CIV/APN/296/90

IN THE HIGH COURT OF LESOTHO

In the Application of :

SEC. LT. BABELI .....Applicant

and

POLICE DISCIPLINARY
APPEAL BOARD ..... 1st Respondent
COMMISSIONER OF POLICE ..... 2nd Respondent
ATTORNEY-GENERAL---------- 3rd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 6th day of March, 1991.

This is the extended return day for confirmation of a Rule Nisi obtained by the applicant against the Respondents. The Rule is framed in the following terms:

"1. The Respondents are hereby directed and called upon to show cause (if any) on the 17th day of December 1990 at 9.30 a.m. or so soon thereafter as the matter may conveniently be heard, why

(a) the proceedings and decision of the senior officer Major Horoto dated 18th September, 1990 as upheld by first Respondent's decision of 17th October, 1990 in Applicant's disciplinary proceedings therein shall not be reviewed and set aside;

(b) The first Respondent shall not be declared to have flouted the audi alteram partem rule

2/ by having .....

by having failed to accord the applicant a fair hearing before its decision of the 17th October, 1990 as aforesaid;

(c) The Second Respondent's decision demoting the applicant from the rank of Second Lieutenant to Warrant Officer with effect from 6th November, 1990 shall not be declared null and void and thereby set aside.

(d) The Second Respondent shall not be declared to have flouted the audi alteram rule in failing to accord applicant a fair hearing before demoting him as aforesaid;

(e) Respondents shall not be ordered to pay costs of this application.

2. The first and Second Respondents are hereby directed and called upon to dispatch the record of the aforesaid disciplinary proceedings involving the applicant to the Registrar of this Honourable Court within fourteen (14) days of the receipt of this notice and to notify the applicant in writing that they have done so.

3. The Respondents are called upon to show cause why applicant shall not be granted such further and/or alternative relief as this Honourable Court may deem fit."

The Respondents intimated their intention to oppose confirmation of the Rule and affidavits were duly filed by the parties.

It is common cause from the affidavits that the applicant, a Second Lieutenant in the Police Force was, on 4th September, 1990 disciplinarily charged with contravention of Regulation 24 of the Lesotho Mounted Police Regulations, 1972 read with Number 37 of its Schedule of offences and section 18 of Part III of the Police Order 1971 (as amended.)

3/ The facts .....

The facts disclosed by the body of the charge sheet were, in essence, that on or about 27th August, 1990 and at or near Mohalalitoe in the district of Maseru the applicant unlawfully and intentionally failed to take appropriate or reasonable steps as a result of a report made to him by a member of the public that the police had assaulted her during a public disturbance which even resulted in the dealth of another person. Although he had pleaded not guilty to the charge the applicant was, at the end of the proceedings, found guilty as charged and sentenced to pay a fine of M20 by Major Horoto, the Senior Officer who presided over the case.

In the interest of clarity, it may, perhaps, be convenient to quote the legal provisions under which the applicant was charged. Regulation 24 of the Lesotho Mounted Police Regulations 1972 reads:

> "24. Any member of the Force who commits any of the offences set out in the following Schedule, or who contravenes these regulations, shall be deemed to have committed an offence against discipline, and such offence shall be enquired into, tried and determined, and the offender shall in every case suffer such punishment, according to the degree and nature of the offence, as may be imposed in accordance with the provisions of the Order, or these regulations."

Number 37 of the Schedule of offences to Lesotho Mounted Police Regulations 1972 reads:

> "Being guilty of any act, conduct, disorder or neglect to the pre-

judice of good order and discipline."

Section 18 of Part III of the Police Order 1971 (as amended) reads in part:

"18. A member of the Force who is guilty of an offence under this Order shall be liable to one or more of the following punishments:

A .....

(1) .....

(2) In the case of a Subordinate officer -

(a) .....
(b) .....
(c) a fine of M20.00. ....."

Briefly, the evidence adduced before, and accepted, by the presiding senior officer was, that on the day in question, 27th August, 1990, there was a public disturbance in Maseru. The applicant was in command of a number of police officers patrolling, inter alia, the area of Mohalalitoe. At one stage the applicant drove to Mohalalitoe where he met the complainant who had allegedly been assaulted with sjamboks and injured by some police officers under his command. Instead of assisting her to a doctor for medical treatment the applicant left the injured complainant with instructions that she should get nicely dressed and he would come to collect her at some later time. In the mean time the applicant kept himself busy with transportation of suspects and police officers. The injured complainant had to foot it to a place where she could find medical attention.

5/ It was .....

It was by sheer luck that on the way the distressed complainant was spotted by some other members of the police force (not under the applicant's command) who rushed her to a doctor for medical treatment. Indeed, the applicant did not even report either the injury of the complainant or the serious disturbance which had resulted in the death of another member of the public at Mohalalitoe until he was questioned about it.

In his affidavits the applicant avers, inter alia, that sections 11 and 25 of the Lesotho Mounted Police Regulations, 1972 deal with neglect of duty whilst section 37 thereof deals with good order and discipline. He should, therefore, have been charged under section 11 or 25, instead of section 37 of the Lesotho Mounted Police Regulations, 1972. Failure to do so rendered the charge against him defective. His conviction should, for that reason, be set aside, on review. These averments, are, however, denied by the 2nd Respondent.

It is to be observed that the Lesotho Mounted Police Regulations 1972 has no sections 25 or 37. It has only 24 Regulations and not sections. The purported section 11 of the Lesotho Mounted Police Regulations 1972 which is, in fact, Regulation 11 thereof deals with maternity leave and has nothing to do with the question of neglect of duty or for that matter, good order and discipline.

6/ What the .....

What the applicant had in mind was, perhaps, numbers 11, 25 and 37 of the Schedule of offences to the Lesotho Mounted Police Regulations. 1972. As it stands the applicant's averment that he ought to have been charged under sections 11 or 25 instead of section 37 of the Lesotho Mounted Police Regulations 1972 is, therefore, confused and void of substance.

In the decision of Major Horoto, the presiding senior officer, the applicant's failure to render immediate assistance to the complainant (a member of the public) under the circumstances in which he found her in, as well as his failure to report the serious disturbance which had resulted in the death of another member of the public at Mohalalitoe was a conduct prejudicial to the good police discipline and or relations between the police force and the public.

It seems to me Regulation 24 of the Lesotho Mounted Police Regulations, 1972 read with Number 37 of its Schedule of offences does render the applicant's conduct an offence. That granted, the decision of the presiding senior officer cannot, in my opinion, be faulted. I am not prepared, therefore, to set it aside on the ground that the charge preferred against the applicant was defective in the manner suggested by him.

In his affidavits the applicant further averred that Major Horoto could not show him a letter of

7/his appointment, ...

his appointment, was not lawfully appointed to preside over the disciplinary case against him, did not afford him the opportunity to make thorough cross-examination of witnesses and was, therefore, bias against him.

Although he conceded that he could not show the applicant any letter of appointment because he had none, Major Horoto averred that he had been verbally instructed by the 2nd Respondent to preside over the applicant's case. He was confirmed in that regard by the 2nd Respondent who deponed to an affidavit in which he categorically stated that he had instructed Major Horoto to preside over the disciplinary case against the applicant.

I consider it reasonable to accept as the truth the story of Major Horoto corroborated by that of the 2nd Respondent that he was instructed to be the presiding officer in the disciplinary case against the applicant and, therefore, reject as false the latter's uncorroborated version that he was not.

As regards the applicant's averment that he was not afforded the opportunity to cross-examine witnesses, which averment is denied by the presiding officer, I must say I have had the occasion to read through the record of proceedings. There is no indication that the applicant was denied the opportunity to cross-examine any of the witnesses who had testified in this case. On the contrary the record of proceedings shows that the applicant was afforded the opportunity

8/ cross-examine ....

cross-examine all the witnesses who testified against him. The record of proceedings does not, therefore, bear out the applicant in his averment that the presiding officer denied him the opportunity to cross-examine the witnesses and was, therefore, bias against him. That being so, I am not convinced that the decision of the presiding officer can properly be set aside on review for the reasons advansed by the applicant in his founding affidavit.

It is to be observed, however, that ad para 4 of his replying affidavit the applicant raised, for the first time, the point that whilst the prosecution was afforded the opportunity to address the presiding officer at the close of the defence case, he was not afforded the same opportunity. This, in my view, is a point which should have been raised in the founding affidavit. Failure to do so has deprived the Respondents the opportunity to rebut the averment in their answering affidavits.

In any event, it is clear from the record of proceedings that after the prosecution had addressed the presiding officer and a verdict returned the applicant was afforded the opportunity to address him under the heading "Mitigation case." A proper reading of that address leaves no doubt in my mind that what the applicant did was to sum up the evidence and make submissions. The address had nothing to do with mitigation.

9/ I concede .....

I concede that in his conduct of the proceedings the presiding officer does not seem to have followed the procedure in the sequence normally followed in a court of law. For example, one would expect that after the defence had closed its case both the prosecution and the defence would be afforded the opportunity to address the presiding officer before a verdict was returned. In the present case it would appear, however, that after the prosecution had addressed the presiding officer a verdict was returned and only then did the defence address him. There was, to that extent, a procedural irregularity. Be that as it may, it would appear that the applicant was aggrieved by the presiding officer's decision against which he appealed to the first Respondent, presumably in terms of the provisions of section 21 (1) of the Police Order 1971. That section reads:

> "21. (1) Any member of the Force convicted or sentenced by a senior officer, a subordinate officer in charge of district or board as provided in subsections (2) and (3) of section 12 of this Order may appeal to a Police Disciplinary Appeal Board which may alter, reverse or confirm the conviction or increase, reduce, vary or confirm the sentence. The Police Disciplinary Appeal Board shall consist of one or more senior officers appointed by the Commissioner from time to time with due regard to the requirements of impartiality."

The gist of the grounds of appeal was that no identification parade had been held and the conviction was against evidence.

10/ The .....

The first Respondent was constituted by Lt. Col. Makara. As in the case of Major Horoto the applicant disputed the legality of the appointment of Lt. Col. Makara to constitute the first Respondent. The averment of Lt. Col. Makara that he was lawfully appointed to constitute the first Respondent was, however, confirned by 2nd Respondent who even attached to his answering affidavit Annexure "JLDI", a letter dated 15th October, 1990, by which he had clearly appointed him to constitute the first Respondent.

There is not the slightest doubt in my mind that Lt. Col. Makara was lawfully appointed to constitute the first Respondent. The applicant's contention that he was not, cannot, therefore, hold water.

It is significant that the applicant had, in his notice of appeal, specifically requested to be represented by a senior officer for the prosecution of the appeal, presumably in accordance with the provisions of the Police Order 1971 of which section 17 reads:

> "17. At all trials held under this Order before a Board of officers or a subordinate court the persons accused shall be entitled to be represented by a legal practitioner admitted to practise in Lesotho or, except in the case of an appeal heard as provided in subsection (4) of section 21, by a senior or subordinate officer approved for this by the Commissioner."

11/ However, in .....

However, in complete disregard of the applicant's request, under the provisions of the above cited section, the first Respondent dealt with the appeal and summarily dismissed it, on 17th October, 1990, in the absence of either the applicant or his representative and without affording them the opportunity to be heard. I am not aware of any provision of the Police Order, 1971 that authorises the first Respondent to dismiss an appeal summarily in the manner he did. In my finding he ought to have afforded the applicant or his representative the opportunity to be heard before disposing of the appeal. Failure to do so has rendered the first Respondent's decision to be a breach of one of the cardinal principles of natural justice viz. audi alteram partem and for this reason, it cannot be allowed to stand.

It is common cause that after the appeal had been decided against him, the applicant was, on 6th November, 1990, demoted by the 2nd Respondent from the rank of Second Lieutenant to that of Warrant Officer, in the Police Force. It has been argued that the decision of the second Respondent to demote the applicant, as he did, was based on the provisions of section 20 (2) of the Police Order 1971 and not the decision of the first Respondent.

I do not agree. To hold the contrary would, in my view, imply that the 2nd Respondent could have decided to impose punishment on the applicant

12/ even before .....

even before a finality had been reached on the latter's guilt. That would obviously be an arbitrary decision and in my opinion, totally untenable. There is not the slightest doubt, in my mind, that the decision of the 2nd Respondent to demote the applicant in terms of the provisions of Section 20 (2) of the Police Order, 1971, as he did, was influenced by the fact that the first Respondent had dismissed the appeal. As it has already been stated earlier, the first Respondent dismissed the appeal without affording the applicant or his representative the opportunity to be heard. The dismissal was, for that reason, a miscarriage of justice.

I have, earlier in the judgment, pointed out that in his conduct of the disciplinary proceedings, the presiding officer, Major Horoto, committed a procedural irregularity. Had the appeal been conducted in a proper and fair manner the first Respondent would, in all probabilities, have decided whether or not the procedural irregularity was such that it could have vitiated the disciplinary proceedings. As the first Respondent did not conduct the appeal in a fair manner, it cannot be said with any degree of certainty whether or not the irregularity vitiated the disciplinary proceedings.

In the result I would confirm the rule only in terms of prayers 1(b) and (c), but not 1(a), of the notice of motion and in addition make the following:order:

(1) the appeal must be heard de novo before the first Respondent who

13/ will ....

will, however, be constituted by a different senior officer,

(2) the second Respondent must make a decision whether or not to demote the applicant only after the results of the appeal referred to in (1) above have been known and

(3) As he has partly suceeded and partly failed in this matter the applicant is awarded 2/3 of the costs.

B.K. MOLAI,

JUDGE

6th March, 1991.

For Applicant : Mr. Ramolibeli
For Respondents: Mr. Mohapi.