

CIV/APN/3/92

IN THE HIGH COURT OF LESOTHO

In the Application :

LEBOHANG URIEL MONYOBHI Applicant

and

MINISTER OF JUSTICE AND PRISONS 1st Respondent
 MINISTER OF PUBLIC SERVICE 2nd Respondent
 PRINCIPAL SECRETARY FOR MINISTRY
 OF PUBLIC SERVICE 3rd Respondent
 THE ATTORNEY-GENERAL 4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 18th day of June, 1996.

The applicant herein filed, with the Registrar of the High Court, a notice of motion in which he moved the court for an order framed in the following terms:

- "1. Declaring the termination of applicant's employment by 3rd Respondent null and void;
2. Directing 3rd Respondent to re-instate applicant forthwith;
3. Directing 3rd Respondent to pay Applicant's emoluments with effect from the date of dismissal to the date of re-instatement;
4. Directing Respondents to pay costs hereof;
5. Granting applicant such further

and/or alternative relief."

The respondents intimated intention to oppose the application. Affidavits were duly filed by the parties.

It is common cause from the affidavits that prior to 10th July, 1991, the applicant was employed by the Government of Lesotho as a public servant on permanent and pensionable terms. He was attached to the Department of Prisons in the Ministry of Justice and Prisons (now Ministry of Justice and Human Rights). As such the applicant was subject to the laws that govern the public servants in the Government of Lesotho.

On 21st April, 1988, the applicant was promoted, per annexure "A" signed by a certain L. Mosoeunyane on behalf of the Principal Secretary for Public Service, to the post of Superintendent. In December, 1989, applicant received, from the office of the Director of Prisons, a letter notifying him that he was being transferred with effect from 2nd January, 1990, from the Central Prison in Maseru to Leribe. In reply the applicant addressed, to the office of the Director of Prisons, annexure "B", a letter dated 28th December, 1989 in which he resisted the transfer on the grounds

that the notice was too short to enable him to make proper arrangement for his family which had to remain in Maseru; due to his ill-health he had been advised to undergo, at Queen Elizabeth II hospital, here in Maseru, physiotherapy treatment which was not available elsewhere in the country; he was in the process of developing his residential site in Maseru and it would be extremely difficult for him to do so whilst he was away from Maseru. Consequently, applicant applied that his transfer be deferred for a period of 6th Months.

On 2nd January, 1990, the Deputy Director of Prisons, a certain S. Maliehe, addressed to applicant, a letter (annexure "C") in which he catalogued the mistakes made by the applicant whilst he was stationed at the central prison in Maseru. He pointed out that there was not even a medical report to substantiate the applicant's claim for ill-health. The application to defer the transfer was, therefore, turned down.

Under cover of annexure "E", a letter of 8th January, 1990, the applicant sent, to the office of the Director of Prisons, a medical report (annexure "D") dated 22nd December, 1989 which showed that he was, indeed, a sickly person and had to undergo physiotherapy treatment at Queen Elizabeth II hospital

in Maseru. The treatment could not be carried out in Leribe due to lack of facilities.

On 29th March, 1990, the Deputy Director of Prisons, therefore, wrote to the applicant, a letter (annexure "F") by which the latter was transferred, with immediate effect, from Leribe to the Central Prison in Maseru. However, on 6th July, 1990, the applicant received, from the office of the Director of Prisons, another letter (annexure "G") by which he was transferred, with immediate effect, from Maseru to Mohale's Hoek. In reply the applicant addressed, to the office of the Director of Prisons, annexure I, a letter dated 11th July, 1990 by which he again resisted the transfer on the same grounds as the ones he had raised against his transfer from Maseru to Leribe. He also complained that his transfers were always on short notice, a practice which was seldom invoked in the case of other officers of his rank and responsibility. Applicant unsuccessfully requested that the transfer be deferred for a period of 6 months.

On 10th July, 1991 i.e. a year after he had been transferred to Mohale's Hoek, the Principal Secretary for the Ministry of Public Service caused a letter annexure "J", to be addressed to the applicant informing him that a decision had been taken to retire

him from the Public service, in terms of the provisions of S.12 (2) of the now repealed Public Service Order, 1970 which was the applicable law, at the time, and that he (applicant) would be paid cash in lieu of notice.

In the contention of the applicant, his retirement was a nullity inasmuch as he had not been afforded the opportunity to be heard or make representations as required by the rules of natural justice, in particular the audi alteram partem rule; the retirement was actuated by malice; and the letter (annexure "J") requiring him to retire from the public service was not written by the proper person who had the authority to do so. Wherefor, the applicant asked for relief as prayed in the notice of motion.

The contention of the applicant that his retirement was null and void was denied by the Respondents on whose behalf Sofonia Maliehe, Thomas Khali and Elias Ramaema deposed to answering affidavits. The answering affidavit of Sofonia Maliehe was to the effect that he was the Director of Prisons in the Department of Prisons of the Ministry of Justice and Prisons whilst the applicant was a superintendent in the same department. In January 1990, Assistant Superintendent, Situel Mokaloba who was stationed in Leribe as the Officer commanding the

Northern Division of the Prison Department, was about to retire from the public service. It was, for that reason, decided that the applicant should move to Leribe and take over from him as the officer commanding the Northern Division of the Prison Department. The applicant was accordingly transferred.

However, on the basis of his own appeal which he persistently made before and after he had been transferred to Leribe, the applicant was, in March, 1990, transferred from Leribe back to the Central Prison, in Maseru. Superintendent Tseliso Khalieli replaced him as the officer commanding the Northern Division of the Prison Department.

Shortly thereafter, a Policy Decision, whereby all senior superintendents in the Department of Prisons were to be stationed at the Headquarters, in Maseru, was taken. At that time, the officer commanding the Southern Division of the Prison Department was Senior Superintendent Lefa Lebeta who was stationed in Mohale's Hoek. Pursuant to the Policy Decision, he had to be moved from Mohale's Hoek to the Prison Headquarters, in Maseru. The applicant, who was a superintendent, had to be moved from Maseru to Mohale's Hoek to take over, from Senior

Superintendent Lefa Lebeta, as the officer commanding the Southern Division of the Prison Department. Ts'eliso Khalieli, who had just been promoted to the post of Senior superintendent was likewise moved from Leribe to the Prison Headquarters, in Maseru. His place in Leribe was taken by Superintendent Simon Mafatlane from Mokhotlong prison. Letters, marked annexures "DP" and DP1" were attached as proof of the transfers. The deponent denied, therefore, the applicant's suggestion that there was any ulterior motive behind his transfers.

It is, perhaps, significant to observe, at this juncture, that according to annexures "DP" and "DP 1" the transfers affected not only the applicant but other officers of his rank and responsibility as well. His complaint that whenever he was transferred, it was always on short notice, a practice which was seldom invoked in the case of other officers of his rank and responsibility does not, therefore, seem to be valid.

In his answering affidavit Elias Ramaema averred that he was the minister responsible for the public service of Lesotho, as established under the Public Service Order, 1970. As such he exercised powers vested in him by the Order and other laws governing the public servants in the Government of Lesotho.

On 14th May, 1991 a recommendation that the applicant be retired on the ground that he had attained the age of forty-five years was made to the Public Service Commission which accordingly advised him. Acting on the advice of the Public Service commission, the deponent took a decision that the applicant be retired from the public service, in accordance with the provisions of S.12(2) of the Public Service Order, 1970. At the time he took the decision, the deponent knew nothing about he applicant's transfers which were an internal matter between the Department of Prisons and the Ministry of Justice and Prisons. The decision was effected by the letter of 10th July, 1991 (annexure "J" attached to the applicant's founding affidavit). The deponent denied, therefore, the applicant's contention that the decision to retire him from the public service was actuated by any malice or ulterior motive on his part and averred that where a public servant was retired, in terms of the provisions of S. 12 (2) of the Public Service Order, 1970, the right to be heard was excluded.

Thomas Khali averred that he was the Principal Secretary for the Ministry of the Public Service. He confirmed the averments of Elias Ramaema in all material respects and further averred that after the latter had taken the decision to retire the applicant

from the public service, in terms of the provisions of S.12(2) of the Public Service Order, 1970, he instructed Khothatso Ralitsie, the Chief Personnel Officer in the Ministry of the Public Service to write, on his behalf, the letter of 10th July, 1991 (annexure "J") advising the applicant of the decision to retire him from the public service. He denied, therefore, the applicant's contention that annexure "J" was not written by the proper person who had the authority to do so.

It is worth noting that annexure "A" (the letter of 21st April, 1988 by which the applicant was promoted to the post of Superintendent was also not written by the Principal Secretary for the Ministry of Public Service Personally. It was written, on his behalf, by a certain L. Mosoeunyane. The applicant did not then argue that his promotion was null and void because annexure "A" had not been written by the proper person, who had no authority to do so. By analogy the applicant could not, in my view, be heard to argue that his retirement was null and void simply because annexure "J" had been written by Khothatso Ralitsie, on the instructions, and/or on behalf, of the Principal Secretary for the Ministry of the Public Service.

As regards his contention that he was not

afforded the opportunity to be heard or make representations, it was not in dispute that, at the time he was retired from the public service, the applicant was over forty-five years of age but had not as yet attained the compulsory retirement age of fifty-five years. For that reason, he argued that he had a right or legitimate expectation to work in the public service until he had reached the age of fifty-five years. When he was retired from the public service, he had, however, not been afforded the opportunity to be heard or make representations. The decision for his retirement before the age of fifty-five years was, therefore, a nullity inasmuch as it had been taken contrary to the rules of the natural justice, in particular the audi alteram partem rule.

I am unable to agree with this argument. It is pertinent to bear in mind that the applicant was required to retire in terms of the provisions of subsection (2) of section 12 of the Public Service Order, 1970. The subsection read:

"(2) A public officer may at, or at any time after attaining the age of forty-five years, subject to one month's notice being given to him, be required or permitted to retire."

From the provisions of the above cited subsection (2) of section 12 of the Public Service Order, 1970.

the applicant was, in my view, aware that he could be required to retire from the public service at, or at any time after he had attained, the age of forty-five years even if he had not yet reached the compulsory age of fifty-five years, of course with the only proviso, that one month's notice had been given to him. Assuming the correctness of this view, it logically followed that the applicant could not be heard to say he had a legitimate expectation to work in the public service until he had attained the compulsory age of fifty-five years. If, where he was required to retire at, or after attaining, the age of forty-five years, a public officer refused or disputed the validity thereof, as the applicant did in the instant case, he would simply be deemed to have been so retired. I am fortified in this regard by the Public Service Order, 1970 of which subsection (11) of section 12 clearly provided:

"(11) If an officer has been required or permitted to retire from the public service and he fails or refused so to retire, he is deemed to have been retired from the public service."

It was argued, however, that in the present case the applicant had not been given one month's notice as required by the provisions of S. 12(2) of the Public Service Order, 1970. He was, contrary to the

provisions of the said Order, paid cash in lieu of notice. The decision to retire him in terms of S.12(2) of the Public Service Order, (supra), was for that reason null and void.

At page 232 of the South African Mercantile & Company Law (1988 ed.) by Gibson, the learned author had this to say on the issue:

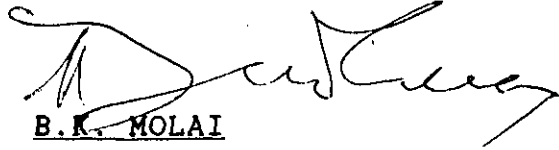
"A master may require the servant to absent himself from the place of employment and cease working if he tenders the servant his wages or salary for the relevant period in lieu of notice."

I agree. On the authority of the above cited passage from Gibson op. cit. it seems to me reasonable, therefore, to conclude that the applicant's argument that his retirement from the public service was a nullity simply because he had been paid cash in lieu of notice cannot be allowed to stand.

From the foregoing, it is obvious that the view that I take is that the termination of applicant's employment in terms of the provisions of S.12 (2) of the Public Service Order, 1970 cannot be declared null and void. That is sufficient to dispose of this matter and it will be purely academic to proceed to deal with the rest of the prayers in the notice of

motion.

The application is accordingly dismissed with costs.



B.K. MOLAI

JUDGE

18th June, 1996.

For Applicant : Mr Mohau

For Respondent : Mr. Mohapi.