CIV/APN/91/91

IN THE HIGH COURT OF LESOTHO

In the Application of:

JOHN MATSOSO BOLOFO — Applicant

and

ATTORNEY-GENERAL — 1st Respondent
COMMISSIONER OF POLICE — 2nd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 27th day of October, 1994.

The applicant herein filed, with the Registrar of the High Court, a notice of motion in which he moved the court for an order framed in the following terms:

> "(a) Declaring applicant's purported retirement from the Police Force null and void;
>
> (b) Directing Respondents to pay the costs of this application in the event of opposition;
>
> (c) Granting applicant such further and/or alternative relief as this Honourable Court may deem fit."

The founding affidavit was duly filed by the applicant. The Respondents opposed the grant of the order sought in the applicant's notice of motion but filed no answering affidavit. They instead filed notice of intention to raise, at the hearing, two questions of law, presumably in terms of the provisions of rule 8(10)(c) of the High Court rules 1980. The questions of law raised by the Respondents were that the order sought by the applicant could not be entertained firstly because it was prescribed in terms of the provisions of the Government Proceedings and Contracts Act, 1965 and secondly on account of the provisions of the Removal of Public Officers (Validation) Order, 1988.

The facts disclosed by the founding affidavit were briefly that the applicant was, at all material times, employed, by the Government of Lesotho, as a major and attached to the Royal Lesotho Intelligence Service branch of the Police Force. He was, therefore, a public officer.

On 10th November, 1987 the applicant received a letter (annexure JMB "1") by which the Director of the Royal Lesotho Intelligence Service instructed him to give reasons (if any) why he should not be retired,

following his failure to take proper and timeous action in connection with terrorists incidents at Maphutseng on 8th November, 1987. In reply applicant addressed, to the Director, a letter (annexure JMB "2") of the same date, 8th November, 1987, in which he pointed out that he had been betrayed by his colleagues who had in their possession the necessary information, upon which he could have taken proper and timeous action, but failed to convey it to him. He denied, therefore, the accusation that he had committed any misconduct for which he could be liable for retirement on public interest.

Notwithstanding the reasons he had given, on 17th December, 1987 the applicant received, from the Secretary of the Military Council, a letter (Annexure JMB"3") by which he was advised that in terms of the provisions of Section 29(f) of the Police Order, 1971 as amended by the Police (amendment) Act, 1983 he had been retired from the Police Force, with effect from 1st January, 1988.

In his founding affidavit applicant further averred that following the allegations contained in annexure JMB"1" a Commission of Inquiry was established to inquire into his alleged misconduct. It exonerated him, a fact which was, however, denied by the Respondents per annexure JMB"7", the letter of

18th September, 1990 filed by the applicant himself.

From the date of his alleged retirement in 1988 up to 1990 the applicant had been shuttling between the offices of the Military Council and Public Service Personnel in an attempt to reach an amicable settlement of his purported retirement but all in vain. Hence the institution of these proceedings in 1991.

It is significant that according to the founding affidavit, which is the only available evidence before this court, the cause of action accrued in January 1988. However, it was not until 21st March, 1991, i.e a little over 3 years later, that the applicant filed with the Registrar of the High Court the notice of motion for an order as aforesaid.

Section 6 of the Government Proceedings and Contracts Act, 1965 provides:

> "6. Subject to the provisions of sections six, seven, eight, nine, ten, eleven, twelve and thirteen of the Prescription Act, no action or other proceedings shall be capable of being brought against Her Majesty in her Government of Basutoland by virtue of the provisions of section two of this Act after expiration of the period of two years from the time when the cause of action or other

proceedings first accrued."

It is common cause that from 1st January, 1988 up to the time when he instituted these proceedings in 1991 the applicant had been shuttling between the offices of the Military Council and Public Service Personnel with the hope that the question of his retirement could be settled amicably. When that did not materialise he decided to initiate these proceedings.

If the applicant had applied for condonation to institute these proceedings outside the prescription period of two years, the court could, in my opinion, have been inclined to consider that application favourably in the circumstances of this case. Although he clearly instituted these proceedings outside the limit of two years prescribed by the provisions of section 6 of the Government Proceedings and Contracts Act, supra, I would not decide the case against the applicant on that basis.

As regards the second point of law raised by the Respondents, it is significant that the now repealed section 29 (f) of the Police Order, 1971 which was the law applicable, at the time, provided:

"29. The Commissioner may, in the case of any member of the Force, at

any time, but after having given that member an opportunity to make representations:

(a) .....
(b) .....
(c) .....
(d) .....
(e) .....
(f) retire in the public interest any such member who displays an habitual inattention to orders, or general incompetence, or fails to obey orders, or fails to co-operate with other members of the Force, or manifests a g u a r r e l s o m e disposition or want of courage, ability or zeal, although he may not be guilty of a specific offence."

The letter (annexure JMB "3") of 17th December, 1987 by which his retirement from the Police Force, with effect from 1st January, 1988, was communicated to the applicant emanated from the Military Council i.e. not the Commissioner of Police. To the extent that it was the Military Council and not the Commissioner of Police who retired the applicant from the Force, the procedure stipulated by the provisions of section 29 (f) of the Police Order, 1979 was, in my view, not complied with. The question that arises is whether or not failure to comply with the procedure laid down under the provisions of section 29(f) of the Police Order, supra, had the effect of nullifying the applicant's retirement from the Force. Section 3 of

the Removal of Public Officers (validation) Order, 1988 provides:

> "3. Notwithstanding the provisions of the Public Service Order, 1970, or of the regulations made thereunder or of any other law, any public officer removed or purported to have been removed from office by any person acting or purporting to act by or under the authority of Government, whether by way of dismissal, retirement or otherwise, for any reason whatsoever, during the specified period, shall be deemed to have been lawfully removed from office, whether or not the procedure for such removal was complied with."
>
> (my underlinings).

I have underscored the words "whether or not the procedure for such removal was complied with" in the above cited section 3 of the Removal of Public officers (validation) order, 1988 to indicate my view that, on the authority thereof, failure to comply with the procedure laid down under the provisions of section 29(f) of the Police Order, 1971 could not, and did not, nullify the applicant's retirement by the Military Council. That being so, the answer to the question I have earlier posted viz. whether or not failure to comply with the procedure laid down under the provisions of section 29(f) of the Police Order, supra, had the effect of nullifying the applicant's retirement from the Force, must be in the negative.

Turning now to the question whether the applicant could, in the circumstances of this case, institute these proceedings against the Respondents, it is worth noting that the removal of Public Officers (Validation) Order 1988 came into operation with retrospective effect from 20th January, 1986. When, on 1st January, 1988, the applicant was retired from the Police Force, the order was, therefore, applicable. Section 4(1) thereof clearly provides:

> "4(1) notwithstanding any law to the contrary, no action or other legal proceedings whatsoever, whether civil or criminal, shall be instituted against,
>
> (a) the Government; or
>
> (b) any person acting by or under the authority of Government;
> for or on account of, or in respect of, the removal from office of any public officer during the specified period."

The specified period referred to under the provisions of the above cited section 4(1) of the Removal of Public officers (Validation) Orders, supra is defined by section 2 thereof as meaning the period between 20th January, 1986 and 31st May, 1988.

However, in total disregard of the provisions of section 4(1) of the Removal of Public Officers (Validation) Order, 1988 the applicant instituted, on 21st March, 1991, the present proceedings against the Respondents. That he could not be permitted to do. It must be accepted, therefore, that the second point of law raised, in limine, by the respondents was well taken.

In the result, I come to the conclusion that this application ought not to succeed. It is accordingly dismissed with costs to the Respondents.

B. K. MOLAI

JUDGE

27th October, 1994.

For Appellant: Mr. Malebanye

For Respondant: Mr. Mapetla.

CRI\T\39\92

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

v

MOHLOMI MOLAHLI

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 24th day of October, 1994

In this case the accused is charged with a crime of Murder in that on about the 31st day of December, 1990 and or near Ha Tsautse in the district of Maseru the said accused acting unlawfully and with intent to kill, did assault Pheko Mojaki and inflict certain stab wounds upon him from which the said Pheko Mojaki died at Queen Elizabeth II Hospital, Maseru on the 3rd day of January, 1991.

In an endeavour to shorten the proceedings the defence admitted the evidence of the following witnesses; and I may even at this stage indicate that the crown accepted the admissions so tendered - the evidence admitted first was that of PW1 at Preparatory Examination Thulo Mojaki, PW2 Motsamai Joseph Rathulo, PW7 Morakane Mojaki, PW8 Det. Trooper Khanyapa, PW9 Trooper Lehata, PW10 Ex-Warrant Officer Molahli.

The oral evidence that was led before Court was that of PW3 Teboho Mokolokolo, PW6 Zola Maseela and PW11 Retselisitsoe Makhele.

PW1 is the father of the deceased, PW3 was the deceased's girl-friend while PW4 was the deceased's elder sister.

The accused and the deceased are purported to have been, at least in terms of what the accused said, friends. PW6 happened to have been a friend of both the accused and the deceased according to evidence led by PW6. PW11 lived in mortal fear of the accused and PW6.

It happens that on the day or just the day preceding the event a big party was going on at PW1's place. What was being celebrated was the coming of New Year's day which was to come in a matter of hours.

Earlier that day the deceased had been moving in the company of his friends PW5 and PW11. The particular place that he was seen around was near the garage at Lekhaloaneng where he went past to go and buy beer or replenish supplies for the party that was to take place later in the evening. It is interesting that on one such occasion when the deceased went past the garage going to this place where he was to buy bottles of beer he met with the accused. The deceased was in the company of PW5 and PW11. But on account

of the deceased's fear of what the accused had either said or done - it was suggested and accepted that they should take, on their way back, a round about way.

It is PW11's evidence that he himself actually had walked ahead of the deceased and PW5 when they came to this garage. He said he heard, when later joined by the deceased, that the accused had tried to stab him with a knife. Strangely, PW5 makes no such statement yet he is the one who was supposed to be in company of the deceased when this took place.

One other thing that this witness PW11 said before the Magistrate's Court was that while at the garage he stopped and looked back; and he went further to say "I saw accused chasing the deceased with the knife raised up". But when this was brought to his attention that in this Court - in other words at this instant trial - he seems to make no mention of such thing he said he never said it to the Magistrate at all at the P.E. of this trial. When it was suggested to him that perhaps he had said it in view of the fact that at the time he was giving evidence before the Magistrate's Court events were fresher in his mind than they are today his illogical answer was that, or implied that, he remembers things a lot more clearly today than he would at the time he was giving evidence before the Magistrate's Court.

Well, it has been urged on the Court by the defence that

Retselisitsoe's evidence should be rejected and I accept that submission.

On the day of events it appears that during the dancing that was going on at PW1's place an occasion arose when PW3 wanted to go to the toilet. No sooner had she left the dancing crowd than was she followed by the deceased. What actually happened when the two were together was related by PW3. The upshot of it is that the boy-friend was assaulting the girl friend. While this was going on the accused and PW6 pitched on the scene. PW6 was quick to intervene on PW3's account, while the accused probably relishing the event was standing there saying either that PW6 should let the deceased assault PW3, or discrediting the girl-friend by suggesting to PW6 not to interfere as the deceased was going to have sex with PW3. What is consistent with this sort of attitude by the accused is the fact that when PW4 apparently under orders to the deceased to call him to their parental home, the accused was seen picking up stones and throwing them at PW4. It was thanks to the deceased who stopped in front of the accused that PW4 was able to betake herself from the scene after dodging the stones. It was just about this moment when the deceased was standing face to face with the accused that PW6 and PW5 heard the deceased say "look, you have stabbed me with a knife" - I should mention that immediately after PW6 had intervened on account of PW3, PW4 was able to lead her away to PW1's home - so at the time that stones were thrown at PW4 it was on her return back to the scene from home.

It is her evidence that she heard the accused say "you know I can stab you" (saying this to the deceased). She also said she heard the deceased say "I know you can" - no sooner had she heard this than did she hear the deceased say "look you have stabbed me with a knife" as he said so the deceased grabbed hold of the left side of his rib-cage around the armpit area and sped home.

Further evidence shows that attempts were made to stop the bleeding from the injury. First by application of a doek and taking the deceased to Doctor Mokete's home and eventually to hospital where the injury was treated. The deceased had arrived there in the early morning of 1st January, 1991 but he died two days later on 3rd of January, 1991.

The doctor who performed the postmortem examination shows that as to external injuries; there were two stab wounds i.e. one 1 cm laceration between the second and the third ribs; and the other an 8 cm laceration between the sixth and seventh ribs. This injury has been recorded to have been 8 cm deep. Looking at the length of the blade exhibit "1" that was being used, it looks like the entire blade is about the same length of 8 cm - so it cannot be altogether discarded as far-fetched what was suggested by the crown that "what stopped the knife from further penetrating could have been the accused's hand". This may even enjoy support of the accused's own story that he believed he had stabbed the deceased

when he saw blood on his own hand.

The accused of course denies that he threw any stones at PW4 or rather a very strange thing he says is that PW4 is not telling the truth when she says the accused was throwing stones at her. But he accepts PW5 and PW6 version to the same effect, relating to the same event which occurred around the same time and place.

So to that effect one sees in the accused a young man with a confused mind. Apparently the confusion he had at the time that he inflicted these injuries due to drunkenness has not abated. To this moment one asks oneself what could be the source of his present confusion. Be that it as it may - I need hardly refer to the number of instances where the accused gave evidence which amounts really to nothing.

I have considered seriously the question of whether in fact the crown has proved beyond reasonable doubt that what the accused has committed is Murder and Murder alone and nothing else.

In its submission the crown brought to the attention of the Court or rather submitted before Court that the nature of the wounds inflicted would then tend to support that Murder has been committed. Apart from the nature of the injury the locality of such injury - it being on the upper vital part of the body. The next consideration was the nature of the weapon - a knife a lethal

weapon sharp as it appears to be.

I have no doubt that in a proper case factors such as those would suffice, to establish or for oneto gather from them, an intent to kill.

The accused seemed to have a problem concerning the one centimeter wound that is between the second and the third ribs. Evidence has shown that the injuries that the deceased sustained were then the only injuries that he sustained from where they were inflicted until he came to the hospital where he was treated. In other words such evidence was to the effect that the deceased suffered no further injuries between the place where the injuries were inflicted to the place where he was treated. Accordingly, the accused when asked to account then for this one centimeter injury he was unable to say how this other one was caused - well in the light of evidence that one has heard and in the light of the fact that the accused himself says he was drunk one would find it hard to side with the accused that the other injury could have occurred out of the blue - occurred without any cause at least attributable to him.

The accused did indirectly suggest that perhaps it could have been caused by the doctor because there was occasion when water and blood were pumped out of the deceased's body. But this view by the accused plausible as it might have been defies the fact that

clinical or surgical wounds are different from injuries crudely caused. The doctor who performed the postmortem had his attention fixed on the business of finding the cause of death. Therefore it cannot be suggested that a surgical wound would fall among what are classified as the crude injury liable for the cause of death; generally speaking. Furthermore the accused was at large both in the Subordinate Court and this Court to have required that the doctor be called to account for this postmortem if he was not satisfied with the way it stood. But instead he admitted the evidence tendered by that doctor. This was not the only occasion when the accused in the conduct of his own defence would let pass in silence evidence which is in conflict with the version that he says he know to be correct. Thus he would let that witness go unchallenged and only when the accused is in the witness box would he suggest that such evidence should be rejected as untrue and his own version be preferred.

In short one such instance was when the accused after letting the evidence of PW4 and PW5 including that of PW6 pass in silence he said the deceased came to whisper to him that he didn't want PW4 to see him as he didn't want to oblige her by going home - such a point should have been raised when PW4 was still in the witness's box in order to afford the Court an opportunity to see how PW4 would have reacted and hear if she agrees with what the accused says or denies it in order to avoid a charge that the accused's story is a mere afterthought or instantly contrived fabrication.

I have earlier alluded to the fact that in order to prove that murder exists there has to be proof of intent. But it is not unusual that such an intent is negatived by a number of factors; and drunkenness is not excluded from such. It has a practical application in obliterating the so called positive intent. But in such instances the accused's defence should be drunkenness. Where drunkenness is pleaded successfully he must show that he was so drunk that he didn't know what he was doing and such drunkenness or its effect on the mind is no different from what induces or leads to insanity. If it is proved that the accused did not induce this obliteration of clear thinking of the mind personally or voluntarily and if he is charged with Murder he will have pleaded drunkenness successfully because the Court will make a finding that the state of his mind was that of an insane person whose insanity was induced involuntarily. In such circumstances the accused person is to be acquitted and discharged.

But on the other hand if the same state of insanity is reached but it appears that the drunkenness which led to it was voluntary then if the accused person is found liable for the death of the deceased he will be, in terms of our law, kept in custody at a place where he wil remain pending the signification of the Head of State. But I find that this particular case with which I am seized falls in neither of these two categories. It is a border-line case between what one would call Murder with intent and

voluntary insanity induced by drunkenness.

While drink is a factor here there is this vital aspect that it doesn't appear that the accused in fact had intended subjectively or otherwise to kill the deceased. There is no history of a quarrel between the accused and the deceased. All that appears is that whenever he is drunk the accused, according to his father, constitutes himself a nuisance. This being the case then I am prepared to give this accused, insofar as the question of Murder is concerned, benefit of doubt and acquit him of the capital charge. He is however found guilty of Culpable Homicide.

MITIGATION

I have just been told by your counsel that you are married and that your wife is expectant. I have taken into account that this is a first offence that you have ever been convicted of. Even if it is the first one I will tell you that it is a very serious one because you have deprived the deceased's own family of his life for no apparent reason. But to your credit I will take into account the fact that you did plead guilty to Culpable Homicide from the word go. That generally speaking does not indicate remorselessness on the part of a man who has caused such grief to the relatives and community. But the Court and particularly this Court constantly disproves use of the knife. Unfortunately here is the knife having been used with disastrous consequences once more. This necessitates that the Court should take more serious steps in

trying to curb this menace. It is necessary to give a remedy that will be seen to be observed.

There is no denying that you probably are going to face the prospects of raising the deceased's head in accordance with the Basotho Law and Custom.

Well, the Court has a duty to protect society and prevent reckless use of knives. While I cannot stop sales of beer on the one hand, I cannot be seen to promote wanton taking away of innocent life through drunkenness on the other.

You are sentenced to pay a fine of M8,000-00 or serve eight years' imprisonment of which half is suspended for two years on condition that you be not convicted of a crime involving violence to a person committed during the period of the suspension.

J U D G E

24th October, 1994

For Crown: Mr. Mofelehetsi

For Defence : Mr. Mashinini