

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

JOSEPH M. KOAHO Appellant

v

SOLICITOR GENERAL Respondent

HELD AT MASERU

CORAM:

TEBBUTT, J.A.

SCHUTZ, J.A.

VAN WINSEN, J.A.

J U D G M E N T

VAN WINSEN, J.A.

This is an application for an extension of time for the noting of an appeal against a judgment delivered by Mr. Acting Justice Isaacs on the 22nd of September 1978.

The applicant had applied to the High Court of Lesotho on notice of motion for the following relief :

An order directing the Lesotho Government to:

- (a) Restore the applicant to the salary scale A1 of the Public Service salary scales forthwith and to pay him for the period April 1976 to date of payment the difference between the salary attached to the scale and the salary actually paid to him during this period computed to include any annual increments due and any upward revisions of the salary attached to said scale which may have taken place from time to time since April 1976;
- (b) Pay to the applicant the difference between the salary actually paid to him for the

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period September 1975 to March 1976 and the salary attached to scale S8 on which scale the applicant was at the time;

- (c) Pay the applicant the sum of R42.00 deducted from his salary for August 1975;
- (d) Pay the applicant interest on the above amounts at the rate of 10 per centum per annum.
- (e) Pay the costs of this application".

The only relief accorded applicant was in the form of an order declaring that -

- (a) The applicant is entitled to be paid the difference between the salary actually paid to him for the period 25th August 1975 to 18th March 1976 and the salary at the rate he was paid immediately prior to 25th August 1975.
- (b) Interest on the above sum at the rate of 6% per annum.

Subject to the right reserved to either party to approach the Court for a variation of the order for costs, applicant was awarded half his costs. Applicant now wishes to appeal against the judgment in the Court a quo in respect of the prayers on which he was unsuccessful claiming that judgment be entered for him with costs on those prayers.

The time for noting an appeal as provided for in Rule 3(1) of the Rules of the Court of Appeal is a period of six weeks from the date of the judgment in the High Court. The judgment in the High Court was delivered on the 22nd of September 1978. Application for condonation for delay in noting appeal was made to the High Court on 27th November 1979 and refused on the 10th December 1979. The present application was only launched on the 4th of February 1980.

This Court has a discretion - to be judicially exercised - to grant the relief sought and in deciding whether to exercise such discretion in applicant's favour it will have regard inter alia, to the degree of delay in approaching the Court for condonation, the adequacy of the reasons advanced for such delay, the prospects of applicant's success on appeal, and the respondent's interest in the finality of the judgment. (See United Plant Hire (Pty) Ltd v. Hills and Others 1976 (1) S.A. 717(a) at p. 720 E to F)

The reasons for the delay advanced by applicant in the affidavit jurat 4 February 1980 are in substance that his legal representatives failed to take the necessary steps within the required time to pursue the appeal. He states in this affidavit that he received a copy of the judgment of the High Court about 10 days after the delivery and that he was dissatisfied with the result and he informed his attorney, Mr. Sello, that he wished to appeal. His attorney asked for time to consider the judgment, no doubt with a view to deciding whether he could advise an appeal or not. Applicant states that despite repeated visits to his attorney he could not ascertain his views until approximately the middle of November 1978 when his attorney advised against an appeal. He then consulted another attorney, Mr. Masoabi, and a considerable time elapsed with much to-and-fro-ing between his new and old attorney. He finally briefed counsel and received counsel's opinion on the 20th September 1979.

Nevertheless as stated above, the first approach to the High Court for relief was only made in late November 1979. While applicant affords no adequate explanation for the delay subsequent to his finding out in November 1978 that he was out of time, he states that he never submitted himself to the judgment from which he now seeks to appeal. This latter statement is controvertial by Mr. Sello, his erstwhile attorney, who states in an affidavit submitted to this Court that he fully discussed the judgment with applicant who informed him that moves were on foot to re-instate him in his former position and that accordingly the matter would end there. It was, so Mr. Sello states, only after the re-instatement did not materialise that applicant approached him to enquire whether the matter could be taken on appeal.

There is no denial by applicant of the allegations in Mr. Sello's affidavit. Indeed the inordinate delays which took place in pursuing this appeal tend to support these allegations. In his affidavit in support of the present application applicant refers to an "unwillingness" on his part with reference to the noting of an appeal. This too would appear to support Mr. Sello's allegation that initially applicant had not intended to appeal against the High Court judgment.

The further explanation for the delay set out in applicant's affidavit with reference to "ignorance" on his part is difficult to reconcile with the fact that on his own showing he was in constant contact with his legal representatives. Applicant also seeks to lay the blame for the delays on a "certain degree of negligence" on the part of his legal advisers. Assuming, without deciding, that there was some negligence on their part, this, too, cannot avail applicant. In the case of Saloojee and Another NN.0 v. Minister of Cummunity Development 1965(2) S.A. 135(a) at p. 141(B-E) Steyn C.J. held that

"It has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered".

"The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in relation to a condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are".

In any event negligence, at any rate in so far as it is attributed to Mr. Sello, is denied by him and applicant has been unable to produce any support from Mr. Masoabi to substantiate any allegation of negligence against Mr. Sello.

In the light of all these circumstances I am unable to conclude that applicant has adduced a satisfactory explanation for the delay in noting his appeal.

He does not find himself in a more favourable position when consideration comes to be given to the merits of his case. With regard to applicant's prospects of success on appeal it was argued by Mr. Erasmus for applicant that the Court a quo erred in failing :-

- (a) to advise the applicant fully regarding the findings of the Commission of Enquiry;
- (b) to correct a wrong impression under which applicant laboured that the proceedings were being conducted against him under Rule 5 of the Public Service Commission Rules, 1970 whereas in fact they were being conducted under Rule 6;

- (c) to observe the rules of natural justice when the disciplinary action was taken against him and
- (d) to rule that the report of the Commission of Enquiry was invalid.

There can be no doubt that the rules of natural justice were applicable to the dispute between applicant and respondent relative to the disciplinary steps taken against him and this was correctly held by the Court a quo to be the case. That Court equally correctly held - and this was not questioned by Mr. Erasmus - that the audi alteram partem rule did not entitle applicant to be afforded an opportunity to be heard before the Commission of Enquiry but that that rule was applicable as between himself and his employer before action could be taken by the latter against him under Rule 6. In my view respondent did all that was required of it in law to afford applicant the opportunity to refute the findings of the Commission of Enquiry in so far as they referred to him had he chosen to do so. The letter of the 10th of February 1976 (Exhibit F) offered him an opportunity to make such representations if he wished to do so but he failed to do so when in his reply to this letter he stated in his letter of 12th of February 1976 (Exhibit H) that "I am unable at this stage to admit or deny the allegations contained in your letter".

Mr. Erasmus criticizes the letter of the 10th of February 1976 in two respects. He says it brought the applicant under the wrong impression that respondent was proceeding against him under Rule 5 and not Rule 6 and further that it did not set out all the findings of the Commission of Enquiry that were prejudicial to him.

It is clear from a perusal of Rules 5 and 6, as set out in the judgment of the Court a quo, that the proceedings under the two rules were independent of each other. It was so held by the Court a quo and this conclusion is not challenged by applicant's counsel. Action by respondent for a reduction in the rank of applicant could be taken against him without the pre-requisite of an interdiction under Rule 5. In a letter dated 25th August 1975 (Exhibit B) applicant was warned that his position was being considered under both Rules 5 and 6.

While it is true that the letter, Exhibit F is headed "Re Your Interdiction" (which the letter, Exhibit B, had said had been undertaken under both Rules 5 and 6) the body of the letter leaves no doubt whatsoever that the respondent had decided to act against applicant under Rule 6.01(1)(b)(c) and (e) and that it was in connection with this action that he was being afforded an opportunity to make representations. Applicant cannot rightly claim to have been misled in this regard. His counsel nevertheless argues that respondent should have concluded from his letter in reply, viz, Exhibit H, that he was labouring under the misapprehension that his case was being dealt with under Rule 5 and that, putting it at its lowest, respondent was by virtue of the operation of the rule of natural justice required to correct this misapprehension. I am unable to agree that fundamental consideration of fairness would require respondent to correct a self-engendered misconception on the part of applicant that his case was being dealt with under Rule 5 when it had been made abundantly clear to him that it was under Rule 6 that respondent was proceeding.

With reference to the adequacy of the information supplied to applicant it is correct that the letter Exhibit F, does not mention all the findings of the Commission of Enquiry prejudicial to the applicant. No doubt the letter sets out the findings which applicant's employer considered to be the ones on which reliance could be placed for any action which it proposed to take. There was no obligation on respondent in deciding to take disciplinary action against applicant to motivate such action with reference to all the findings adverse to the applicant made by the Commission of Enquiry. It might very well have regarded some as too trivial and others as inappropriate to found any action against applicant. Had applicant chosen to avail himself of the opportunity to make representations and had it subsequently appeared that his employers had acted against him on some undisclosed ground he would then have had just cause for complaint and a remedy would have been available to him.

Finally there is no substance in the contention that the report of the Commission of Enquiry was invalid because it was not the work of all three of the members. It was not a statutory tribunal but purely an ad hoc administrative body

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to conduct an administrative enquiry into the workings of a Government office and no minimum number of members was required by law for its proper functioning. The cases quoted by counsel deal principally with statutory tribunals, the number and qualifications of whose members are prescribed by statute and it is therefore to be expected that a failure to comply with mandatory requirements of the statute would vitiate the proceedings of the tribunal. These principles cannot in my view be made applicable to an informal body appointed to conduct an administrative enquiry in order to advise respondent on a course of action taken by it and whose findings and recommendations the respondent would be free to ignore if it so chose.

It was for all the above reasons that this Court in its judgment delivered on the 13th of January 1981 refused condonation of the late filing of the notice of appeal.

Signed; L. De V. Van Winsen
L.DE V. VAN WINSEN
Judge of Appeal

I agree Signed: P.H. Tebbutt
P.H. TEBBUTT
Judge of Appeal

I agree Signed: W.P. Schutz
W.P. SCHUTZ
Judge of Appeal

Delivered this 13th day of January 1981 AT MASERU

For Applicant : Mr. Erasmus

For Respondent: Mr. Tampi