CIV/APN/306/99
IN THE HIGH COURT OF LESOTHO

In the matter between:

LEEMA NTONE
and
THE CHAIRMAN - LESOTHO PRISON SERVICES
DISCIPLINARY COMMITTEE - QUTHING 1st Respondent
THE OFFICER COMMANDING LPS QUTHING 2nd Respondent
DIRECTOR OF PRISONS 3rd Respondent
ATTORNEY GENERAL 4th Respondent

For the Applicant: Mr. Metlae
For the Respondents : Mr. Mapetla

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi on the 10th day of December 2001.

The Applicant herein, who was an employee of the Government of Lesotho, in the Prisons Department challenged his dismissal made pursuant to a decision of

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the disciplinary hearing, convened in Quthing on the 11th November 1998.

A further introduction may prove useful. As should be clear by now the First Respondent presided over this tribunal which was established under Prisons Service Regulations. The tribunal is constituted by Commander of a prison (who presides) where the accused is not a senior officer. Where the officer charged is a senior officer the Director of Prisons has to reside. The charge before the disciplinary hearing had been that:

> "By this carelessness or neglect contribute(s) to the escape of the persons to wit that on the 5th October 1998 on or about 02.30 am the said Accused officer did wrongly and neglectfully failed to see and prevent the escape of prisoners (1) Tšeliso Mafantiri, (2) Lethusang Mochaba, (3) Pule Thene and (4) Kotsoane Mathibeli."

The charge sheet also stated that witnesses against the accused officer would be Senior Prison Officer (S.P.O), M. Metsing Prison Officer (P.O), T. Klaas, (3) Lethusang Mochaba (prisoner) (4) Pule Thene (prisoner). On part B of the form it was stated the List of Defence witnesses if wanted by the accused officer (Applicant) would be Tšeliso Mafantiri, Kotsoane Mathibeli, Lethusang Mochaba.

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As will be noted these were the escaped prisoners.

The record of proceedings itself showed that S.P.O, Metsing who was PW 1 having duly sworn, testified and was cross-examined by the Applicant. Then followed PW 2, P.O E Klaas

who having been duly sworn he then testified and was cross-examined by the Applicant. The third witness was Lethusang Mochaba a remand prisoner who was duly sworn then testified and was cross-examined by the Applicant. Lastly came the evidence of Pule Thene who testified having been duly sworn and was cross-examined by the Applicant.

After close of prosecution case the Applicant was duly sworn: He presented his defence and was cross-examined by the prosecutor. Two witnesses were called by the defence namely Tšeliso Mafantiri (an escapee) and Kotsoane Mafantiri (another escapee). Both were duly sworn, testified and were cross-examined.

At page 24 of the record was a short summary by the prosecutor. Next followed, at pages 25-26, what was called the Court's summary. Then the verdict of "guilty as charged" was entered. Then followed an entry on page 27 titled "mitigation" which I reproduce as follows:

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"It seems the breakage occurred the previous days. I don't deny that prisoners have escaped. I am asking for a lighter award. It is our negligence that we have not been checking the prison all the time prior to the escape. It is my first time to see this kind of an escape. I beg for mercy."

Again on the same page followed a list of previous convictions which show ten such convictions on different dates and different disciplinary awards (punishments). The said disciplinary awards as prescribed in Rule 163(1) of the Prison Rules (see Government Notice 27/1957). The recommendation of dismissal was shown on the same page. The last entry was a notice that "Accused wishes to appeal."

The notice of motion was filed against the above background. In addition to usual prayer for dispensing with periods and modes of service (prayer 1) Applicant sought for a rule nisi "calling upon the Respondents to show cause why:

a) 2The decision of the 1st and 2nd Respondents as contained in pp 35976 dated 14th March 1998 shall not be reviewed, corrected and set aside

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b) 1st, 2nd and 3rd Respondents shall not be directed to forward to the Registrar of this Honourable Court the proceedings of the Disciplinary Hearing of the 9th day of December 1998 held against the Applicant to be reviewed, corrected and set aside.

c) Costs of suit.
d) Further and/or alternative relief.

(2) That prayer 1 operate with immediate effect as an interim Court order." The notice of motion was accompanied by the founding affidavit of the Applicant.

Having indicated intention to oppose the Respondents' answered through the affidavit of Lephotla Siimane, the Acting Director of Prisons (Third Respondent). In support thereof was the affidavit of Thabang Elliot Klaas and that of the First Respondent. In response to the answering papers was the replying affidavit of Applicant.

I agreed with Mr. Mapetla that most of the issues which were debated before the Court were not alluded to in the Applicant's papers except the dispute over the finding over the facts. The one about expiration of the time within which to file disciplinary proceedings was abandoned (see paragraph 11 of founding affidavit) Several issues were raised in Counsel's submissions. First of all I agreed with the Applicant that review powers of the Court were not only intended for decisions of inferior courts but included decisions of public bodies and administrative tribunals. See I. Isaacs Beck's Theory and Principles in Civil Actions (1982) p.327.

Secondly, and most saliently Applicant said where a statute left a matter to be determined by a person or body of persons, it was implied in the absence of anything to the contrary in the regulating statute, that the decision given by such person or body was not appealable. See R v Steenkamp 1967(1) SA 714. This was apparently in answer to why if there was a dispute over the finding on facts the avenue for appeal had not been resorted by the Applicant. In other words the decision of the tribunal was not appealable as Applicant submitted in as much as there was nothing in the Prison Rules that made provision to that effect. With respect I disagreed. See Rule 166.

Furthermore as Applicant's Counsel submitted, as a general rule Courts do

not interfere with decisions of administrative persons or bodies. But where an administrative person has acted beyond the scope of its powers and/or where the method of acting has been irregular, Courts are justified to interfere with such a decision. See Singh v Umzinto Rural Licencing Board and Others 1963(1) SA 872. I thought it had been too simply put. I thought that it had to be more than that. It has to be an irregularity of a demonstrably gross kind. In addition it had to be shown that the irregularity that had been caused or had been calculated, in total circumstances, to cause prejudice to the party who complained. As amply argued the alleged irregularity was in connection with the fact that the presiding officer appeared to have put a premium towards his verdict on the fact of previous convictions against the Applicant.
Applicant's Counsel further submitted that administrative tribunals must act in accordance with the tenets of natural justice. See Gliksmen v Transvaal Province Institutes of Architects and Another 1951(4) SA 56(W). Counsel argued that irregularities such as prejudice bias and admission of hearsay evidence contravened tenets of natural justice. This he argued more about as will be shown later.

I agreed that a tribunal's decision will not be reviewable and cannot be set

aside unless it is shown that the alleged irregularity caused or was calculated to cause prejudice to one who complains. See Shidiack v Union Government 1912 AD 642 and Liverock and Meat Industry Control Board v Robert S Williams (Pty) Ltd 1963(4) SA 592(T). The Applicant would consequently (as he did) point to certain alleged irregularities which he said took place during the said proceedings of the to 11th November 1998 which he said were prejudicial to his interests.

The Court noted that superior Courts have inherent powers of review by virtue of being State Organs charged with administrative law. I was referred to the work Administrative Law by L. Baxter (1984) (See High Court Rules - Rule 50) I noted that it was within the competence of courts of law to review and set aside the decision of administrative tribunals. See Sebe v Government of Ciskei 1983(4) SA 523 (TK) and Administrative Law (supra) page 564-565. Almost the same principles are applicable, as in the English cases shown below, to quasi-judicial tribunals.

The following background is bound to be useful. It is that: In the event of a disciplinary hearing an accused officer who is not an officer-in-charge of a prison will be tried by an officer who is in charge of a prison in terms of Rule 159 of the

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Prison Rules. The Applicant was accordingly tried by an Officer-in-Charge of a prison in Quthing where he worked. In the nature of things this being an administrative tribunal with quasi-judicial powers an officer's record is made available to the presiding officer for certain endorsements of recommendations. The presiding officer in the position of the Officer-in-Charge of a prison would ordinarily be possessed at all times with the records of an accused officer.

These records of an officer are part and parcel of the documents that are placed before the presiding officer, in any event under Rule 165. It is the record of charges or awards that are sent to the Director of Prisons after recommendation, for his action, even if there has been no appeal provided for under Rule 166. So that there is no way of arguing that it is not right or proper that the presiding officer will have available before him at all times an accused's officer's record of service of which the previous convictions and awards are part. Hence it cannot be realistic to expect a senior officer not to be alive to the contents of a service record of an officer under him. This is separate from the way the presiding officer was said to have used the record which I will discuss hereunder.

The above account will partly put to rest this Applicant's submissions grounded on alleged bias which were couched as follows. Firstly that the reason

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for conviction which were delivered by the presiding officer show that the presiding officer was availed of the Applicant's record of previous conduct and records and that the conduct and the records influenced his decision. Applicant submitted that from the record of proceedings it appeared that the previous records of the Applicant were considered by the tribunal before pronouncing its verdict on whether the accused was guilty as charged. Indeed the presiding officer happened to have said at page 26 of the record:

> "Accused's previous conviction(s) on very serious offence(s) and very serious awards including a record 12 months special probation have persuaded this Court to find accused guilty as charged and the recommendation of dismissal was the only alternative." (My emphasis)

The Applicant then cited L Baxter Administrative Law 1st Edition at page 564 where the learned author had this to say:

> "Real or apparent pre-judgment of the issues to be decided by the decision maker gives rise to disqualification or grounds of bias. Prejudice could arise ..... as a result of the decision maker's

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> manner of conduct during the decision making process.....".

This was in connection with the Applicant's allegation of prejudice. It is correct that nowhere in the record of the proceedings itself is there evidence of previous conduct. But as I have said the record of service is all along available to the presiding officer who is even required to forward the record to the Director of Prisons in the event that he is required to deal with it by virtue of an endorsement which he must make following an award. See section 165(1) (b) of the Prison Rules. It was not suggested that "the procedure in the case involved unfairness: no one can be expected to be perfect in all the circumstances" per Lord Russel in Fairmont Investments Ltd v Secretary of State For The Environment (1976) WLR 1255 at 1266 E.

It is to be conceded that the way in which the statement about previous convictions is expressed, and the stage at which it occurs, that is, before the sentencing stage is strange to the traditional legal procedure and practice of a Court in the strict sense. That is things to do with sentence would normally be expected to be raised only after verdict. In this inquiry before that tribunal that was not the case. Strangely enough, as I observed, the question of previous convictions came at the time of the verdict and not after. Supposing it was an error

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of law was it such a material flaw? Griffith CJ said in R v Chief Registrar of Friendly Society (1984) QB 260; 260G-261A in that regard:

> "In a decision involving the weighing up of complex factors it will always be able to point to some factors which arguably should have been taken into account or left out of account; even if they should have been the court should not interfere unless it is convinced that this would have resulted in the decision going the other way. The same applies to an error of law on the face of the record. If the error is fundamental to the decision the Court should intervene but certiorari is a discretion remedy and not every error of law will justify quashing the decision. And finally particular care must be taken in stigmatising a decision as one at which no reasonable person could have arrived, for this is coming dangerously close to the court substituting its own discretion for that of the tribunal." (My underlining)

I respectfully agreed with above statements. I have also reached the conclusion contended for namely that the tribunal's decision ought not to be disturbed. And that this application could not succeed.

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The two other related submissions were as follows. First, that where a presiding officer had a past relationship with the affected individual there was likelihood of prejudice, inasmuch as the officer was likely to identify himself with a particular view, which was directly relevant to the subject matter of the administrative decision and the presiding officer could not therefore remain impartial. I was referred to Administrative Law (supra) at pages 564-565. It speaks of real or apparent prejudice. This is however so widely stated in the book that I wondered if the treatment of the subject by the author concerned the facts or a situation similar to the instant.

In any case I have already commented about the relationship between the presiding officer and an accused officer who is charged in terms of the Prison Rules. I would find nothing wrong with the relationship which is in any event envisaged in terms of the Rules. In short the past activities of the decision-maker, current external commitments or manner of conduct during decision making process did not suggest any bias or ulterior motive. I did not quite appreciate how the presiding officer was said to have identified himself with a particular view, which was directly relevant to the subject matter of administrative decision and could not remain impartial. Except for this aspect of previous convictions I did not find that there was anything arguable in an attempt to persuade the Court to disturb

14 the tribunal's finding. In particular it was not suggested that the tribunal's findings had to be disturbed because they had been arrived at dishonestly. See Koatsa v NUL 1991-92 LLR 163 at 167-168.

Except for the six line paragraphs that speaks about the Accused's previous convictions which I have quoted on page 10 above, the presiding officer's summary runs up to one and half pages. All this which is on the surface a fair evaluation of credibility, reliability of witnesses and probabilities and so forth in an approach that appeared to be objective in dealing with known facts and from which came out a reasoning process which moved towards determination of the facts in dispute. It is said by the Applicant the conclusion on the facts was wrong in that no tribunal properly directed would come to the conclusion.

Numerous flaws were pointed out with regard to the criticisms directed at the Court's conclusion on the facts. One was in connection with alleged wrongful admission of hearsay evidence.

It was contended that the only evidence led before the tribunal which could have led to the judgment was the evidence of one witness who informed the tribunal that he had been informed by one Mokheseng who had been called before

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the tribunal. I was referred to Record of Proceedings at page 25 in which the tribunal stated makes mention that according to the evidence of PW 1 and PW 2 the escape was around 0200 hours.

In addition Applicant submitted that apart from hearing of PW 1 there had been no evidence to controvert the evidence of PW 3, 4, 5 and 6. I was referred to the evidence of Lethusang Mochaba at pages 8 and 9 and that of Pule Thene (PW 4) at pages 10-11. Furthermore it was said that the evidence of PW 1 made no mention of the time of escape. I was referred to page 2 of the proceedings. And lastly that PW 1 merely mentioned that one "Sebota" said he realized at 0200 hours that there had been an escape.

As the above objection goes, it is being contended by the Applicant that the factual evidence did not support the charge that the Applicant had defaulted as charged. It is not without problems. I have considered it as sufficient warning the remarks of Mahomed JA in Koatsa v NUL (supra) where the learned judge said at pages 167-168, that:

> "Neither the High Court nor this Court sits as a Court of Appeal against the findings of the disciplinary committee of the Respondent
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> University. The findings of those organs cannot be disturbed if they were arrived at honestly and if they were findings to which a reasonable man, properly applying his mind could honestly have come."

It is a plain indication as to the inadvisability of a reviewing judge going through the exercise of evaluating the evidence which was led before a tribunal, in search of whether a correct conclusion has been arrived at by a tribunal. This would be without advantage of observing the witnesses' demeanour which (demeanor) the tribunal must have taken into account with the necessary circumspection. Although we know that findings based purely on the demeanour of witnesses are rarely, if ever, rational.

Again on the problem of the Court being required to investigate a tribunal's conclusion on facts, a few examples would be useful. This would do by way of comparison while presuming that such bodies, officials or tribunals are entrusted with certain decisions, be they quasi-judicial or not, and have been so delegated by parliament to positions where the investigation of the facts is in their day to day area of operation. That is why Lord Greene M. R. has said in Associated Provincial Picture House Ltd v Wednesday Corporation 1948.1 KB 223 at 230:

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> "It is clear that the local authority are entrusted by parliament with decisions on the matters which the knowledge and experience of that authority can be trusted to deal with."

This is a consideration that should make the Court reluctant to interfere with finding of tribunals. I have already described the position of the presiding officer who is commander of a prison. He must be having adequate knowledge and experience of things in the mileau in which the Prison Rules operate.

The attitude expected of a High Court judge on review can further be compared to the situation in R v Inland Revenue Commissioner , ex parte Rossminster 1980 AC 952 per Lord Diplock at 1013 EH where it was said:

> "When parliament has designated a public officer or decision maker for a particular class of decisions the High Court, acting as reviewing Court under Order 53 is not a Court of appeal."

The analogous position of the presiding officer in the instant matter and that of the public officer in the above English case is reinforced. In addition it became very clear that "Judicial review is not just a move in an interminable chess tournament"

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per Lord Templeman in Nottingham Country Council v Secretary of State for the Environment (1986) AC 240 at 267. Thus there are limits of review.

In moving towards the closing of the judgment I agreed with Respondents that although the application purported to be a review, the matters raised herein including the question of findings of fact were matters which fell outside the scope of review proceedings and therefore should be ignored by the Court by way of making no attempt to inquire into them. For example the question of the time of escape and whether there were any parts of the prison which were out of view from the control tower, were issues of fact which would best be properly left to the tribunal to determine. See for example Administrative Law (supra) at page 305 and Steyn v City Council of Johannesburg 1934 WLD 146-7. Thus as Lord Acker says in R v Secretary of State for Home Department, ex parte Brind (1991) AC 696:

> ".....It would be a wrongful usurpation of power by the judiciary to substitute its judicial view, on the merits and on that basis to quash the decision."

Thus there are limits to judicial review.

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In the Civil Practice of the Supreme Court of South Africa, Van Winsen at al (4th edition) at pages 946-948 at G. "The Modern Law Reformulated" the authors say that the modern law relating to common law review has been stated in the two cases which the authors mention. I was attracted to the following principles which the authors have culled from those decisions which I quote below as follows:

1) .....
2) The issue before a court on review is not the correctness or otherwise of the decision under review unlike the position in an appeal; a court of review will not enter into and has no jurisdiction to express an opinion on the merits of an administrative finding of a statutory tribunal or official for review does not as a rule import the idea of a consideration of the design of the body under review.

3) .....
4) .....
5) .....
6) The rules relating to judicial proceedings do not necessarily 20 apply to quasi-judicial proceedings.
7) .....
8) A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been "failure of justice". A mere possibility of prejudice not of a serious nature will not justify interference by a superior court.....".

I wholeheartedly agreed with the principles. I was therefore fortified in my view that the Applicant has demonstrated no right to have applied for review of the proceedings of the tribunal. On this ground alone application stands to be dismissed.

I repeat that the Applicant was entitled to and should have proceeded by way of appeal in the circumstances of the kind of complaint that he has brought forward. This includes his query over conclusions of fact reached by the tribunal. He has decided not to appeal. Refer to Rule 166 of the Prison Rules.

In the circumstances the application was dismissed with costs.

T. Monapathi
Judge

10th December 2001