

**IN THE HIGH COURT OF LESOTHO**

HELD AT MASERU

In the matter between:-

CHAKA LEHATA	1 <sup>ST</sup> APPLICANT
SEEISO LETSIE	2 <sup>ND</sup> APPLICANT
PHINIUS KHOMO	3 <sup>RD</sup> APPLICANT
MAOPELO MAKHETHA	4 <sup>TH</sup> APPLICANT
MOTLALEPULA MAFETO	5 <sup>TH</sup> APPLICANT
LEKHARI MOFO	6 <sup>TH</sup> APPLICANT
MOEKETSI JANE	7 <sup>TH</sup> APPLICANT
TS'OKOLO MOSAE	8 <sup>TH</sup> APPLICANT
MATAMO LEUTA	9 <sup>TH</sup> APPLICANT
TEBOHO MATS'A	10 <sup>TH</sup> APPLICANT
BOTIKI FANI	11 <sup>TH</sup> APPLICANT
LEBONA MOTS'EARE	12 <sup>TH</sup> APPLICANT
LEFATA RAMAKHULA	13 <sup>TH</sup> APPLICANT
THABISO MOTHOB	14 <sup>TH</sup> APPLICANT
KONYANA RAMAROTHO	15 <sup>TH</sup> APPLICANT
MALEBANYE SEEISO	16 <sup>TH</sup> APPLICANT
MARAKE MOLEFE	17 <sup>TH</sup> APPLICANT
MORAPELI CHAOLE	18 <sup>TH</sup> APPLICANT
KHAUHELO SEFALI	19 <sup>TH</sup> APPLICANT
PHILLIP MASOABI	20 <sup>TH</sup> APPLICANT

and

THE COMMISSIONER OF POLICE	1 <sup>ST</sup> RESPONDENT
THE MINISTER OF HOME AFFAIRS	2 <sup>ND</sup> RESPONDENT
THE ATTORNEY GENERAL	3 <sup>RD</sup> RESPONDENT

## JUDGEMENT

**Delivered on the 8<sup>th</sup> Day of March, 2002 by the  
Honourable Mr. Justice G. N. Mofolo**

The applicants have approached this court on an urgent basis claiming an order as follows:-

1. (a) That the Rules of this Honourable Court pertaining to service and form shall not be dispensed with on the grounds of urgency;
  - (b) Directing the 1<sup>st</sup> respondent to pay the Applicants the half-pay emoluments withheld by him during the period of interdiction between 1<sup>st</sup> August, 1997 to date;
  - (c) That the decision of the 1<sup>st</sup> Respondent purporting to dismiss Applicants shall not be declared null and void;
  - (d) That the Respondents be directed to reinstate and continue paying Applicants' salaries until the Court of Appeal has disposed of C of A (CRI) No. 9/2000.
  - (e) That the Respondents pay the costs of this application only in the event of opposing same;
  - (f) Granting applicants such further and/or alternative relief.
2. That prayer 1 operate with immediate effect as an interim relief.

The application was opposed.

## **FACTS:-**

Facts of this application are that applicants being members of the Lesotho Mounted Police Service were, as a result of charges brought against them, interdicted on half-pay pending the result of criminal proceedings against them.

The result of the case against applicants was that some of the accused were found not guilty and were acquitted and discharged while applicants were convicted of a lesser charge and accordingly sentenced. Acquitted policemen were re-instated in their jobs and although applicants went in appeal, they were given letter of dismissal. It is worth mentioning that on their conviction applicants were dismissed but later re-instated under the impression that their fate would be decided by the result of the appeal. The current Commissioner of Police and 1<sup>st</sup> respondent herein had, however, reversed his predecessors decision to re-instate applicants and had dismissed them for, according to him 'noting of an appeal to the Court of Appeal does not change the position of Applicants in that they remain convicts until the judgement of this Honourable Court has been overturned on appeal.'

Effectively therefore, what applicants are asking for is:-

- (1) Their half-salary from the period of their interdiction to date;
- (2) Setting aside 1<sup>st</sup> Respondents decision to dismiss them;
- (3) Re-instatement of applicants.

With regard to (1) above both before me and in his heads of argument, Counsel for respondents does not seem to have seriously challenged this. In this regard applicants Counsel has referred this court to a number of cases against withholding a suspect's salary during the period of interdiction. In particular *B. M. Mapola vs Commissioner of Police (CIV/APN/24/98 unreported)* was cited where at page 6 the learned judge remarked:

*'Section (1) of the constitution forbids arbitrary seizure of property or interest in or right over such property.'*

The learned judge also spoke of the constitutional culture of human rights and fairness to the individual adding at page 8.

*'The determination to put him on half-pay appears to have been arbitrary and amounts to punishment before the merits of his case are determined;'*

The system to place suspects on half-pay has been much criticized by Courts of law and not without good cause for the move is mired in prejudice and presumptuous thought processes. As I said in *Lehata's case, (CIV/APN/21/01)* quoting from the first

proviso to **sec. 25 of the Police Order, 1971 (now sec. 53(1) of the Police Service Act, 1998)**, even though a police officer may be interdicted, 'he shall not by reason of such interdiction cease to be a member of the force.' From this it follows that notwithstanding the interdiction, a policeman remains as such in so far as his calling as a policeman is concerned. If he remains a fully-fledged policeman in so far as his duties are concerned, it follows that his rights, privileges and immunities remain unimpaired and undisturbed. Any disturbances of his rights, privileges and immunities while under interdiction would mean ushering in of double standards and selective treatment. Such occurrence is so far-fetched it cannot even be contemplated and for this reason I hold that applicants are entitled to their half-pay up to their discharge or dismissal from the police service and *infra* I will explain why the period is up to their dismissal.

This court has also been called upon to set aside the decision by the 1<sup>st</sup> Respondent to dismiss Applicants from the Police Service. The reason advanced by Counsel for Applicants is that in the first place Applicants are on appeal and that by dismissing them the Commissioner of Police has jumped the gun by prejudging the result of the appeal.

Secondly Applicants' Counsel has submitted that the current Commissioner's predecessor while on Applicants being convicted he had dismissed them, he had nevertheless changed his mind and re-instated Applicants in the Police Service pending the result of their appeal. When, however, the 1<sup>st</sup> Respondent took over from his predecessor, he had overturned his predecessors's decision by dismissing applicants from the police service. Mr. Molapo has contended that on the principle of succession the 1<sup>st</sup> Respondent is bound by the acts of his predecessor and as such is *functus officio* and cannot be seen to revisit or review his own decisions.

Mr. Letsie for the Respondents had disagreed saying afterall applicants have served their full period of sentence and in any event 'the noting of an appeal does not change the position of Applicants in that they remain convicts until the judgement of this court has been overturned on appeal.' Moreover, so went on Mr. Letsie, Rule 6(1) of the Court of Appeal contained in 1980 rules provided that the noting of an appeal did not operate as stay of execution of the judgement appealed from and if Applicants intended to stop execution pending the result of their appeal it was up to them to apply for stay of execution pending the result of their appeal.

With respect, I do not think that the question of succession to office and whether

a successor to office is bound by acts of his predecessor is in issue in these proceedings or for that matter whether the 1<sup>st</sup> Respondent is *functus officio* and may not revisit the issue or as it were review his own decision. What is in issue is whether applicants having been convicted and sentenced execution relating to their status in the Police Service cannot follow in terms of the Police Service Act, 1998 simply because they are on appeal. I understand being on appeal as connoting that an appeal ipso facto stops or stays the evil day namely, applicants dismissal from the Police Service. I cannot disagree more.

Before delving into the issue, I intend re-stating what the Commissioner of Police and the 1<sup>st</sup> Respondent herein has deposed in his Answering Affidavit.

**Ad. Paragraph 11:**

‘..... The re-instatement of the Applicant and other co-applicants was a mistake made by my office which we corrected after being advised by our Legal Counsel. My office had laboured under a mistaken belief that since the applicants had noted an appeal against their conviction then my office had to wait the determination of their appeal before they can be dismissed. The true position is that this Honourable Court has pronounced them guilty in terms of the law. I can only re-instate them if their appeal to the Court of Appeal succeeds.’

**Also ad. Paragraph 10:**

‘..... The Applicants and his co-applicants are convicts. While they remain convicts I am empowered by the law to dismiss them from the Police Service. Up to and until the Court of Appeal reverses the decision of this Honourable Court, then the

Applicant and his fellow Applicants remain convicts.’

Fact of the matter is that there is judgement against applicants and a judgement has consequences being that a losing party expects the judgement against him to be enforced by means of execution. In applicants’ case, it does seem that according to sec. 51(4) being a section dealing with Police Tribunal, where a police officer is convicted and appeals to the Police Appeals Tribunal, ‘the execution of the punishment imposed in respect of the conviction which is the subject of the appeal, shall be suspended pending the decision of the Police Appeals Tribunal on the appeal;’ of significance is the fact that this is a matter that falls under Police statutory ambit and power while applicants were convicted of common law crimes determined by a court of law.

Although the Commissioner of Police has merely said applicants were dismissed from the Police Service ‘in terms of the Police Service Act’ without referring to the particular section, and having gone through the Police Service Act, 1998 have found no such section, **under sec. 29 of the Police Order No.26 of 1971 sub-section (e)** the Commissioner of Police was empowered to ‘dismiss such member on conviction of an offence other than an offence under this order or regulations made there under’ and it



would seem the Order had not been repealed.

I cannot say that in following the Act, 1<sup>st</sup> responded misdirected himself or used his discretion wrongly having regard to the fact that there was a patent error committed by his predecessor. In any event, the fact too that new facts had come to light cannot be ignored.

There is plenty of authority that at common law an appeal suspends execution (see **Wood, N.O. v Edwards and Another, 1966(3) SA 443 (R)** but as Mr. Letsie for respondents has submitted this is not our law.

The question of whether an appeal suspended execution came before the Appeal Court in **Andre v. Panahane LLR. 1979(1)39** where the Appeal Court referred to **Rule 41 of the Court of Appeal les 1971 (now Rule 6(1) of the Court of Appeal Rules, 1980)** which reads:


“An appeal shall not operate as a stay of execution or of proceeding under the the decision appealed from except so far as the High Court on an application when judgement is delivered, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the court appealed from may direct.’

It was in the light of the above rule that the Court of Appeal per Maisels P. (as he then was) held that noting of the appeal did not suspend the operation of judgement of **Rooney J. (c/f Lefalatsa v. Ofinam (Cof A (CIV) No. 5 of 1973, 3/10 November, 1978; Lesotho Electricity Corporation vs Fourfter (C of A) (CIV) No.7 of 1978 2<sup>nd</sup> November, 1978)**. In the same case the court expressed the view that in matters of this nature the question to be asked was whether the applicant would suffer more prejudice if the execution proceeded than the prejudice the respondent would suffer if the execution was stayed (**c/f Lefalatsa v. Olifan Supra; South Cape Corporation Ltd. vs Engineering Services (Pty) Ltd. 1977 (3) SA 534 (A.D)**); moreover, the Court had found it was undesirable to fully canvas the question as to whether the applicant had reasonable prospects of success on appeal. As a result, the Court having found that the applicant is likely to suffer more prejudice if he is ejected from the premises than the respondent would if he is not ejected, had found for the applicant by setting aside the writ of execution.

It has to be understood that the only question to be decided by this court in the present application is whether an appeal suspends the operation of judgement and put in another way, whether an appeal suspends or stays execution of judgement. This court has answered the question in the negative and accordingly, the judgement of this

court is that prayer 1(c) of the Notice of Motion is dismissed. As prayer 1(d) is substantially the same as prayer (c) above, prayer (d) is also dismissed. The court has upheld prayer 1(b) ordering that it be effective up to day of dismissal as a necessary consequence; necessary consequence because applicants have not said what the fate of their appeal is and whether they intend to expedite it. Besides, it is not known when the appeal will be heard and it is not clear to this court whether the appeal is on the roll of cases to be heard in the next sitting of the Court of Appeal or whether it has lapsed. Because of these factors the court has found that respondents would be prejudiced if the order has to take effect up to and including the result of the appeal afterall, it does not seem that applicants are in any way prejudiced for should they be successful on appeal, their re-instatement is assured.

As to costs, in view of the fact that both applicants and respondents have been partially successful, there will be no order as to costs.

  
**G. N. MOFOLO**  
**JUDGE**  
**8<sup>th</sup> March, 2002.**

**For Applicants : Mr. Molapo**

**For Respondents : Mr. Letsie**