

IN THE HIGH COURT OF LESOTHO

In the matter between :

MICHAEL MOCASI Applicant

v

SOLICITOR GENERAL Respondent

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. Justice  
J. Unterhalter on the 3rd day of December 1982

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The Applicant by Notice of Motion seeks an order setting aside his purported retirement from the service of the Lesotho Government and directing the Lesotho Government to re-instate him in the position that he held immediately prior to his purported retirement from the Civil Service.

It is admitted on the papers that the Applicant was a Civil Servant and that on the 19th November 1981 he received from the Head of the Department of Transport and Traffic in which Department he held a position, a letter informing him that the Ministry had made a recommendation that he be retired in the public interest. The reason for the recommendation was stated, this being in effect that the Applicant owned a motor vehicle the documentation of which was false. The Applicant replied in a letter dated the 21st November 1981 and stated that the proposal to retire a public officer on permanent and pensionable terms was to be dealt with under Part 3 of the 1970 Public Service Order. He stated further that the proposal was not made in terms of any of the provisions of that Part and that he had therefore not had an adequate opportunity to defend himself. He claimed in effect that the documents had not been proved to be false and referred to his letter addressed to the Secretary of the Public Service Commission and dated the 17th July 1981 wherein he mentioned certain documents

/relating to

relating to a vehicle that he had obtained from the seller of the vehicle.

On the 4th February 1982 the Permanent Secretary Cabinet (Personnel) wrote to the Applicant and stated that after careful consideration of the report from the head of the Department in which he had served and the representations submitted by him thereon, approval had been given for his retirement under Public Service Commission rule 6-01 (1)(e). The letter concluded that he was retired from the service in the public interest with effect from the date of receipt of the letter.

The Applicant submits that his purported retirement in the public interest is unlawful and therefore null and void on the ground that such retirement constituted imposition of punishment on him without first proving him guilty of a breach of discipline. He submitted further that the imposition of punishment is contrary to the provisions of section 6 of the Public Service Order No. 21 of 1970 and that the unproved facts alleged against him could not form the basis for his retirement "in the public interest". He concludes that the Minister in charge of the Public Service could not in all the circumstances of the case have been satisfied that it was desirable for him to be retired in the public interest, the Minister was wrong in arriving at the decision that he had arrived at, and he therefore prayed for the relief as set out in the Notice of Motion.

The Respondent in the answering affidavit denied that the retirement of the Applicant was unlawful or that it constituted imposition of punishment on the Applicant. It was submitted that the Minister had acted within his powers pursuant to the provisions of Rule 6-01 of Part 6 of the Public Service Commission Rules and in accordance with section 12(9) of Part 3 of the Public Service Order 21 of 1970.

At the hearing of the matter the Court informed Mr. Radebe for the Applicant and Miss Fanana for the Respondent that in annexure 'B' to the Applicant's founding affidavit there was a reference to a photocopy of a report which the

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Applicant apparently had submitted to the Public Service Commission. It was requested that a copy of this report be made available to the Court and that it be served upon the Respondent and this was done. From a study of that report, which is marked Annexure 'B1' to the founding affidavit, it appeared that further correspondence had passed between the Applicant and the Public Service Commission, namely a letter dated the 7th July 1981 and a copy of a letter from the Law Office attached to the letter of the 7th July 1981, the copy of the Law Office letter being dated the 11th February 1981. The Registrar was requested to communicate with both attorneys and obtain copies of these letters and arrange for them to be delivered to the Respondent, and this likewise was done. These are further annexures to Annexure 'B'. The letter from the Law Office records that in the case of an imported second-hand motor vehicle, once a certificate has been issued under section 11(2)(d)(iii) of the Road Traffic and Transport Order 1970 there is no need to procure a certificate from the Lesotho Police.

Section 12(9) of the Public Service Order No. 21 of 1970 reads as follows :

"Every Public Officer is liable to be required or permitted to retire if, having regard to the conditions of the public service the usefulness of the officer thereto and all the other circumstances of the case, his retirement is desirable in the public interest."

It was submitted on behalf of the Applicant that the factors referred to in this sub-section must be determined objectively and not be the subject of the opinion of the official who is entrusted with the exercise of the power of requiring or permitting the retirement of a public officer. The distinction relating to jurisdictional facts is stated in South African Defence and Aid Fund and Another v. Minister of Justice, 1967(1) S.A. 31 C.P.D. by CORBETT, J. at page 34 H. The learned Judge says :

"Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised.

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In such case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see e.g. Kellerman v. Minister of Interior, 1945 T.P.D. 179; Tefu v. Minister of Justice and Another, 1953(2) S.A. 61 (T)). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter."

Section 4(1) of the Public Service Order 1970 reads in part as follows :

"Subject to the provisions of this or any other law relating to the public service, the Minister may (subject to the prior concurrence of the Minister responsible for finance in respect of anything involving the expenditure of public funds) do all things that are in his opinion necessary or expedient for giving effect to the purposes, principles and provisions of this Order or for enabling effect to be given thereto, and in particular but without prejudice to the generality of the foregoing the Minister may make, alter or revoke provision for all or any of the following matters by means of rules or regulations published in the Gazette, or by other means."

Although this sub-section empowers the Minister to make rules or regulations the governing provision is that the Minister may do all things that are in his opinion necessary or expedient for giving effect to the purpose, principles and provisions of the order. If this is read with section 12(9) of the Order in relation to the question as to who is to decide the desirability of the retirement of a public officer in the public interest, then, in my view, it is the Minister whose opinion in the final resort

/is to give

is to give effect to the provision. It follows therefore that the jurisdictional facts referred to in section 12(9) of the Public Service Order No. 21 of 1970 are in the second category stated by CORBETT, J. in the case referred to above. This being so, and again applying the principles stated in that case, it is for the Minister to decide whether having regard to the conditions of the Public Service, the usefulness of the Applicant in the present matter and all the other circumstances of the case the retirement of the Applicant is desirable in the public interest. The Court can only interfere where it is shown that the Minister in deciding that this was the state of affairs, acted mala fide or from ulterior motive or failed to apply his mind to the matter.

Section 12(9) of the Order together with other subsections of that section appear to be directed to the correction of organisational situations in the public service. Thus, if a particular function is no longer required to be performed in a particular department of the public service or the particular public officer with a particular skill is no longer needed because the Department does not require that particular service or because the service can be obtained outside the Department, it may be desirable to dispense with the services of such public officer and it may be desirable in <sup>the</sup> public interest that the cost to the State of his services be ended. With this is to be contrasted the provisions of Part 2 of the Order regarding the conduct of public officers and their liability to discipline. In terms of section 5(1)(a) of the Order an officer commits a breach of discipline if by any act or omission he fails or refuses to comply with a provision of Part 2. Section 10(1) of the Order requires every public officer to comply with stated general rules of conduct and among these he is required not to commit a criminal offence. Section 6(1) provides for punishments that may be imposed on an officer who has been proved to have committed a breach of discipline and amongst such punishments is removal from office by compulsory retirement or by permission or requirement to retire, or otherwise.

On the facts of the present matter the letter of the 19th November 1981 addressed to the Applicant by an officer

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in the Ministry of Transport and Communications suggests that the Applicant has contravened the provisions of the Road Traffic and Transport Order 1970. Section 11(2) of that Order as amended by section 2 of Act No. 26 of 1978 provides that an application for registration of a motor vehicle shall be accompanied in cases of motor vehicles imported into Lesotho by a certificate from the Lesotho Police unless such certificate has already been issued by the police authorities of the place where the motor vehicle is acquired, to the effect that the vehicle is not suspected of having been unlawfully acquired. Section 129 of the Order makes it an offence for a person to use a certificate knowing that it has been counterfeited. The letter addressed to the Applicant states that the documentation in regard to the car referred to in the letter is false. It is clear therefore that a criminal offence is alleged.

Section 4(1) of the Public Service Order 1970 gives the Minister power to make provision by means of rules for a number of matters and among these are the exercising of disciplinary control over persons holding or acting in offices in the public service and the removing of such persons from office. Such rules were made in terms of Legal Notice No. 12 of 1970, Part 5 of those rules being in regard to discipline and Part 6 being in regard to other proceedings, among these being proceedings for removal from office or reduction in rank or salary. Part 5 contains detailed provisions in regard to the alleging of a breach of discipline, the appointment of adjudicators to investigate such breach, the service of the charge sheet upon an officer against whom a charge has been made, the plea and reply to the charge, notice of time and place of hearing in regard of the charge, and the hearing of the case of breach of discipline. Suffice it to say that these are very carefully drawn provisions to ensure that an officer in the public service charged with breach of discipline has a full and adequate opportunity of knowing of the charge, hearing and testing the evidence in support of the charge, leading evidence in rebuttal of the charge and making submissions in regard to his defence.

Rule 6-01 provides that a head of Department may propose in writing to the Senior Permanent Secretary for reference to the Commission the removal of an officer from office on the ground that the public interest so requires. He is required to supply information in support of his proposal and to apply for directions concerning the procedure to be applied. There is no provision for a hearing such as is required in terms of Part 5 of the Rules.

Section 19(1) of the Public Service Order 1970 provides that the power to remove from office persons acting in offices in the public service are exercised after consultation with the Public Service Commission. There are certain exceptions to this but they do not apply in the present matter. Section 20(1) provides that the Public Service Commission shall make recommendations in those cases where it is required to be consulted concerning the exercise of power in regard to disciplinary control over persons in the public service or in regard to the removal of such persons from office. It is the head of a Department who makes submissions to the Commission either in regard to finding and punishment resulting from disciplinary proceedings or in regard to the removal of an officer from office on the ground, among others, that the public interest so requires. The matter is therefore initiated by the head of the Department and he has certain powers in terms of the rules.

One would have expected in the light of the allegations made against the Applicant that the head of the Department concerned would have initiated an enquiry for a breach of discipline. Had he done so there would have been a full investigation in terms of the provisions of rule 5 with an opportunity afforded to the Applicant to prove his innocence if such were the case, and an opportunity to the head of the Department to prove the guilt of the Applicant if that were the case. Instead the head of the Department made use of his powers in terms of rule 6 to recommend the removal of the Applicant from office on the ground that it was in the public interest so to do, thereby depriving the Applicant of his right to meet the charge that had been preferred against him.

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The initiation of proceedings in terms of Rule 6 is linked in its context with the organisational requirements to which I have referred earlier when examining the terms of section 12(9) of the Public Service Order. From this it follows that it was not intended that this rule should be used in order to obviate the need to conduct a disciplinary inquiry should the circumstances be such that a disciplinary inquiry was called for.

In Evans v. Public Service Commission and Minister of Justice, 1920 T.P.D. 170 BRISTOWE, J. in examining legislation in South Africa regarding conditions of employment of public servants said the following at page 173:

"Now under the general law a civil servant holds office at the will of the Crown, and can be discharged at a moment's notice without any reasons being given. If that is the case he can equally be discharged although the Minister may be influenced by wrong reasons, or by no reasons at all. It seems to me, therefore, that apart from the Public Service and Pensions Acts, no complaint could have been raised against a summary dismissal. These Acts have however interposed certain machinery between the civil servant and the arbitrary power of the Crown. They are for the protection of the civil servant, and they modify in his favour the rigour of the common law. But the result is that a public servant is bound solely by the statutes. Whatever rights those statutes give him he possesses."

Rule 1-03 states certain general principles of procedure as follows :

- "(1) Subject to the provisions of the Public Service Order 1970, the commission regulates its procedure generally in accordance with the principles set out in this rule.
- (2) In exercising their respective powers and duties the Minister and the commission have a common interest in maintaining a just balance between two considerations namely -

#### Protection of the State

The public interest in developing and maintaining an efficient and economical public service, in the provision of good public administration and in the consequent need to protect the State against public officers who might abuse their positions by inefficiency,

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wastefulness, laziness, corruption, discourtesy and other misconduct.

Protection of Public Officers

The public interest in developing and maintaining a contented career public service that has high morale and that is efficient, economical, industrious, honest, loyal, courteous and well-behaved, and in the consequent need to protect public officers from favouritism and victimisation of a kind that would harm the development and maintenance of those qualities."

It is similarly the task and duty of the Court to hold a just balance between protection of the State and protection of public officers.

There is no protection for the Applicant in the circumstances of the present matter if, in regard to the allegations made against him, he is not to be given the opportunity of defending himself because the head of his Department has decided that he will justify his recommendation to the Commission on the grounds that the public interest requires the removal of the Applicant from office, without there being an obligation on the part of the head of the Department or others to disclose the reasons for such decision. There is adequate protection both for the State and for the Applicant if the procedure laid down in rule 5 were followed. If the charge were brought home to the Applicant he could be removed from office in terms of section 6(1)(b) of the Public Service Order. And if it were not brought home to him then there would be no reason for his removal from office on the grounds that were outlined in the letter of the 19th November 1981 that was addressed to the Applicant,

On the papers before me I am of the view that the head of Applicant's Department in making the recommendation that he did in terms of the powers vested in him by rule 6-01 of the Public Service Rules 1970 was using those powers in order to deny the Applicant his right to have an investigation in terms of rule 5 into the allegation made against him. In Van Eck N.O. & Van Rensburg N.O. v. Etna Stores, 1947(2) S.A. 984 A.D. DAVIS, A.J. quoted the remarks of DE VILLIERS, C.J. in Orangezicht Estates Ltd. v. Cape Town Council, (23 S.C. 297, at 308) as follows :

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"The Court has more than once expressed the opinion that powers given to a public body for one purpose cannot be used for ulterior purposes which were not contemplated at the time when the powers were conferred."

At page 997 DAVIS, A.J.A. said :

"I can draw no distinction between a public body and a public official; indeed I can see no ground why the principle should even be confined to them. It seems too that the principle is of far more general application, and that private persons or corporations could certainly not be in a better position. To pretend to use a power for the purpose for which alone it was given, yet in fact to use it for another, is an abuse of that power and amounts to mala fides."

The learned Judge said that he was not attaching any moral obliquity to the officers upon whose conduct he was commenting, adding that they were acting in what they conceived to be the public interest. Similarly in the present matter the officers concerned with the decision no doubt believed themselves to be acting as they did in the public interest. But nevertheless they used a power given for one purpose for another and entirely different purpose.

The Lesotho Court of Appeal considered a related matter in the case of the Minister of Public Service and the Solicitor General v. R.C Mokhohlane, C. of A. (CIV) No. 5 of 1982. The majority decision was to the effect that the Public Service Order No. 21 of 1970 authorised the making by the Minister of rules providing for the dismissal of a public servant on the grounds set forth in chapter 6 of the rules. There was no examination of the question as to whether on the facts of that case there had been an abuse of the powers conferred by rule 6.

In National Transport Commission and Another v. Chetty's Motor Transport (Pty) Ltd., 1972(3) S.A. 726 A.D. HOLMES, J.A. was considering a decision of the commission. At page 735 E the learned Judge said :

"The legislature has appointed it as the final arbiter in its special field and, right or wrong, for better or worse, reasonable or unreasonable, its decision stands - unless it is vitiated by proof on review in the Supreme

/Court that...

Court that ..... the commission failed to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice: in other words that, de jure, it failed to decide the matter at all."

In my view having regard to the terms of section 12(9) of the Public Service Order No. 21 of 1970 the Minister did not apply his mind as these principles require. He was not considering a situation contemplated by section 12(9) of the Order. He was considering a situation contemplated by section 6(1)(b) of the Order. Had he applied his mind as the law requires him to do he would not have accepted the recommendation made in terms of rule 6, but would have called for the submission of a report after the conclusion of an investigation in terms of rule 5. Not having done so the decision must be set aside by the Court.

In his dissenting minority judgment in the case of Minister in Charge of Public Service and the Solicitor General v. R.C. Mokhohlane, C. of A. (CIV) No. 5 of 1982 GOLDIN, J.A. set aside the order that the Respondent be removed from office by way of dismissal. He held, however, that it would be unjust and not in the interests of the public service merely to order his reinstatement, because it was not then known whether or not a charge of breach of discipline could be proved. He decided that the Appellants should be afforded their right to follow a proper course. In my view this is the correct procedure to follow in the present matter. The order of the court is as follows :-

- 1 The decision dated 4th February 1982 that the Applicant is retired from the service in the public interest with effect from the date of receipt of the letter containing that decision is set aside.
2. The persons vested with the powers of determining whether or not the Applicant is liable to disciplinary proceedings in terms of part 2 of Public Service Order 1970 as read with part 5 of Public Service Commission Rules 1970 are entitled so to determine.
3. Upon failure to proceed or act as provided in paragraph 2 above within three months from date hereof it is ordered that

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Applicant be reinstated to the position which he occupied in the public service immediately prior to the direction that he be retired.

4. The Respondent as representing the Government of Lesotho is to pay the costs of this application.



J. UNTERHALTER

ACTING JUDGE

3rd December, 1982.

For the Applicant : Mr. Radebe  
For the Respondent : Miss Fanana.