REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 277/2001

Reportable

In the matter between:

PREMIER OF THE EASTERN CAPE PROVINCE AND ANOTHER
First Appellant
and
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Second Appellant

and

BENJAMIN BONGANI SEKELENI
Respondent

CORAM: NIENABER, SCHUTZ, STREICHER, FARLAM et CAMERON JJA

HEARD: 14 MAY 2002

DELIVERED: 31 MAY 2002

SUMMARY:

Public Service – Transkei – Interpretation of section 15(1) and (2) of Public Service Act 43 of 1978 (Transkei), as amended.

JUDGMENT

FARLAM JA

[1] This is an appeal from a judgment of the full bench of the Transkei Division (Zilwa AJ with Van Zyl and Maya JJ concurring), sitting as a court of first instance, which declared that the retirement of the respondent, who is a former Deputy Director General in the office of the Public Service Commission of the former Republic of Transkei, was invalid and that he was entitled to such emoluments and other benefits as would, but for the invalid retirement, have flowed from his employment contract. The court *a quo* also ordered the appellants, the Premier of the Eastern Cape Province and the President, to pay such emoluments and other benefits for a period of 12 calendar months, to be reckoned from 31 December 1992 (on which date the respondent's retirement, which was declared to be invalid, had purportedly taken place). The emoluments and benefits already received by him were to be set off against the payments to which he was entitled.

[2] The respondent had applied in the court below in May 1999 for an order declaring invalid a decision which he alleged had been taken by the Minister of the Public Service Commission of the former Government of Transkei to place him on compulsory retirement and to terminate his employment in from the public service of the former Republic of Transkei with effect from 31 December 1992, in terms of the provisions of section 15 of the Public Service Act 43 of 1978 (Transkei), as amended (to which I shall refer in what follows as 'the Act'). The respondent also applied for a declaration that he was entitled to such emoluments and other benefits as would, but for his invalid retirement, have flowed from his employment contract for the period reckoned from 31 December 1992, to his 65th birthday, which occurred on 7 December 1997.

[3] Before the facts in this case are summarised it is appropriate to quote the relevant legislative provisions.

[4] On 31 December 1992, the date of the respondent's purported retirement from the Transkeian Public Service, section 15(1) and (2) of the Act, as substituted by section 4 of Decree 11 of 1989 (Transkei) and amended by section 3(a) and (b) of Decree 14 of 1992 (Transkei), read as follows:

> '15(1) Subject to the provisions of subsections (2) and (5) an officer (other than a member of the services or an officer employed in the Intelligence Service) shall retire from the public service on the day on which he attains the age of 60 years, if that day is the first day of a month or, if that day is any later day, on the first day of the month immediately following the month in which he attains the age of 60 years.
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> (2) If it is in the public interest to retain an officer (not being a member of the services or an officer employed in the Intelligence Service) in his post beyond the age at which in accordance with subsection (1) he would otherwise retire, he may be so retained from time to time, on the recommendation of the Commission and subject to the approval of the Minister, for further periods which shall not, except with the approval, by resolution, of the Military Council, exceed in the aggregate twelve calendar months.'

[5] Section 15(5), as substituted by section 3(c) of Decree 14 of 1992, read as follows:

> '(5) An officer (other than a member of the services, an officer employed in the Intelligence Service or an officer referred to in subsection (9)) may at any time before or after attaining the age of fifty-five years give written notification to the Director-General of his wish to retire from the public service and, subject in every case to the recommendation of the Commission and the approval of the Minister, such officer shall-
>
> (a) if such notification is received at least three calendar months prior to the day on which he attains the age of fifty-five years, retire on attaining that age if that day is the first day of a month or, if that day is any later day, on the first day of the month following the month in which he attains the said age; or
>
> (b) if such notification is given on any day after he attained the age of fifty-five years, retire on the first day of the fourth month following the month in which such notification is received.'

[6] The 'Commission' referred to in the section was the Transkeian Public Service Commission and the Military Council was the body established with effect from 30 December 1987 to take the place of the Transkeian Parliament, which was dissolved following a successful *coup d'etat* in December 1987: see *Matanzima and Another v President of the Republic of Transkei and Another* 1989(4) SA 989 (Tk) and *Hintsho v Minister of Public Service and Administration and Others* 1996(2) SA 828 (Tk SC) at 836 H-837E.

[7] The respondent submitted in his founding affidavit that what he called the decision to place him on compulsory retirement in terms of section 15 of the Act was invalid. He contended that the failure of the commission and of the Minister to act in terms of section 15 of the Act deprived him of the opportunity firstly to continue in the employ of the Government of Transkei for a period of twelve months after his compulsory retirement and secondly to place facts before the Military Council to enable it to resolve that he should continue in the employ of the Government for more than 12 months. He also stated that he knew of no impediment which would have prevented him from continuing in the employ of the Government until 3 June 1994, on which date his conditions of service would have been amended (in consequence of the coming into operation on that date of the Public Service Act, 1994, which was published in Proclamation 103 of 1994) so that the retirement age then applicable in his case would have been 65 years.

[8] The appellants conceded that the Minister had made no decision as to whether the respondent's services should be retained after he reached the age of 60 years and also that the commission had made no recommendation in that regard.

[9] The court *a quo* held that subsections (1) and (2) of section 15 of the Act should be interpreted so 'as to blend them'. Referring *inter alia*, to *C and J Clark v Inland Revenue Commissioners* [1973] 2 All ER 513(Ch) at 520e-f and *S v Marwane* 1982(3) SA 717 (A) at 747G-748G the court *a quo* held that the use of the expression 'subject to the provisions of subsections (2) and (5)' at the commencement of section 15(1), indicated that subsection

(2) was, as it was put, the master clause and subsection (1) was reduced to a position of subordination thereto. It also held that 'an officer cannot be placed on compulsory retirement merely upon attainment of the age of 60 years without the machinery provided for in section 15(2) of the Act having been exhausted.'

[10] In motivating this conclusion Zilwa AJ said:

> 'I find myself being in respectful agreement with Madlanga J in *Dlisani and Mathwetha v Minister of Safety and Security and Another* 1999(1) SA 1020(Tk) that the Minister has to make a decision in the exercise of the discretion bestowed upon him at the time the employee's retirement is imminent, in terms of section 15(2) of the Act as to whether or not it is in the public interest to retain the relevant employee's services beyond the age of 60 years. Since the employee concerned clearly has an interest in such a decision justice dictates that he/she should be afforded an opportunity to make representations prior to the making of such decision by the Minister. A duty to act and to exercise such discretion rests on the Minister and he cannot validly take the attitude, that if the employee wishes to be retained, it is his/her duty to set the process of getting the Minister to exercise his discretion in terms of subsection (2) afoot by informing the Minister of his/her wishes to be retained and tendering to make representations.

(See: *Shepherd Vuyisile Gantsho v Minister of Education and Others* (Case no 211/91, an unreported judgment by Beck CJ delivered on 14 February 1992, and the decisions quoted therein)). The *Gantsho* judgment, a judgment of the then General Division of the Supreme Court of Transkei, which was endorsed by the erstwhile Transkei Appellate Division in that court's unreported judgment in the case of *Stanford Velele Kuse v The Minister of Police and Others* (Case No 1075/92), delivered on 22 February 1994), is to the effect that until the Minister has applied his mind to the question of the public interest and has come to the decision that the public interest does not require the employee's services beyond the said retirement age of 60, such employee cannot be compulsorily retired, even though he/she is over 55. In my view similar considerations should apply to the Applicant *in casu.'*

[11] The court *a quo* rejected the respondent's prayer that he was entitled to emoluments and other benefits calculated on the basis that he continued in post until his 65th birthday and held that he was merely entitled to such

emoluments and other benefits as would have flowed from his employment contract for 12 months after his retirement, ie, until 31 December 1992.

[12] Mr *Mbenenge*, who appeared for the respondent, relied strongly on the three earlier Transkei cases, viz *Gantsho, Kuse* and *Dlisani,* to which reference was made in the extract from the judgment of the court *a quo* given in paragraph [10] above.

[13] In my opinion the interpretation of section 15(1) and 15(2) of the Act adopted by the court *a quo*, relying on the three earlier Transkeian cases referred to, was wrong. On the clear wording of these provisions the only decision the minister can make, as was correctly submitted by Mr *Kemp,* who appeared with Mr *Msiwa* on behalf of the appellants, is to negate the effect of section 15(1) by extending the date of retirement if the commission so recommends. In doing so he does not change the retirement age : he extends the date fixed in terms of section 15(1). If he has failed to take such a decision the remedy is not to set aside his decision (for there is no relevant decision) but a *mandamus* to force him to decide the issue, or, possibly, to seek damages based on the proposition that if he had decided the matter he would have decided it in the respondent's favour : for such a claim to succeed proof would have been required that it was in the public interest for his services to be retained beyond the prescribed retirement age. There was no need for the Minister to decide whether a person should retire at the age of 60 years : section 15(1) provides in terms for public servants to retire automatically at that age.

[13] It is clear that the expression 'subject to', with which section 15(1) commences, means no more than *if* a decision to extend an official's period of service is taken under section 15(2), then such decision will override the cut-off point in section 15(1): it does not mean that *unless* a decision is taken under section 15(2), section 15(1) never comes into operation. As Mr *Kemp* correctly contended the expression 'subject to' has no *a priori* meaning (see *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996(1) SA 1182(A) at 1187J-1188A). While it is often used in statutory contexts to establish what is dominant and what is subservient its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning 'except as curtailed by': *cf Hawkins v Administration of South West Africa* 1924 SWA 57 and *Crook and Another v Minister of Home Affairs and Another* 2000(2) SA 385(T) at 389A-D. This was clearly what is meant here as is evident from the fact that section 15(1) is expressly made subject not only to subsection (2) but also to subsection (5) which, as has

been seen, provides for early retirement. It is thus clear that subsections (2) and (5) contain exceptions to the general rule that one retires automatically at the age of 60.

[14] In my view the approach upheld in the *Dlisani* case, that where the Minister fails to take a decision as to whether or not the retention of an employee's services beyond the normal retirement age is in the public interest he is to be regarded as having made a 'negative' decision, is inconsistent with the decision of this Court in *Minister van Onderwys en Kultuur en Andere v Louw* 1995(4) SA 383(A), to which Mr *Kemp* referred. This case concerned the interpretation of section 72(1) of the Education Affairs Act (House of Assembly) 70 of 1988, which was substantially the same as section 15(8) of the Public Service Act 43 of 1978 (Transkei), and which provided that a 'person employed in a permanent capacity at a departmental institution and who ... is absent from his service for a period of more than 30 consecutive days without the consent of the Head of Education ... shall, unless the Minister directs otherwise, be deemed to have been discharged on account of misconduct ...' It was held that the section came into operation if the employee without the consent of the Head of Education was absent from his or her service for more than 30 consecutive days. Whether these requirements were satisfied was objectively determinable. The coming into operation of the deeming provision was not dependent upon any decision and there was no room for a reliance on the *audi alteram partem* rule. There was in fact no decision that could be reviewed. It was argued that the deeming provision did not come into operation before the Minister decided whether he was going to direct otherwise. This submission was held (at 389D) to be without substance. This was because it was clear that in the absence of a direction otherwise a discharge came into operation without more.

[15] By parity of reasoning, as Mr *Kemp* submitted, in the present case, in the absence of a decision by the Minister to approve the retention of his services, the respondent's period of service came to end at the end of the month when he attained the retirement age and the Minister's failure to approve such retention was not a 'decision' that could be set aside on review.

[16] It is true, as Mr *Mbenenge* contended, that section 15(1), unlike the section considered in the *Louw* case, is not a deeming provision and is, in terms, 'subject to' section 15(2) and section 15(5), but the essential ideas conveyed by the two sets of the provisions are the same. Both provided for an automatic consequence (retirement at the end of the month when the retirement age is attained and discharge at the end of a 30 day period of absence without the requisite consent) in the absence of a ministerial decision that such consequence should not come into operation. The

position is in fact similar to that obtaining where a proviso has to be interpreted. It is well established that a proviso is not to be treated as what has been described as an independent enacting clause but as being dependent on the main enactment: see *Mphosi v Central Board for Co-operative Insurance Ltd* 1974(4) SA 633(A) at 645C-H. The same approach must apply to other provisions which are in the nature of exceptions to a general provision.

[17] I am also of the view that the *Gantsho*, *Kuse* and *Dlisani* decisions are based on an inversion of the words of section 15(2). Where the subsection spoke of ministerial approval for the retention of an officer in his post if it was in the public interest to do so, the court in the *Kuse* case said that until the Minister came to the decision 'that the public interest did *not* require' the officer's services to be retained he could not be compulsorily retired even though he was over the retirement age.

[18] I conclude that the decision in the *Kuse* case was clearly wrong on this point. This renders it unnecessary to consider the question as to what position in the hierarchy of judicial precedent is occupied by decisions of the one-time Transkeian Appellate Division.

[19] In the circumstances I am satisfied the respondent's application to set aside a decision that was never made should have been dismissed.

[20] I am also satisfied that his further prayer for payment of emoluments and other benefits after the end of the month when he attained the statutorily prescribed retirement age should in any event have been dismissed in its entirety. The only basis on which this relief could conceivably have been given him, in the absence of an order setting aside a decision to place him on retirement, would have been proof that it was in the public interest to retain him in his post after the prescribed retirement age so that a failure before he turned 60 to invite him to make representations as to whether he should be so retained could be said to have caused him to suffer damages in the respects he alleged. (I deliberately use the word 'conceivably' because I am not sure that even if such proof were forthcoming the respondent would necessarily have been entitled to the relief sought.) No such proof was adduced. The position would of course have been different if what was required, before he could be placed on retirement, was a decision that it was *not* in the public interest for him to retire but as I have already held such a decision was not required in terms of the relevant section.

ORDER

[22] The following order is made:

1. The appeal is allowed with costs including those occasioned by

the employment of two counsel.

2. The order made by the court *a quo* is set aside and replaced by the following:

‘The application is dismissed with costs, including those occasioned by the employment of two counsel.’

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IG FARLAM

JUDGE OF APPEAL

CONCURRING:
NIENABER JA
SCHUTZ JA
STREICHER JA
CAMERON JA