

IN THE COURT OF APPEAL OF LESOTHO

C of A CIV/NO.16/95

In the matter between :

SEHLOHO MOKAPELA

APPELLANT

and

THE MINISTER OF HOME AFFAIRS  
COMMISSIONER OF POLICE  
DEFENCE COMMISSION.  
R.L.M.P. - DISCIPLINARY BOARD  
OF OFFICERS  
ATTORNEY GENERAL

1ST RESPONDENT  
2ND RESPONDENT  
3RD RESPONDENT  
4TH RESPONDENT  
5TH RESPONDENT

CORAM

BROWDE J.A.  
LEON J.A.  
VAN DER HEEVER A.J.A.

JUDGMENT

LEON, J.A.

The appellant was the unsuccessful applicant in motion proceedings brought in the High Court. He is a police officer and a member of R.L.M.P. (Royal Lesotho Mounted

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Police) stationed at P.T.C. where he worked.

On the 14th September 1994 he appeared before a Board of four officers charged on two counts to which he pleaded not guilty.

On Count 1 he was charged with the offence of contravening Regulation No.24 paragraph 37 of Legal Notice No.24 of 1972 as framed under Regulation 5 of Legal Notice No. 72 of 1994 and punishable under Regulation 11 of Legal Notice No.72 of 1994. The charge alleged inter alia that he had ordered divers troopers to neglect their duties on the night of the 26th to the morning of 27th August 1994 this conduct being alleged to be contrary to the aforesaid Regulations. Count 2 alleged a further contravention of the same Regulations, the gravamen of this count is that to the prejudice of good order and discipline he had transferred 16 troopers unlawfully without any authority from P.T.C. to Mafeteng and Quthing conveying them to Mafeteng Police Station, which act is contrary to the said Regulations. That is alleged to have occurred on 27 August 1994. On 11 October 1994 the applicant was found guilty as charged on both counts. On each count he was fined M50.00

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and recommended for demotion to the rank of Trooper.

At the hearing the appellant raised two points. Firstly he insisted that the Board produce proof of their appointment. The relevant letters of appointment were produced and the appellant was satisfied. Secondly the appellant called into question the validity of Legal Notice No.72 of 1994. He was overruled on this point but informed that he could appeal that decision. Evidence was then led and a conviction followed. Nothing turns on the facts resulting in the conviction as this case turns solely and exclusively on a question of law.

Being dissatisfied with the decision of the Board the appellant noted an appeal against his convictions. He also sought and obtained a rule nisi against the respondents calling upon them to show cause why:

- "(a) The disciplinary proceedings proceeded with against the applicant before the 4th respondent shall not be reviewed, set aside and declared null and void.
- (b) The respondents shall not be ordered to desist from proceeding with the appeal noted against applicant's conviction pending finalisation hereof.

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- (c) The execution of the conviction of applicant by 4th respondent shall not be stayed pending finalisation hereof.
- (d) The respondents shall not be ordered to pay costs of this application.
- (e) Legal Notice No.72 of 1994 shall not be declared null and void.

Prayers 1, 2, 3(b) and (c) shall operate with immediate effect as an interim Court Order."

The matter came before Guni A.J. (as she then was) on the return day who in a considered judgment, dismissed the application with costs which effectively discharged the Rule with costs. It is against that decision that this appeal is brought.

In his founding affidavit the appellant refers to the fact that the Legal Notice NO. 72 of 1994 was published on Friday the 1st July 1994 in Volume XXXIX of Lesotho Government Gazette Extraordinary. He alleges that that Legal Notice was "purportedly made by the 3rd Respondent "purporting to act" under Section 145(4) of the Constitution of Lesotho.

Paragraph 5 of the appellant's founding affidavit

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reads:

"Section 145 of the Constitution established the 3rd respondent with clear terms of reference. Sub-section (4) thereof provides that the said respondent shall regulate its own procedure through regulations. It is respectfully aver (sic) that the said respondent had no power to make the said regulations styled Legal Notice No.72 of 1994. The Commission has acted ultra vires."

The further point is made by the appellant that in terms of the Law of Lesotho every Subordinate Law (of which Legal Notice No.72 of 1994 is one) must be laid before the Senate within 15 sitting days of its publication in the Gazette. On the 8th July 1994 the Senate went into recess at which stage the said Law had not yet been tabled before it and was laid before the Senate only on the 28th September 1994. It is claimed that as Legal Notice No. 72 of 1994 was not laid before the Senate within 15 sitting days of its publication it ceased to have any effect.

The appellant's case may be summarised as follows:

- (1) Legal Notice No. 72 of 1994 is null and void on the ground that 3rd respondent

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had no power to make it and to make regulations governing the police force.

- (2) The late presentation of the Legal Notice to the Senate rendered it inoperative.

The application was opposed by Captain Malewa a member of the Royal Lesotho Mounted Police on behalf of the respondents. There was also filed a supporting affidavit by Mr. Thakhisi the Deputy Clerk to the Senate to which I shall later refer.

In his affidavit Captain Malewa refers to the fact that Police Order No.26 of 1971 (as amended) had provided for matters of discipline of members of the Police Force in Lesotho. Sometime in April, 1993 the present Constitution of Lesotho came into operation and section 147(1) thereof vested the responsibility for the maintenance of Law and Order in the Police Force for Lesotho. Further it vested in the Commissioner of Police, subject to any direction of the Defence Commission, *inter alia*, the administration and the discipline of the Police Force. He alleges further

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that in the exercise of the powers conferred by Section 11 of the said Police Order the Royal Mounted Police Regulations 1972 Legal Notice No.24 of 1972 were promulgated. Those regulations are still in force. *Inter alia* they created a series of disciplinary offences by members of the Police Force. Part 1 under Section 3 of the Regulations provides that:

"All officers will be responsible to the Commissioner for the efficiency, discipline and internal running of the unit of which they are in command, and for the proper performance of any duty on which they are employed. By amendment of existing laws Regulations Legal Notice No.28 of 1994 Part III of the Police Order 1971 was repealed. It had laid out the procedural machinery dealing with the matter of discipline of members of the Police Force. However the procedural machinery was resuscitated under the Defence Commission (Royal Lesotho Mounted Police Force) Regulations Legal Notice No.72 of 1994."

With regard to the history of Legal Notice No.72 of 1994 Captain Malewa refers to the fact that it was published on Friday 1st July 1994. On 6th July 1994 the Senate House of Parliament of Lesotho officially went into recess. At the time the Senate went into recess only six sitting days of the Senate had passed since the promulgation of Legal Notice No.72 of 1994. The Senate resumed its sitting on

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28th September 1994 and on that day the said Legal Notice was laid before the Senate. Thus it was laid before the Senate on the 7th day of its sitting after publication in the Gazette. These allegations are supported by Mr. Thakhisi in paragraph 4 of his affidavit which is annexed thereto.

The respondents submit that the proceedings were legally valid for the following reasons:

- (1) Legal Notice No. 72 of 1994 was laid before the Senate within seven sitting days of its publication.
- (2) Section 147 of the Constitution establishes a Police Force for Lesotho that is to be responsible for the maintenance of Law and Order in Lesotho and which is to have such other functions as may be prescribed by an Act of Parliament. It further vests responsibility for the administration and discipline of the Police in the Commissioner of Police. Section 5(3) of the Police Order of 1971 is essentially an embodiment of certain provisions of Section 147 of the Constitution.
- (3) Section 6 of the Police Order of 1971 must be read with Section 147(1) of the Constitution. Section 6 authorises delegation by the Commissioner of his powers. That Authority to delegate must be seen as a function prescribed

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by an Act of Parliament. As such the Commissioner was authorised by law to delegate his powers and did just that in the instant case by appointing a Board in the first instance and then a Board of appeal to hear an appeal from the Board.

- (4) In the alternative it is alleged that even if it is held that Legal Notice No.72 of 1994 is *ultra vires* that does not affect the validity of the proceedings as any defect (if there be such) is one of form not of substance.

Finally reference is made in Captain Malewa's affidavit to the fact that the present proceedings were instituted on the 28th November 1994 after the appellant's appeal to the Appeals Disciplinary Board had been heard and dismissed.

No replying affidavits were filed by, or on behalf of, the appellant. Shortly stated the learned Judge *a quo* approached the matter in the following way. Section 145(4) of the Constitution provides that:

"The Commission (i.e. the Defence Commission) may by regulation or otherwise regulate its own procedures and may delegate any of its functions under sub-section (2) to any police officer."

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The functions and responsibilities of the Defence Commission as laid down in section 145(2) relate to the appointment, discipline and removal of members of the police force.

Although the Constitution is silent on the precise manner in which the Commission is to discharge its aforesaid functions and responsibilities the language of section 145(4) is wide enough to give the Commissioner powers to make regulations in order to discharge its duties. And the power to delegate which occurred in this case is expressly provided for.

I pause to observe that, according to the Shorter Oxford Dictionary "regulate" means "1. trans..... To control, govern, or direct by rule or regulations." (my underlining)

The learned Judge took the view that it is also necessary to have regard to section 147(2) which vested the power of command of the Police Force in the Commissioner of Police subject to any direction of the Defence Commission. Thus the Defence Commission remains as the ultimate

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authority in the Police Force and it may act as it sees fit in discharging its powers.

In her judgment the learned Judge has also pointed out that the Regulations in question were to be found in the earlier Proclamation 27 of 1957 and were Part III of Order No.26 of 1971. The history shows that at all times there was some control exercised over the police force and that, under the new Constitution, that control passed to a newly created body i.e. the Defence Commission. Finally, she refers to the new Constitution which heralded and brought about democracy in Lesotho.

"It is intended to bestow legitimacy to the Government and all its organs. How can it be interpreted to bring anarchy particularly to the police force? The Constitution must have been intended to re-establish the rule of Law and Order. The Constitution merely transfers the powers and authority over the members of the police force from the Minister to the Defence Commission."

The approach of the learned Judge on this last point would seem to be in accordance with the approach to Constitutional interpretation which "avoids the austerity of tabulated formalism" and gives to the Constitution a

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purposive interpretation which accords to it the full amplitude of its powers in accordance with the ethos and aspirations of its people.

The grounds of appeal attack both the finding that Legal Notice No.72 of 1994 had been tabled timeously as well as the interpretation adopted by the Court *a quo*.

Section 145(1) of the Constitution provides for the establishment of the Defence Commission which shall consist of:

- (a) The Prime Minister as Chairman;
- (b) The Commander of the Defence Force;
- (c) The Commissioner of Police;
- (d) The Director of the National Security Service;
- (e) The Assistant Commissioner of Police;
- (f) The Deputy Director of the National Security Service.

Section 145(2) provides:

"The Commissioner shall be responsible for the appointment, discipline and removal of members of the Defence Force, members of the Police Force

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and members of the Prison Service".

Sub-Section (4) states:

"The Commission may by regulation or otherwise regulate its own procedure and may delegate any of its functions under sub-section (2) to any public officer".

Section 147 of the Constitution deals with Police Force. It provides:

- "(1) There shall be a Police Force for Lesotho that shall be responsible for the maintenance of Law and Order in Lesotho and shall have such other functions as may be prescribed by an Act of Parliament.
- (2) The command of the Police Force shall be vested in the Commissioner of Police and, subject to any direction of the Defence Commission, shall be responsible for the administration and discipline of the Police Force.
- (3) the power to appoint a person to hold or act in the office of Commissioner of Police and the power to remove him shall vest in the Defence Commission."

The effect of the above sections is *inter alia* to create a Defence Commission which will be responsible for

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the appointment, discipline and removal of the Defence Force, the Prison Service and the Police Force. With regard to the Police Force the command is vested in the Commissioner of Police who, subject to any direction of the Defence Commission, is responsible for the administration and discipline of the Police Force.

In order to discharge its responsibilities which include the disciplining and removal of members of the Police Force the Defence Commission is given power under section 145(4) "by regulation or otherwise (to) regulate its own procedure and may delegate any of its functions to any public officer."

Legal Notice No.72 of 1994 consists of Regulations made by the Defence Commission and deals *inter alia* with the manner in which members of the Police Force may be disciplined. It provides for the appointment of Boards to discipline members of the Police Force, the procedure to be adopted by such Boards and the right of appeal. Boards are appointed by the Commissioner but Regulation 24 expressly provides for the delegation of his functions through officers subordinate to him in accordance with his general

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or special instructions.

As the learned judge correctly points out the Regulations in the Law in question appear in Part III (under the heading of DISCIPLINE) of the Police Order No.26 of 1971 and "prior to the coming into operation of the present Constitution these were the operating regulations in the Police Force." Sections 12 to 22 appearing under Part III of the Police Order 1971 (dealing with discipline) were repealed by Legal Notice No.28 of 1994 signed by the King on 16 March 1994.

Both the repeal of the aforesaid sections and other sections of Police Order 1971 as well as the establishment of the Defence Commission are expressly recognised in the preamble to Legal Notice No.72 of 1994 which reads:

"Whereas section 145 of the Constitution establishes the Defence Commission, and whereas section 145(2) provides that the Commission shall be responsible for the appointment, discipline and removal of members of the Defence Force, members of the Police Force and members of the Prison Service.

And whereas pursuant to section 156(3) of the Constitution Police Order 1971 was amended by repealing sections 5(3), 12 to 22 and 29 by Legal

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Notice No.28 of 1994, as it was necessary for bringing the law into conformity with the Constitution". (my underlining) Now therefore, pursuant to section 145(4) the Defence Commission makes the following Regulations:

It is quite clear from the foregoing that Legal Notice No.72 of 1994 was enacted to fill the void which had been left by the repeal of the identical sections of Police Order 1971. It is equally clear that under the Constitution the Defence Commission was created in order, *inter alia*, to be the supreme body in charge of discipline in the Police Force. In order to achieve its objects it was given *carte blanche* to regulate its own procedures by regulation or otherwise. (sec. 145(4) supra). In my view the language in the context of the Constitution as a whole is plainly wide enough to enable the Defence Commission to make procedural regulations which is what it did under Legal Notice No.72 of 1994. And those regulations deal precisely with what the Constitution empowers the Defence Commission and the Commissioner of Police to do. For these reasons which are substantially the same as those of the learned Judge *a quo* there is no merit in the constitutional attack mounted against Legal Notice NO.72 of 1994.

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There remains to be decided whether there is any merit in the point relating to the time when the law was tabled before the Senate. It is clear from what is said earlier herein that the issue is whether the Law in question was laid before the Senate within 15 sitting days of its publication in the Gazette. The Senate does not sit when it is in recess. On the facts of the case Legal Notice No.72 of 1994 was laid before the Senate on the seventh day of its sitting after publication in the gazette. That was well within the 15 days. This point is therefore without substance and was not persisted in by Counsel for the appellant at the hearing of the appeal.

In arriving at the conclusion concerning Legal Notice No.72 of 1994 I do not wish to be understood as holding that all the Regulations made under Legal Notice No. 72 of 1994 are *intra vires*. Some may well not be but it is unnecessary for me to express an opinion on the topic for the purposes of this case.

One can arrive at the same conclusion by travelling along a somewhat different route from that taken by the learned Judge *a quo*. The charges in question are

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contraventions of Regulation 24 paragraph 37 of Legal Notice 24 of 1972. The reference in the charges to Legal Notice 72 of 1994 is inappropriate. The charges are contraventions of paragraph 37 of Legal Notice No. 24 of 1972 which appears under the Schedule of offences and refers to : "being guilty of any act, conduct, disorder or neglect to the prejudice of good order and discipline."


That Law is still extant and is not the subject of attack in these proceedings. The charges under that Act were perfectly proper charges. What followed dealt with matters of procedure under Legal Notice 72 of 1994 which were clearly within the competence of the Defence Commission under Law 72 of 1994 for the reasons given earlier herein. The convictions which followed were thus perfectly proper convictions in law as the merits of the convictions have not been attacked in these proceedings.

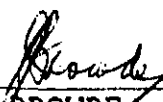
In my judgment the appeal must be dismissed with costs.

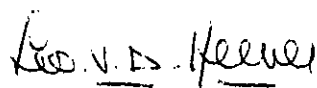
Delivered at Maseru on this 30<sup>th</sup> day of June 1996.

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Signed :

  
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R. N. LEON  
JUDGE OF APPEAL

  
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J. BROWDE  
JUDGE OF APPEAL

  
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L. VAN DEN HEEVER  
ACTING JUDGE OF APPEAL

For the Appellant : Mr. Rakuoane

For the Respondents : Mr. Makhetha