**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 15/2023**

**CIV/APN/277/2017**

In the matter between:

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| **LEBOHANG MOREKE** | **1ST APPELLANT** |
| **LISEBO MAPULUMO MOSISILI** | **2ND APPELLANT** |
| **MAKHOJANE MONYANE** | **3RD APPELLANT** |
| **MAJAKATHATA MOKOENA THAKHISI** | **4TH APPELLANT** |
| **MAMPHO KOTELO-MOLAOA** | **5TH APPELLANT** |
| **BORENAHABOKHETHE SEKONYELA** | **6TH APPELLANT** |
| **MAKALO THEKO** | **7TH APPELLANT** |
| **MOTSEKI MOFAMMERE** | **8TH APPELLANT** |
| **MAPITSO PANYANE, 9TH APPELLANT** | |
| **MAPASEKA KOLOTSANE** | **10TH APPELLANT** |

AND

| | |
|---|---|
| **THE PRIME MINISTER** | **1ST RESPONDENT** |
| **GOVERNMENT SECRETARY** | **2ND RESPONDENT** |
| **ATTORNEY GENERAL** | **3RD RESPONDENT CORAM:** |

MOSITO P

VAN DER WESTHUIZEN AJA

MOKHESI AJA

**HEARD:** 12 OCTOBER 2023

**DELIVERED:** 17 NOVEMBER 2023

## SUMMARY

***Contract*** *- The principal secretaries' contracts terminate with the Government that appointed them. - The principal secretaries contend that their contracts were illegal to the extent that they contemplated termination prior to the three-year term contemplated by section 11(2) of the Public Service Act -There is no conflict between the contract and the Act – Appeal dismissed with costs.*

## JUDGMENT

**MOSITO P**

### Introduction

[1] This is an appeal from the judgment of the High Court (Monapathi J) handed down on 14 December 2022. In the application before the High Court, the Appellants sought several prayers. First, they sought an order staying the decision of the Government Secretary to force them to go on leave of absence pending final determination of the application. Second, they sought a declarator that the decision of the government secretary to force them to go on leave of absence be declared null and void. Third, they sought an order that their employment period and tenure of office be three years from the respective dates of their engagements. Fourth, they sought an interdict

that the Government be interdicted from removing them from their respective offices as Principal Secretaries. Fifth, they sought an order that clause 7.2 and the addendum made to applicants' contracts to the effect that the contract of the person engaged shall automatically terminate before its expiry if the tenure of the office of the Government which appointed him/her comes on the end, and the new Government takes over, Payment of gratuity shall be made on the pro-rata basis where such contract has been terminated prior its expiry should be declared null and void for violating Section 11 (2) of the Public Service Act 2005.

[2] In the alternative, the appellants sought an order that the Government is ordered not to terminate the appellants' respective employment contracts unless it pays the appellants all their employment benefits and entitlements they would have earned up to the end of the tenure of their respective contracts. Seventh, the appellants sought an order that their separation packages be calculated and paid as if they left their respective offices at the end of three (3) years of tenure of office. Eighth, they prayed the court to order that the Government be interdicted from removing appellants from office in implementing prayers (g) unless the appellants' respective monetary benefits have been put into the respective possession of all appellants. Ninth, they requested the court to order further and/or alternative relief.

[3] The respondents opposed the application. After the pleadings were closed, the application served before Monapathi J, who heard the matter on 31 October 2017. However, the

learned judge did not hand down judgment until 2 May 2023. On that date, he dismissed the application with costs. He, however, did not give reasons for his order. I will revert to this aspect later in this judgment.

[4] Dissatisfied with the learned judge's decision, the appellants noted an appeal on three grounds. First, they complained that the learned judge *a quo* erred in dismissing the application as he did against the weight of evidence in favour of the applicants. Second, they complained that the learned judge *a quo* erred in delivering judgment or order not accompanied by reasons for judgment after almost seven (7) years of hearing an urgent application. Third, they further complained that the court below erred in finding that a clause of contract between two parties supersedes a provision of the Statute.

[5] The respondents opposed the appeal. Before examining the appeal's merits or demerits, it is necessary to outline the facts giving rise to the litigation.

**The facts**

[6] The facts of this appeal are contained in the affidavit of the first appellant. He deposes that he is the principal secretary of the Ministry of Public Service and has been since 26 July 2016. He also avers that his co-applicants (appellants) are principal secretaries for different ministries of the Government of Lesotho. He continues to describe the respondents as they appear in the heading of this judgment.

[7] He deposes that the main issues to be determined are whether first the tenure of office of the applicants, Principal

Secretaries. Second, the validity of the acts of the Government of Lesotho in purporting (a) to Force applicants to go on leave and (b) Terminate the applicants' contracts. Third, whether it is correct in law to purport to give precedence to treating two individuals over a statutory provision; fourth, the scope and application of the rules of natural justice viz-a-viz the decision of the Prime Minister, the Executive Arm of the Government, and the Government Secretary.

[8] The appellant avers that he and the other appellants were employed as principal secretaries at different periods. They signed contracts at different periods, a copy of which is exemplified by Annexure PS1. Their contracts were the exact wording, safe for the differences in engagement periods. There was also some addenda with the contracts, which all the respondents did not sign.

[9] The appellant further avers that in terms of the law governing their contracts, which is the ***Public Service Act 2005***, the duration of contracts for principal secretaries is three (3) years from the date of engagement or signature of the contract. He submits further that in terms of the law aforesaid, they were appointed by the Prime Minister. He avers that in terms of the provisions of the Public Service Act 2005, section 11 (4), (5) and read with the employment contract, a Principal Secretary can vacate office after a disciplinary enquiry and also on any of these four (4) grounds mentioned below: (a) Neglect or refusal to do duties; (b) inability to perform duties or comply with orders. (c) Disclosure of Government secrets or information, (d) misconduct.

[10] He further avers that following the meeting of 18 July 2017, he approached and sought legal assistance in the matter. Through the assistance of a legal representative, they wrote annexure “PS 4” hereto, in which they explained his legal position. The fast therein speaks for itself. He says, ‘I aver that at the time they were only eight (8) we are now more in number.’ He further avers that instead of the Government writing to our legal representatives, it wrote to us direct annexure **“PS 5”** hereto, which was served upon some of us on 24 July 2017.

[11] The conclusion he draws from the above facts is that (a) the procedure outlined in our respective contracts has not been followed on the facts and law. (b) there is no due process that was engaged into; (c) upon being called into the office of the 2nd respondent on 18 July 2017, there was no due process being engaged into as the 2nd respondent was informed us that *“the coalition government has decided*”.

[12] He further submits that they were not given a hearing. They were told what the Government had decided, and a letter reiterated it. He avers that they had suffered prejudice and discrimination because of the decision.

**Issues for determination**

The only issue to be determined is whether a contract that provided for a coterminous termination upon the ending of the tenure of the Government that appointed the principal secretaries is illegal.

**The law**

[14] Section 96 of the Constitution of Lesotho provides that every government department shall be under the supervision of the Principal Secretary, whose office shall be an office in the public service. Section 11(1) of the Public Service Act, 2005 provides that, under section 139(1) of the Constitution, the power to appoint a person to hold or act in the offices of Principal Secretary shall vest in the Prime Minister, acting after consultation with the Public Service Commission ('the Commission'). Section 11 (2) of the Act provides that the Principal Secretaries shall hold office for three years. Section 11(6) of the Act provides that, notwithstanding subsections (4) and (5), the power to remove a Principal Secretary from office shall vest in the Prime Minister acting after consultation with the Commission.

[15] Section 11(2) of the Act typically means that the Principal Secretaries are appointed to their positions for a fixed term of three years. This provision specifies the duration of their tenure in office. After the initial three-year term, they may be subject to reappointment or replacement. The purpose of this provision is to ensure that these high-level officials have a reasonable and defined term in office, which can help promote accountability and avoid excessive concentration of power in these positions. It also allows for periodic review and assessment of their performance and may help maintain stability in leadership roles within the Government.

[16] Whether the Government can contract with Principal Secretaries in a way that allows for the termination of their contracts before the three years specified in Section 11(2) expires depends on the specific legal framework and the language of the relevant law or regulations. Roman-Dutch law recognizes the principles of contract law. If there is a valid contract between the parties involved, the general principles of contract law, including breach of contract, may apply. If the coterminous appointment constitutes a legally binding contract, the aggrieved party may have legal remedies for breach of contract. As in common law systems, the doctrine of estoppel may also be applicable in Roman-Dutch law. If one party makes a promise, and the other party relies on it to their detriment, the party making the promise may be estopped from returning to it.

[17] In many legal systems, including those with at-will employment practices, an employment contract can include terms that allow for early termination. These terms might be based on various grounds, such as poor performance, misconduct, or changes in government policies or priorities. However, these termination clauses should follow the applicable laws and regulations. It is important to note that employment contracts for high-ranking government officials, like Principal Secretaries, are often subject to legal and ethical considerations. Termination of such contracts should typically follow due process, be based on valid reasons, and adhere to the principles of natural justice.

[18] The ability to terminate such contracts prematurely may also depend on the specific provisions of the law governing the employment of Principal Secretaries and whether any such flexibility is explicitly granted. If the law allows for contractual provisions that override section 11(2), it would be legally permissible to terminate a Principal Secretary's contract before the three-year period expires. Government contracts with Principal Secretaries can include provisions for early termination. However, the legality and specific conditions of such terminations would depend on the governing law and the terms of the individual employment contracts.

**Application of the law to the facts**

[19] I have read the judgments of my learned brothers Mokhesi and van der Westhuizen AJJA in the draft, and I agree with my learned brother Mokhesi AJA's conclusion and, in general, his reasoning. The appellants complained that the High Court erred in finding that a clause of contract between two parties supersedes a provision of the Statute. Advocate Molati for the appellants accepted that the learned judge did not make this point in so many words anywhere in the reasons for judgment. He, however, contended that an overall examination of the judgment boils down to this impression.

[20] Whether a contract stating that Principal Secretaries' terms are coterminous with the tenure of a sitting government violates the provisions of section 11(2) depends on the specific language and intent of both the contract and

section 11(2) and the overall legal framework in place. In my view, such a contract's legality depends on the contract's specific language and provisions. Whether the contract that makes the terms of Principal Secretaries coterminous with the tenure of a sitting government violates the provisions of section 11(2) will depend on the specific details of the law, the contract language, and the broader legal and ethical context. In my opinion, nothing in section 11(2) of the Act prevents the contract that makes the terms of Principal Secretaries coterminous with the tenure of a sitting government.

[21] I now turn to legally reconcile and analyse the statutory provision that provides that 11(2) the term of office of the principal secretary shall be for three years" with the Principal secretaries' contract that, "the contract of the person engaged shall automatically terminate before its expiry if the tenure of office of the Government which appointed him or her come to an end and be made the new Government takes over. Payment of gratuity shall be made on a pro-rata basis where such contract shall be terminated before its expiry." Section 11(2) implies that the term for a Principal Secretary is fixed at three years by law.

[22] Now, let us analyses how this statutory provision interacts with the Principal Secretary's contract clause that states, the contract of the person engaged shall automatically terminate before its expiry if the tenure of office of the Government which appointed him or she comes to an end and the new Government takes over. Payment of gratuity

shall be made on a pro-rata basis where such contract shall be terminated before its expiry. This contractual clause essentially says that if the Government that appointed the Principal Secretary ends its term, the contract will terminate automatically. In such a case, the Principal Secretary will be entitled to gratuity. However, the gratuity will be paid pro rata if the contract is terminated before its specified expiry date.

[23] This means that, under normal circumstances, the Principal Secretary should serve the entire three-year term as the law mandates. The statutory and contractual clauses must be reconciled to ensure compliance with the law while respecting the contract's provisions. The statutory provision takes precedence as it establishes the standard term of three years. However, the contract clause is also legally valid if it does not violate the statutory provision. The contract stipulates that if the contract is terminated before its specified expiry date due to a change in Government, gratuity will be paid *pro rata*. The Principal Secretary will be entitled to a portion of the gratuity, calculated based on the time served relative to the full three-year term.

[24] In summary, the Principal Secretary's contract acknowledges the statutory provision that sets a three-year term but provides a mechanism for termination and *pro-rata* gratuity in case of a change in Government. The contract operates within the framework of the statutory provision while allowing for contingencies. However, it is essential to ensure that the statutory and contractual

provisions are adhered to in practice, as they form a legally binding agreement.

[25] In the reconciled context described above, if the principal secretary's contract expires before the three-year term due to a change in Government, the principal secretary's entitlement to compensation in salary and other fringe benefits beyond the termination period would depend on the specific terms and conditions outlined in their employment contract and applicable labour laws or regulations. The employment contract of the principal secretary should stipulate the terms and conditions regarding salary and fringe benefits in the event of an early termination due to a change in Government.

[26] As per the contractual clause mentioned, if the contract is terminated early, the principal secretary is entitled to gratuity *prorata*. This suggests that the contract itself contemplates a form of compensation for the period served.. Employment contracts are typically the result of negotiation between the employer and the employee. The specific terms related to compensation and benefits beyond the termination period can vary widely based on the negotiations and agreements between the parties. Since the contract contains provisions for *pro-rata* compensation or any other relevant terms for early termination, those provisions will govern the compensation the principal secretary is entitled to receive.

[27] This Court has repeatedly laid down that judgments must be reasoned and that the reasons for making a court order

must be stated. Without reasons for judgment, it is impossible to decide on appeal whether a decision has been validly arrived at. In the absence of reasons, the appellate court has grave difficulty in deciding whether the proceedings were in accordance with substantial justice. The absence of reasons is a clear irregularity even though this Court is, by law, required to be approached based on orders and final judgments from the High Court only. will be an irregularity. However, it may not be a fatal irregularity, and a decision may still be upheld if the evidence on the record supports it. In appropriate cases, if the judgment is inadequate, the appeal may have to be allowed as it may not be possible from that record for the appeal court to be satisfied that the decisions were warranted.

**Disposition**

[28] In the present context, the specific resolution of the situation where a principal secretary's contract provides for early termination coterminously with the end of the Government, especially in circumstances where a statute dictates a three-year term, depends on the interpretation of the contract and the applicable legal framework. Since the contract explicitly allows for early termination coterminously with the end of the Government, this provision should likely take precedence. For example, the

principle of good faith and fair dealing is often fundamental in contract law.

[29] The contract clearly outlines the consequences of this coterminous appointment ending before the full term, and the legal effect is as dictated in the contract. Therefore, a contracting party cannot claim to have suffered detriment simply because of having performed a contractual obligation, thereby losing the opportunity to breach the contract. [1] It would be a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or pay damages. Rather the promisee has a legal right to the performance of the contract.[2] I agree with the learned judge in the court below that this contract did not violate section 11(2) of the Public Service Act. Furthermore,

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restitution will be granted in cases where the illegal contract has not been substantially carried out and not in those where the contract has been substantially performed. However, such a rule, though affording us some guidance, must be subordinated to the overriding consideration of public policy. The appellants have performed this contract substantially.

## Order

[30] As a result, the appeal cannot succeed. It is accordingly dismissed with costs.

1 Cf Je Maintiendrai Pty Ltd v Quaglia (1980) 26 SASR 101, 115–16 (White J).
2 Coulls v Bagot's Executor & Trustee Co Ltd [1967] HCA 3; (1967) 119 CLR 460, 504, quoting Lord Erskine in Alley v Deschamps [1806] EngR 367; (1806) 13 Ves Jun 225, 227; [1806] EngR 367; 33 ER 278, 279.

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**K. E. MOSITO PRESIDENT OF THE COURT OF APPEAL**

**MOKHESI AJA**

[1] I have had the pleasure of reading the judgment of the Learned President of this Court (the main judgment). I must state that I fully appreciate the reasons for judgment and agree with the orders that he makes. I, however, wish to articulate an alternative approach to that of the Learned President from which I think the matter should best be approached. I have read the dissenting judgement of my Brother Van Der Westhuizen AJA., I respectfully do not agree with him that the matter should be viewed principally from the public law perspective. This matter, as I see it, concerns contractual relationship and should be viewed through that prism. Where I agree with the Learned judge regarding the issue of delay in delivering written reasons for judgment on the part of the court *a quo*. I need not say no more on this issue because it has been dealt with ably by him. The background facts to this matter are uncomplicated and have already been narrated by the main judgment. I will align myself with such narration and avoid regurgitating them. As correctly stated by the main judgment, the issue for determination in this appeal is whether the contracts of Government Secretary and Principal Secretaries that provided for their coterminous

termination with the ending of the tenure of the Government that appointed them are illegal.

[2] In order to answer this anterior question an interpretative exercise of statute must be embarked upon. It is trite that interpretation is a unitary exercise which takes into account the tripartite factors of the language used in the provision understood in the context in which is used and the purpose of the provision (**Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA)** at para [25].

[3] The impugned Section 11 of the Public Service Act 2005 ("The Act") provides that (in relevant parts):

> *"(1) Pursuant to Section 139(1) of the Constitution, the power to appoint a person to hold or act in the offices of Government Secretary or Principal Secretary shall vest in the Prime Minister, acting after consultation with the Commission.*
>
> *(2) The Government Secretary and the Principal Secretaries shall hold office for a period of three years.*
>
> *(3).....*
>
> *(4).....*
>
> *(5).....*

*(6).....             ”*

[4] As a starting point an agreement by means of which a party purports to waive a benefit which is conferred on him by law is contra *bonos mores* and unenforceable especially if it can be shown that apart from the statutory right being conferred for his or her sole benefit, the public interest – public policy – demands that the statutory provision be strictly adhered to. In such a case a benefit as a matter of public policy should not be undermined by a waiver (**McDonald v Enslin 1960 (2) SA 314, 317A – B; Bafana Finance Mabopane v Makwakwa and Another 2006 (4) SA 581 (SCA)** at para. [10]). A reverse side to this is that where a statute expressly or by necessary implication does not prohibit waiver of rights conferred upon a person by law for his/her sole benefit, such a person is free to enter into a contract in which he waives such rights.

[5] **Wille Principles of South African Law 9ed** at 763 states that an agreement which is contrary to public policy manifest itself in the following manner:

> *“An agreement is contrary to public policy if is opposed to the interests of the state, or of justice, or of the public. The interests of the community or public are of paramount importance in relation to the concept of public policy; accordingly, agreements which are clearly inimical to the public interest, whether they are contrary to law or*

*morality or run counter to social or economic expedience, will not be enforced. Furthermore, it is the tendency of the proposed transaction, rather than its proved result, which determines whether or not it is contrary to public policy."*

At p. 764 the learned authors state:

*"The Chief classes of agreements contrary to public policy are those which tend to:*

*(aa) injure the state or the public service*

*(bb) defeat or obstruct the administration of justice; or*

*(cc) interfere with the free exercise by persons of their rights."*

[6] The fact that a statutory provision conferring a right is couched in peremptory terms is not decisive as even in such a case a person may waive his/her right where a right is conferred solely for his benefit. **(**See **Bezuidenhout v AA Mutual Insurance Association Ltd 1978 (1) SA 703 (A) at**

**710 A,** where a waiver of procedural provisions of a statute which regulate third party claims following motor vehicle accidents was found to be in order: **SA Co-op Citrus Exchange v Director General: Trade and Industry 1997 (3) SA 236 (SCA) 242G-H)** This principle

was stated in **Ritch and Bhyat v Union Government (Minister of Justice) 1912 AD 719 at 734 – 5:**

> *"But the question remains whether this is a transaction in which waiver can properly operate. The maxim of the Civil Law (C2, 3, 29), that every man is able to renounce a right conferred by law for his own benefit was fully recognized by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit, but in the interests of the public as well. (Grot*
> *3, 24, 6; n 16; Schorer n 423; Schrassert 1, C1, n 3, etc). And the English Law on this point is precisely to the same effect. In Hunt v Hunt (31 LJ Ch 175), Lord Westbury expressed himself as follows:*
>
> > *"The general maxim applies quilibet potest renuntiare juri pro se introducto. I beg attention to the words pro se, because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbit the renunciation of."*
>
> *And Alderson B in Graham v Ingleby (1 Exch 657) remarked that "an individual cannot waive a matter in which the public have an interest." Cases in which the result of the renunciation or waiver would be to effect something either expressly forbidden by statute or absolutely illegal by common law, of course present no difficulty. But the same principle necessarily apply where the result of a renunciation by an individual*

*would be to abrogate the terms of a statute which in their nature are mandatory and not merely directory. (See Craies at 83)) Because otherwise the result would be not merely to destroy private rights, but to defeat the provisions of an enactment intended on general and public grounds to be peremptory and binding on to all concerned."*

[7] In this jurisdiction the principles under discussion were put to effect in the case of **Rethabile 'Mahlompho Mokaeane v Principal Secretary Ministry of Foreign Affairs and International Relations and Others C of A (CIV) 28/2021 (unreported, dated 12 November 2021).** In this case the appellant had through a 'settlement agreement' reduced the schooling benefit for children, in terms of the Public Service Regulations 2008, to which they were entitled to while posted abroad as a diplomat. While jettisoning the "settlement agreement" (I am putting it in inverted commas because the High Court superimposed a settlement agreement on a matter before it relating to different matter which had nothing to do with it) and the Court Order which endorsed it, My Brother Damaseb AJA relying on **Bafana Finance Mabopane v Makwakwa and Another** (above at para.[4]) said:

*"[17] The effect of the settlement agreement, and the order made by the High Court, is to reduce the appellant's benefit under the school fees regulation from payment of all of the school to only that which the government is able to pay. Besides, it raises the*

> *real prospects that since only she is privy to the settlement, other employees in a similar position as her could be paid their benefits in full while she receives reduced benefits because of the settlement agreement she entered into in the course of litigation. That would be against public policy. It also has the real potential that government will use it as a precedent for not fully meeting its statutory obligations to employees."*

[8] The remarks made in **Rethabile 'Mahlompho Mokaeane v The Principal Secretary Ministry of Foreign Affairs and Others** at paras.[17] to [18] of that judgement relying on **Bafana Finance Mabopane v Makwakwa and Another** are obiter. I was merely making reference to the case to show that it was referred to by this Court as good law. It should be recalled that even this Court in ***Rethabile Mokaeane*** made mention [at para.15] of that judgement that the settlement agreement which the High Court superimposed on the matter was "untenable" as it related to different case. The High Court did not decide the issues that was before it being a writ of *mandamus* to force the Government to pay her children's school fees as part of her benefits *in* terms of Regulation 110(1) and (20) of the Public Service Regulations 2008. This Court in that matter did not engage with the principles underlying waiver of benefits or rights because that was not an issue before it. I express no firm view on whether it would have been correct for this Court to have found that the applicant could

not validly have waived her rights flowing from the Regulations.

[9] In **SA Eagle Insurance Co. Ltd v Bavuma 1985 (3) SA 42 (AD)** at 49G-H the court said:

> *" It is a well established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interest are involved. It makes no difference that the provision is couched in peremptory terms. This rule is expressed by the maxim: quilibet potest renuntiare juri pro se introducto- any one may renounce a law made for his special benefit."*

[10] In **Steenkamp v Peri-Urban Areas Health Committee 1946 TPD** at 429, a case in which section 172 of Ordinance no.17 of 1939 which stipulated the time within which actions may be brought against the local authority from the time the cause of action arose, was held to be intended for the benefit of the local authority, and was not intended for the benefit of the public, and therefore could be waived.

[11] I have laid the legal principles applicable to this case with regard to waiver of rights, I therefore, wish to revert to the interpretive exercise of Section 11(2) of the Act. I agree with the main judgment that one of the purposes of this

provision is to ensure that Chief Accounting Officers and Government Secretary "have a reasonable and defined term in office, which can promote accountability." I may add that from ensuring accountability on the part of these high-level government officials, granting them security of tenure leads to efficiency in government and further promotes government stability. If Chief Accounting Officers have a security of tenure, they can fully push through government policies.

[12] In my view more than giving these officials security of tenure this is beneficial to the government in the manner alluded to in the preceding sentence. The purpose and context of Section 11(2) of the Act is informed by these considerations. Now, having regard to the language used in the subsection it is no doubt that it is couched in peremptory terms, however, as already said earlier, peremptory terms of a provision may not always be decisive as a party is entitled to renounce a right conferred on him by law if that does not run counter to public policy. The subsection is meant for the sole benefit of the Government Secretaries and Principal Secretaries and Government. There is no public interest or public policy dimension to this provision in need of protection through strict adherence with Section 11(2) of the Act in the sense of prohibiting the parties from concluding an agreement relating to waiver of rights.

[13] In the present matter the appellants signed a three-year contract as stipulated by Section 11(2) of the Act. They however, attached a resolutive condition to it to the effect that if the government which appointed them comes to an end, their contracts will end conterminously with it. They however did not sign away their entitlements to gratuity and other benefits, only that those will be determined on a *pro rata* basis taking into account the duration of the contract on termination. In my judgment Section 11(2) of the Act does not expressly or by necessary implication prohibit attaching a resolutive condition of the type we are now concerned with in this appeal, to a statutory term of three years. The appellants were free to waive an unconditional three-year statutory period of their contracts. As I stated earlier this subsection is also for the benefit of the Government and, therefore, the parties were free to contract as they did.

[14] For these reasons I agree with the main judgement that the appeal be dismissed with costs.

**M. MOKHESI**

**ACTING JUSTICE OF APPEAL**

## VAN DER WESTHUIZEN AJA

## The statute and the contract

[1] In this matter, I have read the main judgment by Mosito P, as well as the judgment by Mokhesi AJA. I thank them for their hard work and commend them for their research and strong reasoning.

I accept the summary of the facts and law in the main judgment by Mosito P.

[2] With much of their clear reasoning, I am in agreement. Thus I do not repeat it.

[3] The question in this matter is straightforward; the answer is less so.: Is the contract that Principal Secretaries enter into legally compliant with the relevant directly applicable statute law? Section 11(2) of the Public Service Act states emphatically that the contract runs for three years. The contract contains a clause that the term of employment automatically terminates when the official who appointed the Principal Secretary vacates office. Effectively, this means that whenever a minister is replaced in a particular portfolio, the contract comes to an end.

[4] If I understand correctly, the judgment of Mosito P approaches the issue at stake from the question whether the statute leaves space for the contract. Whether the employee is denied anything they would be entitled to under the statute

seems to be important to this line of reasoning. The proportional compensation that has to be paid to the incumbent employee when the contract automatically comes to an end makes up for whatever the now unemployed person would lose. Thus, they are effectively in the position they would have been if the three years were completed.

[5] The judgment of Mokhesi AJA approaches the matter from a different angle. Contracts requiring conduct that contradicts the public interest or *boni mores a*re invalid *a*nd unenforceable. One may not legally agree to sell your kidney on the street to the highest bidder, or to hire someone to kidnap or kill an enemy - to use my own unsubtle examples. Legislation is supposed to capture the public interest. What is unlawful is thus contractually immoral and renders a contract to be invalid. The judgment then investigates whether a party to a contract may waive a right to which they are entitled by way of the law, for example, legislation, and concludes that it cannot easily be done. With reference to case law, the conclusion reached is similar to the one reached in the judgment by Mosito P, namely that the proportionally calculated compensation leaves the contracting party in a situation similar to the benefit derived from the statute. In other words, because of the monetary reward to the party to the contract, that person does not "sign away" a benefit which is indeed in the public interest.

[6] Both approaches touch upon important aspects of life and display persuasive moments. However, in my respectful view, they focus too strongly on the "contractual side" of the

apparent tension between the clause in the contract and the wording of section 11(2), on the position of the employed Secretary, and too little on the statute as the law of the land.

[7] The starting point has to be the interpretation of section 11(2), It cannot be the contract. The contract has to be lawful in order to be valid. One cannot interpret the law in the light of what the parties - or indeed the most powerful party - to the contract would wish it to mean.

[8] Both judgments deal with the purpose of the three-year stipulation in section 11(2). There is no need to repeat. In my humble opinion, it is twofold: The first is the certainty of a fixed term of three years for any successful applicant. This, of course, has human security and fairness implications, which could be addressed financially, but I have the public interest in mind. In order to get anything meaningful done, one needs to know how much time is available. Imagine an incumbent, let us say for health reasons, vacates the very senior office a few months before a general election. What kind of candidate would apply for a few months under a boss who is unlikely to remain in the portfolio, soon to be replaced by someone with different policies and a different vision? The door could be open to opportunists who want to pocket a handsome sum of money to keep a seat warm with little concern for the future of the office.

[9] The second is related to the first, but more important. What other purpose could the three-year stipulation in section 11(2) have than stability in governance and public administration? The

statute regards the period as reasonable enough to allow for both necessary continuity and inevitable change. Of course, different governing parties may and should have different policies. Furthermore, the most senior official in a department has to work closely with the Minister who is politically responsible for that department. But the first responsibility of the Secretary has to be stable, predictable and transparent administration. Without that, no policy - old or new - can be implemented successfully. The need for shared views and mutual trust between the Minister and most senior officials is important but has to be balanced with the need for stability. It cannot be equated with simplistic "cadre deployment", which is - for example, rightly or wrongly, in South Africa - widely criticised as one of the reasons for inefficient governance and administration, as well as a lack of transparency and a breeding ground for corruption. The Minister is the political boss; the Secretary has to follow orders, regardless of who appointed them. If the Secretary, within the three-year period, refuses to follow lawful instructions or breaks the trust with the Minister, an exit could be negotiated, or legally available disciplinary steps could be taken.

[10] If my interpretation of the purpose of the three-year period, expressly stated in section 11(2), is correct, I am unable to see how this highly important aspect of public interest can be "signed away" in a contract in exchange for monetary compensation. It does not only place a duty on the state to honour the possible rights of the employee. It also imposes on the aspirant employee the duty to commit for a specific time,

obviously, unless unforeseen personal circumstances require otherwise. I would find the contract, in this case, to be invalid.

**Judicial delay**.

[11] In several judgments of this Court, serious concern has been expressed about High Court judges who take unreasonably long to produce reasoned, written judgments. In some cases, an order is made orally in court at the end of proceedings and written reasons for the order are promised, only to leave litigants who wish to consider an appeal or just simply to understand the motivation for the order waiting for very unreasonably long periods. In other cases, the order and the reasoned judgment are reserved for improperly long periods.

[12] The judgment of this Court in *Selloane Makhetha v Thabo Letsie Primary School and Others* (C OF A (CIV) NO 84/2022; CIV/APN/336/2011), delivered on 12 May 2023, is a recent example where the extremely dangerous consequences of longdelayed judgments for the administration of justice and the public perception of courts and lawyers were pointed out. In that case, judgment was given by Monaphati J in 2022, ten years after the court hearing and 11 years after the events had taken place. The matter was referred to the Judicial Service Commission.

[13] The present matter was heard in October 2017. An order dismissing the application with costs was issued on 31 October 2017. The reasoned written judgment - by Monaphati J - was

made available on 14 December 2022 ... more than five years after the order. Crowning the absurdity of this situation is that the matter was heard as one of urgency! As in the *Selloane Makhetha* case, no explanation for the delay was given, at least to the knowledge of this Court. Whether this kind of situation is caused by judicial arrogance, an unfortunate work ethic, gross dereliction of duty, tardiness, incompetence, or some understandable yet undisclosed debilitating factor is unknown. The remarks made in *Selloane Makhetha* apply.

[14] In view of the above, I would uphold the appeal with costs and yet again direct the Registrar to bring the judgment to the attention of the Chief Justice and the Judicial Service Commission. In view of the time that has elapsed since the events several years ago, and because this judgment might be a minority one, I do not delve into the relief originally sought.

**VAN DER WESTHUIZEN**
**ACTING JUSTICE OF APPEAL**

**FOR APPELLANTS:** ADV L.A MOLATI

**FOR RESPONDENTS:** ADV P.T.N THAKALEKOALA