IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.51/2014

In the matter between

LEABA THETSANE (DIRECTOR OF PUBLIC PROSECUTIONS) **APPELLANT**

And

THE PRIME MINISTER **1ST RESPONDENT**
THE MINISTER OF LAW, CONSTITUTIONAL AFFAIRS AND HUMAN RIGHTS **2ND RESPONDENT**
THE GOVERNMENT SECRETARY **3RD RESPONDENT**
THE PUBLIC SERVICE COMMISSION **4TH RESPONDENT**
THE ATTORNEY GENERAL **5TH RESPONDENT**

CORAM : SCOTT, AP
HOWIE, JA
THRING, JA
LOUW, AJA
CLEAVER, AJA

HEARD : 20 OCTOBER 2014
DELIVERED : 06 NOVEMBER 2014

SUMMARY

DPP entitled to elect to retire at age of 60 years in terms of section 26(4)(b) of Public Service Act - interpretation of section 3 of Public Service Act and interpretation of sections 137(3) and 141(8) of the Constitution.

JUDGMENT

SCOTT AP

[1] The appellant was appointed to the office of Director of Public Prosecutions ("DPP") in 2000. The retirement age from that office was by reason of the provisions of section 141 (3) read with section 141 (8) of the Constitution then fifty-five years. The sections read:-

> *"141(3) Subject to the provisions of subsection (5), the Director of Public Prosecutions shall vacate his office when he attains the prescribed age"*

> *"141(8) The prescribed age for the purpose of subsection (3) is the age of fifty-five years or such other age as may be prescribed by Parliament:*
>
> *Provided that an Act of Parliament, to the extent to which it alters the prescribed age after the appointment of a person to be or to act as a Director of Public Prosecutions, shall not have effect in relation to that person unless he consents that it should have effect."*

[2] The Public Service Act of 2005 ("PS Act") was promulgated on 12 January 2005. In terms of section 26 (1) the retirement age for a public officer was determined at 60 years. The section reads:-

> *"A public officer shall retire from the public service, and shall be so retired, on attaining the age of 60 years."*

Section 26 (4) deals with the situation of public officers who were already employed in the public service when the PS Act came into operation. It reads:-

"Notwithstanding sub-sections (1) and (2), a public officer already employed in the public service on the coming into force of this Act shall, within a period and in a manner to be prescribed by the Minister –

(a) elect to voluntarily retire from the public service on attaining the age of 45 or 50 years; or

(b) elect to retire on attaining the age of 55 or 60 years."

A *"public officer"* is defined in section 4 of the PS Act as having the meaning *"assigned to it in the Constitution."* *"Public Officer"* is defined in section 154 (1) of the Constitution as meaning a person *"holding or acting in any public office."* *"Public office"*, in turn, is defined as meaning *"any office of emolument in the public service."* In terms of section 99 (1) of the Constitution the office of the DPP is *"an office in the public service."* The office is clearly one which is *"of emolument."* It follows that the

DPP is a public officer within the meaning of section 26 of the PS Act.

[3] On 17 May 2010 the appellant wrote to the Principal Secretary in the Ministry of Public Service advising that he elected to retire from the public service upon attaining the age of 60 years. Although he did not refer specifically to section 26 (4) (b) of the PS Act it is clear that his election was intended to be in terms of that section. He was then 51 years of age. The Principal Secretary raised no objection. He replied on 10 September 2010 advising that *"we have carefully noted your consent to retire at the age of 60 years...."*

[4] On 28 May 2014, that is to say almost a year after the appellant had attained the age of 55 years, the Government Secretary wrote to the appellant advising that both he and the Prime Minister were of the opinion that the appellant had been obliged to retire at the age of 55 years as the PS Act did not apply to the appellant, principally by reason of the provisions of section 3 of the PS Act, to which section I shall refer later in this judgment.

[5] The appellant's counsel responded by letter dated 2 June 2014 in which he contended that the construction placed by the Prime Minister on the various statutory enactments, particularly section 3 of the PS Act, to which he referred, was incorrect. The Prime Minister and the Government Secretary were, however, unpersuaded, and on 5 June 2014 the Government Secretary addressed a letter to the appellant in which he wrote:-

> *"Having carefully considered representations that your Counsel has made to the Prime Minister, the Prime Minister is not persuaded that your retirement age was altered to sixty years of age. Consequently the Prime Minister reiterates that your retirement age remains fifty-five as specified in the Constitution.*
>
> *In my capacity as acting Government Secretary and as such charged with overall responsibility over all public officers, I direct you to vacate office of Director of Public Prosecutions with immediate effect. By copy of this letter I have advised Public Service Commission that I have directed you to vacate office."*

[6] The appellant's response was on 20 June 2014 to launch proceedings in the Constitutional Court in which he sought, in addition to certain interim relief, orders:-

> *"(d) That the decision of the first respondent to remove applicant from office as Director of Public Prosecutions be declared unconstitutional.*
>
> *(e) That the decision of the first respondent to remove applicant from office as Director of Public Prosecutions be set aside.*
>
> *(f) A declarator that applicant is entitled to retire and is due for retirement as Director of Public Prosecutions upon attaining the age of sixty years."*

Judgment was given orally on 8 August 2014. According to an affidavit subsequently made by the appellant, supported *inter alia* by a minute of the presiding judge's clerk and a press cutting, prayers (d) and (e) of the notice of motion were granted while prayer (f) was refused. When, however, a written judgment was handed down, it appeared that an order directing the fourth respondent, the Public Service Commission, to *"determine the*

retirement status of the applicant having retired at the age of 55" had been substituted for the orders granted orally in favour of the appellant in terms of prayers (d) and (e). The substitution of a different order was of particular relevance at the time in view of a letter dated 25 August 2014 addressed by the Government Secretary to the appellant in which the former advised the appellant that he had been directed by the Prime Minister to request the appellant *"to proceed on special leave by close of business today, the 25th August 2014."* In this Court counsel for the appellant submitted that having granted orders in terms of prayers (d) and (e) the Court *a quo* was *functus officio* and was precluded from altering its order. However, in the light of the conclusion to which I have come regarding the appellant's retirement age, it is unnecessary to decide the issue.

[7] In coming to the conclusion that the appellant's retirement age was 55 years of age, and not 60, the Court *a quo* held, on essentially two grounds, that the provisions of the PS Act were not applicable to the office of the DPP. The main ground and the one relied upon by the Prime Minister and Government Secretary was based on section 3 of the PS Act. The section reads:

"This Act does not apply to the offices specified in section 137 (3) of the Constitution to the extent therein specified."

Section 137 (3), to which reference is made, reads:

"The provisions of this section shall not apply in relation to the following offices, that is to say –

(a) the office of a judge of the Court of Appeal or of the High Court, the office of the Attorney-General, the office of the Auditor-General and the office of the Ombudsman;

(b) the office of the Chief Electoral Officer;

(c) except in relation to appointments thereto or to act therein, the office of the Director of Public Prosecutions;

(d) So far only as concerns appointments thereto or to act therein, the office of Principal Secretary, and the office of Government Secretary;

(e) any office to which section 133 of this Constitution (which relates to offices within the jurisdiction of the Judicial Service Commission) applies;

(f) any office the power to make appointments to which is vested in a Teaching Service Commission established in accordance with section 144 of this Constitution;

(g) the office of Ambassador, High Commissioner or other principal representative of Lesotho in any other country; and

(h) the office of the Commander of the Defence Force and offices of members of the Defence Force, the office of Commissioner of Police and offices of members of the Police Force, the office of the Director of the National Security

> *Service and offices of members of the National Security Services, and the office of the Director of Prisons and offices of members of the Prison Service."*

The Court *a quo* construed these provisions to mean that the PS Act applied to the office of the DPP only in one respect, namely, in relation *"to appointments thereto or to act therein"*. In this Court counsel for the respondents supported this construction but made no attempt to analyse the provisions in question to justify the construction he sought to place upon them.

[8] This construction, however, ignores the all important phrase *"to the extent therein specified"* in section 3 of the PS Act. The phrase is all important because it serves to limit the non-applicability of the provisions of the PS Act to the offices specified in section 137 (3) of the Constitution. In other words, the phrase makes it clear that it is only to the extent specified in section 137 (3) of the Constitution that the provisions of the PS Act do not apply to those offices. It follows as a matter of necessary implication that save for those provisions which in terms of section 137 (3) do not apply, the PS Act *does* apply to the offices specified. In order

then to see which of the provisions do not apply to the specified offices we have to look at section 137 (3) of the Constitution (quoted above). It commences with the words *"The provisions of* ***this section*** *shall not apply in relation to the following offices*" (my emphasis). The relevant provisions of *"this section"* are contained in section 137 (1) (amended by the fifth amendment to the Constitution – an amendment apparently not brought to the attention of the Court *a quo*). Section 137 (1) reads

> *"137. (1) Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), and the power to terminate appointments of such persons, save the power to discipline and terminate the appointment of such persons for disciplinary reasons is vested in the Public Service Commission."*

[9] It will be observed that the section deals with powers vested in the Public Service Commission to appoint persons to hold office and the power to terminate appointments of such persons. These, then, are the provisions that do not apply to the offices specified in section 137 (3). However, when it comes to section 137 (3) (c) it will be seen that one of the provisions of s 137 (1) is excepted from those that do not apply to the specified

offices, namely the provisions in relation to appointments. It follows that in relation to the DPP, appointments are dealt with as provided for by section 137 (1) and therefore in terms of section 6 of the PS Act (which reads in all material respects the same as section 137 (1) of the Constitution). The only provisions in section 137 (1) that do not apply to the office of the DPP are those relating to termination of appointments. Provisions in the PS Act relating to termination are therefore not applicable.

[10] As indicated above, save for the limited extent to which in terms of section 3 of the PS Act the provisions of that Act do not apply, the remaining provisions by necessary implication do apply. The extent to which they apply are, of course, subject to any inconsistency with the provisions of the Constitution, in which event the latter will apply. Not only is the Constitution the supreme law but this is expressly stated in section 5 of the PS Act. It reads:-

> *"The provisions of this Act are ancillary to those provisions of the Constitution that relate to the public service, public offices and public officers."*

[11] The provisions relating to retirement or vacation from offices contained in section 26 of the PS Act are not inapplicable by reason of section 3, nor are they inconsistent with the provisions of the Constitution. They are accordingly applicable to the office of the DPP and the Court *a quo*'s conclusion to the contrary is accordingly incorrect.

[12] A second ground on which the Court *a quo* held that the DPP's retirement age was 55 years and not 60 was that, properly construed, the phrase "*or such other age as may be prescribed by Parliament*" in section 141(8) of the Constitution (quoted in para 1 above) contemplated an *ad hominem* Act of Parliament relating solely to the DPP and that no such Act had been passed. This ground was, of course, premised on and supportive of the correctness of the Court *a quo*'s conclusion that the provisions of section 26 of the PS Act did not apply to the DPP. But, as pointed out above, the DPP is a public officer within the meaning of the PS Act and the provisions of section 26 of the PS Act *do* apply to him. There is accordingly no reason why those provisions relating to the retirement from office of a public officer at the age of 60 years should not be construed as provisions

"*prescribed by Parliament*" within the meaning of section 141(8) of the Constitution and therefore applicable to the DPP. To hold otherwise would be to construe section 26 of the PS Act as having a limited application so as to exclude the DPP from the public officers to whom the section applies. In the absence of some clear indication in the Constitution, there can be no justification for reading into the section such a limitation, particularly having regard to the discriminatory effect such a limitation would have. It follows that in my view the construction placed by the Court *a quo* on section 141 (8) of the Constitution is incorrect.

[13] In this Court counsel for the respondents advanced a further and alternative ground in support of their contention that the DPP's retirement age had not been increased to 60 years. They submitted that even if it were to be accepted that section 26 of the PS Act applied to the DPP, the latter's election to retire at 60 years would nonetheless be invalid by reason of the failure on the part of the Minister to prescribe when and in what manner such an election had to be made. (In terms of section 26(4) (b), which is quoted in para 2 above, the election is to be made "*within a period and in a manner to be prescribed by the Minister*".) It was common cause

that the Minister had made regulations relating to the voluntary retirement of public officers from an older to a younger age but not *vice versa*. Counsel's submission, in short, was that the making of regulations relating to the election to retire at an older age was a condition precedent to the exercise of that election and consequently there could be no valid election in the absence of regulations.

[14] If correct, the submission would have a startling result. It would mean that the object of the section would have been frustrated for a period, thus far, of some nine years by the Minister's inertia. However, I do not think there is merit in the point. The word "shall" in the context in which it is used in section 26(4) is of no consequence. Had the word "may" been used, the meaning would have been the same. The object of the section is clear. It is to afford a public officer already employed on the coming into force of the Act an election to retire on attaining a particular age. The contemplated regulations, on the other hand, would have had no purpose other than the convenience of the employer. No one other than the employer would have had any interest in when the election was to be made and in what

manner. In comparison to the object of the section the contemplated regulations would therefore have had neither an important nor essential function and, if promulgated, would accordingly have been directory, not peremptory. (See **Maharaj and Others v Rampersad 1964(4) SA 638 (A) at 644A-645E**) It follows that in my view the absence of regulations relating to the election to retire at an older age would not preclude the valid exercise of such an election.

[15] In the result, the appellant is entitled to the relief sought in prayer (f) of the notice of motion, namely, a declarator that he is entitled to retire and is due for retirement as the DPP upon attaining the age of 60 years.

[16] There remains for consideration the relief claimed in prayers (d) and (e) of the notice of motion (see para 6 above) which was refused by the Court a quo in its written judgment, but not in its earlier order delivered orally in open court. It is common cause that neither the Prime Minister nor the Government Secretary had the power to require the DPP to retire. (See in this regard section 155(4) of the Constitution.) In his answering affidavit, the Government Secretary suggested that he and the Prime Minister had done no more than exercise

"an executive authority to bring it to the attention of the [appellant]" that he had reached his retirement age and had ignored that fact. However, it is clear from correspondence that preceded the institution of proceedings in the Court *a quo* that the Government Secretary, writing with the concurrence of the Prime Minister, had gone much further than bringing their viewpoint to the attention of the DPP. In his letter dated 5 June 2014 addressed to the appellant he wrote:-

> "*I direct you to vacate office of director of Public Prosecutions with immediate effect. By copy of this letter I have advised [the] Public Service Commission that I have directed you to vacate office.*"

The direction was clearly unconstitutional and the appellant was accordingly entitled in my view to orders in terms of prayers (d) and (e) of the notice of motion.

[17] No order as to the costs of appeal will be made in view of the constitutional issues required to be determined.

[18] The appeal is upheld.

The order of the Court a quo is set aside and the following is substituted:-

(a) The decision of the first respondent to remove the applicant from office as Director of Public Prosecutions is declared to be unconstitutional;

(b) The decision of the first respondent to remove the applicant from office as Director of Public Prosecutions is set aside;

(c) The applicant is declared to be entitled to retire and is due for retirement as Director of Public Prosecutions upon attaining the age of 60 years.

D.G. SCOTT
ACTING PRESIDENT

I agree:

C.T. HOWIE
JUSTICE OF APPEAL

I agree:

W.G. THRING
JUSTICE OF APPEAL

I agree:

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W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree:

_____

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For the appellant: M. E. Teele KC and S Ratau

For the respondents: K. E. Mosito KC and N. Pheko