IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 2/08

Held at Maseru

In the matter between:

MAOPELA MAKHETHA **First Appellant**
MOEKETSI JANE **Second Appellant**

And

THE COMMISSIONER OF POLICE **First Respondent**
THE ATTORNEY-GENERAL **Second Respondent**

CORAM: RAMODIBEDI, P
SMALBERGER, JA
SCOTT, JA

Heard : 26 March 2009
Delivered : 9 April 2009

SUMMARY

Employment law – Dismissal – The appellants dismissed from the police force in terms of s 31 (1) (f) of the Police Service Act 1998 – Dismissal declared unlawful – Claim for reinstatement and payment of arrears of salary – No tender to perform duties shown – Claim dismissed.

JUDGMENT

RAMODIBEDI, P

[1] This appeal is a stark reminder of the age-old adage that justice delayed is justice denied. A process that commenced some nine (9) years ago has astonishingly been allowed to drag through the courts to the present day.

[2] The facts show that in 2000 the appellants, who at the time were policemen in the Lesotho Mounted Police Service, were convicted together with others of the crime of sedition in case number CRI/T/43/97 in the High Court. It would appear that the appellants noted an appeal in the same year under case number C of A (CRI) No.9 of 2000. This Court has no record of this fact and the appellants have failed to attach a copy of the notice of appeal in these proceedings. Thereafter, it is common cause that the appellants did not prosecute their appeal to date. As will be seen shortly, they are content to hide behind the fact

that the appeal in question is "still pending" as a shield against their dismissal.

[3] At this stage it is no doubt convenient to set out a short chronology of the relevant events leading up to this appeal in order to understand the issues which arise for determination by this Court.

[4] On 21 August 2000, the former Commissioner of Police dismissed the appellants from the police service acting in terms of s 31 (1) (f) of the Police Service Act 1998 ("the Act"). This section reads 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:*
>
> *:*
>
> *(f) dismiss an officer who is convicted of an offence, other than an offence against discipline."*

[5] On 25 September 2000, the same Commissioner of Police set aside the appellants' dismissal "pending the results of the Appeal Court" in C of A (CRI) No. 9 of 2000. They were, however, to remain on interdiction on half pay, effective from 1 September 2000.

[6] On 19 April 2001, the new Commissioner of Police wrote to the appellants inviting them to give reasons, if any, why they should not be dismissed from police service for having been convicted of sedition.

[7] On 26 April 2001, the appellants duly made written representations in which they submitted that the new Commissioner of Police was bound by her predecessor's decision which had set aside their dismissal.

[8] On 27 April 2001, the new Commissioner dismissed the appellants from the police service, acting in terms of s 31 (1) (f) of the Act. She expressly pointed out that her predecessor's decision to reinstate the appellants was not binding on her. The appellants responded by launching an application on notice of motion in the High Court seeking the following relief against the respondents:-

> *"(1) Declaring the dismissal of the Applicants by the 1st Respondent as unlawful.*
>
> *(2) Directing the 1st Respondent to reinstate the 1st and 2nd Applicants in the Lesotho Mounted Police Service with immediate effect.*
>
> *(3) Directing the 1st Respondent to pay the salary arrears computed from their date of dismissal to date with 12.5% interest per annum thereon.*
>
> *(4) Further and/or alternative relied."*

[9] The High Court (Mahase J) granted prayer (1) as prayed and declared that the appellants' dismissal was unlawful by virtue of the fact that, as she saw it, the new Commissioner was *functus officio* when she took a decision

to dismiss the appellants. She added that the Commissioner could not review the decision of her predecessor but she was bound by it. Since there is no cross-appeal directed against this part of the order, it is not necessary to determine the correctness or otherwise of the learned Judge's viewpoint on the question of *functus officio* in the matter. It shall suffice merely to point out that the learned Judge was of the view that the declaration to the effect that the appellants' dismissal was unlawful did not entitle them to reinstatement. They were at large to sue for damages. Accordingly, she dismissed the appellants' claim for reinstatement. Similarly, their prayer for payment of arrears of salary was dismissed on the ground that they had not performed any duties since their dismissal.

[10] It follows from the aforegoing that the issue in this appeal is whether or not the learned Judge *a quo* was correct in dismissing the appellants' application for reinstatement and payment of arrears of salary.

[11] As my **Brother Smalberger** correctly pointed out in the case of **Commissioner of Police And Another v Ntlō-Tšoeu 2005 – 2006 LAC** 156 at 159, there are no statutory provisions in the police service regulating either reinstatement or arrear payment. One has perforce to determine these issues on the basis of the common law.

[12] Now, some eighty-three years ago in **Schierhout v Minister of Justice 1926 AD 99** at 107, Innes CJ expressed himself in the following apposite terms:

> *"The plaintiff is a member of the public service; he is therefore a servant of the Crown. Now, it is a well established rule of English law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages. The Courts will not decree specific performance against the employee, nor*

> *will they order the payment of the servant's wages for the remainder of his term. Macdonell (**Master and Servant**, 2nd ed., p. 162) however, points out that Equity Courts did at one time issue decrees for specific performance. But the practice has long been abandoned, and for two reasons; the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently. The same practice has been adopted by South African Courts, and probably for the same reason. See **Wolhuter v Lieberman** 20, C.T., p. 116), and cf. Hunt v **Eastern Province Boating Co**. (111 E.D.C., at p. 23). No case was quoted to us where a master has been compelled to retain the services of an employee wrongly dismissed, or to pay him his wages as such, and I know of none. The remedy has always been damages."*

It is instructive to point out that the principles laid down in the **Schierhout** case (supra) have been followed by this Court in such cases as **Chobokoane v Attorney-General and Another 1990-1994 LAC 224** at 227; **Lesotho Telecommunication Corporation v Rasekila 1990-1994 LAC 261** at 268 – 269. For further authorities on the subject see also the dissenting judgment of Cullinan CJ in this Court in **Koatsa v National University of Lesotho 1985 – 1989 LAC 335** at 345 – 346. In particular, the learned Chief Justice referred to the Privy

Council decision in **Francis v Municipal Councillors of Kuala Lumpur** [1962] 3 All ER 633 (PC). Therein their Lordships expressed themselves in these terms at p.637:-

> *"..... the position on October 1 was that the removal of the appellant was a removal by the council and not by the president. The council were his employers, but having regard to the provisions of the ordinance their termination of his service constituted wrongful dismissal. Their Lordships consider that it is beyond doubt that on October 1, 1957, there was de facto a dismissal of the appellant by his employers, the respondents. On that date he was excluded from the council's premises. Since then he has not done any work for the council. In all these circumstances it seems to their Lordships that the appellant must be treated as having been wrongly dismissed on October 1, 1957, and that his remedy lies in a claim for damages. It would be wholly unreal to accede to the contention that since October 1, 1957, he had continued to be and that he still continues to be in the employment of the respondents. "*

On the question of specific performance, their Lordships added the following apposite remarks on the same page:-

> *"In their Lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to make such a declaration. "*

[13] It requires to be stressed that an order for reinstatement is in the nature of specific performance. The court has a judicial discretion whether or not to grant it. In exercising its discretion the court is entitled to decide which relevant factors it will allow to influence it. In the present case the learned Judge *a quo* stated the following in her judgment:-

> *"The nature of the police service is such that no person with a criminal record should be employed thereat nor that an officer who has since been convicted criminally like the applicants should remain therein."*

That, as it seems to me, is a value judgment which the court *a quo* obviously made in the interests of discipline and good order in the police service. No fault can be found with the learned Judge *a quo*'s approach in the matter. It follows that the appellants' claim for reinstatement was correctly dismissed in the circumstances.

[14] The appellants' claim for payment of arrears of salary is equally hit by the principles set out above. There is no evidence on record that the appellants tendered to perform their duties. Indeed, the learned Judge *a quo* made the following crucial findings:-

> *"The applicants have however not performed any duties since when they were allegedly dismissed for the second time from the police service. They have therefore not earned any salary and so they cannot claim payment of any salary with arrears."*

These findings are, in my view, fully justified on the facts.

[15] Faced with these difficulties, the appellants sought to rely on the **Commissioner of Police And Another v Ntlō-Tšoeu** (supra) for the proposition that they are entitled to payment of arrears of salary. As will be seen, however, that case is distinguishable from the instant matter. It was a case where the appellants had actually been reinstated with effect from a particular date. This

Court held that the Commissioner of Police was bound by his undertaking to reinstate the concerned policemen from that date.

[16] In the light of these considerations it follows that the appeal cannot succeed. It is accordingly dismissed with costs.

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:
_____
J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:
_____
D.G. SCOTT
JUSTICE OF APPEAL

For Appellants : Mr. P.T. Nteso
For Respondents : Mr. R. Motsieloa