IN THE COURT OF APPEAL OF LESOTHO

**C of A (CIV) No. 03/06**

In the matter between:

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| **Director of Postal Services** | **1st Appellant** |
| **Principal Secretary Ministry of Transport & Communications** | **2nd Appellant** |
| **Public Service Commission** | **3rd Appellant** |
| **Attorney General** | **4th Appellant** |
| **and** | |
| **'Mankalimeng Matsoha** | **1st Respondent** |
| **Elsie Ntšohi** | **2nd Respondent** |
| **Mohaletsane Qhobela** | **3rd Respondent** |

CORAM
Steyn,P
Grosskopf, JA
Smalberger, JA

JUDGMENT

STEYN, P

[1] In this matter the three respondents applied to

the High Court for a declaratory order and for certain ancillary relief as set out below. The declarator they sought was an order declaring their suspension from the Public Service on half pay since 1996 unfair. In their claims for ancillary relief they sought the following orders:

1. Directing respondents to pay to applicants arrears of salary from date of the purported suspension to the date of judgment.

2. Directing respondents to reinstate payment of the applicants' full salary pending the outcome of the criminal proceedings against them.

3. Costs of this application.

The High Court declined to grant a declaratory order, but acceded to the subsidiary claims set out above. The appellants have challenged the propriety of the granting of these orders. In order to appreciate the context in which these orders were sought, I set out

below an overview of the facts.

[2] 2.1 All three respondents were employees of the civil service and served as such in the department of postal services which operated under the control of the 1st appellant (the appellant). They were suspended without pay by her because they were suspected of being involved in a fraudulent conspiracy to secure the encashment of South African postal orders to the tune of some M30,000. In response to a request from the postal controller that they should report back to appellant concerning this allegation, the second respondent admitted that she herself had been involved in a conspiracy with her co-respondents in the encashment of postal orders she knew to be fraudulent transactions. There

were therefore reasonable grounds for the suspension of the three respondents pending the institution of either or both disciplinary and criminal proceedings.

2.2 However, as is so often regrettably the case, these proceedings took an inordinately long time to be prosecuted. The original suspension was effective from the 23rd of September 1996 and was still operative at the time of the institution of these proceedings on the 16th of August 2001. Criminal proceedings were instituted in 1997, but were still pending in 2001. However, their suspension without pay was ameliorated somewhat by an amending order from the secretary of the 3rd respondent, the Public

Service Commission (the Commission), in terms of which they were to receive half pay during the period of their suspension. This amendment came into force in May 1997. I should add that the original suspension by the first appellant (the Principal Secretary of the Ministry – the P.S.) included a provision that the appellants "should not obtain alternative employment during your suspension".

[3] I come to deal with the challenge which the appellants directed at the decision of the High Court to grant the relief sought by the respondents. Their challenge was confined to the following complaint by the respondents as set out in the founding affidavit:

> "I wish to take this Honourable Court into my confidence and state that as a matter of practice all civil servants who are under suspension are on

> full pay. As a result our differential treatment in this regard is disconcerting. We have been advised by our attorney of record and verily believe same to be true and correct that legally the said practice of giving suspended civil servants their full pay raises on our part the legitimate expectation that we will be treated likewise."

[4] The validity of this allegation was challenged by the appellants and the contention of the existence of a legitimate expectation was similarly contested. The respondents were invited to submit evidence in support of their allegation but declined to do so. In any event it is impossible on the meagre facts on record either to make a finding that the respondents were unique in their plight, or, even if they were that this was a ground for the vesting of a legitimate expectation. Indeed this was not the basis on which the learned Judge *a quo* found for the respondents. Neither was any argument in support of this

contention advanced to us at the hearing of the appeal. It follows that some other ground upon which the decision to suspend the respondents on the conditions set out above had to be found in the evidence on record. Certainly no explicit factual allegation underpinning a sustainable challenge to the original or the ameliorative orders of the appellants is to be found in these papers. As recorded above, the respondents sought a declarator declaring their suspension on half pay unfair. They also sought the restoration of the *status quo ante* prior to the decision to suspend them. The case the respondents should have brought was one of a review on the well-known grounds; they did not so. There is a clear logical disconnection between the principal relief claimed and the ancillary prayers.

[5] I come to deal with the judgment and the basis on which it sought to come to the assistance of the respondents – the applicants in the court *a quo.* The Judge *a quo* analyzed the history of the role of "courts vis-à-vis administrative organs". He then says the following:

> "The majority decision in **Liversidge v Anderson** above is the bedrock of Mr. Mapetla's contention that the Court is not privy to information at the disposal of applicants' authorities. And while this is true, I am wondering whether this Court is being told that because of the sensitivity and maybe subtle machinations associated with theft cases the Court cannot interfere despite the unreasonably long time applicants have been suspended and put on half-pay, a period well-neigh ten (10) years, it is justifiable for administrative authorities to sit on their laurels without prosecuting applicants. If so, this is unfair and [a] travesty of justice which this Court cannot watch silently for now that applicants are before Court the Court cannot but grant relief if

circumstances deserve it".

The Court then records that there has been a radical revision of the majority decision in Liversidge and Anderson [1942] AC 206 and that "courts insist on examining the soundness of the factual basis on which the discretionary power has been exercised."

[6] The basis on which the court *a quo* found that it was empowered to challenge the validity of the decision of the Commission to suspend the respondents on half pay is articulated as follows:

> "In the instant application, in the beginning the factual basis of putting applicants on half-pay was sound being supported by the statute on account of the discretionary power of the commissioners, but this has been eroded by the fact that applicants have been on half-pay for an unreasonably long time without being brought to

> justice and in the circumstances they have suffered prejudice".

As I understand the court's reasoning, it held that the decision to suspend respondents and subsequently to do so on half-pay was not capable of legal challenge. However, the fact that legal proceedings had not been instituted nor prosecuted diligently, rendered the decision unlawful.

[7] I have difficulty with this reasoning. The appellants point out in their grounds of appeal that:

> "1. The learned Judge a quo misdirected himself by deciding the case on the issue of delay in not prosecuting respondents, a matter that was not in issue in the papers and one on which there was no evidence before him.

2. The learned Judge a quo misdirected himself in holding that the delay in prosecuting respondents had been occasioned by us when in fact, it was clear in the papers that respondents had been charged and the criminal case against them was still pending in Court.

3. The learned Judge a quo misdirected himself in law,

inasmuch as he failed to realize that the decision to suspend either on no pay or half-pay was a matter placed by law within the discretion of the head of department and the Court could therefore not direct otherwise in the absence of an allegation and proof of abuse of that discretion by repository of the powers.

4. The learned Judge a quo erred in law in interfering with the decision of the Public Service Commission in the absence of any evidence whatsoever that the head of department or the Commission had failed to exercise their discretion properly".

[8] These contentions have considerable merit. Indeed the respondents had been charged criminally, but the prosecution of the charges had been delayed. There was no evidence as to why this delay had occurred and whether there was fault attributable to any of the appellants for such delay. It is correct that the disciplinary proceedings had not been instituted when the respondents launched its application for a declarator. However, the appellants did on the 8th of January 2002 in their opposing affidavit say that they were instituting

disciplinary proceedings before an adjudicator. It was common cause that by the time of the hearing of the application in March 2005 these proceedings had commenced and by the time when we heard the appeal, the 3RD respondent had been found guilty of the offence and had been discharged pursuant to the decision of the adjudicator. Also in this context it must be pointed out that there was no challenge by the respondents based on the delay of the disciplinary proceedings. No enquiry was undertaken as to the reasons for it. It is difficult in these circumstances to uphold the decision to modify the conditions of suspension.

[9] What the court *a quo* advanced as the real reason for its decision to grant the respondents relief is set out in the final paragraph of the judgment. It

reads as follows:

> "This Court has rejected Mr. Mapetla's submissions in their entirety since it appears to this Court that it is in the nature of some heads of government departments and ministries to take advantage of government statutes and punish some civil servants by placing them at a disadvantage in suspending them and not prosecuting them. This application is granted to the effect that applicants are to be paid their full salaries from the date of their suspension up to and including finalization of any criminal proceedings that may be brought against them. Respondents will severally and jointly the one to pay and others to be absolved pay costs of this application".

It should be noted that no declaratory order as prayed was granted by the court. Save for making the finding set out above that "the discretionary power of the commissioners has been eroded by the fact that the applicants have been on half-pay for an

unreasonably long time without being brought to justice and in the circumstances have suffered prejudice", the court failed to advance any grounds for interfering with the decision of the Commission to decree the suspension of the respondents on half-pay. As stated *infra* this contention cannot be sustained. In addition to the above considerations, it would be difficult to determine at what point in time that delay *per se* becomes unreasonable. How far back must the Court making such a finding decree its order to be operative? It is difficult to comprehend how the original orders of suspension or its conditions can be vitiated by the subsequent delay per se.

[10] All these factors militate against an order that sets aside the administrative decisions taken in 1997

and directing that the suspension, whilst valid, must be qualified by ordering that it should be on full and not half-pay. The tortuous reasoning of the court *a quo* is indicative of the inappropriate proceedings instituted by the respondents. They either had to seek to review and set aside the administrative decisions on one or more of the well-known grounds for such relief, or they should have sought a mandamus to oblige the appellants to facilitate and conclude the disciplinary proceedings within a specified time, failing which their suspension should be set aside because the delay and the consequential prejudice mandated the relief claimed.

[11] It was in my view manifest that the respondents failed to establish that they were entitled to an order amending the conditions of the order of suspension.

[12] I have sympathy for the High Court seeking a way to come to the assistance of the respondents.

It is unacceptable that such a lengthy delay should have occurred before instituting disciplinary proceedings. The failure to prosecute the criminal proceedings timeously is also to be deprecated. Indeed these delays seem to be endemic both in the civil and criminal justice systems. The question of the limits within which the courts can grant those subject to inordinate delays in criminal proceedings relief is comprehensively dealt with by Smalberger JA in the matter of Ketisi v Rex C of A (CRI) No.9/06 delivered at the same time as our judgment in this appeal. See more particularly the reasoning of the court at p.7-11. Many of the considerations identified by the court have relevance also to civil proceedings. The degree and extent of the prejudice sustained by an accused person may be more profound in criminal matters than in civil

disputes. However, the principles articulated by the court and in the other cases cited by it, appear to me to be relevant considerations also in civil proceedings.

[13] Although the format in which the respondents elected to structure their claims was inappropriate, the relief they sought was couched in wide enough terms for us to be able to grant them orders that will at least limit any ongoing and indefinite prejudice. We are also anxious to demonstrate this Court's disapproval of the endemic delays in the system of justice. Therefore and with the agreement of appellants' counsel we have decided to grant orders in the following terms:

An order is granted declaring that:

1. The continued suspension of the 1st and 2nd respondents on the conditions set out in the order of suspension dated the 19th of September 1996 and as amended by the order issued by the 3rd appellant on the 9th of May 1997 after the date of this judgment without an expeditious determination of disciplinary proceedings against them would be unjust.

2. It is further ordered that:

   2.1 Appellants, either jointly or severally are to institute disciplinary proceedings against the 1st and 2nd respondents within 6 weeks of this judgment and are also to appoint an adjudicator to conduct such a hearing within the period of 6 weeks aforesaid. And:

2.2 Such proceedings are to be prosecuted by the appellants with due diligence and expedition.

3. Should the appellants fail to comply with the directives set out in paragraphs 2.1 and 2.2 above, the right of the 1st and 2nd respondents to approach the High Court on the same papers, duly supplemented, for such relief as is deemed to be appropriate, is specifically reserved.

4. There will be no order for costs both in this Court and in the High Court.

[14] Save as aforesaid, the appeal against the orders granted by the High Court is upheld. The orders granted by the High Court are set aside. In their stead the above orders are granted by this Court.

J H Steyn

PRESIDENT

I agree: _____
F H Grosskopf
JUSTICE OF APPEAL

I agree: _____
J W Smalberger
JUSTICE OF APPEAL

Delivered at Maseru on this 20th day of October 2006

For Appellants : Mr. M. Mapetla

For Respondents: Mr. Thoahlane