CIV/APN/111/84

IN THE HIGH COURT OF LESOTHO

In the Application of :

STEVEN MOKONE CHOBOKOANE Applicant

v

THE SOLICITOR GENERAL Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice T.S. Cotran on the 11th day of September 1984

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The applicant is the former Director of Prisons in the Government of Lesotho. It was common cause that on the 30th September 1982 he was retired from the Public Service.

On the 31st May 1982 the applicant received a letter from the Permanent Secretary of Justice & Prisons asking him to show cause within 14 days why he should not be surcharged M10,149.83, or part of that amount, allegedly misused by him for personal gain, from a fund known as the "Prisons Staff Training School Messing Account". The Permanent Secretary wrote that an "audit report" has shown this to be the case (Annexure A of founding affidavit).

This letter of the Permanent Secretary was written on behalf of the Minister of Finance after a team headed by Mr. V.K.G. Nair, the Controller of Audit, had investigated the Messing Account in question. Mr. Nair averred (in an annexure to the opposing affidavit) that in February/March 1982 he and his team found that the applicant used moneys from the said account "without the authority of the Loans Committee", that the applicant was called to the Auditor General's office in March and was "briefed about

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the irregularities" but he did not "rebut the allegations".

The procedure against the applicant on the face of things conformed with the requirements of s.32(1) and s.34 of the Finance Act 1978.

These provide:-

S.32(1)

> "If it appears to the Minister that by reason of the neglect or fault of any person who is or was at the time of such neglect or fault a public officer the public revenue or public stores have sustained loss or damage, or improper payments of public moneys have been made and if within a period specified by the Minister an explanation satisfactory to him is not furnished with regard to such apparent neglect or fault, the Minister may surcharge against the said person the amount which appears to him to be the loss suffered by Lesotho or the value of the property lost or damaged or the amount improperly paid as the case may be or such lesser amount as the Minister may determine".

S.34

> "The Minister shall cause the person surcharged (through the head of the department concerned), the Auditor-General and the Accountant-General to be notified of any surcharge made under section 32."

The applicant replied in writing on the 9th June 1982 denying that he misused M10,149.83 from the Prison Staff Messing Account and stated that if he is given the chance to "scrutinise and study" the audit report referred to "plus the relevant documents from which the allegation was framed, the meaning and the purpose, this negative feeling is designed to convey, would be viewed differently". This is rather a strange reply but I suppose it might mean that if the applicant is shown the audit report and the documents the negative attitude of his response to the Minister will be viewed differently, or put in another way he will be able to give a satisfactory answer if shown the report and documents but not otherwise. If Mr. Nair is telling

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the truth in his affidavit however the irregularities were pointed out to the applicant and he was given a chance to rebut them at the Auditor General's office and he was unable so to do. The applicant's answer to the Minister is at best vague. The applicant was, as I said, retired in September 1982, and in February 1983 he was formally informed by the Minister that he will be surcharged M10,149.83 and the amount recovered "in full" from his retirement benefits. The action was drastic in that it ruled out any advantage the applicant may have had to settle the surcharge gradually under s.37 of the Act. The applicant on the 3rd March 1983 appealed against the surcharge of M10,149.83. This he did in terms of s.36(1) but the result of the appeal, in apparent compliance with s.37(3) was that the surcharge has been increased to M13,754.17. This must mean surely that when the applicant was called upon to explain the irregularities at the Auditor General's office and failed to rebut them the team had not yet completed the inspection and a further shortage was discovered since then necessitating a further surcharge.

Mr. Sello submits on behalf of the applicant as follows:

(1) With regard to the surcharge of M10,149.83 he was not given the opportunity to defend himself or of being heard by the Minister and that therefore the audi alteram partem rule which is "implicit" from s.32 has been infringed,

(2) That the second surcharge of M3,604.34 was contrary to the provisions of s.32 of the Act in that prior to it being imposed "the Minister never sought an explanation" which makes at least that part of the surcharge "null and void",

(3) That the funds which the applicant allegedly "embezzled" were not "public revenue or monies as contemplated in s.32".

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The first and second submissions can be disposed of at once. The Minister's powers to surcharge a public officer under the Act are neither judicial or quasi judicial. They are purely administrative and are invoked, in the case of a fund manager in the public service, by the bringing in an audit inspection team from the Ministry of Finance to examine the account. It seems to me that the whole exercise is one of arithmetic, no more or less, to determine if there was neglect or fault as defined in s.2(1) of the Act, such neglect or fault to be determined by functionaries under the Minister's jurisdiction but with himself at the top. There is no obligation on the part of the Minister himself to give the applicant any hearing. There is no provision for a hearing even by the committee. A hearing has however been afforded to the applicant at the Auditor General's office when he was shown the irregularities discovered by the audit, and failed to "rebut the allegations", that is, failed to explain the neglect or fault. The applicant's explanation must satisfy the Minister and he did not give an acceptable one. There is no question of the Court substituting its own view to that of the Minister. It does not have the material to do so and I cannot see how, on these papers, the Court can order the audit report to be produced to make an assessment whether there was, or was not, fault or neglect: The applicant made no such request.

The applicant, as he is entitled to, appealed to the Minister who accepted the audit report in terms of s.36(1) and acted in terms of s.36(2). The committee increased the amount of surcharge. This increase arose from the audit exercise of the same account above referred to. It was not a surcharge in respect of any matter extraneous to the Messing Account and no further recourse to s.32 need be had. I doubt if the applicant would have taken a different stance about the latter amount

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from the one he took on the first amount, viz, a stance of vagueness.

The third submission, however, is interesting and rather difficult to determine. A history of the Prison Staff Training School Messing Fund has been given by the applicant and a copy of its regulations were made available to me - Exhibit A - by the respondent. It is not one of the funds named in the schedules of the Act. It seems to be a fund started by, and for the benefit of, a certain junior class of officers just entering the Prisons Service. The fund's recourses consisted of contributions, no doubt from salary or wages of prison trainees, for their maintenance and meals; donations; and profits made from utilisation of monies in the fund in furtherance of its objects, which seem to be somewhat wider than simply maintenance and meals and include for example purchasing welfare equipment and granting of loans to members of the service.

The applicant as the Director of Prisons was the administrator and manager of the fund (Reg.2); money paid from the fund must only be authorised by him (Reg.5) and withdrawals from the bank will be signed by him and the Service Accountant of the Prison School. The Service Accountant, however, is the keeper of records of receipts and disbursements of the fund which, at the end of the year, he must submit to the Director.

Mr. Sello's submission on this point is that the Minister is empowered to surcharge the applicant for neglect or fault if the money in the fund was derived from a public source but not otherwise. The funds in the applicant's charge were money collected from individuals, (although their pay is from public funds), donations and profits from operations, they were not due to, nor did they form part of, state revenue.

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The Crown argues, on the strength of s.2(1)(b) of the Act, that public money is "any moneys (other than money in the Trust Fund for which see s.23) held in his official capacity, whether temporarily or otherwise, and whether subject to any specific allocation or not, by an officer in the public service of Lesotho or by any agent of the Government either alone or jointly with any other person". Mr. Sello says that the applicant was not managing the fund "in his official capacity" but it was administered and managed by him as a private individual who happened to be the director, and whatever the applicant did, even if the auditor's adverse report is correct, have nothing to do with his official duties as the director of Prisons. In other words whilst the members of the fund may sue the applicant for negligence, the Minister may not act on their behalf and exercise his power to surcharge. With respect I find the submission rather difficult to follow. The definition is wide and there is no evidence that the management of that fund could have been held by any person outside the Prisons Service. I think the object of the legislation is to make some senior public servants, responsible for funds collected or contributed by other public servants for a certain object or objects, accountable for neglect or fault not only to members, contributories and donors, but to the state. The intention is to ensure as far as possible that no fiddling takes place and that if it does the public servant in charge will have to pay the price when anything goes wrong if he is, however remotely, negligent or at fault in the manner provided by statute.

The relationship between the applicant and respondent is one of employer and employee albeit of a special kind. At Common law the Crown may not be sued by its servant at all. If

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this has been changed by statute, the applicant's remedy, if he believes that he has not been negligent and is not responsible for the loss, is to sue, to recover his entitlements by way of action (see Monaheng v Clifford Trading (Pty) Ltd. and An. (CIV/APN/164/84 dated 7th September 1984 - unreported).

The application is dismissed with costs.

T. S. Cotran

CHIEF JUSTICE
11th September 1984

For Applicant : Mr. Sello
For Respondent : Miss Tsiu