

IN THE HIGH COURT OF LESOTHO

In the matter between:

CAPTAIN TSEKA LEHLOHONOLO

APPLICANT

and

COMMISSIONER OF POLICE  
DEFENCE COMMISSION  
MINISTER OF HOME AFFAIRS  
ATTORNEY GENERAL

1ST RESPONDENT  
2nd RESPONDENT  
3RD RESPONDENT  
4TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo,  
Acting Judge on the 15th day of September, 1995.

This application came before me on 26th June, 1995. In it  
the applicant applied for an order in the following terms:-

1. That a Rule Nisi do hereby issue calling upon the Respondents to show cause, if any, to the above court, on a date to be determined by this court why:
  - (a) The normal modes of service shall not be dispensed with because of the urgency of this matter;
  - (b) The purported retirement of the Applicant shall not be reviewed, set aside and declared null and void;
  - (c) The Respondent shall not be ordered to reinstate the Applicant to his former position;
  - (d) The Respondents shall not be interdicted and/or restrained from paying terminal benefits to the Applicant pending the determination of this application;

- (e) The 1st Respondent shall not be interdicted and/or restrained from ejecting the Applicant from Police accommodation pending the determination of this application;
  - (f) The Respondents shall not be ordered to pay Applicant his usual monthly salary;
  - (g) The Respondents shall not be ordered to give the Applicant the opportunity to be heard before taking decision on the matter.
2. Directing the Respondents to pay costs of this application.
  3. Granting Applicant further and/or alternative relief.
  4. That prayer 1(d) and (e) operate with immediate effect as a temporary interdict.

I granted the interim relief and made the Rule Nisi returnable on 17 July, 1995. On 17 July, 1995 the rule was extended to 31 July, 1995 and on this date the matter was further postponed to 2nd August, 1995 to enable the applicant to file a letter and the matter was finally heard on 3rd August, 1995 and postponed to 1st September, 1995 for judgment.

On 1st September, 1995 the matter was further postponed to 8th September, 1995 and not being able to hand down judgment I indicated to counsels I would hand down judgment today.

From the papers it appears that the applicant applied for retirement per his letter of 17 March, 1994. In this letter he invoked the statutory notice of six (6) months notice. It will be noticed that in this letter no reason was advanced for the intended retirement and I will for the present assume that there was no particular reason why the applicant lodged his application for retirement.

There is a lot of confusion regarding this retirement but I was informed by counsel on both sides that this intended retirement was withdrawn by the applicant and approved by the 1st respondent.

However, on the 27th March, 1995 applicant wrote a letter in which he wished to proceed on leave pending retirement and to be given dispensation of having to give the statutory notice of six (6) months of the intended retirement. In the letter the applicant wrote, inter alia:

my good office of the Commissioner of Police officers have suggested I proceed on such retirement with some references

again :

I thank the Police Force for the services I have served.'

In this letter there was no complaint or bitterness by the applicant, he seemed to be proceeding on leave pending retirement of his own free will and without any pressure whatsoever. Significantly he had contact with the office of the Commissioner of Police and it had been suggested that 'I proceed on such retirement with some references'.

Notwithstanding that counsel on both sides informed me of the fate of applicant's letter of 17th March, 1994, on 12 August, 1994 a letter had been written to the applicant informing him that as the processing of his application of 17th March, 1994 to retire had been too advanced, it was not possible to accept it and applicant was to proceed on retirement as approved. The letter of 12 August, 1994 had been written by the personnel officer Captain T.S. Koro.

I do not know what was crossing the mind of the Deputy Commissioner B.V. Makoaba. He appears to have written a letter dated 24th March, 1994 superimposed with his official stamp of 24th February, 1995 and against his signature is his official stamp dated 24th February, 1995. In this letter of conflicting dates the Deputy Commissioner of police gave the applicant notice to show cause why he cannot be retired in public interest for not obeying an order transferring the applicant to Thaba-Tseka.

Applicant responded to the above letter in his letter of 28th February, 1995 in which he stated that the intention to retire him in public interest was premature in that the public still needed his services and insisted on the Commissioner honouring an interview he wished to have with him to thrash out matters of public interest and force management.

By his letter of 9th March, 1995 the applicant applied for departmental transfer from the Police Department to the Ministry of Transport and Communication and by savinram of the 28th March, 1995 the Commissioner of Police forwarded applicant's application for transfer to the Defence Commission stating in the said savinram that 'The office of the Commissioner of Police has no objection.'

Significantly, when the office of the Commissioner responded to applicant's request for departmental transfer for all intends and purposes applicant had been transferred to Thaba-Tseka and failing the transfer had been asked, in terms of Deputy Commissioner's letter of 24th March, 1994 or 24th February, 1995 to show cause why the applicant could not be retired in public interest. I don't see how the Commissioner of Police could have acceded to applicant's departmental transfer unless he had waved applicant's transfer to Thaba-Tseka and hence applicant's retirement in public interest.

Regarding applicant's transfer to Thaba-Tseka, a letter dated 28th November, 1994 had been written to him informing him that he had been transferred to Thaba-Tseka and that

upon receiving this letter you will proceed to Thaba-Tseka where you will report before the District Commander there.

In papers before me, it does, however, appear that on the 18th August, 1994 the applicant wrote a letter seeking an interview with the Commissioner of Police. There is no such letter in these proceedings save acknowledgment of the same by Col. Lehloenya to whose letter I will comment shortly plus, of course, a bundle of medical certificates showing, among other things, that applicant was sickly and suffered a multiplicity of ailments consisting of 'bronchitics' 'hypertension' and 'obesity'.

What I find very strange is that nothing was done about applicant's transfer to Thaba-Tseka though in my view the reason could have been that the authorities were satisfied that applicant was not fit, given the state of his health, to go to Thaba-Tseka - hence why even the threatened retirement in public interest did not materialise. It must be remembered that Deputy Commissioner B.V. Makoaba's letter of 24th March, 1994 is the original transcript of this letter and that a dated stamp against the Deputy Commissioner's signature came after this letter of the 24th March, 1994 while applicant's purported transfer to Thaba-Tseka was contained in Captain Malewa's letter of 28th November, 1994.

In his correspondence and before me, it was applicant's counsel's submission that there was a concerted effort by some police officers to have applicant prematurely retired. In his letter of 28th February, 1995 as I have shown, applicant rejected out of hand the pretended intention to retire him and on 9th March, 1995 wrote a letter asking for departmental transfer and incredibly the office of the Commissioner of Police approved the transfer. How could the Commissioner of Police approve the transfer of an officer who

- (a) had been transferred and was resisting transfer,
- (b) had been asked to show cause why he cannot be retired,
- (c) by his letter of 17 March, 1994 and 27 March, 1995 had tendered his retirement?

It seems to me that when the Commissioner of Police wrote savingram of 28th March, 1995 approving applicant's departmental transfer he had forgotten or condoned applicant's transfer and for that matter his intended retirement of applicant in public interest for when this savingram was written it was well over a year from the time applicant had lodged his intention to retire from the service.

On 13th April, 1995 in response to applicant's letter of 27th March, 1995 a savingram was sent to the Commissioner of Police (Personnel Officer) to the Regional Police, Central to firstly

'advise Captain Lehlohonolo to quote the relevant section and subsection of the Public Service Order, 1970 under which he would like to retire. Advise him to closely study and try to understand clearly the provision of Section 12(1)(2) and (3) before he advises this office.' (I have underlined)

secondly

'This office will not be able to process his application unless he has indicated the date upon which he intends to start serving his notice.'

As I understand this savingram, it was a condition precedent that the applicant should satisfy the two conditions of the savingram before his application could be processed.

Ignoring contents of the above savingram and before the applicant was appraised of the contents of the savingram, on 24th May, 1995 V.M. Mpopo, writing under the flying seal of 'Regipol Central', the very officer who had specified conditions to be fulfilled before applicants application for retirement was processed, purported to do for the applicant what the latter should have done for himself by forestalling and pre-empting the applicant by declaring:

'you will therefore serve one month notice with effect from 1st June, 1995 to 31st June, 1995 which will be your last day of service.

and

'this is in terms of section 12(2) of the Public Service Order, 1970.'



Recalling that in precise terms this is what the savingram referred to above had required of the applicant. I find this intervention by V.M. Mpopo to be disgusting, unacceptable and unseavoury and I can well understand why the applicant was aghast: nor do I for a moment believe that V.M. Mpopo is so daft as not to have understood contents of the savingram referred to. On 22nd May, 1995 and ignoring the Commissioner's savingram of 28th March, 1995 aforesaid, the Ministry of Defence per one L. Mosoeunyane had informed the Commissioner of Police that the Defence Commission had accepted applicant's application to retire.

It was submitted in argument that it was never the intention of the Commissioner of Police to have applicant prematurely retired and that this was the agenda of some police officers. In my view, this submission is borne out by the Commissioner's approval of applicant's transfer, by the Commissioner's stipulation of conditions to be fulfilled by the applicant before his application for retirement could be processed and on the other hand, by a letter of 9th September, 1994 written by Col. J.M. Lehloenya denying applicant interview with the Commissioner. I am not prepared to believe that a Commissioner of Police's schedule can be so tight as to make it impossible to see one of his officers. Noticeably, though Col. Lehloenya was adamant 'you will therefore still proceed on retirement as initially approved' and 'further, the processing of your application has gone beyond the stage of

reversal    ironically, applicant neither went on retirement nor was the processing of his application where 'other Ministries are also involved' get anywhere until the applicant lodged his second application to retire.

When the applicant lodged his first application to retire and he was told the decision was irreversible heavens did not fall when he did not go on retirement. Neither will they fall if we reach the conclusion that his was not a voluntary decision to retire.

It seems to me that the letter of 24th March, 1994 superimposed with a date stamp of 24 February, 1995 was an expeditionary mission to goad and force the applicant into an indiscretion or to do something he would not have done but for the said letter. That as soon as the letter had accomplished its mission the ball was then in applicant's court to justify his retirement.

I also do not understand how the office of the Commissioner of Police functions much as I exonerate the Commissioner of Police in all this bungling. But it appears as if there is no coordination and officers are likely to make own decisions in circumstances in which the Commissioner must himself make such decisions. I was also under the impression that the Commissioner of Police like in all other commissions makes recommendations to the Defence Commission and that before the Commissioner of Police reaches

finality on a matter before him and before he has communicated his final decision on the matter to the Defence Commission the commission cannot reach finality?

Mr. Sethathi for the applicant submitted that Moloi Mpopo who opposed the application had no locus standi to oppose the application as he was not authorised by the Commissioner of Police or any of the respondents. I don't agree. It is a basic rule of administrative law that a subordinate may transfer a function involving the exercise of discretionary powers only if authorised to do so expressly or by necessary implication.

Moreover, for the smooth running of affairs the mandate or instruction is usually given within the internal sphere of administrative authority because the two organs are closely linked with each other within the same hierarchy. (i.e. the Commissioner of Police and the Defence Commission) but a superior organ may also give instructions to an inferior organ within a control relationship.

There is authority for the proposition that where the delegate performs a function on behalf of or in the name of the delegans, he replaces the delegans completely and performs the function as if the delegans himself were performing it.

see Wiechers - Administrative Law p.52.

Mr. Putsoane for respondents also submitted that so long as applicant had not withdrawn his application to retire the retirement remained binding on him. Further that the need to be heard would arise only if applicant was being retired.

I have said that I have found as a fact that applicant was forced by circumstances to retire and I am not prepared to take the pretended retirement as binding. Regarding Mr. Putsoane's other submission above.. I don't think Mr. Putsoane is aware or was aware of the enormity of the error committed by Mr. V.M. Mpopo or Col. Lehloenya's refusal to have the applicant see the Commissioner of Police under the pretext that 'it would not be possible to meet the Commissioner of Police in person' due to a light programme of his office ' nor do I find the shady and unexplained goings-on of Deputy Commissioner B.V. Makoaba beyond reproach.

In this regard it was held by Innes C.J. (as he then was) that:

'where the Legislature places upon an official the responsibility of exercising a discretion which the nature of the subject-matter and the language of the section shows can only be exercised in a judicial spirit, then the responsibility cannot be vicariously discharged. The persons concerned have a right to demand the judgment of the specially selected officer ' see *Shidiack v. Union Government*, 1912 648 A.D.

I am not satisfied that fair justice was meted out to the applicant to address the dilemma in which he found himself nor can I condone V.M. Mpopo's move to have taken it upon himself to act for the applicant and less still Col. Lehloenya's frustrating attempts to have applicant meet the Commission of Police.

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In the circumstances the application is granted with costs as  
prayed.



G.N. Mofolo

Acting Judge

13th September, 1995.

For Applicant: Mr. Sethathi

For Respondents: Mr. Putsoane