CIV\APN\156\88

IN THE HIGH COURT OF LESOTHO

In the matter between:

MARY CLOVER NTHOLI Applicant

and

ATTORNEY GENERAL Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 21st day of October, 1991.

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

(a) Declaring Applicant's interdiction dated 29th December, 1987 null and void;

(b) Directing Respondent to pay Applicant's salary with effect from November, 1987 to date of judgment;

(c) Directing Respondent to pay the costs of this application;

(d) Granting Applicant further and\or alternative relief.

The facts of this case are that

(a) The applicant was employed by the Lesotho Government as a clerical assistant in February, 1972.

(b) During the course of her employment, applicant was promoted to the position of assistant instructional material designer, a post she held until her purported dismissal.

(c) On the 29th December, 1987 the applicant was interdicted without pay from exercising the powers and performing the duties of her office by the Principal Secretary, Ministry of Employment, Social Welfare and Pensions. (See Annexure "A" to the founding affidavit)

(d) Prior to the receipt of Annexure "A" the applicant had been convicted of theft of eighteen blankets, the property of Lesotho Government. The conviction was on the 18th November, 1987. She appealed against the conviction.

(e) Annexure "A" interdicted the applicant retrospectively from the 19th November, 1987.

On the 27th October, 1989 the applicant's appeal was heard and dismissed only on conviction. The sentence was varied. On the 17th August, 1990 the applicant was served with a letter of dismissal.

In his opposing affidavit Mr. Lehlohonolo Mophethe, the Deputy Principal Secretary, Ministry of Employment, Social Welfare and Pensions admits all the facts stated above and concedes that Annexure "A" is defective on the ground that it is retrospective and he concedes that the Principal Secretary had no authority in law to interdict the applicant with retrospective effect. However, he alleges that the interdiction is valid from the 29th December, 1987 being the date on which the letter of interdiction was written.

With regard to the salary of the applicant Mr. Mophethe avers that she was paid her salary up to the 18th November, 1987 and he annexes to his affidavit two pay advice forms (See Annexures "A" and "B" for the amounts of R422-17 and R24-82 respectively). From the 18th November, 1987 to the 29th December, 1987 the applicant was undergoing a sentence in prison and did not work, consequently she is not entitled to any salary for that period. From the 29th December, 1987 the applicant was on lawful interdiction on a no-pay basis and she is not entitled to any pay.

In their submissions both counsel raised the question of severability. Mr. Letsie, for the respondent, submitted that in the present case the good can be separated from the bad. On the other hand Mr. Nathane, for the applicant said the whole letter of interdiction is bad because of retrospectivity and must be thrown out.

The principle of severability was well enunciated by Centlivres, C.J. in Johannesburg City Council v. Chesterfield House 1952 (3) S.A. 809 (A.D.) at p. 822 where he said:

> "It is, in my opinion, of the utmost importance to apply a rule which will lead to greater certainty than the so-called new test referred to in Arderne's and Kneen's cases in considering whether legislation passed by subordinate legislatures, which is in part ultra vires, should be held to be valid after eliminating that part which is ultra vires. The result of the application of that test must, of necessity, lead to great uncertainty, for everything depends on what different members of different courts think the legislature would have done in a hypothetical case. In Reloomal's case, supra, the Court assumed that secs. 10 and 11 of the Ordinance then under consideration were ultra vires. Those sections were dependent on other provisions which were intra vires but the intra vires provisions were not dependent upon those sections. In these circumstances the Court held that the sections objected to might quite well be struck out without affecting the real object of the legislature. It is obvious that by the words " real object" the Court could not have meant entire object, for the object as expressed in the ultra vires provisions could not be carried out. What I think the Court meant was the main object of the legislature. The rule, that I deduce from Reloomal's case is that where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute. In Arderne's case the main object of the Ordinance was to raise revenue by means of taxation and the good could easily be separated from the bad. The main object of the Ordinance was, therefore, not defeated by holding that the Ordinance, shorn of its bad parts, was valid. Where, however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole Statute must be declared ultra vires. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the Statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test."

In the instant case the bad words are those that make the interdiction (Annexure "A") retrospective and they are "with effect

from November 19, 1987". The first question to be decided by the Court is whether if those bad words are expunged from the letter the remaining words will make sense so that the interdiction in terms of Public Service Commission Rules 5 - 21 (1) and 5 - 22 (1) may be carried out. I think the answer must be in the affirmative because as soon as the bad words are expunged the effective date of the interdiction becomes the date on which the letter was written. The letter was written on the 29th December, 1987. In other words the main object of the writer of Annexure "A" was to interdict the applicant in terms of the Rules stated above. When the good is separated from the bad, the main object of Rules can still be carried out because the good is not dependent on the bad.

The second question is whether the test or principle of severability is applicable to the present case. Mr. Nathane submitted that it is not applicable because the respondent has conceded that the letter of interdiction is retrospective. In Mpho Qhobela v. Attorney-General and another, CIV\APN\229\85 (unreported) this Court held that the interdiction of the applicant was null and void on the ground of retrospectivity. In that case the principle of severability was never raised. It cannot be said that the two cases are conflicting or that the earlier case was wrongly decided. I am of the opinion that severability applies to this case.

It is also clear from the decided cases that severability

applies not only to statutes, subordinate legislation rules made under an enabling act but to ordinary contracts which are partly illegal (See Eastwood v. Shepstone, 1902 T.S. 303; Bal v. van Staden, 1903 T.S. 81 -2; du Preez v. Laird, 1927 A.D. 27).

I am of the opinion that from the 29th December, 1987 when Annexure "A" was written the interdiction became valid until she was lawfully dismissed after the appeal on conviction was refused.

From the 18th November, 1987 to the 29th November, 1987 the applicant was serving a prison sentence and did not render any service to her employer and then she is not entitled to any salary. She was not stopped from rendering her service by the employer. (See Boyd v. Stuttaford & Co., 1910 A.D. 101).

The period from the 29th November, 1987 to the 29th December, 1987 must be considered in an entirely different light. The applicant avers that on the 29th November, 1987 when she was released on bail, she reported herself at her place of work but a certain Mr. Mohapeloa who was then the Deputy Principal Secretary told her not to come to work because her affairs were being considered. At that time Mr. Mophethe had not yet arrived at the Ministry of Employment. He was in the Ministry of Foreign Affairs. His bold statement that the applicant did not report for work on the 29th November, 1987 cannot be true because he was not in that Ministry as yet. He does not even refer to any documents he may

have found in his new office or to any source of his information.

I am of the opinion that the applicant has proved on a balance of probabilities that on the 29th November, 1987 she reported at her place of work and offered her services and that her employer stopped her from working. The applicant is therefore entitled to her salary for the period from the 29th November, 1987 to the 29th December, 1987 when she was interdicted.

In the result I make the following order;

(a) The interdiction of the applicant is declared null and void for the period from the 19th November, 1987 to the 28th December, 1987, but valid from the 29th December.

(b) The applicant shall be paid her salary for the period from the 29th November, 1987 to the 28th December, 1987.

(c) As far as costs are concerned I think that the applicant's success on a very small part of her claim entitles her to minimal costs. I order that she must be paid one fifth (1\5) of her costs.

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J.L. KHEOLA

JUDGE

21st October, 1991.

For Applicant - Mr. Nathane
For Respondent - Mr. Letsie.