CIV/APN/105/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

JOHN MOLAI RAMOHOLI	APPLICANT
V	
PRINCIPAL SECRETARY FOR THE MINISTRY OF EDUCATION	1ST RESPONDENT
ATTORNEY GENERAL	2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 9th day of January, 1995.

On the 21st October, 1994 Applicant filed of record an application as a matter of urgency in which he sought an order:

(a) Declaring the purported interdiction of applicant by First Respondent on 13th October, 1994 null and void;

/...

(b) Directing Respondents to pay the costs of this application;

(c) Granting Applicant further and/or alternative relief.

Applicant at all material times held the position of Financial Controller in the Ministry of Education, Headquarters and is on the permanent establishment of the Public Service.

There is no dispute that on the 13th October 1993, Applicant who had been on leave reported for duty. When he got to his office he received information that First Respondent who is the Principal Secretary of the Ministry of Education and Manpower Development wanted to see him. First Respondent was not able to see Applicant. When Applicant returned to his office, Applicant's secretary handed to him a notification of interdiction, interdicting him with immediate effect without pay as from the 13th october, 1994.

The Notifiction of Interdiction has been annexed to Applicant's application and is marked "JMR". It is a printed form with blank spaces. The Principal Secretary merely fills blank spaces and signs at the bottom.

In the first paragraph (of the Notification of Interdiction form) all the words are already printed before the word pay, First Respondent has filled is one word "NO". That one word deprived Applicant of his monthly pay with effect from the 13th October, 1994. That date is also filled in by First Respondent.

The reason for interdiction in the Notification of Interdiction has been filled in by First Respondent and it is that Applicant is:

> "alleged to have attempted to acquire money amounting to about M226,892.81 by fraudulent means thereby bringing the integrity of your office/position into disrepute and thus contravening Section 10(1)(a)(m), and 1(n)(i) of the *Public Service order No.21* of 1970 as amended by *Act No.8* of 1973."

I am puzzled by the reason of interdiction. It seems too light to meet the gravity of the situation. This is hardly a case of "bringing the integrity of the Applicant's office and position into disrepute". The real reason is that Applicant is suspected of being involved in a fraud or attempt to steal from Government the sum of M226,892-81. One would expect this true reason to be clearly spelt out. It is really a matter that calls for a police investigtion and indeed the police are already involved. On the face of the papers, this is a criminal offence not just a disciplinary one. Until the Director of Public Prosectutions has declined to prosecute, the Public Service Commission has no jurisdiction in the matter at this stage. It can only suspend or interdict Applicant to await the results of a criminal prosecution.

From the filling of the Notification of Interdiction form, an impression is made that the whole process is a matter of routine. There is no indication that the gravity of the step that is being taken by the First Respondent is evident. The matter is not being treated as if this individual is receiving the attention he deserves. By filing the word "NO" a man's salary for a period of

three months and sometimes more, is taken away all of a sudden. This man who is put to this suffering and inconvenience is only a suspect.

The First Respondent has filled in another blank space of the Notification of Interdiction form the words that further justifies what is being done. The other reason is stated as being that the suspended officer's continued presence constitutes

> "a threat to public funds; hence the effective and smooth running of the Accounts Section of the Ministry of Education."

Indeed keeping someone suspected of stealing over a quarter of a million Maloti next to the till would be most unwise and undesirable. As these funds that would be put at risk are public funds, doing nothing to protect the funds would not be in the public interest.

The Notification of Interdiction form concludes with a printed warning based on the *Public Service Commission Rules* to the effect that Applicant:

"(a) should not assume alternate employment pursuant to *Public Service Commission Rule 5-22(6).*

(b) should notify this office of any change of address."

In his Opposing Affidavit First Respondent at paragraph 8 says,

"It is admitted that applicant was not heard and in the normal course of things ought to have been heard before being interdicted. Applicant could not be heard before being interdicted in the normal course of things."

The averments of First Respondent are in answer to Paragraph 3.7 of Applicant's Founding Affidavit in which Applicant had said:

"First Respondent had not heard my side of the story before he could interdict me as aforesaid. I have to mention that some time ago the office

> of Second Respondent had issued a circular from the Deputy Attorney General (one Mr. Tampi) warning Government ministries and parastatals that before interdiction, the officer to be interdicted is to be given a hearing by the interdicting officer as a matter of law."

At the hearing I was supplied with circular LAW.61/C dated 21st August 1992 issued by Mr. K.R.K. Tampi the Deputy Attorney General. Its title is "INTERDICTION OF PUBLIC OFFICERS". It is not disputed that it was sent to all ministries. Furthermore it was accepted by both sides that Applicant is correct when he says this circular was distributed extensively within the Ministry of Education and all heads of departments were directed to follow it by the Principal Secretary when dealing with suspensions.

The Attorney General is the Principal Legal Advisor of Government and State. See *Section 98(2)(a)* of the *Constitution of Lesotho* of 1993. Government departments are expected to follow and act on his advice in matters of law. That being the case this circular can be regarded by all as a guide in the handling of criminal and

disciplinary matters within Government departments. Although it does not enjoy special legal status, it is for those in the public service part of the ground rules under which they are expected to operate.

The doctrine of legitimate expectation has been adopted by our courts and South African courts from English law. Its essence is that a decision maker who exercises drastic powers such as those of dismissal of employees on behalf of the public should act fairly:

> "The implication of the doctrine of legitimate expectation is that if a decision maker, either through the application of a regular practice or through express promise, leads those affected legitimately to expect that he or she will decide in a particular way, then that expectation is protected and the decision-maker cannot ignore it when making the decision. The doctrine, it seems, applies to both procedural and substantive expectations." —*A Guide to South African Labour Law* by Raycroft and Jordaan page 111.

It is for this reason that we cannot ignore this circular from the Deputy Attorney General. It does not embody just a promise, it is a a directive for all public officers both senior and junior. The other important reason is

that in terms of *Rule 5-41* of the *Public Service Commission Rules* the Attorney General acting through the Director of Public Prosecutions must be consulted if there is information that a criminal offence has been committed, as in this case. In that event the directions of the office of the Attorney General have to be sought.

The role of the Attorney General and the Director of Prosecutions in matters involving disciplinary offences in the Public Service was emphasised by Levy A.J. in *O.T. Teli v M.M. Qhobela, Chairman PSC and Ors* CIV/APN/86/85 (unreported). Whole disciplinary proceedings had to be set aside for failure to liaise with the Attorney General in a matter that had a criminal aspect. That being the case, (in disciplinary matters) even without reference to the principle of legitimate expectation (which applies in this case) the special position of Attorney General cannot be overlooked.

In this case, Applicant's legitimate expectation of a hearing was even much higher. the reason being the Deputy Attorney General's circular Law 61/C which actually stated what Applicant was entitled to expect when he was

suspended. In *Foster v Chairman Commission for Administration & Another* 1991(4) SA 403 at page 408 GH Brand AJ dealing with *audi Alteram* rule relying on what Corbett CJ said in *Administrator of the Transvaal & Others v Traub & Others* 1989(4) SA 731 at 748GH said:

> "The question whether or not the rule is applicable does not depend on whether proceedings are disciplinary in nature. According to classic formulations the *audi* rule applies:
> "...when a statute empowers a public official or body to give a decision affecting an individual in his liberty or property or existing rights, unless the statute expressly or by implication indicates the contrary'..."

At page 409 Brand AJ concluded that the decision which caused Applicant's salary to be decreased was among those which could not be taken without first hearing Applicant. Because "he had a legitimate expectation to be heard on allegations against him". Vide *Foster v Chairman Commission for Administration* (supra) at page 409 EF. This doctrine of legitimate expectations has been recognised in Lesotho for some time now. See *Koatsa v National University of Lesotho* C of A (CIV) No. 15 of 1986 (unreported) where Mahomed JA (as he then was) at pages 11

and 12, dealing with bodies such as government and universities which serve the public, said officials with powers of discipline cannot act capriciously, arbitrarily or unfairly:

> "...The employee should be given a fair opportunity of being heard on the matter, especially where it appears from the circumstances that the employee had a "legitimate expectation" that he would remain in employment permanently in the ordinary course of events."

This doctrine of legitimate expectation has been imported into our system from English law recently. It is relatively new even in England it is not yet a quarter of a century old. Corbett CJ in *Administrator Transvaal and Others v Traub and Others* 1989(4) SA 731 at 761 sounds a warning about this doctrine in the following words:

> "Like public policy, unless carefully handled it could become and unruly horse. And in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the court will, no doubt, bear in mind the need from time to time to apply a curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of

> avoiding undue interference in their administration."

First Respondent says allegations against Applicant are serious. The amount involved is not small. He is a financial controller who authorises payments. The office he holds requires utmost good faith. These facts which appear at paragraph 8 of First Respondent's affidavit are irrefutable. Applicant's presence could also undoubtedly hamper investigations. Indeed First Respondent is right that an interdiction could have been the best way forward. What is being the subject of this application is the procedure followed.

Applicant's reply in paragraph 7•5 of his Replying Affidavit is:

> "It is only in extreme situations where the interdiction could be made before a public officer is heard. Such extreme cases are far and between."

It seems, therefore to be accepted by both sides, that in

very extreme cases the principle of legitimate expectation encompasses the possibility that in extreme circumstances the unexpected might happen, otherwise it might run amock, as Corbett CJ said in *Administrator Transvaal and Others v Traub and Others*. In this case, I am satisfied First Respondent committed an error of omission by calling Applicant, then changing his mind and not hearing Applicant, a procedural step that he was obliged to take. I note as Hoexter JA did in *Administrator Transvaal & Others v Zenzile & Others* 1991(1) SA 21 at page 40 B that it would not have been difficult for First Respondent to give Applicant a hearing. He probably felt disinclined to do as he probably did not consider it important.

The weight of authority on the need for the *audi alteram partem* principle is directed at situations where the suspected public servant is suspended without pay. The nature of hearing that is required for suspension purposes has never been defined. Hoexter JA in *Administrator Transvaal & Others v Zenzile & Others* (supra) at page 40 D recognised that it may not "in a particular situation it may not be possible to accord fully an affected person his right to be heard". This

audi alteram partem principle is a flexible one which has to be exercised within the inherent constraints imposed by a particular situation. Where services of an essential nature had to be rendered on an ongoing basis at a hospital Hoexter JA was in this case *Administrator Transvaal v Zenzile* (supra) of the view that the hospital work-stoppage required prompt action on the part of the Administrator because the particular situation might require some attenuation of the affected person's right to be heard. By this I understand some hearing, however limited must take place.

What is challenged here is the method. Once the method by which suspension was effected was wrong, then the suspension cannot always be valid in the eyes of the law. The court in my view has a discretion to decide to set aside the suspension keeping in mind the balance of convenience. If the first Respondent had gone about the suspension correctly the court would not be able to interfere.

In this case Applicant holds the office of Financial Controller in the Ministry of Education. He is, in my

view not just a book-keeper. He has to do more than that. He is also not just a conduit pipe between the accounts department of the Treasury and other officers serving under him. He should (if his title is anything to go by) see to it that the financial controls that are in the Government Financial Regulations operate effectively to prevent losses, thefts and even frauds.

There is no doubt that appearances can be deceptive. Cheques of about a quarter of a million Maloti which are passed under an officer's financial control should have invited scrutiny of an unusual nature on the part of Applicant. The concern of First Respondent (as Principal Secretary) for the Ministry of Education and as chief accounting officer in matters of finance was correctly aroused. He was obliged to act. He should nevertheless, not have panicked. His righteous indignation should not have beclouded judgment. In my view he was obliged to hear Applicant in order to acquaint himself with facts from Applicant's side and to give applicant an opportunity to explain or justify himself. This would not be putting Applicant on trial, but merely getting some explanation to enable himself to take the decision to interdict

Applicant.

If (for an example) the Government Secretary acting in concert with the Accountant General had suspended First Respondent himself, without pay, merely because First Respondent is the chief accounting officer of the Ministry of Education in respect of the same matter, would First Respondent have considered their action to be fair? The need for some hearing is to prevent mistakes what could have been avoided had decision makers asked for an explanation. It is a notorious fact mistakes in government often take months to correct. This causes government acute embarrassment and untold suffering on the side of those on the receiving end of those decisions.

It follows therefore that having received Applicant's explanation or self-justification, First Respondent could quite legitimately have told Applicant that he hears Applicant's explanation or Applicant's side of the story, nevertheless this matter needs to be investigated. He would then have written to him a letter suspending him in order to facilitate investigations. The view I take is that suspension without pay is no more an available option

in the exiting constitutional order. I will give my reasons later. Indeed first Respondent could quite legitimately have prevented applicant who had been on leave from resuming work, call for an explanation and proceed to suspend him after receiving it.

As was stated the case of *O.T. Teli v M.M. Qhobela, Chairman Public Service Commission and Others* CIV/APN/86/85 (unreported) in suspected cases of fraud, theft or attempted theft of Government money, like this one, there are criminal and disciplinary implications. Criminal aspects must first be cleared with the office of the Director of Public Prosecutions a specialist arm of the Attorney General's office. If he decides not to prosecute, then a disciplinary case of breach of financial and other public service regulations can be investigated. The view I take is that, if only First Respondent had heard applicant he would have been justified to suspend him as he did, having regard to what he says in his affidavit in which he blames everything on his subordinates. What Lord Denning MR said in *Lewis v Heffer and Others* [1978] 3 All ER 354 about the advisability of suspension in cases such as this one makes a great deal of

sense. The principle of legitimate expectation of a hearing must be understood and reconciled with what he said to balance the interests of an individual public servant with good governance.

It seems to me that to the suspected official, suspension without pay is definitely punishment. The reason being that its consequences are often irreversible. The whole style of living of a modern public servant is planned around his monthly salary. It is not unusual that the school fees of his children are paid periodically. goods are taken on hire purchase, house mortgages are periodic payments and all these payments are scheduled and paid out of the monthly salary. To suddenly stop a public servant's salary might sometimes lead to the immediate exclusion of his children from school, repossession of his car and other goods under hire-purchase, the calling of the bound and loss of his house. Even if the suspect is cleared and he gets all his suspended emoluments, he would not always be able to get back what he lost. The Court is obliged to take judicial notice of this reality. Taking away the emoluments of an official suspected of misconduct and suggesting that is not punishment, strikes me as hair-

splitting and using language in the most abstract fashion.

An application such as this one is not only one for a declaratory order. Built into such an application is the quest for fair treatment and justice. This means (provided the Court acts judicially) the court has a discretion to grant such an order or not. In *Lewis v Heffer* (supra) at 365 Lord Denning MR summed up the position as follows:-

> "The one remaining question is: What is the balance of convenience? It seems to me that, if an injunction is granted, saying that officers and committees are not suspended, it will not do anything to remove the chaos."

Lord Denning MR then went into what was best for all concerned in order to protect the interests of all concerned. As the *Lewis v Heffer* case involved suspension of Labour Party officials, the Court after being assured that Mr. Lewis and others would not be suspended from the Labour Party "except after due enquiry and everything had been done in accordance with the dictates of natural a justice" dismissed the application.

The view I take is that even where the Applicant has made a case for the setting aside of the suspension, the Court has a discretion to make or not to make the declaratory order. See *Section 2(b)* of the *High Court Act* of 1978. The Court only grants declaratory orders at its discretion. As Lord Denning MR has said in *Lewis v Heffer* the Court has among other things to consider where the balance of convenience lies.

I note that the Deputy Attorney General in his Circular Law 61/C dated 21st August, 1992 quoted *Lewis v Heffer and Others* [1978]3 All ER 354. In that case Lord Denning MR at 364 CD qualified the *audi alteram partem* principle in respect of suspension as follows:-

> "Those words apply, no doubt, to suspensions which are inflicted by way of punishment, as for instance, when a member of the bar is suspended from practice for six months, or where a solicitor is suspended from practice. but they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on ground that it could not be done unless he is given notice of the charge and an

opportunity of defending himself, and so forth."

What Lord Denning said is still the position under the Common Law. I note in the above passage Lord Denning says "a man may be suspended on full pay pending enquiries".

Taking away what has been earned, or a person's entitlement to emoluments was something that used to be done in the past without a pang of conscience. In the British tradition there is no Bill of Rights of the type that the United States of America has. The British Parliament, being supreme and sovereign, could take any right from the individual by ordinary legislation, provided Parliament believed public opinion would not react negatively to such a step.

The significance of written constitutions that Britain had given to (what used to be called) dominions or self governing territories was not initially appreciated. The then Union of South Africa had inherited a constitution based on the British tradition from Britain. Human rights that were specifically protected by the constitution were something rare and foreign to the

British traditional way of thinking. Yet of late former British territories such as Lesotho have Bills of Rights that specifically protected bundles of rights under the constitution. In the then Union of South Africa, only voters rights of Cape Africans and those of Coloureds had been specifically mentioned in the constitution. Other rights were not mentioned and were therefore the subject of ordinary legislation.

We live in the days when the Constitution is the supreme law of the land. The British doctrine of supremacy of Parliament initially caused a great deal of confusion in the former British Empire. Courts in the former dominions such as the then Union of South Africa felt they had no power to enquire into the procedure followed in the passing of a law and the validity of Acts of Parliament because that would impinge on the sovereignty of the Parliament. See Stratford ACJ judgment in *Ndlawana v Hofmeyr & Ors* 1937 AD 229 at page 238 where (dealing with the taking away of the voters rights of Cape Africans) he said:

"The answer is that Parliament, composed of its

> three constituent elements, can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is so far as the Courts of Law are concerned at the mercy of Parliament like everything else."

This judgment confirmed that of a full bench of the Cape Provincial Division. In *Harris & Others v Minister of Interior & Another* 1952(2) SA 428 Ad at 464 DE Centilivres CJ (dealing with voters rights of Coloureds) in upholding the supremacy of the constitution said:-

> "a State can be unquestionably sovereign although it has no legislature that is completely sovereign."

He then proceeded to state that Parliament is bound to follow the constitution. Therefore the court has the competence to enquire whether laws have been validly passed:-

> "to hold otherwise would mean that Courts of law would be powerless to protect the rights of individuals which were specially protected by the constitution of this country." *Harris & Ors. v Minister of Interior & Another* (supra) page 470 E.

When dealing with the rights of public servants in the Lesotho of today, we should keep the provisions of the constitution in mind.

The Public Service Commission Rules on the method of dealing with public servants suspected of misconduct strike me as violating the spirit if not the letter of the constitution. Senior Public Servants are empowered, virtually in their discretion to treat public servants under them in a discriminatory manner when it comes to interdictions. Some public servants are to be suspended on full pay, others with a portion of their pay while there are those who are suspended without any pay whatsoever. No guiding criterion is even set. See *Rule 5-21(1)* read along with *(3)* of the *Public Service Commission Rules* of 1970. This rule speaks of an advisory Public Service Commission when in terms of *Section 137 of the Constitution* of 1993 the Public Service Commission is not subject to anybody in the exercise of its powers. Secondly a suspected public servant is treated as if he is already guilty and his right to be heard on the question of emoluments before and after interdiction is treated as a privilege not a right. In my view even Parliament

itself has not the power to violate any person's right by passing laws that take away the rights of individuals and open the way to discrimination, see *Section 18* of *The Constitution of Lesotho* 1993. The *Public Service Regulations* and the *Public Service Commission rules* being delegated legislation ought to be even more restricted in this regard.

It seems to me that a man's salary is his property. Contractual rights too can be property. If by legislation Parliament takes away a person's salary during suspension it arbitrarily seizes it contrary to *Section 17* of the *Lesotho Constitution* more especially when he is forbidden to find alternative employment in terms of *Rule S-22(6)* of the *Public Service Commission Rules* 1970. Government appropriates the suspect's time and the entitlement to emoluments that are an officer's due and keeps them while forbidding the public servant to use them in order to be able to earn some money to live on. This should be unconstitutional. Surely Parliament cannot validly make laws that discriminate against public servants by taking away from public servants the rights other employees have.

Applicant in pointing out the prejudice he is suffering or about to suffer because of interdiction without pay at paragraph 5 of his Founding Affidavit says:

> "5.1. I have three minor children who are dependent on me. I have an old mother to maintain. I have financial commitments I have to provide for myself. I have no other source of income other than my salary. To be interdicted without pay and without my side of the story being heard has drastic financial consequences...
>
> 5.2. ....The month is about to end. I have instalments to meet. Which I shall not be able to meet if I am not paid my salary."

In *Muller v Muller and Others v chairman Ministers Council & Others* 1992(2) SA 508 Howie J. felt the cessation of pay could not be separated from the suspension of a public officer, and that the financial position of such an officer could not be irrelevant. At page 532 B Howie J. said:

> "such suspension unquestionably constitutes a serious disruption of rights. The implication of being deprived of ones pay are obvious."

The First Respondent in his Opposing Affidavit does not find himself even obliged to consider the present financial embarrassment of Applicant because *Rule 5-22(1)* of the *Public Service Commission Rules* has given him the power to disregard it.

I have great difficulty with *Rule 5-22(1)* of the *Public Service Commission Rules* 1970 which provides:

> "An officer who has been interdicted in terms of the preceding rule is not entitled to any emoluments for his period of 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 the department an opportunity to be heard, advise the Minister to vary, confirm or set aside that order."

I have already said the commission is in terms of the constitution no more an advisory body in matters of appointment and discipline. It now has full powers of appointment and discipline over the public service. I find it strange that through delegated legislation it was possible to deny an officer in the public service his emoluments merely because he was suspected of a

disciplinary offence or a crime. What is even worse is that thé rule gave an individual head of department a discretion to withhold a portion or the whole of an officer's emoluments. Does this give such an officer equality before the law and equal protection before the law as provided for in *Section 19* of the *Constitution of Lesotho* 1993?

Does this rule free such a suspected officer from discrimination by a head of the department in terms of *Section 18* of the *Constitution of Lesotho* 1993? I have serious reservations about the power of the head of department to deny a suspended officer suspected of disciplinary offence of his or her emoluments. This *Rule 5-22(1)* of the *Public Service Commission Rules* seems to conflict with the constitution.

Rules such as this one have the effect of making heads of department to relax and not proceed with the disciplinary offence, because Government is not under pressure to proceed with the matter because it does not lose any money. In *Mhlauli v Minister of Department of Home Affairs and Others* 1992 (3) SA 626, a public officer

suspected of a disciplinary offence was suspended without pay in terms of the South African *Public Service Act* of 1984. The matter was not heard for over 16 months. In South Africa of the day like the Lesotho of 1970, there was no culture of human rights or a democratic constitution. Such laws were not out of place.. In the Lesotho of today such laws in my view conflict with the constitution.

There can be no doubt that suspending an employee without pay causes the employee great prejudice. It has been shown that applicant was forbidden from taking some other employment. Where an employee has been suspended (according to the Common Law) and where,

> "the master is prepared to hold the servant to his contract, and according to the contract the servant may be called upon to come forward and do his work, and when the contract prevents him from being free to earn wages in some other capacity, then the master cannot claim abdication of wages for the time services were not actually performed." *Norton v Mosenthal Co.*

1920 EDL 115 at page 118 quoting from *van der Merwe v Colonial Government* (14 C.T.R. 732 at 737).

It is because of this principle that I have difficulty with the words in *rule 5-11(1)* of the *Public Service Commission Rules* 1970 where it provides:

> "An officer who has been interdicted in terms of the preceding rule is not entitled to any emoluments for the period of his interdiction ..."

The problem is magnified by the fact that empowering legislation, the *Public Service Order* of 1970 does not seem even to authorise such a denial of livelihood to a suspect. "The view I take is that under the prevailing constitutional order a head of department may not suspend an officer without pay at the time he interdicts him whether he hears him or not.

In the existing South African case law that is collected in *Mbilauli v Minister of Department of Home Affairs and Others* 1992 (3) 635 the emphasis is on the

audi alteram partem rule. I feel taking away the right to a suspended person's emoluments is a constitutional issue under the human rights clauses. Employment is also a question of status. See *Maseribane and Others v. Kotsokoane and Others* 1978 LLR 455. Taking a person's emoluments (even temporarily) is also taking away his property and existing rights. That has to be prejudicial and calls for a hearing. For this reason courts have of late come to a conclusion that a hearing is a Common Law right that has existed all along. It is only in the last twenty-five years that our courts have recognised the existence of this right which they often overlooked in the past.

At one time South African courts felt (no hearing was necessary) in spite to the harsh consequences of taking away a suspended public servant's pay. According to this reasoning, because the guilt or innocence of such a person had not been determined, taking away his emoluments was not a penalty. See *Swart & Others v Minister of Education and Culture & Another* 1986 (3) SA 331. This case has been overruled and superseded by *Administrator Transvaal and Others v Traub and Another* 1989 (4) SA 731 (A). At page

762 E Corbett CJ say denial of a hearing by the authority "constituted a failure on his part to act fairly".

In *Muller v Chairman Minister's Council* 1992 (2) SA 508 at pages 522 H Howie J. agreed with a foreign decision such as *Furnell v Whangarei High School Board* [1973] 1 All ER 400 and others and in particular the following:

> "the Court considered suspension such a drastic measure which, if more than momentary, had a devastating effect on the officer concerned. The prejudice occasioned (him) by a suspension could never be assuaged even if he was ultimately vindicated at a disciplinary hearing and restored to office and paid arrears of salary. Had the respondent given appellant an opportunity to be heard, he could, *inter alia*, have emphasised the particular implications of suspension without pay."

Howie J. added at page 523 BC continued:

> "suspension unquestionably constitutes a serious disruption of rights. The implications of being deprived of pay are obvious. The implication 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 so immediately realised by the outside observer. There are indeed substantial social and personal implications inherent in this aspect of suspension."

/...

Although South African cases emphasise a hearing on emoluments I have already said even the right to with-hold a salary is not in my view sanctioned by the constitution. I am of the view that suspension from office should be made after hearing the explanation of the applicant. Interdiction of public servants is often a necessary and legitimate step, so long as the suspect under investigation continues to get his salary. If the employee knows that the employer heard him and is also taking the employee's explanation into account in his investigations, then everything is fair. It is all a question of the legitimate expectation to be treated fairly. After all:-

> "an employer is normally not obliged to provide the employee with work but merely to pay wages if and when they fall due, the employer may lawfully instruct the employee not to continue working (e.g. while charges against the employee are being investigated)... A Rycroft and B. Jordaan *A Guide to the South African Labour Law* at page 100."

In essence what First Respondent is (by inference) saying, to justify his action, can be summarised by Wentzel JA in the case of *William Lemena and Others v. I.*

Nurcombe (Headmaster Lesotho High School) and Another C of A (CIV) No. 12 of 1984 (unreported) at page 7:

> "there was an emergency to be met. The headmaster rightly felt that all semblance of discipline would have been lost if he had not acted. The boys were simply not entitled to a full scale hearing in the formal sense, and in the atmosphere that then prevailed to be wary of revealing the identities of those who implicated others is quite understandable."

The difference between this case and that one is that school children are not involved. This is a case of employment in the public service which is a matter of status. See *Maseribane & Others v Kotsokoane & Others* 1978 LLR 455. In this case no hearing of any kind was given. Even in an emergency some hearing even if it is not a full-scale one ought to have taken place.

The principle of legitimate expectations should operate within this legal environment:

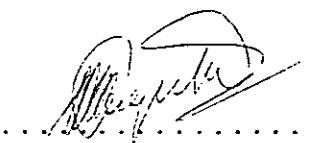
> "A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by a public

authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration." *Administrator Transvaal & Others v Traub & Others* (supra) at 761GH.

In the light of the foregoing this Court makes the following declaratory order:-

(a) the purported interdiction of applicant by First Respondent is null and void.

(b) Respondents are directed to pay the costs of this application.



W.C.M. MAQUTU
JUDGE

For the Applicant : Mr. L. *Pheko*
For the Respondents : Mr. T.S. *Putsoane*