim for substantive relief and not only the right to procedural fairness.

3. In *Meyer's* case *(supra)* the Court left open the difficult question whether the English doctrine of substantive relief should be incorporated into South African Law (at 733 I to 734 A). It is also not a question that needs to be dealt with in this case. The respondent does not seek substantive relief. The appellants concede, however, there was a practice which entitled police officers to have an expectation of retiring at the age of 55 years. One question that arises is whether the respondent should be in a less advantageous position because her expectation was based on a settled practice and not on a legal right. It may be observed that in cases of procedure an established practice or policy has been held to be sufficient to give rise to a legitimate expectation that a decision-maker should act fairly (see the authorities quoted in *Administrator Transvaal and others* v *Traub and Others* 1989 SA 731 (A) at 756 G to 757 E and the remarks

of Corbett CJ at 761 I to 762 B). It is certainly conceivable that consideration of fairness might also require that legislation that removes an expectation, based on an established practice, to receive a certain benefit, should be construed in accordance with the presumption against the interference or removal of existing rights. This aspect was only touched on in argument before us and in view of its importance I hesitate to express a firm conclusion on the matter. Moreover it is not necessary to do so in view of the finding that the respondent's expectation was based on a legal right.

27] Three important points remain. First, this judgment is concerned only with regulation 11(1) as amended. It is emphasised that we express no opinion on whether or nor regulation 11(2) or any of the other regulations are retrospective in their operation. Second, although it has been found the regulations are not *ultra vires* insofar as they apply to conditions of service generally, no argument was addressed to us on whether the Minister was authorised by the Act to make regulation having an retrospective effect and, if not, what would the result be if the regulations were found to be restrospective in their operation. We therefore express no opinion on this

subject either. Thirdly we do not find it necessary to decide whether the respondent would have been entitled to rely on the presumption against restropectivity had we been of the view that she had no right, but only an expectation, to remain in employment until retiring at 55 years of age.

28] To sum up, therefore:

1. Regulation 11(2) does not apply to this appeal. The Commissioner did not intend to retire the respondent in terms of this regulation. His real intention was to inform the respondent that she was obliged to accept compulsory retirement in terms of regulation 11(1). The litigation had to be dealt with on that basis.

2. The respondent was not entitled to a hearing or the right to make representations under regulation 11(1). The regulation applied by the operation of law and not due to the exercise of a decision by an official.

3. Regulation 11 is not *ultra vires* to the extent that the Minister is

precluded from regulating for the retirement of police officers. The Act authorises him to make regulations in respect of conditions of service of police officers : this includes the right to make provision for retirement of members of the LMPS.

4. Prior to the coming into force of the regulation the respondent had the statutory right to retire at the age of 55 (subject to certain qualifications) and not a mere expectation to retire at that age.

5. Regulation 11(1), according to its terms and the terms of the empowering Act, should not be interpreted so as to operate retrospectively. There are no sound reasons for holding that the regulation should be construed so as to remove the respondent's statutory right to retire at the age of 55 years. Accordingly the right of subordinate police officers to retire at the age of 55 has not been taken away by regulation 11(2). No opinion is expressed on whether the other regulations, including regulation 11(2), operate retrospectively.

29] For the reasons set out above, the appeal is dismissed. However it is necessary to adjust the order of the Court a *quo*. It is therefore ordered that:

1. The appeal is dismissed with costs;

2. The order of the court a *quo* is set aside and is replaced with the following:
" Paragraphs 1(b), (c), (e) and (g) of the rule *nisi* issued on 3 September 2004 are confirmed."

_____
LS MELUNSKY
JUDGE OF APPEAL

I agree

_____
J STEYN
PRESIDENT

I agree

_____
FH GROSSKOPF
JUDGE OF APPEAL

For the appellants : TS Putsoane
For the respondent: EH Phoofolo