CIV/APN/114/83
CIV/APN/117/83

IN THE HIGH COURT OF LESOTHO

In the Applications of

LETSIELO THAANYANE — 1st Applicant
EMMANUEL MPALIPALI LEROTHOLI — 2nd Applicant

V

SOLICITOR GENERAL — Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 24th day of February, 1984.

Both Applications are treated as one for the purposes of this judgment because the issues involved are the same although the facts may be slightly different.

The applicants seek for an order :

1. Setting aside the Honourable Minister of Finance's decision to surcharge the Applicant with an amount of M10,196.24,

2. Granting the Applicant such further and/or alternative relief as the Court deems fit;

3. Granting the Applicants the costs of this Application.

Both applicants were civil servants employed by the Lesotho Government. They were both stationed at Maseru Sub-Accountancy as accountants. In 1980 they were criminally charged with the theft of a sum of M20,392.59. They were found not guilty and acquitted. However, on the 22nd December 1982 the Commissioner of

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Inland Revenue issued to each of them a letter (Annexure "A") calling upon them to show cause why they should not be surcharged in the full amount or in part with the loss which occured during the course of their duty at the Sub-Accountancy. On the 30th November 1982 a request was made through their attorneys as to how the amount of M20,392.59 was arrived at. (Annexure "B"). The Commissioner of Inland Revenue replied on the 9th December 1982 as per Annexure "C". There followed an exchange of letters the culmination of which was a letter dated the 30th March 1982 from the Commissioner of Inland Revenue that the Minister of Finance had surcharged each of the applicants an amount of M10,196.24 (Annexure "G"). To Annexure "G" was attached Annexure H1 indicating now the surcharge in each case would be liquidated - in respect of Thaanyane at the rate of M85 per month and in the case of Lerotholi at the rate of M55 per month. In addition, the money due to them in terms of the Compulsory Savings Act would be applied in full towards the recovery of the surcharge. Annexure "H"2 was a payment voucher reflecting payments and balances.

Before the receipt of Annexure "G" applicants wrote through their attorneys to the Commissioner of Inland Revenue showing cause why they should not be surcharged. (Annexure "F").

Both applicants deny that they were negligent. They were not responsible for the receiving and issue of receipts for payments made to Government. They were

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only to see that proper accounts are maintained.

They both submit that the provisions of section 32 of the Finance Act 25 of 1978 have been wrongly and unlawfully applied in their cases because conditions precedent to the exercise of the power under the provisions of the said section did not exist. The Minister of Finance has caused to be deducted, as part of the surcharge, a sum of M4,750.45 (in respect of Thaanyane) and M10,196.24 (in respect of Lerotholi) per Annexure H2" from the salary due to them. This, it is submitted, in wrongful and unlawful to the extent that it conflicts with provisions of section 37(1)(a) of the Finance Act 25 of 1978.

The applications are opposed. The main opposing affidavit appears to be that of the Minister of Finance. In essence, he says that the applicants were negligent, that annexure "A" was written in conformity with the provisions of section 32(1) of the Act; that after reading a report by the Senior Internal Auditor of his Ministry (one Nair who has made a lengthy affidavit as well) it appeared the Ministry had suffered loss to an extent of M20,392.59 due to the negligence of Lerotholi by removing cash and covering it up with bogus cheques. These cheques were dishonoured, and are not even available; That Thaanyane was negligent in not discovering the loss sooner; that he considered the representations made by applicants on the 25th March 1983 and found them unsatisfactory; that he contents that the recovery of M4,750.45 (Thaanyane) was in order since it represents

/arrears

arrears of salary to which the applicant was entitled following his interdiction, criminal prosecution and subsequent reinstatement; that he had ordered the entire sum because he had more than reasonable grounds for assuming that the state would suffer tremendous loss unless a greater part of his salary was withheld; that the amount surcharged exceed M10,000.00, that what was done was lawful in compliance with the law and the degree of negligence, by collusion, was of a high degree.

Nair made a long affidavit in which he sought to establish that Lerotholi stole the money at the Sub-Accountancy and signed bogus cheques. He had also testified before a magistrate during the Criminal trial of both applicants. After examining the documents at the Sub-Accountancy he was of the opinion that twenty-three (23) cheques were included in the Bank deposition slips to cover up illicit removal of liquid cash and this fraudulently balance the cash register and prevented detection of fraud against the Government. The dishonoured cheques should have been kept to expidite a follow up. He is aware that the applicants were criminally prosecuted at the Magistrate's Court, Maseru with the theft of the said money. He had testified in that Court and had referred to certain documents which he subsequently handed into Court as exhibits. He understands that those exhibits have been stolen.

The Minister of Finance (hereinafter referred to as the Minister) concedes that Annexure "A" was written in conformity with the provisions of section 32(1) of

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Act 25 of 1978 (hereinafter referred to as the Act). The section reads thus:

"Section 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 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." (My underlining).

It is quite clear from the reading of this section that it is the Minister who is to initiate an action contemplated against a public servant. It is also quite clear from the reading of the section that the Minister has a discretion. It is also clear that the rights of the public servant are affected. It is also quite plain from the section that the Minister has a duty to make an inquiry into matters of fact or fact and law. The Minister, in my view therefore acts in a quasi-judicial capacity and not in absolute discretion when he invokes the provisions of the section. Unless, therefore, the maxims audi et alteram partem and nemo index in sua causa are excluded by the governing statute they apply. These maxims are sometimes referred to as the rules of national justice.

If the Minister deposes in his affidavit that Annexure "A" is written in confirmity with the provisions

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of Section 32(1) of the Act, he is in fact conceding that it was written on his behalf. What did Annexure "A" convey to the applicants? This is how it reads:

" CONFIDENTIAL

INREV/LOSS/MSU/C

Inland Revenue Office,
Private Ba A 102,
MASERU 100.
22nd November, 1982.

Mr. C.L. Thaanyane
c/o Leribe Sub. Accountancy,
P.O. Box LR 88
LERIBE 300.

Dear Sir,

LOSS OF PUBLIC FUNDS - MASERU
SUB ACCOUNTANCY - M20,392-59.

You are kindly requested to show cause why you should not be surcharged in full or in part with the above loss which arose during the course of your duty at the above sub-Accountancy.

Your reply to be received before the 6th December, 1982.

Yours faithfully,

COMMISSIONER OF INLAND REVENUE".

There is no allegation that it was written on behalf of the Minister persuant to the provisions of Section 32(1) of the Act. The Annexure "A" merely informs the applicants of the loss of public funds at Maseru Sub-Accountancy and that they, the applicants, should show cause why they should not be surcharged with the whole or part of the loss suffered. They were to furnish their

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replies in less than a month. It is now trite law that the applicants ought to have been informed fully about the prejudicial allegations made against them. They must know the case they are called upon to meet. The notice is required for the specific reason that the person in applicant's position ought adequately to have an opportunity of rebutting the case against him.

However, it must be clearly understood that what I have said above does not amount to formalities required in framing a criminal charge. In cases such as the present, the rule merely ensures that the applicants are aware of the charge. The applicants content that Annexure "A" did not come anywhere near satisfying the above test. Mr. Tampi for the Respondents, very fairly in my view conceded the point but submitted that the correspondence that followed had the tendency of clearifying the issues. The point it, Annexure "A" did not, by itself, satisfy the test. As Mr. Tampi was to concede again, it was drawn by an official who assumed that everybody was aquinted with the background facts. It is not always so. Perhaps if the matter is dealt with departmentally can one be excussed in acting on such an assumption. However that may be, the Minister was acting in his quasi-judicial function and had to observe the rules attendant thereto. Despite this irregularity the applicants were surcharged.

The applicants approached this Court by way of a relief as indicated above. It was only from the opposing affidavits that for the first time they knew the real case against them. Before then, they tried to find out but had drawn very little facts. However,

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in the papers before this Court, for the first time, they got to grisps with the reasons why they were surcharged. Unfortunately by then, the Minister had already exercised his discretion and decided to impose a burden or a disability on the applicants. He had in fact, decided to do something even more drastic by invoking the provisions of section 37(1)(b) which read:

> "(b) Where the person surcharged is due to be paid any moneys of whatever description by the State other than by way of salary or pension, the Minister may cause the amount of any surcharge imposed on that person to be deducted from such moneys in whole or in part as he considers" (My underlining)

The Minister had decided to take the whole amounts due to the applicants whereas he should have treated those amounts as arrear salaries and had only taken what section 37(1) (a) entitled him to. These amounts are surelysalaries because as salaries they were never paid to applicants but rather compulsorily put away for them. They cannot, therefore, be called by any other name as long as they constitute a fraction of the applicants' salary which by operation of the law were never paid to them. Again, when all these things were done by the Minister, the applicants had not yet been afforded a hearing persuant to the audi et alteram parten maxim. This, in my view, is clearly wrong. In any event, Mr. Tampi conceded that the Minister had been wrong in withholding the entire salary, that is arrear salaries. He is quite correct because the public servant is not meant to be left penniless in the surcharge proceedings. They are to be applied humanly.

/The Applicants,

The Applicants, lastly, discovered for the first time in this Court that they are not being charged with neglect but with fraud and theft. The allegations by the Respondents in this Court contain issues which should have been placed before the Applicants by the Minister. The Applicants, unfortunately, are not being tried before this Court. It is no longer a question of the Minister having acted mala fide as the Respondents' counsel submitted. It is the question rather of whether the applicants were afforded a hearing before a surcharge was imposed on them. The answer is surely in the negative.

In the premises the Order is granted as prayed.

J U D G E.

24th February, 1984.

For the Applicants : Mr. K. Sello

For the Respondents : Mr. Tampi