

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no: J533/08

In the matter between:

LEFA EPHRAIM MOFUBETSOANA

Applicant

And

THE DEPUTY MINISTER OF JUSTICE

1ST Respondent

**THE REGIONAL HEAD (GAUTENG
REGIONAL OFFICE OF JUSTICE)**

2ND Respondent

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is urgent application in terms of which the applicant sought an order compelling the second respondent to reinstate his salary payment into the state salary computer system with immediate effect dating back to the 1st March 2008.
- [2] The second order sought by the applicant was to compel the second respondent to retain him in his post for a period of 2 (two) years which is until the end of February 2010.

Background facts

[3] The applicant was employed by the respondent as a senior court interpreter stationed at the high court of South Africa (WLD) in Johannesburg. The case of the applicant is that he commenced employment with the respondents on the 1st November 1991 and being born on the 25th February [.....] he would have reached the age of 65 which is the retirement age on the 25 February 2008.

[4] On the 24th February 2008 the applicant addressed a letter to the court manager indicating amongst others that in term of S16 (1) (a) of the Public Service Act 103 of 1994 (the Act) he had:

“A right to be retired from service with effect from March 01, 2008”.

[5] He contended in this letter that the Act gave him the right to retire and consequently the discretion whether to retire or not rests with him. At Paragraph 4 of the same letter the applicant states the following:

“4 My application to you is that I should be retained in my post beyond February, 2008 for a period of 2 years until the end of February 2010. It is in the public interest to retain me in my post.

- (i) *I am in good health;*
- (ii) *I have vast experiences as court interpreter.*
- (iii) *There is a need for my services at the institution where I am stationed, particularly because use is made of temporary interpreters as a result of a shortage of experienced interpreters.*
- (iv) *My capability and experience are indispensable in my work; I interpreted in serious cases where life sentences are usually imposed. It would be a compromise of the interest of justice to retire an officer who is in good health, efficient, capable and experience for some one who is of a lower quality in a profession that serves one of the fundamental human rights (the right to a fair trial) S35 (3) of Act 108 of 1996.*
- (v) *I have school going children. Their interest would be better served if I am retained in my post as I have requested.*
- (vi) *I hope that my application will meet your favourable consideration. Thanking you in anticipation. Yours faithfully)*

[6] According to the applicant, he received no reply to his letter but received a note from Mr Kgoisitsile of the respondent on the 19

February 2008 requiring him to furnish certain documents in order to complete the retirement process. The applicant responded to the note in a letter dated 20th February 2008 wherein he replied as follows:

“1. I received your note addressed to the Court Manager (Mrs Mngomezulu) dated February 15, 2008.

You informed her that:” they want these matters” (which are retirement documents).

2. On January 24, 2008 I made a written representations; the receipt of it was duly acknowledged by the court manager on January 25.

3. The manner in which this matter is being dealt with is unprofessional:

3.1 The human resource department of the regional office must reply my letter.

3.2 they must reply the letter because there are implications of my rights in this letter and, in the event of my rights being violated they must take it possible for me to seek relief accordingly

4. I am not prepared to comply with what “they want” before they have fully complied with my letter of January 24, 2008.

Thanking you in anticipation. Yours Faithfully)

- [7] The second respondent replied to the applicant letters of the 25th January 2008 and 20th February 2008 and advice that it was not possible for the respondent to retain the services of the applicant on a permanent basis beyond the age of 65 as in terms of the Public Service Act, employees who attain the age of 65 years are to be retired. The applicant was further advised in the same letter if he so wish to submit a request to be considered for an appointment on a contract basis which will not exceed a period of 2 (two) years.
- [8] The applicant contended that Mrs Hardien misinterpreted the provisions of s 16 (1) (a) when she indicated that the applicant had to be retired because he had reached the age of 65. The applicant argued that the proper context and interpretation of the Act is to read s16 (1) (a) together with subsection 7 of the same section.
- [9] The applicant further argued that the stopping and reversal of his salary which was due to the misinterpretation and misunderstanding of the provisions of the Act had caused him serious problems because he was not yet ready to retire.

[10] It is trite that before this court will grant an urgent relief an applicant must satisfy the following requirements in its urgent application:

(a) a clear right or a right prima facie established though opened to some doubts;

(b) a well- grounded apprehension of irreparable harm if the interim relief is not granted;

(c) A balance of convenience in favour of the granting of an interim relief;

(d) The absence of any other satisfactory remedy. SEE **Phutiyagae v Tswaing Local Municipality 2006 27 ILJ 1921 (LC) at Page 1930A -B, Spur Steak Ranches v Saddles Steak Ranches 1996 (3) SA 706 (C) at 714B-C and Setlogelo v Setlogelo 1914 AD 21.**

[11] In the case of Phutiyakgae (Supra), Mokgoatlheng AJ as he then was in dealing with the issue of urgency held that the question of urgency has to be determined inconjunction with the establishment of a right to obtain the relief the applicant seeks at the stage when the urgent application was instituted.

[12] In the present case it was the duty of the applicant, in order for him to succeed, to show that he had a right (though may be in doubt) in

terms of the Act not to be retired when he reach the age of 65 (sixty five) years. It is evidently clear that the applicant relied on the provisions of s16 (1) (a) read with subsection 7 of the same section in order to establish a *prima facie* right that entitled him to the relief he sought. The relevant parts of s 16 read as follows:

“(1) (a) Subject to the provisions of this sections, an officer, other than a member of the service or an educator or a member of the National Intelligence Services, shall have the right to retire from the public service, and shall be so retired, on the date when he or she attains the age of 65 subsection (7) of S16 reads as follows:

[13] Section 16(7) reads as follows:

“(7) If it is in the public interest to retain an officer other than a member of the services or an educator or a member of the National Intelligence Services in his or her post beyond the age at which he or she is required to retire or to be retired in terms of subsection (1) , he or she may with his or her consent be so retain from time to time on the recommendation of the Commission and the approval of the relevant

executing authority, for further periods which shall not attach to the application in the files except with the approval by resolution of Parliament exceed in the aggregate 2 years”.

[14] In my view retirement of an employee comes into effect by operation of the law. Thus in terms of s16 (1) an employee who has reached the age of 65 years is automatically retired. I therefore do not agree with the applicant that the provision in s16 (1) (a) of the Act gave him the right to choose whether or not to retire when he reached the age of 65 (sixty five) years.

[15] The choice which is available to both the employer and employee is that which is provided for under section 16 (7) which allows for the extension of the employment of an employee after reaching the age of 65 (sixty five) years. In terms of this subsection the employment of the employee can be extended if he or she consent to be retained and such retention has to be done on the recommendation of the Public Service Commission and the relevant executing authority.

[16] Where the employees agrees to be retained in the employ of the employer such retention shall not exceed a period of 2 (two) years.

Any retention exceeding 2 (two) years would require a resolution of Parliament to that effect.

[17] In the present case it is common cause that the applicant has reached the age of 65 (sixty five) and therefore is automatically retired in terms of the law. It is apparent that the applicant has initiated steps towards evoking the provisions of section 16 (1) (7) of the Act.

[18] The other complaint of the applicant seems to suggest that the employer is frustrating the processing of s16 (7) coming into operation. This is not however pleaded in the applicant's notice of motion and therefore this court does not have to consider this compliant.

[19] In the light of the above it is my view that the applicant has failed to prove that he has a prima facie case.

[20] It was on the bases of the above reasons that I issued the order that:

1. The application is dismissed.
2. There is no order as to costs

MOLAHLEHI J

Date of Hearing: 01 April 2008

Date of Reasons: 22 April 2008

APPEARANCES:

For the Applicant: LEFA MOFUBETSOANA (In person)

For the Respondent: L Moyse