

CIV\APN\256\90

IN THE HIGH COURT OF LESOTHO

In the matter between:

NTAI ABRAHAM MONAHENG

Applicant

and

PERMANENT SECRETARY HEALTH
ATTORNEY GENERAL

1st Respondent
2nd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 17th day of September, 1991

This is an application for an order directing the first respondent to resume payment of applicant's salary including arrears as the interdiction dated the 5th January, 1990 has long lapsed and the ground for its imposition has fallen away and costs.

On the 5th January, 1990 the first applicant interdicted applicant on the ground that applicant had been criminally charged with the crime of fraud in CR 1130\89. On the 1st June, 1990 CR 1130\89 was struck off the roll. The applicant alleges that CR 1130\89 is therefore no long pending. He was interdicted without pay and as long as he remains in Government service he is forbidden by the Public Service Rules from obtaining an alternative

employment.

In terms of Rule 8 (10) (c) of the High Court Rules 1990 the respondents have raised a question of law to the effect that there is no procedure under our Criminal Procedure for striking a criminal matter off the roll. It was submitted that there is still a case pending in court against the applicant.

In Nkafane Theko v. Permanent Secretary (Ministry of Health) and others, CIV\APN\215\90 (unreported) dated the 5th November, 1990, Mr. Putsoane, counsel for the respondents, raised the same question of law which was upheld by this Court. I held that the practice of striking off a criminal case from the roll is not sanctioned by any provision of our Criminal Procedure and Evidence Act 1981. In fact it seems to be in direct conflict with the provisions of section 278 which read as follows:

"(1) 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.

- (2) Where the charge is at the instance of a private prosecutor the accused may move the court that the private prosecutor and his sureties be called on their recognizance, and, in default of his appearance, that the recognizance be estreated, and for an order directing the private prosecutor to pay the costs incurred by the accused in preparing for his defence.
- (3) Nothing in this section shall deprive the Director of Public Prosecutions or the public prosecutor with his authority or on his behalf, of the right of withdrawing any charge at any time before the accused has pleaded, and framing a fresh charge for hearing before the same or any other competent court."

I was told that on the 1st June, 1990 when CR 1130\89 was struck off the roll the applicant and the public prosecutor were present. If the latter was unable to proceed on unsound or flimsy reasons the applicant was entitled to apply that he be discharged and that the charge against him be dismissed. If the application was refused the applicant would have to be remanded for a period not exceeding thirty days in terms of section 106 (2) of the

Criminal Procedure and Evidence Act 1981. If the application were granted the applicant would be discharged and the charge against him would be dismissed.

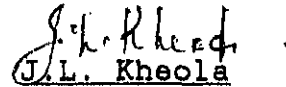
In the instant case the case was struck off the roll but the charge against the applicant was not dismissed. I am of the opinion that the charge against the applicant is still pending; in other words no final decision was made; it is a case awaiting decision or settlement.

I agree with Mr. Putsoane that the procedure of striking off a criminal case from the roll is not sanctioned by our Criminal Procedure and Evidence Act 1981. I do not understand how a criminal case in which the public prosecutor and the accused are present can be struck off the roll by consent when the law is very clear that a criminal case cannot be postponed sine die.

I am of the opinion that the charge against the applicant is still pending. It was never dismissed in terms of the law.

In the result the application is dismissed. There will be no order as to costs. The applicant was interdicted without pay in January, 1990. The Rules under which he was interdicted provide that he may not seek alternative employment while under interdiction. It would be unfair and unjust to hold that costs must follow the result. The State has forced this applicant to

remain unemployed for more than one year and eight months.


J.L. Kheola

JUDGE

17th September, 1991.

For Applicant - Mr. Maqutu

For Respondents - Mr. Putsoane.