

IN THE HIGH COURT OF LESOTHO

In the application by

ATTORNEY GENERAL

Applicant

vs

BEN ALOTSI

Respondent

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice D. Levy
on the 30th day of May, 1986

Applicant as representative of the Minister of Agriculture has brought this application for the ejection of the Respondent from certain house No. 604/C and for payment of an amount of M276.80 as rent from June 1984 to April 1986.

It appears that this house had been allocated to Respondent on 9th January 1979 in his capacity as a civil servant he having been appointed as a Conservation Officer in the employ of the Ministry of Agriculture on 30th August 1979.

On 19th September, 1984, as appears from Annexure A5, proceedings were initiated against the Respondent for his removal from office under the Public Service Commission Order 1970 Sections 6(1)(a) and 6(3) and 10(1)(i) on the grounds that he absented himself from his office without leave or valid excuse from 22nd May 1984 onwards.

On 17th October 1984, as appears from Annexure A6 the Commission advised under Section 6(3) of the Public Service Order 1970 that the Respondent be removed from office by way of dismissal without disciplinary proceedings.
/On .

On 7th November 1984 the Respondent was notified by the Permanent Secretary Cabinet (Personnel) that it had been decided under Section 6(3) of the Public Service Order 1970 that he be dismissed from office with effect from 22nd May 1984. On 17th December 1984 and on 23 September 1985 and again on 29 November 1985 letters were addressed to the Respondent requiring him to vacate the house consequent on his dismissal, all of which notices the Respondent says that he ignored.

On 7th April 1986, acting under the provisions of Public Service Regulations 1985, the Applicant through its officials, ejected the Respondent and his property from the premises. This led to an application for a mandament van spolie which was granted by Mofokeng J, on 18th April 1986 shortly before his untimely death.

Consequent on his order the Respondent was restored to his former position in occupation of the premises in question.

I have carefully perused the reasoning of Mofokeng J, in CIV/APN/124/86. I regret to say that I am unable to agree with his judgment and indeed I am constrained to add that I consider the judgment to be clearly wrong and not one which I should follow. I say this for the following reasons.

Mofokeng J, found that the present Respondent was no longer a public official and therefore no longer amenable to the provisions of the Public Service Regulations which he found applied to public officials and nobody else.

He found accordingly that the powers vested in the Applicant by the Regulations themselves to eject dismissed officers did not extend to ex-officers who, although they

/occupied . .

occupied their houses as public officers, continued to occupy them only as private individuals once dismissed and that the invocation by the Applicant of its powers under the regulations to evict dismissed officers would amount to an act of spoliation against them

Regulation 64(b) of the Public Service Regulations 1985 which were published on 20th December 1985 provides that

" An officer who . (b) is dismissed from the Public Service . shall vacate his quarter with effect from the date of dismissal."

Regulation 65(1) provides that

" When an officer is required to vacate his quarters under Regulation 64(6) . . the following shall apply

- (a) the appropriate authority shall give notice in writing to the officer to vacate his quarters and to remove his personal effects therefrom within seven days from the date of the notice,
- (b) Upon failure to comply with paragraph (a) the appropriate authority may enter the quarters, eject the officer and his personal effects therefrom and take possession of the quarters "

These Regulations were duly made by the Prime Minister as Minister responsible for the Public Service and published in exercise of the powers conferred by Section 4(1) of the Public Service Order 1970 inter alia (v) to exercise disciplinary control over persons holding or acting in such offices and interdicting and removing such persons from office and (x) make provisions for all matters relating to or arising out of the employment generally of public officers.

The Public Service Regulation 1969 as amended in 1971, 1972, 1973 and 1983 were probably the effective regulations at the date of Respondent's dismissal in 1984.

/But . . .

But since Regulation 605(c) of these Regulations as amended by Government Notice 71 of 1983 is in virtually identical terms with Regulation 65 of the 1985 Regulations, nothing turns on the question of which set of Regulations is applicable in the instant case.

These Regulations have been given the force of law by their enabling statute and are not said to be either ultra vires or unreasonable. There can be no doubt therefore that there is appropriate legislation (by way of regulation) enabling Applicant itself through its officers to eject the Respondent from the premises after his dismissal and after notice duly given. (Cf Moroka v Germiston City Council 1961(3) S.A. 573(A) where it was held that power of demolition of unlawful immovable structures may by bye-law be vested in a local authority without recourse to Court for a demolition order). That he is no longer a serving officer is irrelevant. It is the very essence of this regulation that the officer to be ejected has already been dismissed and he is clearly subject to its provisions after dismissal nor do the powers of the Ministry to eject him cease upon his dismissal. To say otherwise would be to reduce a reasonable and proper provision to an absurdity and to deprive it of all effect or utility.

That a mandament van spolie was issued by Mofokeng J, is not decisive of any issue in the instant case. It leaves untouched the question whether the Applicant has any right to eject the Respondent and by its very nature it restores the parties simply to the status quo ante leaving it to a subsequent action to determine the substantive rights of the parties to the spoliation. So even if not clearly wrong Mofokeng J's judgment is not decisive of any present issue between the parties.

/Of course,

Of course, the power to eject or of this Court to order ejectment turns upon the question whether the Respondent has in fact been lawfully dismissed.

But before answering this question I must deal with an objection to the jurisdiction of this Court taken by Respondent's Counsel at the end of his argument and without any notice to the Applicant. The objection so taken is that Section 6 of the High Court Act provides that no civil cause or action within the jurisdiction of a Subordinate Court shall be instituted in the High Court save -

- (a) by a Judge of the High Court acting of his own motion, or
- (b) with the leave of a Judge upon application made to him in Chambers and after notice to the other parties

The Applicant took exception to the late notice of this objection to the jurisdiction and I agree that such an objection should be taken by way of notice on the papers before any further affidavits are filed and at the earliest possible moment. The Applicant then applied orally for the appropriate leave.

In my view this is a proper matter to be entertained in the High Court Respondent sought and obtained a remedy for spoliation in this Court in the previous case between the parties making it reasonable that further proceedings should continue in this Court. Further the matter in issue is one of some complexity and substance making it proper for a decision by the High Court The fact that the objection was made only late in the day after most of the argument had been concluded seems to me to invite a ruling that the case should continue where it has begun. It also seems implicit

/in . .

in Section 6(a) of the High Court Act that the case must have already commenced before a Judge who would otherwise not know that he should assume jurisdiction of his own motion I therefore ruled that the case should continue in this Court

Was Respondent's dismissal lawful?

Section 6(3) of the Order provides that if an officer has contravened the provision of this part in respect of absence from his office or from his official duties he may without delivery of a formal charge or any other proceedings prescribed in these rules be removed from office by way of dismissal or other termination of appointment Section 10(1)(i) provides that a public officer shall not absent himself from his office without leave or valid excuse

The Respondent alleges that a charge had been brought against him and that this charge had to go through the procedure of formal investigation by an appointed adjudicator in terms of the Public Service Commission Rules 1970 (See Section 5-42 and onwards). No charge sheet has been produced by the Respondent and there is nothing to indicate that any procedural steps had been taken which if taken would have entitled the Respondent to continue in office until the determination of proceedings.

Instead, the Applicant has produced documents which show that the procedure set out in Rule 6-01 which may govern proceedings for the removal from office of public officers dealt with under Section 6(3) of the Order has been complied with.

Annexure A5 contains the written proposal of Respondent's head of department, whose signature it bears, to the Permanent Secretary for reference to the Public Service

/Commission . .

Commission for the dismissal of the Respondent in terms of Section 6(3) read with Section 10(1)(1) of the Order. This Annexure states that the information in support of the proposal is attached and directions are requested in terms of that rule. That the Commission sat on the matter and came to a determination on the proceedings appears from Annexure 'A6'. That document shows that the Commission advised that the Respondent be dismissed without disciplinary proceedings in terms of Rule 6-01(3)(c).

The decision of the Minister is expressed in Annexure A dated 7th November 1984 that the Respondent be dismissed with effect from 22nd May 1984.

It seems to me that there has been substantial compliance with the requirements of the Rules and I do not consider that the failure of the Applicant to produce any further documents such as the information attached to Annexure A5 or such written directive as may have been given thereon in any way detracts from this finding. These are requirements which ex facie the documents produced appear to have been satisfied.

See Mocasi v Solicitor General C of A (CIV)6/84

I entertain some doubt whether the provisions of Rule 6-01 of the Rules apply to the exercise of the power to dismiss an officer under Section 6(3) on the grounds of absence from office. This section states that dismissal may take place without any formal charge or other proceedings prescribed in the rules. This section would therefore appear to vest in the Ministry the power to dismiss an officer who has committed a breach of discipline by absenting himself from office in contravention of Section 10(1)(1) of the Order.

/However

However, I have found that there has been substantial compliance with the provisions of Rule 6-01 notwithstanding that the grounds recited therein for removal from office do not include a breach of discipline such as is expressed in Section 10(1)(1) of the Order. Nor, apart from a formal statement that procedural requirements have not been followed does the Respondent allege any flaw in the proceedings against him save that a charge, presumably under Rule 5-01 had been brought but which was not proceeded with. I have already indicated my view that the bringing of such a charge and its discontinuance before any further steps are taken (it is not even alleged that a written charge sheet was served on the Respondent) does not prevent disciplinary action under Section 6(3) of the Order.

In these circumstances I am compelled to find that the Respondent was lawfully dismissed and that he is obliged to vacate the house occupied by him as a condition of his employment which has ceased in terms of Public Service Regulations

Respondent's Counsel has further argued that the Minister, whose notice of dismissal is dated 7th November, 1984, exercised his authority retrospectively by declaring the effective date of dismissal to be 22nd May 1984. I have found that the Minister was entitled to dismiss the Respondent. I cannot agree that an attempt to exercise powers of dismissal retrospectively in this fashion can vitiate the act of dismissal itself. An employer who dismisses his employee on the grounds of non-attendance over a period may well and properly say that the dismissal is effective from the commencing date of non-attendance because from that date the employee is no longer entitled to the payment of any salary or other benefits of his employment which would otherwise have been /earned .

earned during the period of non-attendance. The statement, therefore, that the effective date of dismissal in Respondent's case was 22nd May 1984 meant no more than that he has earned no salary or other benefits from that date on.

The Respondent also argued that there is no allegation that Applicant is the owner of the house occupied by Respondent and is not entitled to rei vindicatio in the absence of such proof of ownership. By way of a corollary he also argued that such an action may not be brought in motion proceedings. I think the better view of the matter is firstly that a tenant may not dispute his landlord's title to property since he occupies the property only with the leave and licence of the landlord from whom he received occupation, secondly the action of rei vindicatio may well be brought in motion proceedings and not necessarily by way of rou actie where the material facts are not in dispute. Thirdly, in an action for ejectment the lessor of property has the right of possession of the property which he has voluntarily parted with to the lessee. On breach by the lessee the lessor is entitled to recover possession by a possessory remedy and not necessarily by the rei vindicatio. For the success of the former remedy proof of ownership is not necessary, indeed, in many cases a lessor is not the owner of the property leased but he is entitled to enforce his right to possession of the property against the world including his lessee and the owner in a proper case. See Pretoria Stadsraad v Ebrahim 1979(4) S A 193(1)

Applicant also claims payment of a sum of money alleged to be arrear rent since May 1984 and said to be calculated at the rate M12 per month from the date of dismissal to the present time. The Respondent has not

/alleged ...

alleged payment of any portion of the rent due and whether the amount claimed be claimed as rent or as damages for wrongful holding over the amount of R12 per month from at latest 1st June 1984 to date is owing by Respondent, that is, an amount in total of $R12 \times 23 = R276$.

The Respondent is ordered to vacate house No. 604/C forthwith and to pay the amount of M276. The Respondent is ordered to pay the costs of these proceedings

D LEVY

A C T I N G J U D G E

30th May, 1986

For the Applicant Mr. Mpopo

For the Respondent MR. Phoko