

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MATSIE CHOBOKOANE

APPELLANT

AND

ATTORNEY GENERAL  
MINISTRY FOR THE PUBLIC SERVICE

1ST RESPONDENT  
2ND RESPONDENT

Held at Maseru

Coram

I. Mahomed P.  
L.W.H. Ackermann J.A.  
J. Browde J.A.

JUDGMENT

BROWDE J.A.

During 1987 the appellant was employed by the Ministry of Works as an Assistant Engineer. The facts which were set out in his founding affidavit revealed that on 15 February 1989 the appellant received a letter from the Ministry of Works informing him that he had "been removed from office by way of dismissal without disciplinary proceedings under Section 6(3) of the Public

Service Order, 1970, in consequence of your absence from duty without leave in contravention of Section 10(1)(i) of that Order". The appellant instituted application proceedings before the High Court for an order

- (a) Declaring applicant's dismissal from the public service null and void;
- (b) Directing Respondents to pay Applicant's salary with effect from the date of the purported dismissal;
- (c) Directing the Respondents to pay the costs.

The application was opposed and in due course was dismissed with costs. It is against that order that the appellant has come before this Court.

The facts leading up to the appellant's dismissal are common cause and are as follows:

- (i) At all material times the appellant was employed as an assistant engineer with the Ministry of Works.

- (ii) On 24 December 1987 Appellant was transferred from the Central Region, Maseru, to the Southern Region Mohale's Hoek as assistant engineer (South) with effect from 11 January 1988.
  
- (iii) The appellant did not report for duty at Mohale's Hoek and as a result the Engineer (Executive) addressed a letter to him calling upon him to "appear for work at the office of Engineer (South) as soon as possible in order to avoid unnecessary disciplinary action that may be taken against you".
  
- (iv) The appellant still did not report for duty and on the 28 January 1988 the appellant received a letter from the Senior Roads Engineer informing him that if he did not report for work on the 29 January 1988 and take up his transfer as directed he would be considered to be on unpaid leave as and from that date.
  
- (v) Appellant did not report as directed, or at all, but on 18 February 1988 he wrote to the Principal Secretary, Works, setting out his complaints and asking, *inter alia*, that his transfer to Mohale's Hoek be suspended pending an appeal which he wished to make. He also asked whether

he could be allowed to proceed with his "current assignments" (presumably in the Maseru area) until his case had been resolved.

(vi) Appellant received no response and on 15 February 1989 the letter of dismissal was received by him.

Various interesting arguments relating to the alleged invalidity of appellant's dismissal have been placed before us in appellant's heads of argument. Respondent's counsel has conceded, however, that if the appellant was placed on unpaid leave he could not be dismissed on the grounds of unlawful absenteeism. In my view this concession is clearly correctly made and in the light of the unequivocal terms of the letter from the Senior Roads Engineer dated 28 January 1988 the Appellant was on unpaid leave from the following day. Indeed in his founding affidavit the appellant states that he considered himself as being on unpaid leave as from 29 January 1988. That being so, there can be no reason to differ in any way from the finding of the Court *a quo* that appellant's dismissal was unlawful.

The only issue for decision in this appeal (apart from the question of costs) is, therefore, whether the appellant is entitled to be paid the salary which he claims, namely salary with effect

from the date of the purported dismissal.

Counsel for the appellant in support of his submission that the retirement or dismissal of a members of the public service procured contrary to the provisions of Public Service Order 1970 is a nullity, referred to the judgment in Schierhout vs Minister of Justice 1926 AD 99. That case certainly supports the submission as far as it goes. When it comes to the payment of salary, however, the Appellate Division made it clear that the unlawfully dismissed servant can claim the salary of his office only upon tender to perform his duties. Such a tender has never been made by the appellant whose attitude appears from the affidavits to have constantly been that he was prepared to work where he wanted to work and not where he was required to work by the department. In any event, as I have already pointed out, the appellant accepted that he was on unpaid leave until his purported dismissal and it is incomprehensible to me how he can justify a claim for salary from that date. There appears to be no logical reason and certainly no reason in law why the appellant should be better off after his dismissal than he was when still in employment and on unpaid leave. Appellant's counsel has submitted that a public servant whose retirement is unlawful is not confined to a remedy in damages but is entitled to treat his retirement as null and void and to claim the salary of his office. He relies again on

Schierhout's case (supra) but frankly refers to the requirement laid down by the Appellate Division that before the salary can lawfully be claimed the servant must tender to perform his duties. That tender must, of course, be to perform those duties legitimately called for by the employer in terms of the contract between them and not the duties decided upon by the servant as being convenient to him. There is no suggestion that the department's requirement that the appellant work at Mohale's Hoek was in any way in breach of the contract of service and consequently there has been no valid tender by the appellant to perform his duties. This is fatal to any claim for salary that he might have had.

Despite finding that the appellant's purported dismissal was unlawful the learned Judge *a quo* dismissed the application with costs. The appeal must therefore succeed insofar as prayer (a) in the notice of motion is concerned and appellant's dismissal from the public service is declared null and void. The appeal relating to the payment of salary is dismissed.

The appellant is entitled to costs both in the Court below and in this Court. However in both Courts a good deal of the argument was taken up by appellant's contention that he was entitled to salary from the date of the purported dismissal and as on this

aspect the appellant has failed in both Courts the respondent is entitled to some relief in regard to costs. I think justice will be done if the respondent is ordered to pay one-half of the appellant's costs both in the Court a quo and in this Court.

The order made therefore is that the purported dismissal of the appellant is declared null and void. The appellant's claim for salary is dismissed and the respondent is ordered to pay one-half of the appellant's costs in the Court a quo and in this Court.

*Browde*

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J. BROWDE  
JUDGE OF APPEAL

I agree

*I. Mahomed*

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I. MAHOMED  
PRESIDENT OF THE COURT OF APPEAL

I agree

*L.W.H. Ackermann*

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L.W.H. ACKERMANN  
JUDGE OF APPEAL

Delivered at Maseru this 26<sup>th</sup> day of July 1991.

For the Appellant : Mr. S. Malebanye  
For the Respondent : Mr. T.S. Putsoane