

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CIV/APN/0049/2022**

In the matter between:

**MONTŠUOE ALFRED KOLOI**

**APPLICANT**

And

**COMMISSIONER OF POLICE**

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

**LMPS-HUMAN RESOURCE OFFICER**

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

**ATTORNEY GENERAL**

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

**JUDGMENT**

Neutral citation: Montšuoë Alfred Koloi vs. Commissioner of Police and Ors  
LSHC 158 CIV (15 July 2022).

**CORAM:** T.J. MOKOKO J

**DATE OF HEARING:** 22 JUNE 2022

**DATE OF JUDGEMENT:** 15 JULY 2022

## **SUMMARY**

*Rejection of application for withdrawal of early retirement- Whether failure to furnish reasons amounts to unfair dismissal – Is the applicant entitled to reinstatement and payment of salaries.*

## **ANNOTATIONS**

### **Cases**

1. Council for scientific and Industrial Research (CSIR) V Fijen (1996) 15 ILJ 759 (LAC)
2. *Kragga Kamma Estates CC and another v Flanagan* 1995 (2) SA 367 (A) at 375 C
3. *SALSTAFF obo Bezuidenhout vs Metrorail* [2001] 9 BALR 926
4. *Selloane Mahamo vs Nedbank Lesotho Limited*, LAC/CIV/04/1

### **Statutes**

1. *Lesotho Mounted Police Service (Administration) Regulations 2003*
2. *Police Act, 1998*

## **Introduction.**

[1] Facts of this case are that around the year 2021, applicant was stationed at Thetsane Police Station in the Maseru district. Applicant together with his colleagues were suspects in the death of a detainee who died in Police custody. As a result of this suspicion, on or around 20<sup>th</sup> September 2021, applicant was placed on interdiction by the Commissioner of Police, in terms of *section 53 (1) of Police Act, 1998*. On or around 22<sup>nd</sup> September 2021, applicant tendered his application for early retirement from the Police Service. On the 20<sup>th</sup> October 2021, applicant was advised by the Office of the Commissioner of Police, that his application for early retirement had been approved. Around 27<sup>th</sup> October 2021, applicant applied for withdrawal of his early retirement. On the 10<sup>th</sup> December 2021, a Memo was addressed to the applicant, in which he was informed that his application for withdrawal of early retirement was not successful. As a result of the rejection of his application for withdrawal of his application for early retirement, applicant instituted these proceedings, claiming the following reliefs;

- a) That applicant's dismissal be declared null and void.
- b) That the first respondent be directed to reinstate applicant retrospectively to the date upon which he was dismissed.
- c) That first respondent be directed to pay applicant his salary from the date of dismissal to date of reinstatement, with interest of 11%.
- d) Costs of suit.

## **APPLICANT'S CASE**

[2] Applicant's case was simply that the first respondent failed to advance reasons why his application was unsuccessful, and that failure to give out

reasons, amounted to unfair dismissal. It is on the basis of this that applicant claimed reinstatement retrospectively, from the date of the alleged dismissal, and salaries from the date of dismissal to the date of reinstatement.

### **FIRST RESPONDENT'S CASE.**

[3] The first respondent's case was briefly that the employer has a right to approve or disapprove the application for withdrawal of early retirement. That it was improper for applicant to apply for the withdrawal of early retirement after it had been approved by the administrative body. That the withdrawal is untenable because it has been overtaken by events, in the sense that the application for early retirement has been approved and plans for filling the vacancy in terms of promotions in respect of that position, have already taken place. The first respondent pleaded further that applicant was never dismissed from employment, but voluntarily opted to take early retirement while on interdiction, therefore applicant cannot talk of reinstatement where he was never dismissed. That once his application for early retirement was approved, the employer has no obligation to advance reasons why withdrawal of such application for early retirement was unsuccessful.

### **MATTERS OF COMMON CAUSE.**

[4] The following facts are matters of common cause.

- a) That applicant was a member of the Lesotho Mounted Police Service.
- b) That around 20<sup>th</sup> September 2021, applicant was interdicted from duty in terms of *Police Act 1998*, pending resolution on any disciplinary or criminal proceedings against him.
- c) Around 22<sup>nd</sup> September 2021, applicant tendered his application for early retirement from the Police Service.

- d) On the 20<sup>th</sup> October 2021, his application for early retirement was approved.
- e) On the 27<sup>th</sup> October 2021, applicant submitted application for withdrawal of application for early retirement.
- f) On the 10<sup>th</sup> December 2021, applicant was advised that his application for withdrawal of early retirement was not successful.

### **ISSUES FOR DETERMINATION.**

[5] The issue for determination is whether rejection of applicant's application for withdrawal of early retirement, amounts to unfair dismissal, thus entitling applicant to reinstatement and payment of salaries.

### **DISCUSSION OF THE LAW.**

[6] It is apposite to state that applicant tendered his application for early retirement, of his own volition. The application for early retirement was accordingly approved. It is applicant's case that his employer failed to advance reasons why his application had not been successful, therefore that failure amounted to unfair dismissal.

### **Early Retirement**

[7] *Lesotho Mounted Police Service (Administration) Regulations 2003 at section 11. (1)* provides that subject to these regulations, a police officer shall retire from the Police Service, and shall be so retired, on attaining the age of 45 years in the case of a Senior Officer and the age of 40 years in the case of a subordinate officer and other ranks.

[8] *Section 11. (2)* provides that 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 attains the of 40 years.

[9] *Section 11. (3)* provides that a police officer who has served a continuous period of a minimum of 10 years may, at any time before or after attaining the age of 40 years, retire from the Police Service and shall give written notification to the Commissioner to this effect.

[10] *Section 11 of the Regulations* indicate in clear terms that the applicant tendered his application for early retirement, in accordance with the provisions of the law. It is a matter of administration that, once the Commissioner received such an application, the Commissioner was obliged by the law to consider such application. This court therefor has no doubt in its mind that the Commissioner's approval of the applicant's application for early retirement, after due consideration cannot be faulted.

### **Analysis of the Law**

[11] The Labour Appeal Court of Lesotho, in the case of ***Selloane Mahamo vs Nedbank Lesotho Limited<sup>1</sup>, Dr. K. E. Mosito AJ***, as he then was, quoted with approval what was said in ***SALSTAFF obo Bezuidenhout vs Metrorail<sup>2</sup>***: “[a] resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period stipulated in the contract or by law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without the consent of the employer, is in fact the act that terminates the contract...The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequences of the resignation. To be legally effective, a notice of intention to resign from employment and therefore to terminate the contract must be clear and unequivocal. (See ***Kragga Kamma Estates CC and another v***

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<sup>1</sup> LAC/CIV/04/1

<sup>2</sup> [2001] 9 BALR 926

*Flanagan*<sup>3</sup>). The employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention. (See **Council for scientific and Industrial Research (CSIR) V Fijen**<sup>4</sup>). Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent. The South African Labour Appeal Court in **Fijen case** (*supra*) stated that to resign, the employee had to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract.

[12] This court holds a view that the principles enunciated in the above cases, have the same application and effect in the present matter. There is no doubt that applicant voluntarily tendered his early retirement from employment, and the employer reasonably acted on his application for early retirement, by approving it. There is no doubt in the mind of this court that, application for early retirement was clear and unequivocal. The court further holds that the applicant's application for early retirement was a final unilateral act which once given could not be withdrawn without the employer's consent.

[13] The applicant's submission that the employer was required to give reasons for the rejection of withdrawal of the early retirement application, is without merit. This is so because upon the approval of the early retirement, the employment relationship between the parties came to an end, therefore there was no obligation on the employer to furnish any reasons.

## **CONCLUSION.**

[14] In his founding affidavit, applicant states that he voluntarily tendered his early retirement. This court holds a view that, upon the approval of his application for early retirement, the employment relationship between applicant

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<sup>3</sup> 1995 (2) SA 367 (A) at 375 C

<sup>4</sup> (1996) 15 ILJ 759 (LAC)

and his employer came to an end. The employee's withdrawal of early retirement is therefore subject to the employer's consent.

[15] This court finds that the applicant's submission that non-approval of his application for the withdrawal of early retirement amounts to unfair dismissal has no merit, because the applicant of his own volition took early retirement from his employment. The employer in those circumstances having considered applicant's application, duly approved it. This means that by his conduct he terminated his contract with the employer. The rejection of his application for withdrawal of the early retirement does not amount to unfair dismissal, because withdrawal of the early retirement depends entirely on the consent of the employer. The question of reinstatement and payment of salaries was dependent on the success on the question of unfair dismissal. Now that the court finds that the issue of unfair dismissal has no merit, in the same token the issue of reinstatement and payment of salaries face the same fate, therefore should be dismissed.

**Order.**

The court makes the following order.

1. Application is dismissed with costs.

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**T.J. MOKOKO**  
**JUDGE**

**FOR APPLICANT:** ADV. L. KETSI

**FOR RESPONDENTS:** ADV. P.D. PHATŠOANE