IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) 11/08

In the matter between:

MOTEBANG RAMAHLOKO **APPELLANT**

And

THE COMMISSIONER OF POLICE **1ST RESPONDENT**
THE ATTORNEY GENERAL **2ND RESPONDENT**

CORAM: **RAMODIBEDI, P**
HOWIE, AJA
HLAJOANE, JA

Heard : 7 October 2008
Delivered : 17 October 2008

JUDGMENT

SUMMARY

Police Service Act 7 of 1998 – s 59 – Police Assistants – appointment for temporary period – termination of appointments by notice – application for reinstatement and lost benefits.

Police Assistant appointed temporarily but no period stated – one month's notice of termination given, purportedly in reliance on s 59(4) – no hearing afforded to appointee – whether hearing should have been given.

Held: Rules of natural justice not excluded by section – hearing ought to have been afforded – appeal allowed, and reinstatement ordered.

HOWIE AJA

[1] The appellant was appointed in August 2003 as a police assistant in terms of the Police Service Act 7 of 1998 (the Act). On 20 August 2007 his appointment was terminated on one month's notice. He was not afforded a hearing before or after receipt of the notice. Citing the Commissioner of Police and the Attorney General as first and second respondents, he applied for an order in the High Court reinstating him and requiring payment of the benefits due to him between termination and reinstatement. The High Court (Mahase J) dismissed his application. The issue on appeal is whether he was entitled to a hearing before his appointment was terminated.

[2] Section 59 of the Act reads as follows:

> "(1) Whenever there are not in any area or locality sufficient members of the Police Service available to perform police

duties or whenever any grave disturbance of the peace has taken place, or in any public emergency, or where any such disturbance may reasonably be anticipated, or where it is in the public interest, the Police Authority may, on the application of the Commissioner, authorise him to appoint, in such form as may be prescribed, any person willing to act as a police assistant for a temporary period.

(2) A police assistant shall be paid such remuneration as the Commissioner may prescribe.

(3) A police assistant shall cease to occupy that office when his period of temporary appointment lapses.

(4) The Commissioner may, by notice in writing, suspend or terminate the appointment of a police assistant."

[3] Although the record contains a letter on behalf of the Commissioner which states that the appellant "signed an agreement setting out the terms and conditions of his temporary appointment", it is common cause on appeal

that there was no such written agreement. And although s 59(1) refers to a "form as may be prescribed" it is further common cause that no form has been prescribed, certainly not in so far as is relevant to this matter.

[4] In the circumstances the answer to the question whether the appellant was entitled to a hearing cannot be influenced by agreed or prescribed contractual terms, or shorter than reasonable notice. The final preliminary observation I must make is that the Commissioner has not asserted, either in correspondence or the opposing affidavit, that the consideration or considerations referred to in s 59(1), which prompted the appellant's appointment, had ceased to exist and that it was on that ground that notice was given.

[5] Clearly the appellant, even if only temporarily employed, had rights pursuant to that employment. He had the right to remuneration (s 59(2)), the right to work and the right to the benefits to which employment as a police assistant entitled him. The right to remuneration is, of course, a right to property because it entitles one to an income, no less than an income is derived from investment.

[6] Where a statute deprives a person of the right to liberty or property that person has the right to be heard before being so deprived unless the right to a hearing has been excluded expressly or by necessary implication:

Attorney General, Eastern Cape v Blom and Others 1988(4) SA 645 (A) at 662 G-J.

[7] Not only that, in this court it has been held that even though a person is in a temporary position and the rights attaching to that position may be taken away, such person is entitled to be treated fairly, including being given a hearing before termination of the rights:

Rakhoboso V Rakhoboso LAC (1995 – 1999) 331 at 338 E-H.

[8] Accordingly the question is not whether the Act impliedly grants a police assistant a right to a hearing but whether such right has been excluded. There being no express exclusion, the inquiry, then, is whether the Act contains any indications that warrant the conclusion that, by necessary implication, the right has been excluded.

[9] Turning to an examination of the relevant provisions of the Act, s31 provides, as regards police officers (who are permanent members of the

Police Service) for various ways in which the Commissioner can put an end to their appointment. He can terminate the appointment of an officer on probation and he can, depending on the circumstances, dismiss or retire an officer, as the case may be. However, it is provided in s 31(1) that before taking these steps the Commissioner must give the officer concerned an opportunity to make representations. That section appears in Part III of the Act, headed 'POWERS AND DUTIES'.

[10] In Part V of the Act, headed 'DISCIPLINE' there is provision for disciplinary proceedings against police officers where they are charged with offences against discipline. Charges for other offences mentioned in this Part will therefore be in criminal proceedings before the ordinary criminal courts. In either event the officer may be interdicted by the Commissioner under s 53 pending resolution of the proceedings. Interdiction not only deprives an officer of pay and allowances (subject to the discretion of the Commissioner to order payment of part or all of them) as well as powers, privileges and benefits. It subjects the officer to the same duties, discipline and authority as if the officer had not been interdicted.

[11] Despite the stringent regime imposed, albeit temporarily, by interdiction, s 53 contains no provision for a hearing before interdiction. All the same, neither the section itself nor anything else in the Act warrants the conclusion that a hearing is impliedly excluded. The most that can be said is that a hearing is expressly provided for in s 31 but not in s 53. Is the position with regard to police assistants materially different? For reasons which follow I do not think so.

[12] Termination of appointment as a police assistant occurs in one of two ways. Where the appointment is for a stated period, the appointment ends when the period lapses (s 59(3)). Or termination may be effected by notice (s 59(4)). Obviously the latter is the case where the appointment is not for a stated period.

[13] However the section provides for other eventualities, too. They are: suspension during the currency of the appointment and termination before the end of a fixed period appointment. Suspension will, in all likelihood, occur for disciplinary reasons or in connection with a pending disciplinary procedure. Quite apart from fairness in the disciplinary proceedings themselves, fairness dictates that a hearing be afforded before suspension

because suspension would temporarily disturb enjoyment of at least some of the benefits of the office.

[14] In the case of termination before the end of a fixed term appointment the case for a hearing would, if anything, be even stronger than in the case of suspension.

[15] It would be contrary to logic and principle were an assistant in the last – mentioned situation be entitled to a hearing and an assistant in the appellant's position not. Each would wish, understandably, to state the reasons why termination would be against the interest of the Police, the public himself and it would be fair to allow them to express their concerns. Particularly in the appellant's case, having been in his position for four years, termination would constitute more of a disruption than if he had been an assistant for several months or even a year.

[16] As a matter of practicality a hearing in a case such as the appellant's would not be difficult to hold, whether from the point of view of time or expense. The requirements of fairness would not demand a complicated procedure.

[17] In my view the Act's provisions imply entitlement to a hearing rather than the converse. Exclusion is certainly not something necessarily implied. It follows that the appellant did have the right to be heard.

[18] The Court's order is as follows –

1. The appeal is allowed, with costs.

2. The order of the High Court is set aside and substituted therefor is the following –

   'An order is granted in terms of paragraphs 1, 2 and 3 of the notice of motion'.

_____
C.T. HOWIE
ACTING JUSTICE OF THE COURT OF APPEAL

_____

I agree: **M. M. RAMODIBEDI**
PRESIDENT OF THE COURT OF APPEAL

I agree: _____
A. M. HLAJOANE
JUSTICE OF THE COURT OF APPEAL

For the Appellant : Adv. L. Molapo

For the Respondents : Adv. L. Mokhehle