

CIV/T/214/89

IN THE HIGH COURT OF LESOTHO

In the matter of:

MATSARANKENG MAKHABA ..... Plaintiff

and

THE ATTORNEY GENERAL ..... Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 7th day of February, 1996.

Plaintiff herein instituted a civil action, against the defendant. The claim, stated in the summons (as amended), was couched in the following terms:

- " 1. Reinstatement of Plaintiff to his post as a government controlled schools supervisor and payment of his arrear salary.

Alternatively

Damages for unlawful dismissal calculated on monthly salary from March 1988 to date of judgment as follows:

1. March 1988

M1.020

April, 1988 to March, 1991 i.e. 36 months @ M1,855-50 per month	66,789
April, 1991 to April, 1992	39,117
May, 1992 to November, 1992 i.e. 7 months @ M3,009 per month	21,063
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Total as at 30/11/92	127,998

2. Pensions and gratuity.
3. Costs of suit.
4. Further and/or alternative relief."

It may, perhaps, be convenient to mention, at this stage, that during the course of his evidence, Plaintiff told the court that he was abandoning the claim for pension and gratuity. The court will, therefore, not concern itself with the claim under this heading.

Defendant intimated intention to defend this action and duly filed his plea. Inasmuch as it is relevant, it was common cause from the pleadings that on 25th January, 1971 Plaintiff and the Ministry of Education concluded a written contract whereby the latter employed the former, on permanent terms, as a supervisor of controlled schools. The defendant did assume duties as the supervisor of controlled schools

but on 16th October, 1987, the Ministry of Education addressed to him a three (3) months' notice to terminate the contract on the basis that Plaintiff had attained the retiring age. The notice was to operate with effect from 1st November, 1987. On the same day, 1st November, 1987, Plaintiff wrote, to the Ministry, a letter by which he inquired whether the contract was being terminated in accordance with the provisions of regulation 6(1)(a) or regulation 29 (2) of the Teaching Service Regulations 1986. His letter elicited no reply from the Ministry of Education.

In the contention of the Plaintiff, the contract was being terminated in accordance with the provisions of regulation 6 (1)(a) and not regulation 29(2) of the Teaching Service Regulations 1986. However, inasmuch as it did not end on 31st December, the notice to terminate the contract did not comply with the mandatory provisions of regulation 6(1)(a) of the Teaching Service Regulations 1986. For that reason, the termination of the contract of employment was unlawful and of no legal force. Wherefor, Plaintiff claimed for relief, as aforesaid.

In his plea, defendant alleged that Plaintiff was 75 years old in 1987. His retirement (at the age of 65 years) had, therefore, long passed. The termination of Plaintiff's contract of employment was

in terms of the provisions of regulation 29(1) of the Teaching Service Regulations 1986. Although he acceded to Plaintiff's contention that the contract of employment was not terminated in accordance with the provisions of regulation 29(2) of the Teaching Service Regulations 1986, defendant denied, however, the contention that the contract was terminated in accordance with the provisions of regulation 6(1)(a) of the Teaching Service Regulations 1986.

In terms of regulation 29 (1) of the Teaching Service Regulations 1986, under whose provisions the contract of employment was terminated, there was, strictly speaking, no need to serve the Plaintiff with notice to do so. Defendant denied, therefore, Plaintiff's allegation that, because of the irregularity in the notice which was not a requirement, the termination of the contract by way of retirement, was unlawful and of no legal force. Wherefor, defendant prayed that plaintiff's action be dismissed with costs.

No witnesses were called to testify on behalf of the Plaintiff who, however, himself gave evidence on oath. At the end of the case for the Plaintiff, defendant closed his case without adducing any evidence, at all, in his defence. The court has, therefore, only Plaintiff's evidence to rely upon for

the decision in this matter.

Briefly stated, Plaintiff's testimony was to the effect that he was born on 29th August, 1912. He attended school and in 1940 obtained a matriculation certificate at Roma College. He then joined the civil service in the Government of Lesotho until 1968 when he retired, presumably because he had reached the retiring age viz. 55 years. He was given all his terminal benefits viz. gratuity and pension.

However, on 25th January, 1971 the Ministry of Education and the Plaintiff, who was then 59 years old, entered into another written contract of employment whereby the former engaged the latter, on permanent terms, as a supervisor of controlled schools. As proof thereof Plaintiff handed in the written contract as exh "E" and part of his evidence. The Ministry of Education subsequently served, per its letter of 16th October, 1987, the Plaintiff with notice to terminate the contract. The letter was handed in as exh "A". It read, in part:

"Mr. E.M. Makhaba  
Supervisor  
Government Controlled Schools,  
c/o T.S.U.  
MASERU. 100

Dear Mr. Makhaba,

Notice of Termination of Contract

The purpose of this letter is to inform you that, in accordance with the retirement age regulations in the Lesotho Government, you are served with a notice of termination of your contract as Supervisor, Government Controlled Schools.

You will be apprised of arrangements for your successor in such a way that handover processes may begin.

I look forward to your co-operation and assistance in this matter.

Yours sincerely,

M.K. TSEKOA  
PRINCIPAL SECRETARY FOR EDUCATION"

(My underlinings)

According to Plaintiff, exh "A" did not disclose the law under which the contract was being terminated nor did it state the reasons therefor. Consequently, on 1st November, 1987, he addressed, to the Ministry of Education, a letter by which he sought clarification as to the law under which the agreement was being terminated. The letter was handed in as exh "B" and part of his evidence. It read, in part:

"The Principal Secretary,  
Ministry of Education,  
P.O. Box 47,  
Maseru. 100

Dear Sir,

Notice of Termination of Contract:

I acknowledge with thanks your letter No. C/ED/103, dated 16th October, 1987 on the above matter.

I request and would be grateful for a clarification: 17 years ago I signed a permanent Teachers' contract as controlled schools supervisor and since then I am being paid from teachers sections.

I am of an opinion that termination of this contract - all things being normal, shall be in accordance with Rule (sic) 6 (1)(a) or Rule (sic) 29(2) of the Teaching Service Regulations 1986. I am now rather not sure whether the contract is terminated on any other terms than those mentioned above in this letter.

Yours faithfully,

E.M. MAKHABA  
C.S.S.

I shall return to the evidence of the Plaintiff in a moment. It is significant to observe that clauses 3, 4 and 5 of the written contract (exh "E") entered into by Plaintiff and the Ministry of Education provided:

- "3. Both parties to this agreement acknowledge that the conditions of service set out in Proclamation No. 76 of 1947 and Part IV of the Education Rules 1965 as amended from time to time will apply to this agreement as though specifically set out.
4. Both parties to this agreement acknowledge that in matters which are not dealt with in this contract, the provisions of the Basutoland Education Proclamation for the time being in force and any Rules made there under shall apply.

5. Both parties agree that, in the event of either party terminating this agreement without due notice, damages for such breach of contract shall be estimated as follows:

- (a) in case no notice or less than one month's notice is given, a sum equal to three months' salary;
  - (b) in case the notice given is one month or more but less than two months, a sum equal to two months' salary
  - (c) in case the notice given is two months or more but less than three months, a sum equal to one month's salary;
  - (d) in case the notice given is three months or more but does not expire at the end of a school year, a sum equal to half a month's salary."
- (My underlinings)

The Education Proclamation 1947 and the Education Rules 1965 were repealed by the Education Order, 1971. In exercise of the powers conferred upon him by the provisions of S.21 of the Education Order, 1971, the Minister responsible promulgated the Teaching Service Regulations 1974 which were, however, repealed and replaced by the Teaching Service Regulations 1986. When, on 16th October, 1987, the Ministry of Education terminated the contract, the Teaching Service Regulations 1986 were, therefore, the applicable law.



I have underscored, in the above cited letter, marked exh. "A", the words "in accordance with the retirement age regulations in the Lesotho Government" to indicate my view that, in notifying him of the termination of the contract, the Ministry of Education did apprise Plaintiff about the reason therefor viz. that he had attained the retirement age. Indeed, that was alleged by the defendant ad para. 5 of his plea to the declarations to the summons. Plaintiff was, in the circumstances, simply not being honest with the court when he testified that the contract was terminated for no disclosed reasons.

Now, returning to his evidence, Plaintiff told the court that his letter of 1st November, 1987 elicited no reply from the Ministry of Education. He did not, therefore, leave his employment at the end of the three (3) months notice. Indeed, the Ministry itself had requested him not to, as it was still looking for his replacement. However, Plaintiff subsequently received, from the Ministry of Education, another letter, dated 22nd February, 1988, which he handed in as exh. "C" and part of his evidence. It read, in part:

"Mr. E.M. Makhaba,  
Controlled Schools Supervisor,  
C/O Teaching Service Unit,  
Maseru. 100

Dear Sir

This is to amend my earlier letter addressed to you on the above. Your last day on duty will be 29th February, 1988.

Please make sure to hand over to the Principal Education Officer so that your successor can take over from him. I am copying this letter to the Teaching Service Unit (Secretary) so that they settle all that is contractually due to you .....

Yours sincerely,

M.K. TSEKOA  
Principal Secretary for Education

Copy: Secretary, T.S.U.  
P.E.O."

According to him, at the end of February, 1988, Plaintiff did leave his employment after his monthly salary of M1,020 had been paid. He, however, disputed the lawfulness of the termination of his contract employment. In his contention, the termination was made in terms of the provisions of regulation 6(1)(a) of the Teaching Service Regulations 1986. However, inasmuch as the notice given under exh "A" did not end on 31st December, it was irregular and, for that reason, the termination of the contract was unlawful and of no legal force. Wherefor, Plaintiff claimed for relief, as aforesaid.

It is to be observed that the grounds upon which a contract may be terminated in terms of regulation 6(1) of the Teaching Service Regulation 1986 are spelt out in subregulation (2) thereof. The subregulation provides:

"(2) The ground which may be included in a notice given by a manager under subregulation (1)(a) may be one or more of the following:

- (a) that owing to re-organization the services of the teacher have become redundant,
- (b) that the teacher has refused to comply with the authority of the Educational Secretary or Supervisor for the teacher's transfer to another school;
- (c) the school or class in which the teacher holds appointment has been closed for a reason considered valid by the Principal Secretary;
- (d) reasons bearing on behaviour and work (morals and competence) and breach of any terms of contract as may be considered sound by the Principal Secretary or Educational Secretary or supervisor, as the case may be."

None of the abovementioned grounds was included in the notice (exh "A") terminating Plaintiff's contract of employment. Instead exh "A" notified Plaintiff that his contract was being terminated "in accordance with the retirement age regulations in the Lesotho Government" i.e. he had attained the retirement age.

In my finding there can be no doubt that Plaintiff's contract of employment was terminated by reason of his having attained the retirement age and not, therefore, in accordance with the provisions of regulation 6(1)(a) of the Teaching Service Regulations

1986. Assuming the correctness of my finding, it seems to me that where a contract of employment governed by the Teaching Service Regulations 1986 is terminated, on the basis of retirement age, the relevant law is regulation 29(1) thereof. The regulation reads:

"29(1) A teacher shall retire from the Lesotho Teaching Service on attaining the age of sixty-five."

I was told in argument that when, in 1987, he was served with notice (Exh "A") to terminate his contract of employment, Plaintiff was 75 years of age. The Ministry of Education had chosen not to terminate the contract by way of retirement at the time Plaintiff attained the age of sixty-five i.e. it had waived its right to do so.

The argument is, in my opinion, untenable. I have underscored the word "shall" in the above cited regulation 29(1) of the Teaching Service Regulations, 1986 to indicate my view that the provisions thereof are mandatory and the parties have, therefore, no choice in the matter. To hold the contrary would imply that the provisions of regulation 29(1) of the Teaching Service Regulations, 1986 could be frustrated by the parties failing to comply therewith.

There is no evidence that Plaintiff's contract of employment was extended after it had terminated as a matter of law i.e. in terms of mandatory provisions of regulation 29 (1) of the Teaching Service Regulations 1986. Nonetheless he continued working, obviously under no contract at all. On 16th October, 1987 Plaintiff who was then 75 years old, was, per exh "A", notified of the termination of his contract, and rightly so in my view, because his retirement age of sixty-five years had long been overdue.

It is common cause that Plaintiff was duly paid his salary for the services he rendered after he had attained the retirement age. He cannot, therefore, have any complaint in respect of this period. Assuming the correctness of my view that his contract was rightly terminated, per exh "A", it follows that Plaintiff's first prayer viz. reinstatement to his post as a government controlled schools supervisor and payment of arrear salary, cannot succeed.

As regards the alternative prayer for damages, it is significant to observe that regulation 29 (1) of the Teaching Service Regulations 1986 makes no provision for notice to terminate a contract of employment. However, I shall assume, for the benefit of the Plaintiff, who was admittedly employed on permanent terms, that such notice was implied.

Again, I have underscored, in the above cited Clause 3 of the written contract of employment (Exh E) the words "the conditions of service set out in Proclamation No. 76 of 1947 and Part IV of the Education Rules 1965 as amended from time to time will apply to this agreement as though specifically set out" to indicate my view that the conditions of service as amended by the sixth schedule of the current Teaching Service Regulations 1986 applied at the time Plaintiff was served with the notice (exh "A") to terminate his contract of employment in terms of the provisions of regulation 29(1) thereof. Condition 4, contained in the sixth schedule of the current Teaching Service Regulations 1986, clearly provides, in part:

- "4. .. in the event of either party terminating this agreement without due notice, damages for such breach of contract shall be estimated as follows:-
- (a) .....
  - (b) .....
  - (c) in case the notice given is two months or more but less than three months, a sum equal to one month's salary."

In the present case, the notice given was, as amended by the Ministry of Education's letter of 22nd February, 1988, three months. It did not, however, expire at the end of the school year. Be that as it may, it is significant to observe that Clause 5(d) of the written contract (Exh E) which required the three

(3) months notice to expire at the end of a school year had been omitted and it was, therefore, no longer a condition of service under the sixth schedule of the current Teaching Service Regulations 1986 at the time the notice was served upon the Plaintiff in 1987.

In any event, I have already made a finding that Plaintiff's contract was lawfully terminated in terms of the provisions of regulation 29(1) of the Teaching Service Regulations 1986. That being so, it seems to me that Plaintiff has failed to establish a case for damages. Likewise the alternative prayer cannot, therefore, succeed.

In the result, I have no alternative but to dismiss Plaintiff's action with costs.



B.K. MOLAI

JUDGE

7th February, 1996.

For Plaintiff : Dr. Tsotsi

For Defendant : Mr. Putsoane.