CIV/APN/486/99

IN THE HIGH COURT OF LESOTHO

In the Application of:

MOLEFI A. LEKETA — Applicant

and

THE ACTING DIRECTOR OF PRISONS — 1st Respondent

THE ATTORNEY GENERAL — 2nd Respondent

REASONS FOR JUDGEMENT

On 21st September 2001, I disposed of this application and intimated that full reasons for the decision would be filed in due course. These now follow:

The applicant herein filed, with the Registrar of the High Court, a notice of motion in which he moved the court for an order framed in the following terms:

"1. Declaring the Applicant's dismissal from the Public Service unlawful, null and void and of no legal force and effect;

2. Directing that the Applicant be reinstated to his post in the Public Service of Lesotho;

3. Directing that the Applicant be paid all his emoluments and annual increments since October 1999;

4. Directing the Respondents to pay costs hereof;

5. Granting Applicant further and/or alternative relief."

The respondents intimated intention to oppose the application. Affidavits were duly filed by the parties. In as far as it is relevant, it was common cause, from the facts disclosed by affidavits, that on 19th October 1984, the applicant was employed as a prison officer in the Government of Lesotho - see annexure "ML1" (offer of appointment accepted by the applicant). He was, therefore, a Public Officer.

Some time in July 1999, disciplinary proceedings were brought against the applicant, for allegedly failing to supervise a gang of prisoners and, as a result, contributing to the escape of one of them. At the conclusion of the disciplinary proceedings, the applicant was found to have committed the disciplinary offence against which he stood charged. Following his conviction on the disciplinary charge against him, the applicant received, on 9th November 1999, annexure

"ML2" (a letter dated 8th November 1999). Annexure "ML2" reads, in part:

> " **DISMISSAL FROM THE SERVICE**
>
> The office of the Director of Prisons has received your letter dated 9th October 1999 in which you presented your grounds against dismissal.
>
> It is regretted to inform you that the reasons which you presented are vague and irrelevant and therefore not convincing. As a result, you are dismissed from the service with effect from 10th November 1999.
>
> You are to handover all items of uniform and any Government property in your possession to O/C Mohale's Hoek Prison.
>
> Yours faithfully,
>
> C.L. SIIMANE
> Acting Director of Prisons"
> (my underlings)

In the contention of the applicant, the power to remove Public Officers from office was, in terms of the Constitution of Lesotho, vested in the Public Service Commission and nobody else. In dismissing him, as he did, the 1st respondent, who was admittedly not the Public Service Commission, had acted ***ultra vires*** and, therefore, unlawfully. For that reason, his (applicant's) purported dismissal by the 1st respondent was null and void and of no legal force.

There could be no doubt that the applicant relied, for his contention, on the provisions of subsection (1) of section 137 of the Constitution of Lesotho. The subsection reads:

" (1) Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the Public Service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission."

It is, however, significant to observe that subsection (3) of the same section 137 of the Constitution provides, in part;

"(3) The provisions of this section shall not apply in relation to the following offices, that is to say -

(a) .....
(b) .....
(c) .....
(d) .....
(e) .....
(f) .....
(g) .....
(h) the office of Commander of the Defence Force and offices of members of the Defence Force, the office of Commissioner of Police and offices of members of the Police Force, the office of the Director of the National Security Service and offices of members of the National Security Service, and the office of Director of Prisons and offices of members of the Prison Service."

It is clear from the provisions of the above cited subsection (3) (h) of section 137 of the Constitution that the removal or dismissal from office of a member of the Prison Service is governed by a different legislation from section 137 (1) of the Constitution. That legislation is, in my view, the Prisons Proclamation 30 of 1957, as amended by the Prisons (amendment) Order 1970 of which section 3 reads:

> "3. The power to appóint 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."

It was not really in dispute that the applicant was, at all material times, holding the rank of prison officer in the Prison Service Department - a position which was admittedly below the rank of Senior Chief Officer. Assuming the correctness of my view that his removal or dismissal from office was governed by the Prisons Proclamation 30 of 1957, as amended, it followed that the applicant could not be heard to say that his removal or dismissal was null and void and of no legal force simply because it had been effected by the Director of Prisons and not the Public Service Commission.

It is, perhaps, necessary to mention that, in his affidavits, the applicant averred that his removal or dismissal from office was unlawful inasmuch as he was not given notice thereof. That is, in removing or dismissing him from office, as he did, the 1st respondent had afforded him no opportunity to be heard and, therefore, violated the principle of ***audi alteram partem.*** It is to be observed, however, that the applicant made this important averment in his replying affidavit

when the respondents had already filed their answering affidavits and, therefore, unable to deal with it. In my judgment the applicant could not be allowed to do that. He ought to have made that important averment in his founding affidavit so that the respondents could be able to deal with it in their answering affidavit. To hold the contrary would imply that the applicant was allowed to build his case as the case progressed, with the resultant prejudice to the respondents.

In any event, I underscored the words in paragraph 1 of annexure "ML2", attached to his own founding affidavit, to indicate my view that before he could be dismissed from office, with effect from 10th November 1999, the applicant had, indeed, been invited to present grounds (if any) against his dismissal. He did, on 9th October 1999, furnish reasons against his dismissal, which reasons were considered but found to be vague, irrelevant and unconvincing by the 1st respondent. The applicant was, therefore, not being honest with the court in his averment that, contrary to the principle of ***audi alteram partem***, the 1st respondent had removed or dismissed him from office without first affording him the opportunity to be heard.

From the foregoing, I took the view that the applicant's dismissal by the 1st respondent could not be faulted. That, in my judgment, was sufficient to dispose of the whole application and it would be purely academic to proceed to deal with the other prayers in the notice of motion.

The application was accordingly dismissed with costs.

B.K. MOLAI

JUDGE

3rd September, 2001

For Applicant : Mr. Matooane

For Respondent : Mr. Putsoane