

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 11/2018

(CIV/APN//09

In the matter between:

RETHABILE RATHOMA

APPELLANT

and

COMMISSIONER OF POLICE

1ST RESPONDENT

MINISTER OF POLICE

2ND RESPONDENT

FINANCIAL CONTROLLER

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM : DAMASEB (DCJ), AJA
MAHASE ACJ
CHINHENGO AJA

HEARD : 21 JANUARY, 2019

DELIVERED: 1 FEBRUARY, 2019

Summary

Appellant, police officer, charged with bribery in magistrate court, convicted and sentenced to 2 years imprisonment; Appellant applies to High Court for review of proceedings and setting aside of conviction and sentence; Appellant serves sentence awaiting decision of review application; Review judgment delivered two years and seven months after review hearing and after appellant served sentence;

Conviction and sentence set aside on review and trial de novo ordered; Appellant successfully applying for permanent stay of prosecution and then reinstated in his job;

Appellant suing employer for salary not paid during period of imprisonment;

Held - reinstatement not retrospective in effect; salary arrears over period spent in prison not claimable as imprisonment was consequence of due process of law and employer not at fault- Appeal dismissed

JUDGMENT

CHINHENGO AJA:-

[1] The appellant is a member of the Lesotho Mounted Police Service. He was charged in the Maseru Magistrate's court with bribery on 2 May 2006. He was convicted and sentenced to two years imprisonment on 27 June 2006. Immediately after sentence, he applied to the High Court for a review of the criminal proceedings that resulted in his conviction. The review application was heard on 25 September 2006 and judgment thereon was reserved.

[2] It is not uncommon in this jurisdiction that a reserved judgment takes an inordinately long time to be handed down.

Often parties are constrained to set down their appeals in the absence of written reasons for orders made by the lower courts. Despite repeated admonitions by the Court of Appeal that written reasons for judgment must be given, or given within a reasonable time after a hearing, there has been no change in the general approach of the High Court in this regard. In this case the review judgment was handed down some two years and seven months after it was reserved. This was on 4 May 2009. That judgment set aside the appellant's conviction and sentence and ordered a trial *de novo*. In the meantime the appellant had served the full sentence of 2 years imprisonment.

[3] Before the state moved to prosecute the appellant afresh he countered that move by lodging an application for a permanent stay of the prosecution. He was successful in that application. Accordingly an order was issued by the High Court on 13 December 2011 permanently staying his prosecution. As a consequence of that order the appellant was reinstated in his employment. At paragraph 11 of the founding affidavit the appellant stated-

"Since I had been dismissed from my work following my conviction, I was then reinstated upon the review order. I was reinstated, but since reinstatement, I have not been paid my arrear salaries from March 2007 to July 2009."

[4] In the quoted paragraph the appellant made two important averments. First that he was dismissed following his conviction and sentence and, second, that he was reinstated upon the review order.

[5] The non-payment of the salary arrears resulted in the appellant instituting motion proceedings against the respondents for payment of those arrears from March 2007 to the time of his reinstatement in July 2009. In the notice of motion the appellants indicated that he was also claiming damages, as compensation “for being in prison”, in the sum of M 200 000.00. He did not raise or support this claim in the founding affidavit. In the result he did not place facts or evidence before the court on which the court could determine his entitlement to the relief he was seeking. Rule 8(1) of the High Court Rules 1980 requires an application on notice of motion to be supported by an affidavit setting out the facts upon which the applicant relies for relief. His legal representative informed this Court that this claim was withdrawn with the consent of the respondent but the parties did not reach an agreement on the costs. The High Court dismissed his claim for salary arrears with no adverse order of costs. It is against that decision that this appeal lies to this Court.

[6] The appellant’s reasons for challenging the High Court decision are set out in detail in the notice of appeal. They are seven in number but it is only one of them that appellant’s counsel pursued at the hearing of the appeal. They may be briefly summarised as follows: the court erred in not accepting that he “provided evidence of circumstances justifying his absence from work or duty”. It erred in finding that the order issued on review did not quash the charge when regard is had to the fact that the charge was permanently stayed. It erred in disbelieving his averment in the replying affidavit that the 1st respondent made an oral undertaking to pay the arrear salary when he had done so, thereby making an admission that interrupted the running of prescription. It is that the court should have found that he was entitled to receive arrear salary

because his absence from work was involuntary and that the court should also have found that his reinstatement and receipt of salary thereafter “impliedly meant that the dismissal fell away.” He referred to *Mkwanasi v Ministry of Agriculture and Forestry* 1990 (4) SA 763 in regard to the first contention. Finally he contended that the court erred in failing to recognise that he had not been dismissed at all as no letter of dismissal was served on him. His reinstatement was also verbally communicated to him.

[7] The respondents’ answer to the appellant’s claim was basically two-fold. First, the deponent to the answering affidavit averred that the cause of action arose in 2009 when the appellant’s conviction was set aside and the appellant only instituted proceedings on 18 February 2016. As such his claim had prescribed. This is the point which the appellant addressed in the replying affidavit where he stated that the 1st respondent admitted liability.

[8] Second, the respondents had no legal duty to see to it that the appellant did not serve a sentence imposed on him by a competent court. Accordingly there is no basis for any delictual liability on their part. In addition the appellant did not perform any of his duties during the time that he was serving the prison sentence. The respondents prayed for the dismissal of the claim with costs.

[9] The learned judge *a quo* identified two issues for decision: prescription and whether or not the reinstatement had retrospective effect. He did not address the issue of prescription in his judgment nor make any determination on it at all.

[10] The judge considered the issue of reinstatement and came to the conclusion that mere fact of reinstatement did not mean that the employee became entitled to receive arrear salary. The judge found that the appellant had failed to make a case for the payment of the arrears. He relied on *Commissioner of Police and Another v Ntlo-Tsoeu* LAC(2005-2006) 156 and *Chegutu Municipality v Manyora* 1997 (1) SA 662 (ZSC). In not so clear terms, the learned judge found that, because of imprisonment, the appellant did not perform his duties as a police officer. Having not so performed and for reasons not attributable to his employers, there was no legal basis for him to receive any payment for the period that he was serving the prison term and did not perform his duties.

[11] The main ground of appeal as set out by the appellant in his written submissions (paragraph 1.5) is that the judge a quo “erred in law in finding that the appellant was not entitled to back pay for the period he was absent from work (being in prison) serving a custodial sentence.” He submitted that the issue before the court was whether the learned judge was correct in holding that the appellant was not entitled to back pay. He further submitted that the appellant’s absence from work was not voluntary. Relying on the same case authorities as the respondents, he submitted that since his conviction was set aside and he was reinstated without conditions, he must be paid the arrears of salary.

[12] The position that emerges from the papers is that the appellant was not reinstated in consequence of the setting aside of his conviction and sentence on review, but in consequence of

the permanent stay of the criminal proceedings that he was facing in the magistrate's court.

[13] The issues in this appeal are narrow in their scope. This appears from the affidavits filed of record, the decision of the judge *a quo*, the grounds of appeal and the written and oral submissions of the parties. The issues are simply whether in law the High Court was correct to dismiss the appellant's claim for the reasons that, first his reinstatement did not operate retrospectively and therefore arrear salary was not payable, and second, whether the fact that the appellant was serving a prison sentence, an involuntary act on his part, did not make a difference in his case.

[14] The learned judge discussed at length the question whether reinstatement as a word carries any retrospective connotation. The answer is that it does not:

“... the word “reinstate” or “reinstatement” carries no automatic retrospective connotation, either in ordinary language or in ... legislation: normally it meant simply that the person concerned would be placed again in his/her former job.”

[15] This is what this Court, adopting the *dictum* in the Zimbabwean case of *Manyora (supra)* said in *Ntlo-Tsoeu (supra)*, at 159I -160.

[16] The law is therefore quite clear that when an employee is reinstated in his job, he is so reinstated with effect from that time (*ex nunc*) and not from any time before, such as the time of his suspension or earlier dismissal (*ex nunc*). There are

situations where either by written or oral advice to the person concerned the reinstatement is to take effect from a prior date. In that event the reinstatement is clearly stated to have a retrospective effect. This was not the case with the appellant herein.

[17] In the replying affidavit, and notably not in the founding affidavit, the appellant averred that the 1st respondent verbally advised him that he would be paid his salary arrears. This averment was however made in an attempt to show that that verbal intimation amounted to an acknowledgement of indebtedness that would serve to interrupt prescription, a point raised by the 1st respondent in the answering affidavit, and not to prove that the 1st respondent made an undertaking that the appellant would be paid salary arrears. Even if I were to be sympathetic to the appellant and accept that that averment was also an attempt to show that such undertaking was made, I would still have great difficulty in finding evidence that the 1st respondent indeed gave that undertaking. The issue was not conclusively determined by the judge. It is however clear that the respondents contested the averment that such an undertaking was made. In submissions before us counsel for the appellant did not base his contentions on this point. Again in regard to *Ntlo-Tsoeu*, he concentrated on the second issue, to wit, that the appellant failed to render service during the period of his incarceration, for which he was not to blame, and was therefore entitled to salary arrears.

[18] In *Ntlo-Tsoeu* the court was dealing with two periods of failure to render service by the respondent therein. The first period was when the appellant fled to South Africa fearing for his life. The second period was when, upon his return to

Lesotho, he was arrested and imprisoned awaiting trial on charges of treason, sedition and contravention of the Internal Security (General) Act. Those charges were never pursued. The respondent was released and reinstated in his job as a police officer.

[19] Regarding the second period, the court determined that the respondent was entitled to payment of salary arrears, not only because his reinstatement was retrospective in effect but also that his failure to render service in that period was irrelevant. At 160E of the report the court stated in this regard as follows –

“In my view the first appellant is bound by his undertaking in respect of the second period. There is no suggestion that the respondent did not accept what was offered in that regard. The fact that he did not render services is irrelevant; the undertaking was made with full knowledge of the fact that his imprisonment had precluded him from doing so; and the authority to make the undertaking has never been disputed.”

[20] In regard to the first period the court had this to say at 160F-161A:

“[13] The position is, however, different in respect of the first period. It [the reinstatement] was made subject to an important qualification—that because the respondent’s absence “from police work was in your own accord that made it impossible for you to render police services to LMPS” he was not entitled to salary over that period. In other words, the first appellant specifically invoked the common law principle of “no work no pay” in relation to the first period. Apart from the fact that this period was conditional upon no salary being paid to him, the respondent, in my view, made out no proper case for payment of salary over that period.

[14] Save for the bald allegation that he fled because he feared for his life, the respondent has put forward no facts to justify his prolonged

absence from Lesotho, and his failure to return to duty... the onus is on the respondent to establish his entitlement to back pay in respect of the first period. Because of his failure to provide evidence of circumstances justifying his prolonged absence, and in the light of the qualification that attached to his reinstatement in respect of this period, he has in my view not succeeded in doing so. He is consequently not entitled to back pay for the first period.”

[21] In *casu* the appellant was incarcerated following the due process of the law. He was charged with bribery and tried, convicted and sentenced by a competent court. He served the prison sentence as a result of this. Whilst he deserves sympathy arising from the long delay in finalising his review application, sight cannot be lost of the fact that he was not acquitted of the offence charged. On review his conviction and sentence was set aside on the basis of some irregularity that occurred during the trial and it was ordered that he should be tried afresh. It is then that he applied for a permanent stay of prosecution and was successful. Notably he was not absolved of the offence but it was recognized that a trial in those circumstances would amount to a travesty of justice.

[22] The question is – whilst it is accepted that he did not serve the prison term voluntarily, would his incarceration in the circumstances found liability on the part of his employers to pay him salary arrears when he did not provide any service due to absolutely no fault on the employers’ part. The fault can only lie with him for placing himself in a situation where he had to be charged with an offence and could not render service to his employer. In my view in the absence of any fault whatsoever on the part of the employer there can be no justification to require the employer to pay him any money in that regard. I am satisfied that the decision in *Mkhwanazi (supra)* does not assist the appellant. That case is concerned with a matter in which, on the evidence, the court found that the employee’s absence was not

voluntary, in the sense of deliberate absence, and that a misconduct charge based on that absence is not sustainable.

[23] It follows that the appeal must fail. In regard to costs, there is no reason why the general principle must not apply in relation to the costs of the appeal. The costs must follow the cause.

1. The appeal is accordingly dismissed with costs.



MH CHINHENGO
Acting Justice of Appeal

I agree

P.T. DAMASEB (DCJ)
Acting Justice of Appeal

I agree

MAHASE ACJ
Justice of Appeal (Ex officio)

For Appellant: Adv. Habasisa

For Respondents: Adv. T.Lebakeng (Miss)