

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MATOKO MAHLOKA

APPLICANT

vs

DIRECTOR OF PRISONS
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 10th February, 2000

In this application, the applicant seeks to have the decision of the first respondent purporting to dismiss him declared null and void and that he be reinstated to his former position of prison warder in the prison service. The history of the matter can be summed up briefly thus: On the 9th July 1996 the applicant, a prison warder, appeared before a disciplinary board at Leribe on the allegation that he had contravened the (Lesotho) Prison Rules (1957) Rule 156 (7) in that he had by carelessness or neglect contributed to the escape of one prisoner one Mosotho Meya

at Leribe Hospital. It was common cause that on the 9th July 1999 a disciplinary hearing was instituted presided by Assistant Senior Superintendent Hlalele. The applicant pleaded not guilty; evidence was led in support of the charge; the applicant also gave evidence in his own defence. The applicant was found guilty as charged and award imposed was “severe reprimand” which was a competent punishment in terms of Prison Rule 163 (1) (b) (iii). The record of the proceedings reveals that the applicant stated that he did not wish to appeal. On the 12th July 1996, the Divisional Superintendent (North) made written comments on the record expressing his dissatisfaction with the award and recommended that the applicant be dismissed from the prison service. This adverse recommendation probably influenced the Director of Prisons when the record of the proceedings was forwarded to him in terms of Rule 165 which reads in part:

“The award or recommendation and any other, shall be reported to the Director, who shall take the following action

- (a)
- (b) if the charge is dealt with by means of an award under paragraph (b) of subrule (1) of rule 163, record it in the officer’s record of service.”

It is my view that once the officer in charge made a decision to make an award under Rule 163 (1) (b), the Director of Prisons had no power, despite the apparent leniency of the award, to review the same and substitute, as he did, the award of dismissal per his letter dated 12th August 1996. It reads:

“12th August, 1996

Officer No.893 M.R. Mahloka,
P.O. Box 89,
Leribe 300
u.f.s. O/C Leribe Prison

DISMISSAL FROM THE SERVICE

The proceedings of a disciplinary case against you where you were charged and convicted of contravening the provisions of paragraph 7 of Rule 156 of the Lesotho Prison Service on 5th July. 1996 have been before this office for review.

At the close of the case the adjudicating officer found you guilty and gave you an award of a severe reprimand and you did not make an appeal. On review the conviction was confirmed and the award varied to a dismissal. You were given chance to show cause if any, why you could not be dismissed from the service and you failed.

You are therefore informed that you have been dismissed from the service with effect from 12th August, 1996.

You will hand over to Officer Commanding Leribe Prison all items of uniform and any other government property that was entrusted to you during your term of service.

A.T. KHALIELI
DIRECTOR OF PRISONS

cc: Div. North
Acgen
Audit
MPS
Toka

His function under Prison Rule 165 (1) (b) is limited merely to record such award in the officer's record of service. There is no procedure for automatic review under the Prison Rules. It is quite clear that the applicant, perhaps basking in the award's benevolence, did not appeal to the Director under Rule 166. It is under this Rule that it is provided that the Director having considered the record of the proceedings may confirm, vary or reverse any award made under Rule 163. A fair reading of Rule 163 conveys an impression that an officer-in charge presiding over disciplinary proceedings under 163 has power either to make an award under (a) or (b) or he can make a recommendation under (c) if he is of the opinion that a more severe award is merited under the circumstances of the case at hand. The Director can then deal with the matter under Rule 169.

In the case of **Khongoane and others vs Director of Prisons and others** - 1991 - 96 LLR (vol. 1) p.270, a case almost similar to the present, the applicants were gaolers who had been charged under Rule 156 of the Prison Rules for having negligently contributed to the escape of a remand prisoner. The presiding officer had found them guilty and recommended that they be dismissed. **Ramolibeli A. J.**, as he then was, stated as follows:-

“I am satisfied therefore that by purporting to dismiss the applicants from their respective offices the 2nd respondent acted ultra vires his powers and consequently such dismissal is unlawful, null and void and of no legal force and effect.”

The learned judge found that section 3 of the Prisons (Amendment) Order No. 30 of 1970 vested the power to dismiss on the Director of Prisons and not on the Deputy Director of Prisons. According to the procedure set by the Prison Rules, the Director can however only dismiss a prison officer who has been found guilty by a presiding officer who then formally recommends under Rule 163(1)(c)(i) that he be so dismissed.

In the present case it appears that the Director of Prisons, probably appalled by the leniency of the award, then wrote a letter dated 23rd July 1996 directing the applicant to give reasons if any before the 29th July 1996, why he should not be dismissed from the prison service. On the 26th July 1996, the applicant replied stating the circumstances which led to the escape of the prisoner and also pleading for leniency. This letter was not forwarded to the Director of Prisons but instead the applicant was ordered to write another letter stating full reasons why he was not to be dismissed. He wrote it on the 29th July 1996 - the ultimatum date. On the 12th August 1996 the then Director of Prisons A.T. Khalieli wrote a dismissal letter in which he states:-

“..... On review conviction was confirmed and the award varied to a dismissal.” (underlining mine)

The pertinent question is whether the Director has power to review the award made under Rule 163 (1) (b).

Mr Mapetla in his strong submission argues that whilst the validity of the Rules is not being doubted, these Rules must be read subject to the Prisons (Amendment) Order

No.30 of 1970 which amended the Prisons Proclamation (the Principal law) and a new Section 3 is substituted to read:-

- “3. The power to appoint a person to hold or act in an office of the rank of Senior Chief Officer or below (including the power to confirm appointments and to appoint by way of promotion), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall be exercised by the Director of Prisons without consultation with the Public Service Commission.”

In fact the new Section 3 is also in harmony with Section 149 (2) of the 1993 Constitution of Lesotho which reads:-

“The superintendence of the Prison Service shall be vested in the Director of Prisons, and subject to any direction of the Defence Commission, the Director of Prisons shall be responsible for the administration and discipline of the Prison Service.”

He submits that the Prison Rules being subsidiary or delegated legislation should be read subject to the principal law as amended. He submits that the new Section 3 vests in the Director ultimate power of disciplinary control and this includes power to review awards. He argues that all disciplinary awards made under Rule 163 are subject to confirmation by the Director as “repository” of disciplinary control; the officers in charge he submits have no power to make any final awards and such awards should be taken as mere recommendations; he argues that unless some of the disciplinary powers are delegated the final decision vests in the Director.

Mr Teele counters by submitting that the Prisons Rules are still extant and valid and do not conflict with the spirit of Section 3 which vests disciplinary control in the Director of Prisons. He submits that the Director can only competently review awards only if the matter is before him on appeal. He submits that in the circumstances of this case, the Director has acted **ultra vires**.

The important question of law is whether the disciplinary control vested in the Director of Prisons also vests power in him to review awards made under Rule 163 (1) (b). The maxim **generalalia specialibus non derogant** means that where a general or principal Act of Parliament is intended to cover a whole subject to which it relates there is a presumption that the later general enactment was not intended to repeal an earlier special enactment unless there is a clear indication that the repeal was so intended. (**Khumalo v Director General of Cooperation and Development** - 1991(1) SA 158; **Devendish - Interpretation of Statutes** (1992) page 281.

The main purpose of the Prison Rules is to deal with specific disciplinary matters like types of offences, charges, proceedings and procedure at trial and on appeal, powers of the officers in charge and also powers of the Director of Prisons. I do not read these Rules to be in conflict with or irreconcilable with the principal law as amended.

Under the Prison Standing Orders (Part 3) every the officer in charge is responsible to the Director for the conduct and treatment of the Prison Officers and Prisoners under his control and for the due observance by prison officers and prisoners of the provisions of the Prisons Proclamation and Rules as amended from time to time.

The Rules were promulgated by Resident Commissioner on the 20th September 1957 in terms of section 31 of the Prisons Proclamation 1957. The Rules are therefore a subsidiary form of legislation. I am of the view that the Director of Prisons can exercise disciplinary control as envisaged under section 3 through his officers in charge who are selected to preside over disciplinary proceedings. I see nothing in the clear language of Rule 163 which imperils the power of the Director of Prisons; the presumption that a later general enactment was not intended to repeal a special conflicting regulation or rule can only apply if such conflict is demonstrable and evident. I discern no such. In the circumstances I do not think that Mr Mapetla's submissions should be sustained. In my view the Director did not have power to review an award made under Rule 163 (1) (b) nor was this power implied under the new section 3 of the principal law. It was unfortunate that the officer in charge chose to make an award of "severe reprimand" and the applicant in his wisdom elected not to appeal which latter step could have had the effect of opening his case to be reviewable. The Director can only exercise powers as vested in him by the law and the Rules - he has no inherent powers to review or vary the awards made by officers in charge under Rule 163 (1) (b).

Section 161 of the Prisons Rules reads as follows-

"Every officer in charge shall have the power to determine any case of an offence against discipline by an officer, and after having heard the evidence, he shall so determine it' (my underlining)

I understand the word “determine” to mean that the officer in charge has power to dismiss the charge or find the officer guilty and in the case of the latter finding make an award under Rule 163 (a) or (b) or make a recommendation under (c) thereof.

A fair interpretation of the new Section 3 should be taken to mean that the disciplinary control over prison officers of the rank of senior officer or below was being vested in the Director of Prisons without consultation with the Public Service Commission; it was not intended to abolish the disciplinary structures and procedures hitherto established under the Prison Rules of 1957.

The new Section 3 must be given a purposeful interpretation. Is it possible for the Director of Prisons to adjudicate and determine all cases of discipline regardless of how trivial? Do the Standing Orders not state that all officers in charge will be responsible to the Director for the conduct and treatment of prison officers and for the due observance by prison officers of the provisions of the Prison Proclamation and Rules as amended from time to time? The disciplinary control vested in the Director can be exercised by him or through his officers subordinate to him; to infer divestment of adjudication powers under Rule 161 would indeed create chaos resulting in all numerous disciplinary cases bulking on the Director’s desk and would dislocate the whole disciplinary machinery! (**Mokapela vs Minister of Home Affairs** - 1995 -96 LLR (LB) 224; - **Devendish** Interpretation of Statutes, page 35 - 38. The Part E - Code of Discipline for Officers which creates offences and manner of adjudication is still extant and cannot be taken to be inconsistent with the new Section 3 whose main purpose was principally to divest the Public Service Commission of the power to (a) appoint, (b) discipline or (c) remove persons holding

the rank of Senior Chief Officer or below. It was not intended to disturb the disciplinary structures and procedures within the Prison Service.

I do not find it necessary to make any decision whether the applicant was not afforded a fair hearing by the Director because the whole process after verdict and sentence was altogether irregular. The principle of **audi alteram partem** does not apply where the proceedings are per se irregular. The subsequent inquiry mounted by the Director of Prisons requiring the applicant to furnish reasons why he should not be dismissed also amounted to subjecting the appellant to double jeopardy and any hearing subsequent would suffer the same fate of illegality.

It therefore stands to good reason that the dismissal from prison service purportedly made by the then Director of Prisons on the 12th August 1996 cannot stand and is hereby set aside as being **ultra vires**.

The application succeeds and it is ordered that:

- (a) The decision of the First Respondent purporting to dismiss the applicant is hereby declared null and void and the applicant is to be reinstated forthwith;
- (b) Costs of this application are to be paid by respondents.

S.N. PEETE

JUDGE

For Applicant : Mr Teele

For Respondents : Mr Mapetla