

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/441/2012

In the matter between:-

PASEKA RASELABE

APPLICANT

AND

**THE PRINCIPAL SECRETARY – MINISTRY
OF LAW AND CONSTITUTIONAL AFFAIRS**

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : 1ST November, 2012
Date of Judgment : 5th February, 2013

Summary

Civil Procedure – Civil Servant – Absenting himself from official duty – disciplinary inquiry by head of department – withholding of one salary for an indefinite period – failure by head of department to afford civil servant prior hearing before effecting such a withdrawal of salary – Application of the Public Service Act and Codes of Good Practice 2005.

ANNOTATIONS

CITED CASES:

- **Standard bank of Bophuthatswana v. Reyholds No and Others, 1995 (3) S.A. 74B at 89 f – 90 f.**
- **Fazenda No. v. Commissioner of customs and Excise 1999 (3) S.A. 452 (TPD) at 463.**

- **Singh v. S.A. Rail Commuters Corporation (2007) 20 ILT 2067 (LC)**
- **Kemoneilwe v. Westynd Security LTDIC 86/98 (South African Case unreported)**
- **Myers v. Sieradzki 1910 TPD 869 and**
- **Stachan v. Prinsloo 1925 TPS 709**

STATUTES:

BOOKS:

- **Administrative Law, Marinns Weichers 1985, Butterworths, Durban at pp 211 - 212**
- **Herbstain and Van Winsen, the Civil Practice of the Supreme Court of South Africa, 4th Edition, 1997 Juta & Co. pp 464 – 465.**
- Employment Rights, Juta (2010) Cape Town pp 75 – 76: John Grogan.
- Workplace law 3rd Edition - John Grogan.

- [1] The applicant is a civil servant who is employed as a public prosecutor and is stationed in Butha-Buthe. He has approached this Court on urgent basis in terms of the provisions of Rule 8 (22) (c) of the High Court Rules. Reasons for same are set out in the certificate of urgency filed of record. One such reason being that the applicant's salary has been withheld unilaterally.
- [2] The facts are that the applicant had absented himself from his official duties from the 27th February 2012 to around April 2012.
- [3] Prior to April 2012, the applicant had requested a transfer from his current post in Butha-Buthe. He stated the reasons for that application of transfer from Butha-Buthe as being the fact that among others his life is in danger

because of an incident which has occurred between him and a certain officer. Refer to annexure “B” dated the 7th March 2012, page 13 of the paginated record. The applicant’s said application or request was ignored by the respondents’ office.

[4] However, by letter dated the 10th April 2012, and without any response to applicant’s letter dated the 7th March 2012, Mr. T. Mokuku; the Crown Attorney, asked the applicant to explain his absence from work – Refer to annexure A, page 11 of the paginated record.

[5] The applicant was given a period of seven days from receipt of annexure “A” to give an explanation of his unauthorized absence from his official duties.

[6] I pause to note that in annexure “A”, writer therein says that in the applicant’s personal file, there was no explanation or any circumstances showing why applicant had absented himself from his official duties without any authorization.

[7] This court observes that in this annexure “A”, there is nowhere where the Crown Attorney, Mr. Mokuku refers to or makes mention of the applicant’s letter dated the 7th March 2012. He does not even acknowledge receipt of same. There is therefore an apparent break down of communication between the applicant and the office of the Crown Attorney in question.

[8] I note however that nowhere in his letter of the 7th March has applicant indicated that as a result of the altercation he has referred to and, which he

had reported to the Butha-Buthe police, he is unable to and or that he is prevented by anybody from resuming his official duties.

- [9] Subsequently, a disciplinary action against the applicant was mooted – by letter dated the 14th May instant addressed to the applicant u.f.s the Director of Public Prosecutions. Reference is made to the applicant’s letter dated 16th April 2012 whose receipt is being acknowledged by Mr. Mokuku. However, a copy of this letter is not in the Court’s file, as such I am unable to refer to its contents.
- [10] However, applicant’s representation on his explanation with regard to his absence from duty without leave is the subject-matter of this latest correspondence between him and the Crown Attorney, Mr. Mokuku. The applicant is informed that a disciplinary charge will; in accordance with the provisions of section 142 of the Public Service Act 2005 and section 3 (1) (c) (2) of the Codes of Good Practice be held against him. Further on, he is also informed that he shall be furnished with a copy of the charge sheet in due course together with the notice of the venue for the hearing.
- [11] However no such disciplinary hearing has been held by the respondents against the applicant contrary to what was suggested in the contents of annexure “C” herein.
- [12] I pause to note that the above is demonstrated by the fact that there is no record of the disciplinary hearing/inquiry annexed to these proceedings.

- [13] Be that as it may, applicant's salary was stopped in August 2012 and his inquiries about same from the Human Resource Department of his Ministry (or of the respondents) revealed that the HR Officer had been ordered not to process payment for the salary of applicant for the month of August 2012.
- [14] This is the obtaining situation to date. This is why the applicant decided to approach the court to seek the prayers which appear in the notice of motion filed in this court on the 16th October 2012.
- [15] Prior to this date, the applicant had sort administrative intervention from the Principal Secretary, Ministry of the Public Service but in vain.
- [16] Before I deal with the respondents' case, I will to point out that I have been referred to section 142 of the Public Service Act of 2005, which is the section which the Director of Prosecutions/Crown Attorney Adv. T. Mokuku proposed or relied upon in preferring to institute a disciplinary charge against the applicant. Refer to annexure "C" page 14 of the record.
- [17] I have extensively perused the said Act as well as a copy of the Codes of Good Practice but I have not come across section 142 of the Public Service Act 2005. The next section quoted in this annexure "C"; namely Section 3 (1) (c) (2) of the Codes of Good Practice are also problematic because they deal with general issues some of which are unrelated to the disciplinary inquiry against the applicant. The respondents do not say which specific subsection of section 3 of the codes the applicant has violated.

- [18] In other words, the respondents are not supported by the provisions of the sections of the Public Service Act and the Codes of Good Practice (supra) which they purport to rely on in preferring disciplinary inquiry proceedings against the applicant. This is the problem with their purported disciplinary inquiry. They have not referred this Court to any specific and or appropriate section of the law they are invoking.
- [19] This court has however been called upon to determine an issue pertaining to be unilateral withholding of the applicants salary, which feature still persists even though the applicant is and remains an employee of the Government of Lesotho to date. In other words his services from the civil service have to date not been terminated.
- [20] I say so because nowhere do the respondents argue that the applicant has since been dismissed from the government employ. They do not even say whether or not the applicant has since resumed duties after payment of applicant's salary for August was unilaterally stopped.
- [21] The respondents have also not disclosed in their papers what the outcome of the disciplinary charge or inquiry which was mooted in annexure "C" has been.
- [22] The applicant's case is that no disciplinary action was ever taken against him, but that without notice or without due process being followed, his salary of August 2012 was terminated. This probably explains why there is no prayer to the effect that respondents should be ordered to furnish

applicant and the court with proceedings of that disciplinary actions against the applicant.

[23] In fact even the respondents have made no reference to the outcome of such a disciplinary action, nor have they alluded to the decision or outcome of that disciplinary action. They have also not argued that they withheld the applicant's salary as they did because of the decision of that disciplinary action which was taken against the applicant. They have only stated the general principles of the law with regard to the meaning of a salary, by whom, and when and why, how, and when same can be withheld by an employee.

[24] The Court has no problem with the articulation of the law by the respondents with regard to the issues pertaining to salary or wages. But respondents have not disclosed the actual basis upon which they decided to unilaterally terminate or stop payment of applicant's salary. Having outlined in general terms the conduct which is normally considered to constitute a vital breach of material terms of an employment contract, the respondents should have specifically informed the applicant in clear terms the basis upon which, and or the reasons for which they have decided that the applicant's conduct was willful, deliberate and or intentional. No such reasons have been stated by the author of annexure "C". This is despite the fact that the applicant has, in annexure "B" clearly stated the reasons for having applied to be transferred from his current station of Butha-Buthe. One does not even know if the applicant's immediate supervise (Mr. T. Mokuku) or his office have had the applicant's encounter with another officer which the applicant has had reported to the Butha-Buthe police investigated by his office. Neither has

the crown attorney say anything about the request that applicant be transferred from Butha-Buthe so that applicant can pursue his studies as he has requested. Has Mr. Mokuku put his mind to applicant's request.

[25] In short, failure by the respondents to subject the applicant to any form of disciplinary action for applicant's failure to comply with a standard of conduct, constitutes a breach by the respondents of the provisions of section 5 of the very Codes of Good Practice of 2005, as a result of which they denied the applicant an opportunity against and to say anything in mitigation of a case against him. Refer to Part III Disciplinary Code, Section 4 (1) (d).

[26] In the circumstances, it is the considered view of this Court that the applicant's application should and is hereby granted as prayed in his notice of motion dated or filed in this Court on the 16th October 2012.

[27] Costs are awarded to applicant on an attorney and client scale.

M. Mahase

Judge

For Applicant - Adv. T.R. Mpaka

For Respondents - Adv. T. Molapo