

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMONYANE MATEBESI

APPLICANT

and

THE DIRECTOR OF IMMIGRATION
THE MINISTRY OF PUBLIC SERVICE
THE ATTORNEY GENERAL

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT

JUDGMENT

Delivered by the Honourable Justice Mrs. J.K. Guni
On the 15th day of December, 1995

The applicant in this matter sought, as appears on the Notice of Motion, a declaratory Court Order in the following terms:-

- (a) Declaring the purported dismissal of applicant from the public service null and void.
- (b) Reinstatement of applicant to the public service.
- (c) Directing the 1st respondent to pay applicant arrear salary from the date of the purported date of dismissal to date of judgement.
- (d) Costs of suit.

The facts of this case, as appears from the papers, are as follows:-

This applicant at the time this dispute arose was employed

by the Government of Lesotho, Ministry of Interior, in the Department of Immigration. She has been a civil servant for approximately (15) fifteen years, seven of which she spent working in the Department of Immigration at Maseru. By Circular Savingram dated 7th November, 1994, which was addressed and sent to all members of staff, including this applicant, she was transferred to Mokhotlong. She immediately took steps to make representations, as shown in Annexure "B" indicating her reasons against the said transfer and also indicating her preferences as regards the said transfer. Unsuccessfully as it may seem, this applicant pursued her case against her transfer to Mokhotlong from the Director of Immigration, through to the Principal Secretary of the Ministry of Interior and finally to the Minister of Interior. At all these levels no grounds were found to warrant the reversal of the decision of her transfer to Mokhotlong. Nevertheless this applicant resisted that transfer. According to the Circular Savingram indicating her transfer, this applicant should have reported for duty at her new station in Mokhotlong on 01/12/1994. She did not do so. On 19th December, 1994, according to her averments at paragraph 8 of her Supporting Affidavit, she was in the office of the Deputy Director of Immigration here at Maseru where she was "informed never to show face again in the same office if she had not by then transferred to Mokhotlong". It seems she went away but definitely not to her new station - Mokhotlong - nor any other office for the purposes of carrying out her official duties according to the Deputy Director. This is not denied by this applicant.

"Whilst awaiting, an amicable consideration and settlement of my problems", this is said by this applicant at paragraph 9 of her Supporting Affidavit, "I was to my dismay served with a letter of dismissal from service, dated 11th May, 1995". The reason given in that letter for her dismissal is an unauthorised absence from office and official duties.

The applicant is challenging the validity of the said letter of her dismissal on three grounds as shown at paragraph 10 of her Supporting Affidavit.

- "(a) It does not disclose the period covering the alleged period of absence from office.
- (b) I have never been given an opportunity to account and/or make representation of the alleged unspecified period of absence, contrary to the rules of natural justice.
- (c) The period known to me of absence from work was due to sick leave both for my infant as well as for myself covered by the medical doctors and known to my employer. I annex copies thereof marked "D" and "E" respectively."

It is correct the letter of her dismissal - Annexure "C" attached to Supporting Affidavit - does not specify the period of the alleged unauthorised absence from official duties. In answer to this applicant's contention the Deputy Director of Immigration at paragraph 7 (a) of ANSWERING AFFIDAVIT, pointed out that, it was not necessary to inform the applicant of the period of her absence because this applicant knows that period. He went further to allege that as at the date the answering affidavit was made, this applicant had not reported for official duties at the office. The applicant does not deny that she personally knows the period referred to as the one covered by the

alleged unauthorised absence from official duties but she is insisting on her legal title to be informed. (See paragraph 6 of her REPLYING AFFIDAVIT). She is correct. She should have been given specific dates covered by her alleged absence from official duties. Since she appears to know the period of her absence from office there has been no prejudice which might have resulted, had she been totally ignorant of the dates of her absence from official duties.

The applicant further claims that there should have been a proper formal charge levelled against her before a tribunal where she should have been given an opportunity to defend herself prior to the purported dismissal. On the face of it and considered alone in isolation of the rest of the facts and circumstances of this case the argument is impressive. Annexure "C" reads as follows:-

"I am directed to advise you that the Public Service Commission has resolved that you be removed from service by way of dismissal following upon an unauthorized absence from your office and official duties contrary to Section 10 (1) (i) of the Public Service Order 1970".

In the consideration of the challenge to the validity of this letter "Annexure "C" proper analysis must be made of applicant's contentions. What purpose would be served by specifying the exact dates of which this applicant was allegedly absent from official duties? The specification of the dates covering the alleged period of an unauthorised absence from official duties, would enable the applicant to give an excuse for consideration for its validity for the alleged dates of absence.

From on or about 19th December, 1994 when the Deputy Director of Immigration indicated expressly to this applicant his unwillingness to give her audience nor to see her in his office, if she has not reported for official duties at her new station - Mokhotlong, there is nowhere in her affidavit this applicant shows that she performed her official duties. She claimed she was denied access to her office by the Deputy Director of Immigration. She never again showed her face at the Deputy Director's office. Why? Maybe because she had not reported for official duties at her new station. Maybe she had nothing to see the Deputy Director about. To complete the scenario or to be just imaginative, this applicant attached to her Supporting Affidavit two medical certificates. One of which shows that this applicant may have been sick from 30th November, 1994 to 10th December, 1994. The other certificate shows that the applicant was unfit for work due to nervous tension from 9th December, 1994 to 17th December, 1994. (See Annexures "D" and "E" attached to Supporting Affidavit)

So far the applicant has accounted for her absence from official duties by production of these two medical certificates. This applicant does not deny that she had not reported for official duties, when Annexure "C" to Supporting Affidavit was served upon her. This Annexure "C" is dated, 11th May, 1995. The period prior to this date, stretching back to 19th December, 1994, when according to the applicant she left the Deputy Director's office - after being told, "never to show face again in the same office if she had not by then transferred to

Mokhotlong", is approximately five months. For five months, she did not report at her office for official duties. She does not say, why she did not and she does not say where she was working if she was working.

The period of absence from official duties as far as this applicant's account is concerned, and covered by the two medical certificates and the letter of dismissal dated 11th May, 1995 is approximately two weeks. At paragraph 9 of her Supporting Affidavit this applicant claimed she was discharged when she was served with the letter of dismissal "whilst awaiting an amicable consideration and settlement of" her problems. (My underlining).

The period this applicant has accounted for without being asked by anyone, falls entirely within one month - December, 1994. Why does she elect to account only for these seventeen days in December and says nothing at all regarding the dates thereafter to the 11th May, 1995? Again as far as the period after the letter of dismissal was served upon her, this applicant chose to account for her absence from official duties, by none withdrawal of that letter of dismissal. Before she was dismissed, prior to 11th May 1995, but after the dates covered by her medical certificates she chose to say nothing. Where was she awaiting an amicable consideration and settlement of her problems? This applicant does not show the length or make any mention of the specific period of her waiting. Both parties seem to omit mentioning the very material time. Is it bad faith? Perhaps not, the Deputy Director in his Answering Affidavit at paragraph 7 claimed that it was not necessary to inform the applicant the

period of her absence from work. At paragraph 6 of her Replying Affidavit the applicant insists on her legal entitlement to be informed, although she does not deny that she had not up until the date that Affidavit was being made, reported anywhere for performance of her official duties. What is not denied by this applicant remains unchallenged and worthy of consideration. This applicant seems to suggest that she was supposed to report in the Deputy Director's office at Maseru for the performance of her

official duties - This impression lives no doubt in my mind that she still is persisting in her refusal to take up her transfer to Mokhotlong. She seems to be suggesting that since the Deputy Director told her not to show her face in his office, she was being denied access to her office. There is nowhere she claimed the Deputy Director's office to be hers. Why did she not go to her very own office at her new station?

The second ground on which the validity of the letter of dismissal is being challenged, is that the applicant had not been given an opportunity to account and/or make representation for the alleged unspecified period of absence from duty. The letter of dismissal clearly shows that the authority or ground on which the dismissal is based is SECTION 10 (1) (i) PUBLIC SERVICE ORDER NO.21 OF 1970. The relevant portions of the proviso are as follows:-

° 10 (1)

Every public officer shall comply with the following general Rules of Conduct -

- (a)

- (i) A public officer shall not absent himself from his office or from his official duties during hours of duty without leave or valid excuse". (My underlining)

The applicant's contention is that there was a need for her to be put before a tribunal where the proper charge against her would be put and she should have been afforded an opportunity to defend herself before a letter of dismissal was made and served upon her. This is a very plausible argument. It was argued on behalf of this applicant that the Rules of Natural Justice demand the treatment outlined above to be meted out to this applicant. To this extent Mr. Molapo agreed with the applicant's argument but promptly pointed out that there are exceptions to this rule of Natural Justice. That exception is found in SECTION 6 (3) PUBLIC SERVICE ORDER No.21 OF 1970. Here the legislature saw it fit to oust the rules of Natural Justice. The formal charge which this applicant is demanding to be laid against her before a tribunal has been dispensed with. Any other proceedings prescribed in these rules have also been dispensed with. Mr. Molapo argued that the respondents in their action of issuing that letter of dismissal - Annexure "C" - acted competently within the law. That Law reads as follows:-

Section 6 (1)

"The following punishments may be imposed on an officer who has been proved (My underlining) to have committed a breach of discipline".

Section 6 (3)

"If an officer has contravened the provisions of this part in respect of absence from office or from his official duties he may without delivery to him of a formal charge or any other proceedings prescribed in these rules be removed from office by way of dismissal or other termination of appointment".

For an officer to be proved to have committed a breach of discipline, there is an implication that there is a need for a hearing for such proof to be made out. Without a formal hearing there must be some other way of proving that a breach of discipline has occurred. It seemed appropriate to the Legislature to do away with that proof when it came to absence from duty. In respect of absence from his office or official duties, the public officer may, without delivery to him of a formal charge or any other proceedings prescribed in the rules, be removed from his office. The significance of the underlined words is the clear authorization to effect summary dismissal under the circumstances outlined in SECTION 6 (3) PUBLIC SERVICE ORDER NO.21 OF 1970.

The whereabouts of this applicant were not known to the respondents during the period preceding her dismissal. Her pay

cheque for the month of December 1994 was sent and apparently returned unclaimed, from Mokhotlong. It may be in this circumstances, when an officer disappears and his or her whereabouts are not known, that the legislator saw it fit to enact the law in terms of which such an officer would not remain employed.

Although the applicant denied deserting her office, and claimed she was denied access to her office by the Deputy Director of Immigration, she did not spell out how the Deputy Director denied her access when it appeared that at no time she ever reported at Mokhotlong office as her cheque was returned from there unclaimed. This was December cheque which the respondent does not oppose the claim for its re-issue and payment. This cheque the 1st respondent is ordered to re-issue.

The additional ground, according to Mr. Molapo of the lawfulness of the applicant's dismissal by letter of 11th May 1995, without giving her hearing, or hearing further representations by the applicant for her failure to report for official duties at Mokhotlong, is the futility of such an exercise. As indicated by annexures BNQ1 and BNQ2 this applicant has exhausted all her so called local remedies. She had made representations as regards her resistance to transfer to Mokhotlong to the Director of Immigration, through to the Principal Secretary for the Ministry of Interior and ultimately to the Minister of Interior. Her unauthorised absence from official duties was a direct consequence of her transfer and her

resistance to such a transfer. This comes out clearly from her averments at paragraph 8 of her Supporting Affidavit. The relevant portion reads as follows:-

"I was informed never to show face again in the same office if I had not by then transferred to Mokhotlong".

At paragraph 3 of REPLYING AFFIDAVIT, this applicant went on to say that

"My case was not turned down for want of merit and I aver that it was not being given reasonable consideration".

The issue and the only issue in this application is whether or not this applicant has reported for official duties at her new station. It is abundantly clear that she still insists that she should not be transferred to Mokhotlong. Annexures BNQ1 and 2 show that there were no grounds found to exist to warrant the reversal of the decision of her transfer. She stayed away from duty whilst fighting this transfer. By awaiting amicable consideration and resolution of her problems in total disregard of her duties and obligations to her employer this applicant cannot expect this Court to endorse that behaviour.

This application is dismissed with costs.

K.J. GUNI
JUDGE

For the Appellant: Mr. Mpopo
For the Respondents: Mr. Molapo