

IN THE HIGH COURT OF LESOTHO

In the Application of :

THUSO KHAMA

Applicant

v

1. THE MINISTER RESPONSIBLE
FOR THE PUBLIC SERVICE
2. THE SOLICITOR GENERAL

Respondents

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 11th day of March, 1983

The facts of the case as appear on papers before me are briefly as follows : The applicant is a public officer and was first interdicted by the Permanent Secretary to Agriculture his Head of Department for three months on half pay from the 23rd April 1982 allegedly for being involved in the terrorist activities of the so called Lesotho Liberation Army. The Permanent Secretary purported to act in terms of powers conferred upon him by the Public service Order 1970 read with Part 5 of the Public Service Commission Rules (annexure A to founding affidavit) which period of interdiction was extended on 15th June 1982 by three months during which time he was asked to submit, if he wished, "any deliberations" before 30th June 1982 (annexure B). On 10th September 1982 the period was extended through a letter from the Chief Agricultural Officer, the applicant's immediate superior by yet another three months effective from 23rd July 1982 (annexure C). In the latter three instances extending the interdiction no Rules were quoted. On the 27th September 1982 the applicant was placed on "indefinite compulsory and unpaid leave" by the Acting Permanent Secretary to Cabinet(Personnel) from 1st October 1982 purportedly under powers conferred upon the Minister vide s.4(1)(x) of the Public Service Order 1970 (annexure D). On the 21st October 1982 the applicant was

/summoned

summoned (after some discussion earlier) to appear at the office of the Permanent Secretary for Agriculture for a "hearing" to be held on 27th October 1982 (annexure F). On 27th October 1982 the applicant appeared to answer charges but the proceedings were then adjourned. There was one main charge c/o to s.10(1)(p)(iv) of the Public Service Order 1970, and three alternative charges under s.10(1)(c), 10(1) as amended by s.3(e) of Act 8 of 1973 (this 10(1)(v) and s.10(1)(m). In this meeting, which was clearly intended to be one of a disciplinary nature under Part 5 Rules 5-01 et seq of the Public Service Commission Rules the applicant's representative intimated that he was going to lodge an application to the High Court and it would appear that the proceedings were adjourned with the consent of all sides.

On the 15th December 1982 the applicant, on notice to the two respondents, moved the Court for an order couched in the following terms:

- (a) Directing the respondents to stop the disciplinary proceedings set up in terms of the Public Service Commission Rules against the applicant;
- (b) Setting aside the purported interdiction as well as the indefinite compulsory and unpaid leave of applicant and directing that the respondents shall forthwith reinstate applicant in his position in the Ministry of Agriculture;
- (c) Directing the respondents to pay all applicant's arrears of salary with effect from the month of April, 1982;
- (d) Directing respondents to pay the costs of this application;
- (e) Granting further or alternative relief as is deemed fit by the above Honourable Court."

The applicant set the 24th December 1982 for filing an intention to oppose and set 14 days from hence for answering affidavit if any was contemplated.

The Notice of Intention to Oppose was filed on the 22nd December 1982. Under Rule 1 of the High Court Rules "days" in the computation of time include Saturdays but unless a Judge otherwise orders the days between the 16th December and 12th January shall not be included in the computation of time. The effect of this Rule (barring a Judge's order) is that the 14 days from the date of entry of appearance on 22nd December 1982 ended on 28th January 1983 by which time the

/respondents

respondents opposing affidavit should have been filed. No affidavit by respondents however had been filed by that date nor an extension of time applied for.

The applicant moved the Court on 3rd February 1983 seeking confirmation of the rule and the matter came before Molai J. Counsel for respondents asked for more time to file an affidavit and this was granted the Court fixing the 9th February 1983 (not 9th January 1983 quite obviously) for the hearing. The opposing affidavit was filed on the 8th February 1983. The applicant replied to the opposing affidavit on the 9th February.

The application was crowded out and Molai J could not hear it. It was argued before me on the 15th February 1983.

The opposing affidavit from the 1st respondent was sworn by Mr. Bereng the Permanent Secretary Cabinet(Personnel). He avers in paragraphs 2 and 3 as follows :

"

2.

The present position obtaining in this matter is that the applicant has been lawfully dismissed from the Public Service under Rule 6-01(1)(b) and (e) of the Public Service Commission Rules. The copy of a letter of dismissal is herewith attached marked "A". The question of re-instatement of the applicant therefore cannot and does not arise.

3.

Therefore the respondents pray that the applicant's request for reinstatement be dismissed with costs."

It should be noted that the applicant had not been dismissed at the time he launched the application. The word "reinstate" was probably used in its wide sense to indicate that amongst the reliefs sought was one for an order directing the respondents to allow the applicant to resume work.

The letter dismissing the applicant was signed by the Permanent Secretary Cabinet(Personnel) and is dated the 20th January 1983 and reads :

" I regret to inform you that it has been decided that you be removed from office by way of dismissal in terms of Section 6-01(1)(b) and (e) of the Public Service Commission Rules 1970.

You will be paid a month's salary in lieu of notice, as well as all salary due to you since 23rd April, 1982, when you were interdicted from performing the duties and responsibilities of your office. Your last day of service as an employee of the Lesotho Government will be 28th February, 1983."

/In

In the replying affidavit the applicant avers that his purported dismissal was unlawful and therefore null and void. His counsel adopted, in essence, the arguments of Unterhalter AJ in Mocasi v Solicitor General (CIV/APN/69/82) in which the learned Judge distinguished the majority judgment of the Court of Appeal in the Minister in Charge of Public Service & another v Mokhahlane - C. of A. (CIV) No.5 of 1982 on the ground that that judgment did not examine the question "as to whether on the facts of that case there had been an abuse of the powers conferred by Rule 6 of the Public Service Commission Rules 1970".

I find the Permanent Secretary's Cabinet(Personnel) letter of 20th January 1983 rather puzzling for in one breath he writes that it has been "decided" to dismiss the applicant under Rule 6-01(1)(b) and (e) and in the other breath the applicant is given one month pay in lieu of notice. Miss Fanana could not bring to my attention any provisions in the Rules giving power to terminate on one month's notice the service of an officer who has been confirmed to the Permanent Establishment. I am told that provisions for termination on notice is found in appointments on temporary or contract terms.

If it is assumed that the applicant was so confirmed (as appears to be the case) it seems to me that no need arises for extra remuneration of one month's salary in lieu of notice and indeed a bonus of an extra 8 days to the 28th February. I see nothing in the Rules that would justify this payment unless it falls under the head of "ex gratia" payment which would require the concurrence of the Minister of Finance in terms of s.4(1) of the Public Service Order 1970.

Miss Fanana's argument was that the effect of the Permanent Secretary Cabinet(Personnel) affidavit is an implied acknowledgement that some of the steps taken against the applicant from the 23rd April 1982 up to the letter of dismissal were irregular. I do not think, in view of Crown counsel's admissions on behalf of the respondents, that I need go into the original complaints of the applicant. The Crown admitted irregularities and agreed to make amends for the past by paying him full salary but the submission before me was that the dismissal was valid because it was exercised under a "different Rule".

/The crux

The crux of the respondents' case is this: The power to dismiss under Rule 6 is independent of the power relating to discipline conferred by Rule 5 so the Minister may exercise the power to dismiss a public officer notwithstanding proceedings successful, semi successful, unsuccessful, discontinued, aborted, or irregular under Rule 5. One Justice of Appeal in Mokhahlane's case supra (Goldin JA in a minority Judgment) and two High Court Judges (Rooney J sitting at quo in Mokhahlane supra, a case of dismissal, and Unterhalter AJ in Mocasi supra, a case of compulsory retirement) held otherwise. The latter case has been taken to the Court of Appeal and was heard on or about the 25th January 1983. I have postponed giving judgment in this application for a little while in the hope that during the interval further enlightenment could have been shed. The judgment has not arrived yet and I cannot keep the litigants waiting.

In the absence of any change of stance by the Court of Appeal (for the Court has the privilege of finding that the matter, to quote Baron Bramwell, does not appear to it now as it appears to have appeared to it then) I am bound by the majority opinion in Mokhahlane supra, and proceed on the basis that the power to dismiss a public officer can be exercised under Rule 6 independently of Rule 5.

The resort to Rule 6 is drastic for it does not necessarily permit of a right to a hearing (Mocasi's case) and the head of department must apply for directions from the Senior Permanent Secretary as to the procedure to be adopted which procedure the Public Service Commission must also follow. But reference to the Public Service Commission there must be. It is the latter body that advises the Minister what to do. It is not necessary for me to decide whether the Minister is bound by that advice but it is necessary that a Court of review be satisfied that the Commission had been seised of the complaint and had tendered an advice. It does seem that that advice is not subject to review. The object of reference of a matter involving a public officer to the Commission under this Rule is clear, viz, that an objective body would go over the complaints against the officer unhampered by the rigidity of Rule 5 and make an independent assessment if there is some substance in the complaint or whether it is no more than a mere executive whim.

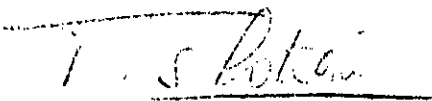
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The letter of dismissal is not written under the authority of the Minister, it does not state that the Public Service Commission has completed any proceedings referred to it by the Head of Department or the Senior Permanent Secretary; and it does not say any advice had been tendered. It should be noticed that the word used is "may" so that if no advice by the Commission has been tendered to the Minister the matter probably ends there.

There is a presumption of course that when a public officer has been dismissed under Rule 6 that the various persons involved in the proceedings have complied with the provisions of the Rule and that is what the majority of Justices in the Court of Appeal assumed in Mokhahlane, supra, but this presumption has been negatived in this instance by the admittedly irregular proceedings taken under Rule 5, the proposed, by apparently unauthorised, disbursement of funds to the applicant, and by the timing of the dismissal. It is not enough, in my opinion, in circumstances such as prevailed in this case to arrive at a conclusion that the Rule has been complied with.

It follows that the dismissal of the applicant by this particular letter of January 20th was invalid.

The respondents to pay the costs.


CHIEF JUSTICE
11th March 1983

For Applicant : Mr. Mphutlane

For Respondents : Miss Fanana