CIV\T\181\91

IN THE HIGH COURT OF LESOTHO

In the matter of:

SANAHA NTLALOE **Plaintiff**

vs

ATTORNEY GENERAL **Defendant**

JUDGMENT

Delivered by the Hon Mr Justice M L Lehohla on the 21st day of October, 1997

Following a summons issued against the defendant for

(a) an order declaring plaintiff's military service after (*sic*) war to be pensionable service;

(b) costs of suit;

© further and or alternative relief

the Court "entered judgment by consent and as prayed for in the summons as set out

in prayers (a) and (b)".

This occurred on 14-12-92.

The brief outline of the plaintiff's declaration was that in April, 1938 the plaintiff was employed in the Government of the then Basutoland on permanent and pensionable terms until in or about September 1954 when he was retired in the public interest.

During 1940 to 1945 he served in Her Majesty's forces with the full approval of the authority in whose service he was serving at that time.

Since 1973 till 25th March, 1991 he has been called upon by Lesotho Government to command His Majesty's Armed Forces on every Armistice Day, and as such discharging a military duty.

In terms of section 18(1) of the Pensions Proclamation 1964 service in Her Majesty's forces including any period after the war is considered to be military service.

In terms of the Pensions Proclamation 1964 and regulations made thereunder the period of military service is included on the computation of one's pension.

In computing plaintiff's pension the period of plaintiff's military service after the war has been excluded contrary to the Pensions Proclamation 1964 and regulations made thereunder. This brings an end salient points of the respondent\plaintiff's declaration.

On 20th August, 1993 Cullinan C.J., as he then was, granted a *Rule Nisi* in favour of the defendant\applicant the fuller terms of which were to call upon the plaintiff\respondent to show cause if any why :

(a) the Consent Order granted on 14th December, 1992 by the Honourable Justice Mahapela Lehohla in CIV\T\181\91 shall not be rescinded on the ground that it was granted as a result of a mistake common to the parties;

(b) the respondent\plaintiff's claim shall not be dismissed with costs

© the respondent\plaintiff shall not be ordered to pay the costs of this application in the event of opposition.

(d) the Order of the learned Justice Lehohla in CIV\T\181\91 shall not be stayed pending the finalisation of the present proceeding;

(e) (*sic*) further and\or alternative relief.

2. That prayer 1(d) operate with immediate effect.

The *Rule Nisi* was granted largely in the form set out above and was returnable on 30th August, 1993. The application for the *Rule Nisi* is opposed.

After several extensions of the rule and postponements occasioned by the turbulence in the political landscape of that period resulting in unfathomable loss of court hours and time which was most precious to litigants, the matter was finally heard and argued on 25-11-94.

The applicant\defendant relies on the affidavit of the Attorney-General Mr Lebohang Fine Maema whose averment is common cause in paragraphs 3 and 4 that the respondent\plaintiff enlisted in the then Basutoland Mounted Police as a trooper in May 1938 and joined Her Majesty's forces during the 2nd World War. The respondent\plaintiff clarifies the position by indicating that he joined the Basutoland Mounted Police in April, 1938 and came back to Basutoland on 21st June 1945.

It is also common cause that the respondent\plaintiff was promoted to the rank

of sergeant in March, 1947 and reduced to the rank of corporal in October, 1951. Further that he was retired in September 1954 and was paid gratuity and pension for his service from 1st May 1938 to 30th September, 1954. Both parties are agreed that the period of service in Her Majesty's Forces, including the period after termination of war, was counted as pensionable service according to section 18(1) of the Basutoland Pensions Proclamation 1964. (See the Laws of Basutoland Vol. IX 1964 p.116).

The learned Attorney-General avers in paragraph 7 that his inquiries revealed that from 1954 the respondent\plaintiff was not employed by the Government of Basutoland (or Lesotho after Independence) in any pensionable office in terms of the Pensions Proclamation referred to earlier. But the respondent\plaintiff counters by saying he was employed by the Government in a pensionable office in terms of Pensions Proclamation from 1973 to 1991 as appears more fully in his declaration. The relevant portions of the declaration referred to in the foregoing sentence were touched upon in the outline I made at the beginning of this judgment. Perhaps a simple letter of employment by Government "in a pensionable office" would have placed the claim being made by the respondent\plaintiff beyond dispute and saved the court a fair amount of precious time. I thus see merit in the applicant\defendant's

contention and find it acceptable that "The respondent\plaintiff has produced 'SN1' annexed to the Answering Affidavit which is only an order of ceremony and which at best only shows that the respondent is calling the parade to attention. By no stroke of imagination can it be seriously contended that the above solitary performance in any manner makes him a member of the Lesotho Defence Force nor that he was *the holder of any pensionable office in the Public Service".* (Italics supplied).

The Court notes and it is common cause that the respondent\plaintiff retired from the Public Service with effect from 30th September, 1954. (See paragraph 8 of the founding affidavit read with Para 6 of the Answering Affidavit and Para 3 of the Declaration).

The deponent for the applicant\defendant avers that during Armistice Day, the ex-servicemen who are alive participate at a memorial parade and the respondent\plaintiff also, over the years, had participated in such parade. He further avers that according to his information there was no agreement nor understanding between the respondent\plaintiff and Government, whereby the Government undertook to pay anything to the respondent\plaintiff for his participation in the Armistice Day parade, which was held once every year and for a couple of hours

only. Thus Mr Maema contends on information available to him that the respondent\plaintiff had no legal entitlement whatsoever to claim any remuneration from Government for participating in the ceremony during Armistice Day. None was agreed upon and nothing was paid throughout the year.

The respondent\plaintiff reacts to the foregoing by first charging that the deponent relies on hearsay and does not even reveal the source of his information. He dismisses all what Mr Maema has gathered as misinformation. In turn, the respondent\plaintiff informs Court that during the period under reference he was a public officer called upon to perform a military service. He goes further to indicate that he was the only one who was assigned the duty to call the parade to attention and relies on "SN1" the Order of Ceremony attached to his answering affidavit and reflecting at several intervals as Dignitaries arrive that he called the parade to attention. He avers that in like manner when he served in the war, there was no agreement between him and the Government that he would be paid. He says he was paid as a public officer. He asserts that section 18(1) of the Pensions Proclamation 1964 considers such service as military service.

I however wonder how long when serving in the war the respondent\plaintiff

had to wait before being paid considering that in the instant matter despite that he had been called once a year, year after year for upwards of twenty years, there is no indication that he was ever paid for performance of this task on the Armistice Day yet he seems to have not laid any claim with Government. This inaction on his part gives credence to the averment that because there was no legal entitlement to claim remuneration as none was agreed upon then none was paid throughout the year. Suffice it to say he denies contents of paragraph 9 of the founding affidavit.

In the founding affidavit it is shown further that in the 5th paragraph of the Declaration the respondent\plaintiff alleges;

> "Since in or about 1973 up to 25th March, 1991 the plaintiff has been called upon by Lesotho Government to command His Majesty's Armed Forces on every Armistice Day, as such discharging a military duty".

The respondent\plaintiff in reaction to averments in paragraph 10 of the founding affidavit made reference to annexure "SN1".

Relying again on "SN1" the respondent\plaintiff avers that he, exclusively, was officially instructed to call the parade to attention and thus dismisses the Attorney-General's contention that from 1980 when Lesotho Defence Force was constituted

in terms of Lesotho Para Military Defence Force Act 1980, the Command of the Force vested in the Commander appointed under the aforesaid Act. The respondent\plaintiff is at loggerheads with the assertion that it is erroneous of him in law and fact to allege that he was commanding His Majesty's Forces.

If in fact the respondent\plaintiff was mistaken in fact and in law then it would appear the assertion is impregnable that the true position was that he participated as an ex-soldier at the memorial parade in honour of those soldiers who had fallen in the line of battle.

Indeed the respondent\plaintiff has consistently denied allegations that he, like the applicant\defendant has laboured under any mistaken belief, be it of law or fact, that when called upon once a year to bring the parade to attention on Armistice Day he was discharging a military duty, which because it occurred after the war, then he should obtain the assistance of this Court to regard it as a military service which as such should be declared a pensionable service by Order of Court.

The application for rescission is based on Rule 45(1)(b) and (c). The relevant provisions read :

"The court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected, rescind or vary

(a) .....

(b) an order or judgment in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission;

© an order or judgment granted as a result of a mistake common to the parties".

I have indicated that in the averments and submissions made in favour of the respondent\plaintiff it is denied that there is any mistake under which the respondent\plaintiff's side laboured. In fact *Mr Pheko* for respondent\plaintiff strained to show that the applicant\defendant laboured under no mistake either. That in any case if the applicant\defendant's side did ever labour under any then because the other party didn't, the application should fail for then the mistake, if any, is not common between the parties and thus the application fails to accommodate itself within the ambit of the relevant provision of Rule 45(1)(c) in order to qualify for success in an application for rescission.

But closer scrutiny of paragraph 6 of the Declaration, in so far as in it the respondent\plaintiff avers that in terms of section 8(1) of the Pensions Proclamation

1964, the service in Her Majesty's Forces, including any period after the war is considered to be Military service leads to an untenable notion.

It appears to me untenable and indeed fallacious to maintain that attendance at a parade during the Armistice Day is a Military service within the context and meaning of section 18(1) of the Pensions Proclamation 1964 which provides as follows :

> "When an officer shall have served with Her Majesty's Forces in time of war, with the approval of the authority in whose service he was last employed before so serving or of the Secretary of State, the following provisions shall have effect :-
>
> 1. During the period of such service in Her Majesty's Forces, including any period after the termination of the war (in this section referred to as "military service"), he shall be deemed, for the purposes of this Proclamation, to have been on leave on full salary from the public service in which he was last employed, and to have held the substantive office last held by him in that service prior to military service".

Mr Ntlaloe agrees in his answering affidavit that at no time was he a member of the LDF. It would seem therefore contradictory for him to allege that he should be treated as if he is or was a member. He prayed that his service after the war be declared pensionable service. But for that to happen one has to have received

emoluments and contributed to the pension fund. In terms of the law the discharge of military duty during this period spanning the first occasion when he called the parade to attention on the Armistice Day and the last, cannot be called pensionable service. Thus although he says during this period he was discharging a military duty a counter-statement should prevail that he is wrong because to do so he would have to be a member of the particular military cadre. See page 29 paragraph 4 of ex-serviceman Mofoka's affidavit.

Another aspect of fallacy on which the respondent\plaintiff's case is based comes into sharp relief when considered in conjuction with the fact that section 18 of the Pensions Proclamation refers to Her Majesty's Forces in times of war. Thus provisions of subsection (1) which refer to the period after the termination of the war must necessarily refer to the period after cessation of hostilities and the time relating to the demobilization, which should be understood to refer to movement of soldiers who were engaged in service of other authorities in other countries at the time when these soldiers were sent home. It thus should be clear that section 18 can only apply to people who joined the army from the Public Service. The public service would thus be the place applicable in reference to the last place they were last employed in before joining the army.

It follows therefore, in keeping with the provisions of the section in reference, that the respondent\plaintiff who was a trooper in the Basutoland Mounted Police during the 2nd World War, did revert after his service in the army to his original employment in the Public Service of the then Basutoland from which he retired on 30th September, 1954.

Notwithstanding his protestations to the contrary it is to me clear from the factors set out above that the respondent\plaintiff laboured under a mistaken perception that because he participated in the parade, he was still on military duty.

He makes much of the fact that he alone calls the parade to attention. He overlooks the fact that this court which attends such parades takes judicial notice of the fact that the ex-soldiers too respond to his commands as he utters them. Aren't these ex-soldiers too in military service when they do so?

The respondent\plaintiff tries to water down the participation of ex-soldiers as no service; in contrast with his which he regards as military service. He finds justification for this fine distinction which he makes, on the ground that he, unlike them, receives "SN1" Order of Ceremony in which his name appears as the man who

time and again calls parade to attention. But the fact is the ex-soldiers too, formed up in military rows, respond dutifully to his commands on the same parade yet it cannot be said when so responding they are performing military service within the meaning of section 18 above. What justification would the respondent\plaintiff have for being treated differently from them? I think none. I would therefore accept averments of Brigadier Kopo in so far as they relate to "SN1" and to the extent that they clarify the position relating to rank in the army and to Mr Ntlaloe's association therewith.

Mr Pheko for the respondent\plaintiff charges that when the consent judgment was entered *Mr Letsie* for the Crown was labouring under no mistake. But *Mr Letsie* has told me that he was labouring under a mistake and has outlined circumstances for his mistakenly believing that the respondent\plaintiff's attendance at the Armistice Day Parade constituted military service. Furthermore he has attested to an affidavit subscribing to Mr Maema's averment that he succumbed to the mistaken perception referred to in this proceeding. See Para 16 of founding affidavit and page 8 Para 2 of *Mr Letsie's* supporting affidavit. I endorse Joel Mofoka's supplementary affidavit at page 28 of the paginated record. It stands to reason then that despite submissions to the contrary there was a mistake common to both parties, as a result of which a

consent judgment was granted to the effect that "plaintiff's military service after the War is hereby declared to be Pensionable Service". It should be apparent then that even though Rule 45(1)(c) talks about mistake common to both parties, there doesn't have to be a consensus of the parties' view on the fact of the existence of a common mistake between them. It is enough, where the facts reveal the existence of such a situation, that the court is able to make a finding to that effect notwithstanding protestations of one of the parties to the contrary or submissions by that party's counsel to that effect.

What is clear to me is that from 1938 to 1954 respondent\plaintiff was employed as a public servant who even had a contract with Government.

But from 1973 to 1991 when called upon to command parades on Armistice Days he was not employed by Government as indeed there was no contract of employment between him and Government. It is therefore an absurdity to argue that when recruited to join the army where he served for the protracted period from early 1940's till the end of the War he had no contract with Government. The fact is that for that period at least he obtained emoluments. While for the period since 1973 till 1991 he was earning no emoluments.

I accept the Attorney-General's proposition that this "service" cannot in law be considered to be a pensionable service in terms of the Pensions Proclamation 1964 because the respondent\plaintiff's participation in the Armistice Day events did not entitle him to earn any emoluments from the State, a factor which otherwise would have been considered in his favour in computing his pensionable emoluments in terms of the Pensions Proclamation referred to above.

The respondent\plaintiff makes a merit of the fact that "SN2" in paragraph 16 of his Answering affidavit is an offer by the Ministry of Home Affairs made on 24th May, 1993 to him for "M5 000-00 in full and final settlement of the matter". To me this does not amount either to emoluments which would give rise to pension or to pension itself. I am inclined to the view that it is only an *ex-gratia* award. Therefore it cannot be construed as an admission of legal liability on behalf of the Government. In any case since the respondent\plaintiff rebuffed it, it ceased to amount to anything on which to build a case for what he claims in the Summons or in his opposition to this application.

The above set of circumstances would render the instant case distinguishable from the authority of ***Nedbank Ltd vs Morsead Securities Pty Ltd*** 1978(3) SA 633

where it was held that

> "in acknowledging and consenting to judgment, the respondent had given up any common law right to rely upon the defence that part of the claim, namely, the interest, had exceeded the principal debt".

The Attorney-General has averred that this matter came to his notice as late as 28th July, 1993 which was the time when the respondent\plaintiff came to see him concerning execution of judgment that had been given way back on 14th December 1992.

The fact that the Attorney-General moved this application by 13th August, 1993 shows that he didn't delay taking action from the time the anomaly came to his notice which was at the end of July that year.

Reference to a parallel matter may be fruitful in the instant matter. See therefore ***De Wet and Ors vs WesternBank Ltd*** 1978(2) SA (AD) 1031 where Trengove AJA accepted that :

> "The fact that a party had not been advised timeously of the withdrawal of his attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of a judgment under common law but it is not a circumstance which he can

effectively rely on for the purpose of an application under the provisions of Rule of Court 42(1)(a)".

I am of the view that the interpretation flowing from the use of "may" in Rule 45(1)(c) postulates a general discretion upon whose basis the applicant\defendant has shown good cause.

I would accordingly allow the application for rescission of judgment. I would however not go as far as dismissing the plaintiff's claim with costs as desired by the applicant\defendant in paragraph (b) of the Notice of Motion

The effect of this judgment is that pleadings in the action shall stand together with the instant affidavits pending hearing of the action in due course.

Consequently, each party will bear its own costs of the instant application.

JUDGE
21st October, 1997

For Plaintiff : Mr Pheko
For Defendant: Mr Letsie