

**IN THE COURT OF APPEAL OF LESOTHO**

C OF A (CIV) 72/2011

In the matter between:

**MABOTSE LEROTHOLI**

**APPELLANT**

and

**GOVERNMENT SECRETARY  
PRINCIPAL SECRETARY –  
PUBLIC SERVICE  
ACCOUNTANT GENERAL  
ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**CORAM:** SMALBERGER JA  
SCOTT JA  
HOWIE JA

HEARD : 3 OCTOBER 2012  
DELIVERED : 19 OCTOBER 2012

**SUMMARY**

Claim by a public officer for payment of money in lieu of accumulated leave – payment not permitted in terms of the relevant provisions of the Public Service Regulations 1969 – Appeal dismissed – no order as to costs.

## **JUDGMENT**

SMALBERGER, JA

[1] The appellant, who at all relevant times was a senior officer in the public service, instituted action against the respondents for payment to him by the Government of Lesotho of money in lieu of 105 days annual holiday leave and 306 days foreign service leave at the rate of his salary prevailing as of 16 September 2005, together with costs.

[2] The appellant's claim was dismissed by Mofolo J after what turned out to be an unnecessarily protracted trial. The learned judge made no order as to costs. The present appeal lies against his decision on the merits.

[3] It is common cause that the appellant's claim to be entitled to be paid cash in lieu of accumulated leave is governed by the Public Service Regulations 1969

promulgated in terms of Legal Notice No. 16 of 1969 (the 1969 Regulations). While the extent of the appellant's accumulated leave was initially at issue, it ultimately became common cause that he had accumulated leave in the number of days claimed. The trial proceedings were mainly (and misguidedly) devoted to the question whether the appellant had obtained approval to accumulate such leave rather than to the more pertinent enquiry whether he had any legal entitlement to claim a cash payment in lieu thereof.

[4] Before proceeding to deal with the relevant provisions of the 1969 Regulations it is of interest to note that in 1985, in terms of Legal Notice No.136 of 1985, new Public Service Regulations were published (the 1985 Regulations). These regulations were to come into operation on a date to be fixed by the responsible Minister by notice in the

Gazette. In the event it is common cause that the 1985 Regulations were never brought into operation and the 1969 Regulations remained in force until their repeal in 2006. The judge *a quo* appears to have erroneously been under the impression that the 1985 Regulations applied in the present matter, a mistake that may well have been shared by certain Government officials.

[5] Holiday leave was dealt with in regulations 501 to 509 of the 1969 Regulations. Regulation 501 emphasized that a public officer did not have a right to a holiday. However, regulation 502 (1) provided that “subject to the exigencies of the service” a public officer might be granted by a head of department an annual holiday of a prescribed number of working days depending upon the particular officer’s salary scale. The regulations were clearly designed to ensure that public officers would, in their own interests and in the

interests of the smooth functioning of the Public Service, utilize their annual holiday within each current holiday year. In this respect regulation 503 (1) provided that annual holidays taken during the relevant holiday year “shall not be carried forward to the next holiday year” except as provided in regulation 503 (2) (which has no relevance to the present matter) or “in special cases on the authority of the Senior Permanent Secretary [who later became the Principal Secretary of the Public Service]”.

[6] Of particular significance in the present appeal were the provisions of regulation 502 (5) which provided, in unequivocal and mandatory terms, that: “In no case shall pay be granted in lieu of holiday under this Regulation.” This imposed an absolute and unqualified prohibition on the payment of cash in lieu of accumulated holiday leave (whether authorized or not) and is a complete answer to the

appellant's claim for such payment. The regulation was operative at the time of the institution of the appellant's action and the appellant simply has no, and never had any, legal entitlement to such claim.

[7] The wording of regulation 502 (5) is to be contrasted with that of the proposed regulation 43 (5) of the 1985 Regulations (which never came into operation), which was in identical terms to regulation 502 (5) but added the important words "except with the permission of the Principal Secretary for Cabinet (Personnel)". This appears to have led to the confusion reflected in the circular from the Ministry of the Public Service dated 21 July 2003 under the hand of its Principal Secretary (which forms part of the appeal record) where it was, *inter alia*, stated (mistakenly): "That authorized accumulated leave must all the taken during the course of the current leave year

2003/2004. Where exigencies of work do not permit, it must be paid in full or part thereof and the remaining leave taken whenever it is practical". The circular glaringly overlooked the imperative prohibition against payment contained in regulation 502 (5), and could not hold sway over a legislative provision such as regulation 502 (5). In the circumstances the appellant's claim for payment of cash in lieu of accumulated holiday leave cannot succeed.

[8] Leave in relation to service abroad (foreign leave) was dealt with in regulation 1472 of the 1969 Regulations. It provided, *inter alia*, that: "Periods of leave will not be leave earning. Officers serving abroad will be required to take all leave due to them at the end of a normal tour of duty". Not only was the requirement that all leave must be taken mandatory, no provision was made in regulation 1472 or elsewhere, expressly or by necessary implication, for any

authorized accumulation of such leave or payment in lieu thereof. The appellant is accordingly precluded from claiming payment for accumulated foreign leave.

[9] Two witnesses testified for the appellant that they had on retirement from the public service been paid cash in lieu of accumulated leave. Mr. Thabane, for the appellant, contended that this had become the common practice in Lesotho and that the appellant's case amounted, unfairly, to an exception to the rule. There is no evidence on record before us to that effect; nor in the case of the two witnesses do we know the precise circumstances in which payments were made to them. It may be that they were paid in ignorance, or because of a misinterpretation, of the relevant provisions of the 1969 Regulations. Whatever the position, there can be no question of any discrimination or inequality affecting the appellant such as might amount to

a breach of a constitutional right. Although one may have some sympathy for the appellant's situation, we are bound to apply the law and cannot grant relief which the law prohibits. Our finding in that regard renders it unnecessary to consider whether the appellant's accumulated leave had been authorized.

[10] In the court *a quo* Mofolo J made no order as to costs. That was appropriate, as the matter was one which could have been dealt with on exception thereby avoiding the costs of a trial. Mr. Moshoeshoe, for the respondents, fairly, and in our view correctly, conceded that there should also be no order as to costs in respect of the appeal.

[11] In the result the appeal is dismissed. There will be no order as to costs.

**J.W. SMALBERGER**  
JUSTICE OF APPEAL

I agree:

**D.G. SCOTT**  
JUSTICE OF APPEAL

I agree:

**C.T. HOWIE**  
JUSTICE OF APPEAL

For the Appellant: Adv B. Thabane  
For the Respondents: Adv L.P. Moshoeshoe