

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/167/2020

In the Matter Between:-

THABO TJAMELA

APPLICANT

AND

COMMISSIONER OF POLICE

1ST RESPONDENT

STAFF OFFICER TO COMPOL

2ND REPENDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 09TH SEPTEMBER 2020

DATE OF JUDGMENT : 15TH OCTOBER 2020

SUMMARY

ADMINISTRATIVE LAW: *Applicant was precautionarily suspended on full pay- He challenges this suspension on the ground that he was not afforded pre-suspension hearing- Application succeeds with costs.*

ANNOTATIONS

BOOKS:

LAWRENCE BAXTER, *Administrative Law (1984) (Juta)*

CASES:

Muller v Chairman, Ministers' Council, House of Representatives
1992(2) SA 508

Matebesi v Director of Immigration and Others LAC (1995 – 99)
616

MEC for Education, North West Provincial Government v Grandwell
[2012] 8 BLLR 747 (LAC); (2012) 33 (LAC)

MOKHESI J

[1] INTRODUCTION

The applicant senior officer in charge of police in the district of Leribe (DISPOL – Leribe) and had instituted these proceedings on an urgent basis seeking, principally, a stay of the Commissioner of Police's (COMPOL) decision to suspend him on full pay. The applicant had sought the following prayers in his Notice of Application:

"1. Dispensing with the ordinary rules pertaining to the modes and periods of service.

2. A Rule nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:

a) The decision of the 1st and 2nd Respondents to interdict/suspend the applicant from work with immediate effect without affording him hearing shall not be stayed pending the final determination of this application and status quo be maintained.

b) The decision of the 1st and 2nd Respondents to interdict/suspend the applicant from work with immediate effect without affording him hearing shall not be reviewed, corrected or set aside as it is irregular.

c) The 1st and 2nd Respondents shall not be ordered to dispatch to this Honourable Court within 14 days the record of proceedings which led to the decision to interdict/suspend the applicant.

3. Costs of suit.”

[2] FACTUAL BACKGROUND

In the wake of the advent of the Covid-19 outbreak, Lesotho being no exception, in an effort to contain it, imposed several restrictions which included, among others, restrictions on the selling of alcohol, and consequently, closure of outlets which sold it. These restrictions were effected by means of a Government Gazette. Naturally the Lesotho Mounted Police Service were tasked with ensuring compliance with these Regulations. The applicant is the officer in charge of the police for the Leribe district. The applicant's superior, one Assistant Commissioner of Police (ACP) Nthimo, on the 23rd May 2020 called the applicant on his cellphone to express his displeasure that bars in Leribe were operating when they should have been closed per the Regulations. What seemed to have triggered a chain reaction was that a bar next to the residence of one Deputy Commissioner of Police (DCP) Likhama was not closed. The applicant averred that he ordered his officers to proceed there to order its closure. This seems to have rubbed DCP Likhama the wrong way, as the officers, instead of going where they had been instructed to, ended up being in his residence. It is not clear how

this happened, but what is common cause is that on the following day, the applicant was served with the letter informing him that he was being suspended with immediate effect.

[3] In that suspension letter it was stated (in relevant parts)

"U.F.S Regipol North

May 24, 2020

Superintendent Thabo Tjamela

LMPS

LERIBE

Dear Superintendent,

Interdiction from Police Duties

You will recall that on 23rd May 2020 you were instructed by Regipol North, ACP Nthimo (a.i) to close the public bars in your policing precinct of Leribe District in compliance with Public Health (COVED - 19) Regulations, 2020 (as amended). You will also recall that you failed or refused to heed to those instructions of your superior. You will further recall that Regipol North caused the police officers, on realization that the public bars were still opened regardless of this instruction to you to close them, to close those public bars but you prevented those police officers from

effecting public bars closure by giving them instruction not to do so and sent some to DCP OPS (Mr Likhama) place of abode on pretence that he needed them.

You will therefore not deny that any failure to close the public bars has put the lives of the public in danger of being exposed and contracting COVID – 19 pandemic. You will also not deny that you have now, as District Commissioner Leribe, turned to be a thread (sic) to the lives of the public in that District you are entrusted to protect. You will also not deny that your continued presence in the LMPS, as a senior police officer that you are, is likely to plunge this country into a disaster of spreading COVID-19 pandemic as you have officers regarding the enforcement of the Public Health (COVID – 19) Regulations, 2010 (as amended).

It is not in the best interest, safety and protection of lives of this nation to leave you commanding LMPS at your place and it would be remiss of the Commissioner of Police not to immediately act and interdict you from public duties because to delay for any reason can cost these nation such a catastrophe due to the seriousness of these (sic) pandemic which requires constant suppression. The cumulative effect of the foregoing

leaves the Commissioner of Police with no other option but to interdict you from police duties with immediate effect without affording you an opportunity to make representation.

I have been instructed by the Commissioner of Police, therefore to inform you, as I hereby do, that you are interdicted, with full pay, from police duties with immediate effect in terms of the provisions of section 53 of the LMPS Act NO. 7 of 1998. Upon the receipt of this letter, you are instructed to proceed on interdiction while charge sheet initiating disciplinary action against you will follow..."

[4] This is basically the source of this litigation. In opposition, the Commissioner of Police (COMPOL) does not deny that the applicant was not afforded a pre-suspension hearing, but instead argues that the applicant suffered no prejudice because he was suspended in circumstances of emergency with full pay: At paragraph 10 of his opposing this is how COMPOL Molibeli puts it thus:

"AD PARA 9

10.1 Save to say that I took the decision to suspend the applicant without following the rules of natural justice because there was eminent harm which was still

continuing (sic). I submit further that there was nobody to order the closure of the bars and as a result, the people could continue infecting themselves.

10.2 I have been advised by my counsel of record and verily believe the same to be true that the decision taken should be prejudicial to the person affected by them. I aver that the decision which I took in suspending the applicant was not prejudicial to him in anyhow because he had been suspended with full payment of his monthly salary and all other benefits.”

[5] On papers there were disputes of facts, but in my judgment those disputes are peripheral to the determination of this matter. Largely, the facts of this case are common cause as between the parties. The common cause issues are:

- a) The applicant was suspended a day after his superiors became aware that public bars were open for business despite the Regulations prohibiting same.
- b) The applicant was suspended with immediate effect without prior hearing.
- c) The Commissioner of Police invoked his powers under section 53 of the Police Service Act No. 7 of 1998.
- d) The applicant was suspended with full pay and benefits.

[6] ISSUES FOR DETERMINATION and DISCUSSION.

1) whether s.53 of the Police Act (Act) empowers COMPOL to suspend the police officers without observing the *audi* principle.

2) whether the decision to precautionarily suspend the applicant without a hearing and on full pay attracts this court's review powers.

[7] The starting point is the decision of ***Muller v Chairman, Ministers' Council, House of Representatives 1992(2) SA 508*** at 516 H-I, wherein the court said:

"Now the correct approach to the question whether the *audi* rule applies in statutory context is this. When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before the decision is taken unless the statute expressly or impliedly indicates the contrary: *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 748 (G) " (see also: ***Matebesi v Director of Immigration and Others LAC (1995 – 99) 616 at 621***)

[8] Section 53(1) of the Act provides that:

"Any member of the Police Service may be interdicted at any time by the Commissioner pending the resolution of any disciplinary or criminal proceedings against him, but he shall not by reason of such interdiction cease to be a member of the Police Service: Provided that during the period of his interdiction he shall not be entitled to any pay or allowances but the Commissioner may, at his discretion, order payment of the whole or part of his pay and allowances...."

[9] The Commissioner *in casu* invoked his powers of suspension under the proviso to the section, and it is the fact that the applicant was suspended with full pay and benefits that COMPOL would seem, fallaciously, to contend that the applicant was not entitled to pre-suspension hearing. The ensuing discussion will seek to dispel that erroneous belief. It will be observed that section 53(1) is silent on whether COMPOL should hear an officer before issuing him or her with a suspension letter, but that silence in law invites a common presumption that natural justice was intended by the legislature. The Learned author Baxter, ***Administrative Law (1984)*** (Juta) at pp. 570 – 571 had the following to say:

"(b) Implying the Duty to observe Natural Justice.

1. The Presumption

Where the enabling legislation is silent, a duty to observe the principles of natural justice, like all other judicial qualifications of the exercise of statutory powers, must be found to have been impliedly intended by the legislature. There is a presumption that natural justice was intended. Like all presumptions of statutory intention, the presumption that natural justice is applicable has independent weight deriving from the common law in which the principles were first developedByles J, in the Old English case, Cooper v Wandsworth Board of Works, was moved to declare:

'Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature....' ..."

[10]In the absence of a clear legislative ouster, section 53(1) enjoins COMPOL to afford an officer a pre-suspension hearing. These is yet another facet to COMPL's argument which needs attention of this court, and it is that, because the applicant was suspended with full pay he was not prejudiced, and therefore not

entitled to pre-suspension hearing. This argument is unmeritorious and unsustainable: (see: ***The Lesotho Revenue Authority and Others v Moutloatsi Dichaba and Others C of A (CIV) No. 21/2018 (unreported) 01 Feb. 2019***). It is no doubt that we are dealing with what is known as an administrative or precautionary, as opposed to punitive, suspension. Administrative suspensions are invoked in situations where the employee is barred from entering the workplace in order to protect the integrity of investigations into his or her misconduct. A precautionary suspension may be without pay or with full pay, as in this case.

[11] However, the question may be posed whether suspending an employee with full pay is prejudicial to that employee thereby attracting the utility of the requirements of natural justice implicit in section 53(1) of the Act? Suspension by its very nature, whether with or without pay is prejudicial as it carries with it a stigma that the person was subject of a suspension. The decision to suspend an employee has both societal and personal implications:

"The implications of being deprived of one's pay are obvious. The implications of being barred from going to work and pursuing one's chosen calling and being seen by the community round one to be so barred, are not immediately realized by the outside observer and appear, with underestimated in the Swart and Jacobs cases. There are

indeed substantial social personal implications inherent in that aspect of suspension.....” (Muller above at 523 B – C)

[12] In the context of administrative suspension with full pay, the infinitely flexible requirements of natural justice would require only written representations showing cause why an administrative suspension should not be effected, because the right to a hearing does not, in these circumstances, equate with “an entitlement of judicial-type proceedings, with their full attributes.” (***Matebesi above 626 A – B***). The *audi* principle may be excluded or attenuated by the specific circumstances of each case: As in this case, the fact that the applicant was suspended with full pay serves to attenuate the full application of the *audi* principle. I am in full agreement with the views expressed in ***MEC for Education, North West Provincial Government v Grandwell [2012] 8 BLLR 747 (LAC); (2012) 33 (LAC) (25th April 2012) at para. 44***, where the court said:

[44]....Fairness by its nature is flexible. Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it. When dealing with a holding operation suspension [administrative suspension], as opposed to a

suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice following the action is significantly contained and minimised. Secondly, the period of suspension often will be (or at least should be) for a limited duration..... Provided the safeguard of no loss of remuneration and a limited period of operation are in place, the balance or convenience in most cases will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness."

[12] The above authorities make it plain that, the fact that the applicant is being suspended on full pay does not disentitle him or her to be heard before the decision to suspend is made. An administrative suspension, whether with or without pay is prejudicial. In *casu*, therefore, COMPOL ought to have afforded the applicant a pre-suspension hearing.

[13] In the result:

a) The application is granted as prayed with costs.

M. MOKHESI J

**FOR THE APPLICANT: ADV. 'MONE INSTRUCTED BY T.
MAIEANE & CO. ATTORNEYS**

**FOR THE RESPONDENTS: ADV. MOHLOKI FROM THE
ATTORNEY-GENERAL'S
CHAMBERS.**