

IN THE HIGH COURT OF LESOTHO

In the Application of:

JOHN MATSOSO BOLOFO

Applicant

and

ATTORNEY-GENERAL
COMMISSIONER OF POLICE

1st Respondent
2nd Respondent

J U D G M E N T

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 quarrelsome 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.

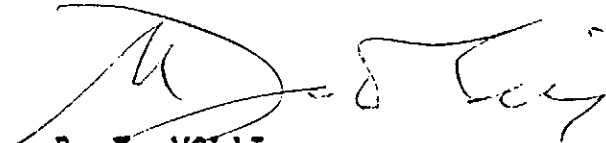
Turning now to the question whether the applicant could, in the circumstances of this case, institute these proceedings against the Respondents, it is worth noting that the removal of Public Officers (Validation) Order 1988 came into operation with retrospective effect from 20th January, 1986. When, 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.