

IN THE HIGH COURT OF LESOTHO

In the matter of :

Bakhethiloe Mafa - Applicant

v

Minister in charge  
of the Public Service - 1st Respondent

The Solicitor General - 2nd Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Acting Judge, Mr. J. L. Kheola on the  
17th day of October 1983

An application is made for an Order in the  
following terms :-

- 1.(a) Calling on the Respondents to stop the proceedings before the "Adjudicator" set up in terms of the Public Service Commission Rules; and there and then on a date to be determined by the above Honourable Court to show cause why;
- (b) An Order setting aside the proceedings before the "Adjudicator" should not be granted.
- (c) An order setting aside the Applicant's purported interdiction by Respondents and also the indefinite, compulsory and unpaid leave and also directing Respondents to forthwith reinstate applicant on his position should not be granted.

/((d) ...

- (d) An order directing the Respondents to pay to the Applicant all the Applicant's arrear salary calculated from the month of April, 1982 should not be granted.
2. That prayer 1(a) operates with immediate effect as an interim interdict.
  3. Directing respondents to pay the costs of suit.
  4. Granting such further and/or alternative relief as the above Honourable Court permits.

On the 26th October, 1982 Rooney, J, granted an interim interdict as prayed in prayers 1(a), (b) and 2. The other issues were to be argued at a later stage and costs were to be costs in the cause.

It is common cause that on the 23rd April, 1982 the applicant was interdicted from performing the duties of his office as a Senior Livestock Assistant. The letter of interdiction reads.-

Mr. Mafa, B.J.,  
Box 24,  
Maseru.  
u.f.s. Director of Livestock.

Sir,

I have received a report to the effect that you have been under police interrogation because of your involvement in matters affecting security.

2. In exercise of the powers conferred on me by the Public Service Order 1970 read with Part 5 of the Public Service Commission Rules, I hereby interdict  
/you ...

you from performing the duties and exercising the powers of your office with effect from to-day's date.

3. I am of the opinion that the public interest requires that you should immediately cease to exercise the powers and to perform the duties of your office. I have taken this decision after carefully weighing both your interest and the public interest and I am satisfied that it is in the public interest that I interdict you immediately.

4. I have determined that during your interdiction you shall be paid half of your normal emoluments.

5. Lastly, you are not to leave your duty station without consultation with your immediate supervisor. This last directive is intended purely to enable me know your whereabouts as I plan to dispose of this matter as early as possible.

Yours faithfully,

S. J. KAO  
Permanent Secretary for Agric &  
Marketing

Copy : Cabinet (P)  
Audit  
Treasury  
D.C.  
D.A.O. Berea

On the 22nd September, 1982 the interdiction was extended for a further period of three months with effect from the 24th July, 1982.

/On the ...

On the 29th September, 1982 the applicant received a letter which subjected him to an indefinite, compulsory unpaid leave in terms of Section 4 (1)(x) of the Public Service Order 1970.

On the 15th October, 1982 the applicant was served with a charge sheet in which he is charged with collaborating with the Lesotho Liberation Army.

I have already stated that on the 26th October, 1982 this Court granted an interim interdict and the disciplinary proceedings before the adjudicator were temporarily terminated. The learned judge found that the Permanent Secretary had not complied with the provisions of Rule 5-41 of the Public Service Commission Rules 1970 which provide that when the head of department received information alleging that an officer has committed a criminal offence he consults with the Attorney General and seeks his directions whether a prosecution is to be instituted. The allegations against the Applicant show that he has committed High Treason.

The papers before me do not show that the Respondents made any attempt to comply with the provisions of Rule 5-41 of the Public Service Commission Rules because if they had done so the Director of Public Prosecutions would have indicated whether or not he is bringing a criminal charge against the Applicant, Rule 5-41 (3) reads.

/"If the ...

"If the Attorney General directs that no prosecution is to take place or if the allegation does not involve a criminal offence, and if in either case the allegation does involve a breach of discipline, and if the head of department proposes to commence disciplinary proceedings, he prepares a charge of a breach of discipline against the officer in accordance with the provisions of rule 5-42."

I now come to the letter of the 22nd September, 1982 (hereinafter referred to as Annexure B) which purports to extend the original interdiction by a further period of three months retrospective to the 24th July, 1982. The Applicant has contended that the Permanent Secretary had no powers to extend the interdict which had long expired according to Rule 5-22(2). On the other hand the Permanent Secretary for Personnel in the Cabinet Office argues that the extension of the period of interdiction was in accordance with the Rule because on the 15th June, 1982 a letter was written to the Applicant to inform him that the period of his interdiction was going to be extended by a further period of three months. Rule 5-22(2) reads:

"(2) If no criminal charge or charge of breach of discipline is preferred within three months against an officer who has been interdicted the interdiction lapses and he shall be allowed to resume duty and he shall be paid his full emoluments for the period of his interdiction unless on the application of the head of the department and after having given the officer

/an opportunity ...

an opportunity to make representations, the Minister after consulting the Commission orders otherwise.

It is common cause that the period of the original interdiction expired on the 23rd July, 1982 and that Annexure A written on the 22nd September, 1982 purported to extend the period of three months retrospective to the 24th July, 1982. The Rule makes it quite clear that every interdiction against an officer lapses after three months if no criminal charge or charge against breach of discipline is preferred within the period of three months. On the 24th of July, 1982 the Respondents had preferred no charge against the Applicant and unless the Permanent Secretary for Agriculture and Marketing had made an application and the Minister had decided otherwise after consulting the Commission, the period of interdiction against the Applicant must be taken to have lapsed on the 23rd July, 1982. In his opposing affidavit the Permanent Secretary for Personnel in the Cabinet Office says that on the 15th June, 1982 a letter was written to the Applicant to the effect that the period of his interdiction was going to be extended and the Applicant was invited to make representations in terms of Rule 5-22 (2). The applicant has filed no replying affidavit to deny or admit the receipt of such letter but I shall take it that he did receive that letter and made no representations.

The question to be decided is: did Applicant's failure to make representations entitle the Minister not to take action within "three months" till the period  
/of ...

of interdiction lapsed on the 23rd July, 1982? To my mind Rule 5-22 (2) requires that the actions to be taken by the head of department and the Minister must be within the first three months of the interdiction. If they fail to take action and decide otherwise, at the end of the first three months the period of interdiction must lapse. In this application the head of department wrote a letter to the Applicant on the 15th June; that was about a month and fifteen days before the interdiction was due to lapse. In other words, by the 15th of June the head of department had already decided that the period of interdiction would have to be extended. Having written that letter we do not know what he did till the 23rd July when the period of interdiction lapsed. It was about three months after the lapse of the interdiction that he wrote Annexure A in an attempt to revive the interdiction that had already lapsed.

The other question is whether or not the Minister or the head of department had the power to make the interdiction retrospective to the 24th July. Section 4 of the Public Service Order 1970 under which the Minister made the Public Service Commission Rules gives him no power to make rules or regulations with retrospective effect, and I see nothing in Rule 5-22 which allows the Minister to make orders which have retrospective effect. We know that there is a presumption against interpreting a statute in such a way as to make it apply retrospectively (See Interpretation of Statutes by G.M. Cockram page 65).

/I come ...

I come to the conclusion that Annexure A could, under no circumstances revive an interdiction that had lapsed and it was, therefore, null and void.

It has been printed out in a number of cases of this Court that the 1st Respondent is empowered by the Public Service Order 1970 to make rules and regulations in terms of Section 4 and that once he has made such rules and regulations he is bound by them. In Solicitor General v. Michael Mocas C. of A. (CIV) No.11 of 1982 Van Winsen, J.A. said:

"The Minister responsible for the Public Service saw it fit to prescribe rules governing the circumstances under which a public servant could be removed from office(Rule 6-01) and the wording of that rule leaves no doubt that the grounds for removal from office must objectively exist before the Minister becomes vested with the discretion to remove a public servant from office. The Minister, by the Rules he himself has formulated, has set out the conditions under which he acquires and may exercise the discretion to remove a public servant from office and he is accordingly himself bound by such Rules."

In the present application the Respondents decided that they were going to interdict the Applicant in terms of Rule 5-21, 5-22. They are bound to follow the procedures prescribed by those Rules and if they fail to do so, their actions shall be set aside as illegal and null and void. I have stated earlier in this judgment that in my view the attempt by the Permanent Secretary for Agriculture and Marketing to extend the period of  
/applicant's ...



Applicant's interdiction after it had legally lapsed was illegal because he failed to comply with Rule 5-22 (2) but that is not the end of the matter.

I now turn to the letter written to the Applicant by the Acting Permanent Secretary for Personnel, Cabinet Office. It is dated the 27th September, 1982 and reads.

Mr. J. B. Mafa  
P. O. Box 24,  
Maseru 100.  
U.I.S. P. S. Agriculture.

Dear Sir,

I wish to inform you that the Honourable Minister responsible for the Public Service, in exercise of the powers conferred on him under Section 4(1)(x) of the Public Service Order 1970, has decided to place you on an indefinite, compulsory and unpaid leave pending finalisation of investigations into your alleged involvement in matters affecting the security of Lesotho.

This decision supercedes your interdiction and shall come into effect on 1st October, 1982.

Yours faithfully

N. B. Bereng  
Acting Permanent Secretary Cabinet (Personnel)

c.c. ACCEN  
AUDIT  
COMPOL (NSS)  
LEGAL

Section 4 of the Public Service Order 1970 is the enabling Act which gives the Minister the powers to make rules and regulations governing the public servants and conditions of their employment. Before I consider the conflicting interpretations placed by the Applicant and Respondents of Section 4 I wish to quote it fully, it reads:

4.(1) "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 purpose, 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:-

- (1) ..... (ii) ..... (iii) ..... (iv) .....
- (v) ..... (vi) ..... (vii) ..... (viii) ....
- (ix) .....
- (x) All matters relating to or arising out of the employment generally of public officers."

In his opposing affidavit the Permanent Secretary, Cabinet (Personnel) says that only rules and regulations have to be published in the Gazette but "other means" need not be so published. The Applicant contends that the Minister has acted ultra vires because he has created

/no ...

no regulations under the said section.

I must say that I am unable to agree with the Respondents' interpretation of the said section on the ground that the Minister is empowered to make rules for the public service as a whole and not for a particular public servant when he has a dispute with the Honourable Minister. In other words, the Minister is empowered to make rules and regulations of general application to every public servant who happens to be faced with a charge of breach of discipline or a criminal charge similar to the charges now facing the Applicant. If I am right in the **view** I take that the rules and regulations made by the Minister must be of general application to the public service as a whole, then they must be published in the Gazette so that all the public servants may know them. Even if the Minister decides to make the regulations or rules by other means - such as writing Cabinet Circular to all public servants or writing letters to each and every public servant in the public service - I am of the opinion that some publication has to be made to emphasize the point that the rule or regulation is of general application to all civil servants. The Minister must not create the impression that whenever he is faced with a problem he will resort to Section 4 and make an ad hoc rule or regulation against a civil servant who finds himself faced with a criminal charge or charge of breach of discipline.

/On the ..

On the 23rd April, 1982 the Applicant was interdicted under Part 5 of the Public Service Commission Rules because there was a police report that he (Applicant) was involved in matters affecting security. On the 15th October, 1982 was served with a charge sheet for breach of discipline and the case was set down for hearing on the 27th October, 1982. This means that by October last year the investigations concerning the Applicant's involvement in the matters involving security were complete. The judgment of Rooney, J, was delivered on the 26th October, 1982 in which the learned judge granted the interdict applied for on the ground that there was no indication in the papers before the Court that the Permanent Secretary for Agriculture and Marketing had complied with Rule 5-41 by making consultations with the Law Officer concerned. Up to now there is still no evidence before me to show that such consultations have been done.

It seems to me that the finalisation of this matter has been unduly delayed because by the 15th of October last year all the investigations had been completed and disciplinary proceedings had already been instituted. It must be borne in mind that the Applicant has not been receiving his emoluments from the 1st of October last year; as he is still a civil servant he is not supposed to look for another employment.

For the reasons stated above I make the following order:

(i) ...

- (i) The Respondents are given a period of twenty-one days within which they must either bring a criminal charge against the Applicant in terms of Rule 5-41 or proceed with the charge of breach of discipline in terms of Rule 5-41 (3).
- (ii) The period of 21 days shall run from the 18th October, 1983.
- (iii) Upon failure of the Respondents to proceed or act as provided in paragraph (i) above within 21 days from the 18th October, 1983 the Respondents must reinstate the Applicant to his position of district livestock officer. The Respondents must pay the Applicant all his arrear salary calculated from the 1st October, 1982.
- (iv) The Respondents must pay costs of suit.

*S. S. Khumf.*  
ACTING JUDGE  
17th October, 1983

For the Applicant : Mr. Maqutu  
For the Respondents : Mr. Mafisa

IN THE HIGH COURT OF LESOTHO

In the matter of :

Samson Ramahomana Matlanyane - Applicant

and

Minister in charge of Public Service - 1st Respondent

The Solicitor General - 2nd Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Acting Judge, Mr. J. L. Kheola on the  
14th day of October 1981

The Applicant has applied for an order in the following terms:

1. Setting aside the Applicant's purported interdiction by Respondents and also the indefinite, compulsory and unpaid leave 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 April, 1982.
3. Directing the Respondents to pay the costs of this application.
4. Granting the Applicant further and/or alternative relief as the Court may determine.

The events which led to the making of this application may be summarised as follows:

/The Applicant ...

The Applicant is employed as a manager in the Livestock Products Marketing Services in the Ministry of Agriculture and Marketing. On the 23rd April, 1982 he was interdicted from performing the duties and exercising the powers of his office in terms of the Public Service Order 1970 read with Part 5 of the Public Commission Rules.

On the 15th June, 1982 the Permanent Secretary for Agriculture wrote a letter to the Applicant informing him that he intended to extend the interdiction period by a further period of three months in order to enable the National Security Services to complete their inquiries. The period of interdiction was in fact extended by a letter dated the 22nd September, 1982.

On the 27th September, 1982 the Permanent Secretary, Cabinet (Personnel) wrote a letter to the Applicant informing him that the Honourable Minister responsible for the Public Service had decided to place him (the Applicant) on an indefinite, compulsory and unpaid leave in terms of Section 4 (1) (x) of the Public Service Order 1970.

In his founding affidavit the Applicant says that he is prejudiced by the fact that there is a blanket reference to the Public Service Order 1970 and Part 5 of the Public Service Commission Rules. He says that the letter of interdiction should have been more specific. There is altogether no substance in

/this

this argument because the powers of the head of department to interdict are defined in Rule 5-21 of the Public Service Commission Rules and no other Rule deals with that subject. The letter of interdiction is so clear that no reasonable man could confuse it with a charge sheet.

On the 20th October, 1982 the Respondents filed a Notice of Intention to Oppose but they never filed an opposing affidavit. On the 22nd November, 1982 the Applicant and Respondents signed a deed of settlement which was made the Order of this Court. It reads :

"Before Mr. Justice Mofokeng of the High Court of Lesotho on the 22nd November, 1982 at 9.30 a.m.

Order of Court

Having heard Mr. M. Gwentshe, advocate for Applicant and having heard Mr. Mafisa, attorney for Respondent :

It is ordered that :

1. Respondents pay to the Applicant all the applicant's arrear salary calculated from, and including the month of April, 1982 to date.
2. Respondents pay the costs of this application.
3. The rest of the issues in dispute between the parties be resolved by the above Honourable Court.

/4. The ...



4. The Solicitor General be directed to submit an answering affidavit in twenty-one days.

By Order of Court"

The Solicitor General did not comply with the provisions of paragraph 4 of the Order. On the 29th December, 1982 Mr. Maqutu, who appeared for the Applicant, applied for a default judgment in terms of prayer 1 of the Notice of Motion. Mr. Mafisa, who appeared for the Respondents, submitted that the 2nd Respondent did not file an affidavit because the matter had been settled a long time ago.

The default judgment was granted as prayed in prayer 1 of the Notice of Motion with costs.

ACTING JUDGE  
14th October, 1983

For the Applicant : Mr. Maqutu

For the Respondents : Mr. Mafisa