

IN THE HIGH COURT OF LESOTHO

In the Application of :

RORISANG CHURCHILL MOKHAHLANE Applicant

v

MINISTER IN CHARGE OF THE PUBLIC
SERVICE & THE SOLICITOR GENERAL Respondents

J U D G M E N T

Delivered by the Hon. Mr. Justice F.X. Rooney
on the 2nd day of February, 1982.

Mr. Sello for the Applicant
Mr. Mafisa for the Respondents

The applicant was a public servant until the 7th October, 1980 when he received a letter from the Permanent Secretary (Cabinet Personnel) informing him that he had been removed from office by way of dismissal. This action was prompted by the belief that he was disloyal and had consorted with people who were engaged in subversive activities designed to achieve the overthrow of the Government. The rights and wrongs of the applicant's conduct in this regard are not material to the determination of this dispute.

In his notice of motion the applicant sought an order in the following terms:

- "1. Setting aside the Applicant's purported dismissal by the Respondents and directing the Respondents to forthwith re-instate applicant in his position;
2. Directing the Respondents to pay to the Applicant all the Applicant's arrear salary calculated from, and including the month of June 1980;
3. Directing the Respondents to pay the costs of this application;
4. Granting the Applicant such further and/or alternative relief as the Court may deem just."

It is the applicant's contention that his dismissal from the public service was not carried out in accordance with law and it is therefore null and void and has no force or effect.

The rights and obligations of members of the public service of Lesotho are governed by the Public Service Order 1970 (as amended). No public officer may be retired or dismissed except in accordance with the provisions of that Order and the regulations made thereunder. The retirement or dismissal of a member of the public service procured contrary to the provisions of the Order is a nullity. Such public servant is not confined to a remedy in damages, but is entitled to claim reinstatement. (Schierhout v. Minister of Justice 1926 A.D. 99). The history of the events leading up to the dismissal of the applicant can be stated briefly.

The applicant was employed as a technician in the Ministry of Water, Energy and Mining in March 1974. On the 1st January, 1980 he was arrested by the police at Quthing. He was detained until the 18th March when he was released without any charge of criminal activity being preferred against him. He resumed his duties until June when he was informed by a letter from the Chief Water Engineer dated 6th June, 1980 that he was interdicted with immediate effect.

This was followed by a form of Notification of Interdiction dated 12th June, 1980 which advised the applicant that he was alleged to have contravened Sections 5(1) and 10(1) of the General Rules of Conduct. He was further advised that as a result, his continued presence in office constituted a threat to good relations with the public and good discipline. Reference was made to Public Service Commission Rule 5-21(5). In a separate letter, the applicant was advised that during the period of interdiction he would not be entitled to draw any salary.

Sometime after the receipt of this document, the applicant wrote a letter to the Permanent Secretary of his Department setting out the reasons why he should be

3/ dismissed.

dismissed. In the meantime, on the 25th June, 1980 proceedings were instituted for his removal from office, or retirement under Rule 6-01 of the Public Service Commission Rules 1970. At a meeting held on the 11th July, 1980, the applicant's case was considered by the Public Service Commission. The minute reads

"Commission advised that the officer be notified in writing that his dismissal from the service is contemplated on the grounds already disclosed to him and he be given an opportunity of replying thereto within 7 days".

On the 29th July, 1980 the applicant was advised as follows :

"Dear Mr. Mokhahlane,

You are hereby informed that due to the incidences you already know of your arrest in Quthing from 31st January, 1980 and the interdiction from the service, it has been proposed that you advance in writing the reasons why you feel action of dismissal should not be taken against you within seven days.

Sgd ???
for PERMANENT SECRETARY. "

When the Public Service Commission met again on the 13th August, 1980, it minuted

"After careful consideration of the officer's representations, was satisfied that the officer did connive with Terrorists. The Commission therefore advised that the officer be removed from office by way of dismissal".

On the 7th October, 1980 the applicant was informed by the Permanent Secretary Cabinet (Personnel) that he had been removed from office by way of dismissal.

Part 2 of the Public Service Order 1970 deals with the conduct of public officers. Section 5 defines a breach of discipline. Sub-section 5(2) lays down that if the breach of discipline is a criminal offence the record of the trial and conviction shall be sufficient proof of the commission by him of that offence.

Part 2 of the Order also provides for the conduct of public officers and proceedings against them for breach of discipline and the punishment which may be imposed on an officer "who has been proved to have committed a breach of discipline"

4/ (Section 6

(Section 6(1)). The punishments include removal from office by dismissal (6)(1)(a). A public officer may also be retired at prescribed ages or in prescribed circumstances. These include abolition of office or redundancy (6) for the purpose of facilitating improvement in the organisation of the department in which he serves (7) medical grounds (8) and marriage in the case of a female officer (10).

Section 12 (9) reads

"Every public officer is liable to be retired 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".

The Minister is empowered under Sec. 4 of the Order to make regulations that are in his opinion necessary or expedient for giving effect to the purpose, principles and provisions of the Order. Such regulations under 4 (v) include those "exercising disciplinary control over persons holding or acting in such offices and interdicting and removing such persons from office". The regulations are contained in the Public Service Commission Rules 1970 (as amended). Part 5 of the Rules govern discipline and Part 6 other proceedings.

In this case the respondent contends that the applicant's removal was procured by the application of Rule 6-01 on the grounds that he is unfitted for his duties (1)(b) and that the public interest so requires (1)(e). In those circumstances Rule 6 (3)(c) empowers the Public Service Commission to advise the Minister to order "that the officer be removed from office by way of dismissal or compulsory retirement or permission to retire or otherwise". In reply, the applicant argues that Part 6 of the Public Service Commission Rules 1970 to the extent that it imposes punishment on an officer without such officer having been proved to have committed a breach of discipline, is ultra vires the provisions of the Order.

It was held by Isaacs A.J. in CIV/APN/73/78 Koaho v. The Solicitor General (unreported).

"On a consideration of Rules 5-21 (power to interdiction) and 6-01 (Proceedings for removal from office or reduction in rank or salary), it seems to me that they are independent of each other".

This view was accepted by the Court of Appeal in the same case (C. of A. (CIV) No. 3/80)(unreported).

When the applicant was interdicted from duty, he was referred to Sections 5 and 10 of the Order and to Rule 5 of the Rules. The letter of the 29th July, 1980 which invited him to "advance in writing the reasons why you feel the action of dismissal should not be taken against you" made no reference to the proceedings which had already been instituted against the applicant under Part 6 of the Rules. He may have expected to have been dealt with under Part 5 and to have received a charge sheet under 5-42 and had his case heard under 5-61. This was not to be because of the independent proceedings commenced against him.

Where a public officer is not dealt with in accordance with the procedure set out in Part 5 of the Rules he may fall under Part 6 if the circumstances bring him within the provisions of Part 6-01 which reads as follows :

- "(1) 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 or his reduction in rank or salary on one or more of the following grounds -
- (a) that he has been convicted of a criminal offence, and that disciplinary proceedings under Part 5 are unnecessary or inappropriate;
 - (b) that he is unfitted for his duties;
 - (c) that he is incapable of carrying out his duties efficiently;
 - (d) that he has attained the age prescribed in section 12(2) of the Public Service Order 1970;
 - (e) that the public interest so requires;
 - (f) that his work or conduct while on probation or trial has been unsatisfactory;
 - (g) that the terms of his contract or temporary appointment so provide,
 - (h) that an office that is one of two or more similar offices, has been or is to be abolished, and that it is necessary to

determine which one of the officers holding them should be removed from office.

(2) The head of department shall supply information in support of his proposal and he shall apply for direction concerning the procedure to be applied. He shall report to the (Senior Permanent Secretary), for reference to the commission, the result of the application of that procedure.

(3) The commission may after the completion of any proceedings under directions given under paragraph (2) advise that the Minister should -

- (a) order that no further action be taken in the matter; or
- (b) order that the officer's salary or rank or both his salary and rank be reduced to an extent specified; or
- (c) order that the officer be removed from office by way of dismissal or compulsory retirement or permission to retire or otherwise.

(4) If a head of department is the subject of a proposal under this rule the Senior Permanent Secretary may make that proposal and may do all things that are assigned to a head of department in these rules. For that purpose a reference to a head of department in these rules and in proceedings is construed as a reference to the Senior Permanent Secretary."

When the case of the applicant was referred to the Public Service Commission, it had a number of options open to it. The Commission could advise the Minister to order that no further action be taken or to order that the applicant be removed from office by way of compulsory retirement or permission to retire or otherwise. What the Commission could not do was to advise the Minister to dismiss or otherwise punish the applicant.

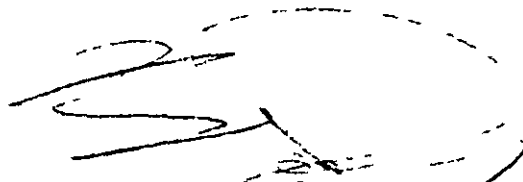
A punishment can only be imposed on an officer who has been proved to have committed a breach of discipline under Section 6 of the Public Service Order. The applicant had not absented himself from his official duties (Sec.6(3)). No formal charge alleging a breach of discipline had been made against him under Rule 5-42. He had not been convicted of a criminal offence and did not fall within the purview of the Rule 6-01(a).

The Public Service Commission made an error in its advice to the Minister. This must be corrected. It will be sufficient to meet the justice of the case if the

status quo ante is restored and the Public Service Commission is given a further opportunity to consider the position.

I therefore make the following order :

1. That the order of the Public Service Commission dated 13th August, 1980 that the applicant be removed from office by way of dismissal is set aside. Any subsequent order made by the first respondent is likewise set aside.
2. The respondents are directed to re-instate the applicant in the position which he was as a member of the public service of Lesotho immediately before the meeting of the Public Service Commission held on the 13th August, 1980.
3. For the purposes of Rule 5-22 the period of three months mentioned therein is deemed to have commenced on the 12th June, 1980 and to have been interrupted between 13th August, 1980 and the date of this judgment (both days inclusive) so as to enable the Minister to consult the Commission as if the three months' period referred to in Rule had not been interrupted by the dismissal of the applicant.
4. That the Respondents pay the applicant's costs of this application.



F.X. ROONEY
JUDGE

2nd February, 1982.

Attorney for the Applicant : Messrs. Mohokare, Sello & Co.
Attorney for the Respondent : Law Office.