

**IN THE COURT OF APPEAL OF LESOTHO**

C OF A (CIV) 18/09

In the matter between:

**MATHIBA MALOTHOANE**

**APPELLANT**

**AND**

**COMMISSIONER OF POLICE  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

**CORAM:**

GROSSKOPF, JA

MELUNSKY, JA

HLAJOANE, JA

Heard : 9 October 2009  
Delivered : 23 October 2009

**SUMMARY**

Was the appellant given a proper opportunity to make representations  
before he was dismissed from the Police Service?

**JUDGMENT**

**GROSSKOPF, JA**

[1] The appellant was the applicant in the court a quo. The appellant applied on notice of motion that the first respondent's decision to dismiss him from the Police Service be reviewed and set aside, and that the first respondent be ordered to pay the appellant his monthly salary from May 2007 to date of judgment. The court a quo (Guni J) dismissed the application and the appellant appealed against "the entire judgment" of the learned judge.

[2] It is common cause that the appellant became a member of the Lesotho Mounted Police Service in September 2001 and that he remained a member of the Police Service until he was dismissed by the first respondent with effect from 14 November 2007. It is also not in dispute that the appellant was absent from work from 23 March 2007 until 19 September 2007 when he resumed his duties at Bokong, Thaba-Tseka where he had been stationed. The reason for his absence and the circumstances surrounding his absence are however in dispute.

[3] It is the appellant's case as set out in his founding affidavit that he was granted sick leave as from 25 March 2007 but that he was allowed to leave two days earlier on 23 March 2007. According to the appellant the leave was "necessitated by health conditions that required constant medical attention". The appellant alleged that an operation was performed on his leg and that the doctors at Queen II Hospital recommended that he should seek extended leave. It is the appellant's case that he was duly granted permission to take extended leave in order to recover fully. He did not, however, receive any salary for May 2007 or for the months thereafter. He eventually decided to resign from the Police Service and wrote a letter to that effect in August 2007. His resignation was refused by the Police Service and he was ordered to resume his duties.

[4] The first respondent denied that the appellant had applied for leave in March 2007 or thereafter. The only time that he had applied for leave was in February 2007, and that was for one day only. The first respondent further pointed out that the appellant did not produce any

proof that he had been ill and treated at Queen II Hospital. Section 10 of the Lesotho Mounted Police Service (Administration) Regulations of 2003 provides as follows:

“A member of the Police Service shall not be entitled to be absent from duty on account of injury or illness unless a qualified medical practitioner has certified him or her to be unfit for duty.”

The appellant failed to produce the required medical certificate which would have entitled him to be absent from duty. The first respondent pointed out that the appellant could at least have produced his health book to support his claim that he had been ill, but this was not done.

[5] It is the first respondent's case that the appellant left his duty station on 23 March 2007 without the permission of his supervisor and that he simply disappeared without anyone knowing where he had gone to. A letter dated 20 April 2007 was thereupon written on behalf of the first respondent and addressed to the appellant at Thaba-Tseka. The letter reads as follows:

NO. 10667 TRP MALOTHOANE  
LMPS  
THABA-TSEKA

u.f.s. DISPOL THABA-TSEKA

Dear Trp Malothoane

NOTICE OF STOPPAGE OF PAY

Following a report that you have disappeared from duty since 23/03/07 to date, the Commissioner of Police has directed me to herewith inform you that your monthly salary will be withheld with immediate effect until your case is finalized.

By copy of this letter paypol is instructed to struck (sic) this officer off the payroll with immediate effect.

Furthermore, the Commissioner of Police has directed me to advise you to give reasons if any as to why you think you cannot be dismissed from the police service under the provision of Section 31 (1) (h) of the Police Service Act No. 7 of 1998.

Your response is expected on or before 02/05/07 through the office of Dispol Thaba-Tseka.

Best regards

Yours sincerely

Signed  
S/INSP/ L.S. MAKHAKHE  
HEAD HUMAN RESOURCE

CC REGIPOL CENTRAL  
DISPOL THABA-TSEKA  
PAYPOL”.

[6] It is common cause that the letter was only served on the appellant upon his return to his duty station at Thaba-Tseka on 19 September 2007. By then the time for the appellant to respond to the letter and to

give reasons why he should not be dismissed had long since expired. The appellant asked the Officer Commanding Thaba-Tseka what he should do in these circumstances, whereupon he was ordered to respond within two days. The appellant tried to convince the Officer Commanding that he needed more time in order to secure his medical record at Queen II Hospital but his request for more time was refused.

[7] The first respondent explained in her answering affidavit that efforts had been made to serve the letter of 10 April 2007 on the appellant but that he could not be traced at all. In the result the time for the respondent to respond to the letter had lapsed. It is the first respondent's case that the two days that the appellant was subsequently given "was a matter of leniency" and that there was no need to give the appellant more time.

[8] The appellant made representations in writing in response to the letter of 10 April 2007 and also requested more time to obtain the relevant documents, but he was advised by letter dated 14 November

2007 that the reasons for his absence were not convincing and that he was dismissed from the Police Service with effect from the date of that letter. According to this letter of 14 November 2007 the appellant's dismissal was in terms of Section 31 (1) (h) of the Police Service Act 1998 which provides as follows:

“31 (1) Notwithstanding the provisions of Part V, the Commissioner may, at any time, after giving the police officer concerned an opportunity to make representations:

(a) .....

(h) dismiss an officer who is absent from duty without prior permission for a continuous period of more than twenty-one days;  
.....”

(Emphasis added)

It is the appellant's case that in view of all the circumstances he was not afforded the required “opportunity to make representations”.

[9] There was no application at the hearing of the matter in the court a quo that the case be referred to oral evidence. We are therefore bound to decide the appeal on the papers before us. It is however clear that the affidavits reveal serious disputes of fact. On the general rule laid down

in the well-known case of Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) the dispute must be resolved on the facts as stated by the first respondent together with the admitted facts in the appellant's affidavit. On that basis it is clear in my view that the first respondent did not know where the appellant was when she wanted to serve the letter of 10 April 2007 on the appellant. The appellant, by his own conduct, therefore made it impossible for him to make representations as he was entitled to do in terms of the above quoted section 31 (1) of the Police Service Act 1998.

[10] In the case of Mamonyane Matebesi v The Director of Immigration and Others 1997-1998 LLR 455 at 465 to 466 this Court had to decide whether the summary dismissal of an employee should be permitted in circumstances where the whereabouts of the employee were unknown and where the employee was not readily to be reached. The Court there held that –

“the common law (and indeed, common sense) would suggest that in such circumstances any right to audi is displaced.”



[11] Counsel for the appellant conceded, quite rightly in my view, that the letter of 20 April 2007 gave the appellant sufficient opportunity to make representations. Counsel further conceded that if this Court should find that the whereabouts of the appellant were indeed unknown at the time when the first respondent tried, without success, to serve the letter of 20 April 2007 on the appellant, the first respondent would have been entitled to dismiss the appellant summarily after 2 May 2007, being the last day allowed in the letter of 20 April 2007 for the appellant's response. Counsel for the appellant submitted however that the first respondent had lost her right to dismiss the appellant once she gave him a further opportunity on 19 September 2007 to make representations. In my view the first respondent did not lose her right to dismiss the appellant. The two days subsequently granted to the appellant to make representations were given to him on compassionate grounds and not in substitution of the period initially granted, or because he had any right thereto.

[12] The appellant further submitted that the two days granted to him on 19 September 2007 to make representations were wholly insufficient to secure the necessary documents to prove that he was ill and treated at Queen II Hospital. The first respondent however pointed out in her answering affidavit that even if the two days did not give the appellant sufficient time to secure his medical record at Queen II Hospital (which was not admitted) he could at least have produced his health book which he must have had with him. It is common cause that the health book is in the custody of the patient and not the hospital and that it would have shown the appellant's medical history including his alleged treatment at Queen II Hospital during the relevant period. The appellant failed to deal specifically in his replying affidavit with these submissions concerning his health book or with his failure to produce it in support of his alleged illness. Counsel's submission that the appellant's health book was not in the appellant's possession at Thaba-Tseka but was in Maseru is not borne out by the facts alleged in the appellant's affidavit.

[13] In my judgment the appellant was not even entitled to the two days grace granted to him on 19 September 2007, but I am in any event of the view that those two days gave him sufficient opportunity to make the required representations. The appeal should accordingly be dismissed except for the following order in respect of the appellant's outstanding salary for the period 19 September 2007 to 14 November 2007.

[14] The appellant claimed payment of his monthly salary from May 2007 to date of judgment. It is however common cause that the appellant was absent from duty from 23 March 2007 until 19 September 2007 when he returned for duty. The appellant was dismissed on 14 November 2007. It is common cause that the appellant is entitled to be paid his outstanding salary for the period 19 September 2007 to 14 November 2007 and I shall order accordingly.

[15] The following order is made:

1. The first respondent is ordered to pay the appellant his outstanding salary for the period 19 September 2007 to 14 November 2007.

2. Save for paragraph 1 the appeal is dismissed in all other respects with costs.

**F H GROSSKOPF**  
JUSTICE OF APPEAL

I AGREE:

**L S MELUNSKY**  
JUSTICE OF APPEAL

I AGREE:

**A M HLAJOANE**  
JUSTICE OF APPEAL

For the Appellant	:	Adv S. Ratau
For Respondents	:	Adv M. Mabea