CIV\APN\17\93

IN THE HIGH COURT OF LESOTHO

In the matter between :

MATEKANE ELIAS MAPETJA	Applicant
and	
M. MOLOINYANE	1st Respondent
THE HONOURABLE MINISTER OF JUSTICE AND PRISONS	2nd Respondent
THE ATTORNEY GENERAL	3rd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 4th day of September, 1995

This application is made by the Applicant who was employed by the Lesotho Prisons Service. It is a sequel to an incident in which seventeen prisons escaped at Mafeteng Prison on the 1st November 1992. The Applicant's rank was that of a sergeant. An investigation was conducted by a Disciplinary Committee consisting of the officer in charge established under Part E of the Prison Rules Proclamation No.30 of 1957. After the inquiry it was recommended that the Applicant should pay a fine of M200.00. It meant that the Applicant was found liable for the escape of the prisoners. The details of the escape were very pathetic and were a sad story. The Applicant seemed to have

denied complecity in the cause of the escape of the prisoners all along but he accepted to pay the fine.

The above finding was made between the 7th and the 14th day of November 1992. Before he could pay the fine and while still awaiting the confirmation of the recommendation in terms of Prisons Rule 165 (1) (c), he was served with a letter of dismissal. The letter was annexure A to the Applicant's founding affidavit. It was dated the 26th November 1992. Its last paragraph reads :

> " Due to the seriousness of the offence you are hereby informed that the recommendation that you be fined the amount of M200.00 has been varied to dismissal from service with effect from 30th November 1992 you are therefore instructed to hand over all items of uniform which were issued to you to the Officer Commanding Mafeteng Prison."

It was signed by M. M. Moloinyane Deputy Director of Prisons. It was from the Office of the Director of Prisons. I am satisfied that the Deputy Director does not purport to be instructed by the Director nor does he indicate in anyway that he has been so instructed. This is objected to by the Applicant who deposes in paragraph 8 of his founding affidavit thus:

" 8

I have advised and reasonably believe that the First Respondent has no power to dismiss me from office because he was then and still is the Deputy Director of Prisons and not the director."

This the Respondents have not answered directly nor issuably or in any helpful way. I will comment about this later in my judgment. The officer in charge who is the Disciplinary Committee imposed a fine as aforesaid in terms of Rule 163 (1) (c) which read :

163 (1) An officer in charge determining the case shall either dismiss the charge or find the officer guilty thereof and

(a) .....

(b) .....

or

(c) Make the following recommendations :

(i) that the officer be dismissed.

(ii) .....

(iii) .....

(iv) .....

(v) .....

(vi) .....

(vii) that the officer shall be fined an amount not exceeding one half of such officer's basic salary for one month."

The Applicant submitted that having accepted to pay the fine imposed in terms of section 165(1) (c) which reads :

"165(1) ..... The award or recommendation, and any Order, shall be reported to the Director, who shall take the following action :

(a) .....

(b) .....

(c) If the charge is dealt with by means of a recommendation under paragraph (c) of sub rule (1) of rule 163, make no entry in the officer's record of service <u>until such recommendation has been confirmed with or without modification.</u>

The Applicant takes exception that it was not within the powers of the Deputy Director to have imposed a sentence under rule 163(1)(c). This, he says, amounts to a variation of the

recommendation and is certainly not a "recommendation with or without a modification." He says that the Director had only two alternatives available to him. Firstly to confirm the award as given or to modify the award but certainly not to impose a harsher sentence because that would amount to enhancing the sentence. The ordinary dictionary meaning of to modify is "to moderate, lessen, qualify, to alter (philology) - see ODHAMS Dictionary of the English Language. And : 1. to make somewhat different in form, character etc vary. 2. To reduce in degree or extent, moderate;" - See FUNK & WAGNALL'S Standard Dictionary International Edition: And "to make less severe or extreme, tone down" - see Concise Oxford Dictionary.

To the extent that the punishment by the Deputy Director of Prisons amounts to an enhancement of the sentence, the Applicant submitted that before such action by the Director the Applicant ought to have been given a hearing. He says the Director committed a breach of the *audi alteram partem* rule in that while he had a right to be heard there was no notice made to him of the intended prejudicial action by the Deputy Director and he was given no opportunity to make representation. This meaning that :-

> "An opportunity to be heard presupposes adequate notice of intended administrative action. Whether

this is required by statute or not or affected party must be given adequate notice of the possibility that administrative action may be taken against him." L. Baxter Administrative Law 1st edition, page 544.

The Applicant says that this right to be heard is implicit in the Prisons Rules when one has regard to rules 169(1) and (2) and (3), which read partly :

"169(1) Any recommendation made under paragraph (c) of sub rule (1) of rule 163, shall be subject to confirmation, and shall, subject to the provision of this rule be dealt with in the manner laid down in Regulations and Orders governing the public service.

(2) An officer in respect of whom a recommendation has been made under paragraph (c) of sub-rule (1) of rule 163 may submit a written statement setting forth any mitigating circumstances which he wishes to have taken into consideration. Such statement shall be submitted and considered together with the record of proceedings.

(3) The Resident Commissioner may, on considering a

recommendation made under paragraph (c) of sub-rule (1) of rule 163 order a rehearing or further inquiry by a person or persons nominated by him.

At such hearing or further inquiry the procedure, and the powers and duties of the person or persons so nominated shall be that prescribed by rules 159, 160, 161, 162, 163, 165, 166 and 167, but the accused officer, with the consent of such nominated person or persons may be represented by an advocate or attorney".

I concluded that the Applicant had at least a legitimate expectation that he would be dealt with according to the rules. At least he should have been invited to make a statement in terms of Rule 169(2).

The Respondent's Counsel made certain submissions. He submitted that the Applicant did forfeit his right of hearing and therefore waived that right. In support of his contention he cites the rule 169(2) and the fact that the Deputy Director's decision was to take place in the future. He further cited L. Baxter in his helpful work Administrative Law 1st Edition at page 557 at (e) under Forfeiture of Natural Justice by Waiver where the learned author says: "Natural justice requires that the

affected individuals be afforded to opportunity of a fair and unbiased hearing. Should he not wish to take advantage of this right then he is at liberty to waiver it. Indeed it seems that the administration depends for its smooth functioning upon the large scale waiver of this right in practice". I have commented about rule 169(2) in the last paragraph. I will do so again. My comment about the alleged waiver follows presently.

The learned author went on to say : "When an individual does not expect his opportunity of a hearing he cannot afterwards have the decision set aside for wait of hearing ....." This is well set out by the author. But I do not agree with the contention that this supports the Respondent's case. The rule 169(2) gives the opportunity to an officer when and if he is not satisfied and does not intend to accept the recommendation without protest. This was not the case. Secondly, the way the Deputy Director's letter is framed, it only gives the Applicant four days to leave. The period of four days was certainly not intended to give the Applicant any opportunity to take steps to challenge the recommendation. I do not see how this can be implied. There was no fair opportunity. I have cited the rule 169(3) to illustrate the extent to which the Prison Rules have the principles of natural justice is built into them. This is so, more especially where the officer is dissatisfied with an award or recommendation.

That as award can be varied is not only envisaged under Rules 169 and 170. This can also be done under Rule 166(3) - following an appeal by the officer. The section reads :

> " The Director may, after considering the papers forwarded to him under sub-rule (2) allow the appeal and dismiss the charge or may confirm the disciplinary award or substitute therefor a caution or any award, whether more or less severe, which would have been within the power of the officer in charge to impose, and confirm, vary or reverse any Order under rule 163." (My underlining)

The point being made is that clearly the powers of sentencing under this Rule are very wide and include that of imposing "a more or less severe" award. But this the Director is not empowered to do under Rule 165(1) (c). One other effect of the Rule 166(3) is that the appealing officer anticipates that there can be a variation or an enhancement of the recommendation on appeal. This he does not expect in Rule 165(1)(c).

I do not accept that as after the decision by the Deputy Director there was an opportunity for the matter to be heard. There were no special circumstances which necessitated that there would be a hearing after the decision. It was not the intention

of the Deputy Director to grant such a hearing subsequent to his decision. Mr. Makhethe referred me in this regard to page 587 of L Baxter Administrative Law under (c) A hearing after the Decision. That only served to persuade me that the Deputy Director could not have approached the matter in a proper manner.

I thought that this Court of Appeal case KOATSA vs NUL C of A (CIV) No 15 of 1986 was much authoritative (as submitted by Applicant's Counsel) when it took care of somewhat different circumstances but where at page 17 Mahomed JA said :

> " The notice given by the Staff Discipline Committee in the circumstances, could only be understood by the Applicant to be a notice that the Committee was considering the imposition of one or more of the punishments which it was entitled to impose if the Applicant was guilty of the charge. It was not intended to be a notice to the Appellant that any organ of the University would be considering the termination of is employment."

This means that there had been a promise (based on the rules or prior conduct) or expectation that is matter would be treated in a certain manner. It was improper therefore that when a different procedure or step was taken he was not given prior

notice.

I would also find that the provisions of section 31(2) of Interpretation Act 1977 are not such as to dispense with the requirement by the Deputy Director to set out the circumstances in his affidavit or a separate one why he was empowered to act when the Rules required the Director to act. If he had done that that could be good reason or an explanation. This is more so where his powers or actions were specifically challenged by the Applicant in his founding affidavit at paragraph 8 where he said:-

> " I have been advised and reasonably believe that the First Respondent has no power to dismiss me from office because he was then and still the Deputy Director of Prisons and not the Director ....."

It could be that the Deputy Director has powers of his own which coincide with those of the Director. In Mpho Qhobela vs Attorney General and Another CIV/APN/229/83 (unreported) 13/12/85 Kheola J (as he then was) had this to say at page 3-4 of the judgment:

> " The Principal Secretary cannot delegate his powers under Rule 5-21 to any officer. The reason for not giving him authority to delegate his powers is

obvious. Interdiction without a pay is a very serious matter which may adversely affect the life of the officer and his family if the salary is the only income of his family. In some cases the interdiction may lead government into unnecessary litigation if the officers do not get legal advise before taking such a step. So the law places the discretion to interdict in the most serious department....." In the instant if the decision had been taken by the Principal Secretary the opening words of the letter ought to have read as follows: "I have been instructed (by the Principal Secretary) to interdict you on no pay."

"If that had been the case, it could well be argued that the Permanent Secretary took the decision to interdict the Applicant and merely instructed his subordinate officer to pass the message to the Applicant."

It may be that after all the said section 31(2), does in any event, empower the Deputy Director. It reads:

" Where an Act confers a power or imposes a duty on the holder of public office as such then the power may be exercised and the duly appointed by the holder for

the time being of that public office or by a person duly appointed to act for him."

But even then, it appears that, the circumstances or what causes of the substantive holder of an office to be unable to act must be explained. This is, why was it the Deputy Director not the Director himself? The Court was not even urged to speculate.

In making the Order that I made I have considered that the matter is an old matter with obvious inconveniences. But I have avoided to substitute my decision for that of an officer who would otherwise be empowered by the Prison Rules to perform certain duties or function as is provided for in Rule 165(1)(c).

The Order I make is that the application succeeds and the following prayers are confirmed, namely:-

(a) That Applicant's dismissal from employment as a Sergeant is declared null an void.

(b) That the Disciplinary Committee's recommendation shall be placed before the Director of Prisons for his action within 30 days in accordance with the Lesotho Prison Rule 165(1).

(c) That Respondents shall pay the costs of the application.

T. MONAPATHI
JUDGE

4th September, 1996

For the Applicant : Mr. Phoofolo

For the Respondents : Mr. Nakhethe