

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMOHOLI LITHEBE APPLICANT

and

THE PRINCIPAL SECRETARY 1ST RESPONDENT
(Ministry of Finance)

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 16th day of December, 1996

This is an application for an order in the following terms:

1. Declaring the interdiction of Applicant on
16th June 1993 as null and void;
2. Directing Respondents to pay the costs
hereof;
3. Further and/or alternative relief.

Alternatively to 1 above

- 1.1 Directing First Respondent to be caused to

be paid to Applicant her half-salary from 16th June 1993 and as long as the interdiction is in force in the event that it is found that her interdiction was lawful;

1.2 Directing Respondents to pay the costs hereof;

1.3 Further and/or alternative relief.

The facts of this case are common cause. At all material times the applicant was a public servant in the Government of Lesotho. She was a cashier in the Department of Income Tax in the Ministry of Finance. On the 16th July, 1993 she was placed on interdiction for theft and fraud or embezzlement of public funds. On the 30th November, 1993 she appeared before the Maseru Magistrate Court and was criminally charged with theft. She was remanded.

Rule 5-22 (1) (2) of The Public Service Commission Rules 1970 provides:

"(1) An officer who has been interdicted in terms of the preceding rule is not entitled to any emoluments for the period of his interdiction but the head of department may in his discretion order payment to that

officer of the whole or portion of his emoluments. The commission may on the application of the officer and after having given the head of department an opportunity to be heard, advise the Minister to vary, confirm or set aside that order.

- (2) If no criminal charge or charge of a breach of discipline is preferred within three months against an officer who has been interdicted the interdiction lapses and he shall be allowed to resume duty and he shall be paid his full emoluments for the period of his interdiction unless on the application of the head of department and after having given the officer an opportunity to make representations, the Minister after consulting the commission orders otherwise."

If my computation of time is correct, the period of three months after the interdiction of the applicant expired on the 16th day of October, 1993 or if the 16th day of July, 1993 is excluded the three month period expired on the 17th October, 1993. There is nothing in the papers before this Court to show that just before the interdiction lapsed it was extended beyond the original period of three months. When the applicant was subsequently criminally charged on the 30th November, 1993 the

interdiction had lapsed on the 17th October, 1993. As it was never revived, that means that the applicant is not on interdiction anymore. The criminal charge that was later brought against her on the 30th November, 1993 did not and could not, revive the interdiction which had lapsed.

In paragraph 5 of the answering affidavit the deponent avers that the applicant was placed on interdiction on the 16th July, 1993. She admits that the applicant was charged and remanded on the 30th November, 1993. I fail to understand why the deponent cannot see that from the 16th July, 1993 to the 30th November, 1993 is a period exceeding three months.

On this ground alone I think that the interdiction must be set aside. However, there were other grounds, so argued **Mr. Ntlhoki**, attorney for the applicant, upon which the interdiction should be set aside. One of such grounds is that it is the head of department who may interdict a public officer. (Rule 5-21 of the Public Service Commission Rules 1970). He submitted that consequently it is the head of department who ought to justify or explain his action and not an officer subordinate to him, such as a personnel officer. This is more so since the power to interdict and the terms thereof, particularly those relating to emoluments, are discretionary. The personnel officer cannot in law and fact seek to justify or explain the exercise of discretionary powers of the Principal Secretary for Finance. There can be no delegation of discretionary powers and motivation for the exercise of such powers.

He referred me to the case of **Shidiack v. Union Government (Minister of the Interior)** 1912 A.D. 642 in which it was held that the section required the personal discretion and judgment of the Minister and that regulations declaring that the satisfaction of a subordinate officer would suffice were **ultra vires**. The section dealt with the words "to the satisfaction of the Minister."

It seems to me that as far as the interdiction is concerned the case cited above is not relevant because the interdiction was made by the Principal Secretary himself and he also ordered that it shall be without pay. In doing so he was exercising his discretion in terms of Rule 5-22 (1) which provides that the head of department may in his discretion order payment to that officer of the whole or portion of his emoluments.

I agree with the submission that discretion involves opinion and value judgment which are personal and peculiar to the person exercising such discretion. He is the only person who can explain his opinions, motives and value judgments. In the present case the Principal Secretary of Finance is accused of having exercised his discretionary powers in an arbitrary and discriminatory manner. Under the present circumstances the Principal Secretary himself ought to have filed an answering affidavit to refute the allegations against him. These allegations cannot properly be refuted by a personnel officer who did not exercise the discretionary powers imposed upon him by statute.

In the result I make the following order:

1. The interdiction of the applicant on the 16th July, 1993 is declared as null and void with effect from the 18th October, 1993.
2. The applicant must be paid her full salary with effect from the 18th October, 1993.
3. The respondent must pay costs.


J.L. KHEOLA
CHIEF JUSTICE

16th December, 1996

For Applicant - Mr. Ntlhoki
for Respondents - Mr. Letsie