

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAKAFANE THEKO

Applicant

and

THE PERMANENT SECRETARY (MINISTRY OF HEALTH)

1st Respondent

THE MINISTER OF HEALTH

2nd Respondent

THE ATTORNEY-GENERAL

3rd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 5th day of November, 1990

This is an application for an order in the following terms:-

1. Declaring that Applicant's interdiction from duty with the Respondents has lapsed;
2. Directing the Respondents herein to allow Applicant herein to resume his duties at his substantive post or any suitable place on full pay;
3. Directing Respondents herein to pay Applicant his arrear salary to date;
4. Directing Respondents to pay costs hereof.

It is common cause that at all material times hereto the applicant was employed as an assistant accountant at Queen Elizabeth II Hospital, Maseru. He was under the control of the first and second respondents. On the 5th January, 1990 he was interdicted on no pay because he had been criminally charged with fraud in CR 1130/89. The applicant was jointly charged with two other people who are not involved in the present application.

The applicant and his co-accused first appeared before the Subordinate court on the 14th December, 1989. The case was postponed to the 15th January, 1990 and they were released on their own recognizances. Following several remands the applicant and his co-accused appeared before the court on the 1st June, 1990. Mr. Mohau appeared for all the accused and made an application that the case should be struck off the roll because it had been pending before the court for a long time. Furthermore, the accused have been interdicted on no pay. He stated that the case may be brought before the court when the Crown is ready to proceed with the case.

The public prosecutor said he had no objection to the application of Mr. Mohau. He stated that it was clear from the court's record that the accused were brought before the court on the 14th December, 1989. He had tried everything to see to it that the case should proceed. He talked to Sgt. Rantsatsi and to Captain Sempe about this matter but in vain. The court granted the application and struck the case off the roll.

After the striking off of the case from the roll the applicant's legal representative wrote a letter to the first

respondent demanding that his client be reinstated and be paid his arrear salary. The respondents' reaction to this demand was that their interpretation of the striking off the roll of the case was that the case was still on or pending and that they must all wait for the final outcome of the case.

The respondents have not filed any opposing affidavits but have filed a notice to raise points of law in terms of Rule 8 (10) of the High Court Rules 1980. The point of law is that there is no procedure under the Criminal Procedure and Evidence Act 1981 for striking a criminal case off the roll. They submitted that on the basis of the above point of law there is a case still pending in court against the applicant.

Mr. Mohau, counsel for the applicant, submitted that at the present moment the applicant is not facing any charge because the striking of the case off the roll is equivalent to the dismissal of the charge under section 278 of the Criminal Procedure and Evidence Act 1981. On the other hand Mr. Putcane, Crown Counsel, submitted that the only procedure provided by our law is that described in section 278 of the Criminal Procedure and Evidence Act 1981 (the Act).

It seems to me that the practice of striking off criminal cases from the roll may be common in our courts but I have found no legal basis for it. It is usually a civil procedure whereby a civil action is removed from the roll for lack of prosecution. The case is simply removed from the roll of that particular court.

but the claim is not dismissed. Thereafter the plaintiff may make an application for the reinstatement of the case explaining in an affidavit why he failed to appear on the day the case was set down for hearing. As I have stated above the effect of striking off a civil action from the roll is not to dismiss the action altogether but merely to remove it from the roll of that particular day. The effect is that the case remains pending before the court.

The procedure in our Subordinate Courts is that every morning of the court day the clerk of court takes all the criminal cases files due for hearing or remand on that day and prepares a roll for the day by entering them in a register. Now when the criminal case is struck off the roll for lack of prosecution that simply means that it is removed from the roll of that particular day. The charge is not dismissed.

Section 278 (1) of the Act reads as follows:-

"If a prosecutor

- (a) in the case of a trial by the High Court having given notice of trial, does not appear to prosecute the indictment against the accused before the close of the session of the Court; or
- (b) in the case of a trial by a subordinate court, does not appear on the court day appointed for the trial, the accused may move the court to discharge him and the charge may be dismissed, and where the accused or any other person on his behalf has been bound by recognizance for the appearance of the accused to take his trial, the accused may further move the court to discharge the recognizance."

Although in the instant case the public prosecutor did appear on the court day appointed for the remand, I am of the view that Mr. Mohau ought to have made his application under section 278 (1) (b) of the Act. The applicant and his co-accused would have been discharged and the charge against them would have been dismissed. At the moment the case against the accused is still pending sine die and that is against the provisions of section 106 (2) of the Act which prohibit postponement of a criminal case sine die. The section provides that the accused shall not be remanded for a period exceeding thirty days if he is not in custody, or for a period exceeding fifteen days if in custody. The applicant and his co-accused are not in custody and their case ought to have been remanded for a period not exceeding thirty days until a proper application had been made on their behalf for their discharge and the dismissal of the charge against them.

~~In the application before the Subordinate Court Mr. Mohau said that the case may be brought before the court when the Crown is ready to proceed with the case. This gives one the impression that he was of the opinion that the case must be made to hang somewhere until the Crown was ready to proceed. He did not say the charge against his clients should be altogether dismissed. He wanted the charge to hang over the heads of his clients until the crown was ready to proceed. I do not think that we have such a procedure in our law. An accused person is entitled to know the final outcome of a criminal charge against him and should not be punished by having a charge hanging over his head for an indefinite period.~~

I come to the conclusion that the practice of striking off criminal cases from the roll without dismissing the charge and discharging the accused if in custody is an illegal act which is contrary to the provisions of section 278 (1) and section 105 (2) of the Act.

In the result the application is dismissed. There will be no order as to costs because respondents have not asked for costs.

J.L. KHEOLA
JUDGE

5th November, 1990.

For Applicant - Mr. Hiohau
For Respondents - Mr Putsoane.