IN THE LESOTHO COURT OF APPEAL

HELD AT MASERU

C. of A. (CIV) 2/96

In the matter between:

MAMONYANE MATEBESI Appellant

and

THE DIRECTOR OF IMMIGRATION First Respondent

THE MINISTRY OF PUBLIC SERVICE Second Respondent

THE ATTORNEY GENERAL Third Respondent

JUDGMENT

Date of hearing: 28 July 1998

Date of judgment: 31 July 1998

GAUNTLETT, JA

The primary issue in this appeal is whether the appellant, a public servant in Lesotho, was entitled to be heard before being dismissed in terms of section 10(1)(i) of the Public Service Order, 21 of 1970.

This provision states:

"**Section 10 (1) Every public officer shall comply with the following general rules of conduct -**

..... .

(i) A public officer shall not absent himself from his office or from his official duties during hours of duty without leave or valid excuse....".

The material facts are confined. At the time the dispute between the parties arose, the appellant had been employed as a public servant for some 15 years, seven of which had been spent in the Department of Immigration at Maseru. On 7 November 1994 she was notified by circular that she (among others) would be transferred as from 1 December 1994, on which date "**all concerned officers are expected to report to their new stations**". She responded in a letter on 17 November 1994 stating that she was not refusing the transfer (in her case, to Mokhotlong), but setting out certain problems relating to her children and the absence of her husband in South Africa which, she considered, militated against the move. She also attached a medical report, evidently, in respect of one of her children.

These representations (addressed to the Principal Secretary at the Ministry of Home Affairs) elicited a prompt response - one of two important letters not disclosed in the founding affidavit. On 20 November 1994, the Principal Secretary himself

stated that he had "**studied your file and asked the director why he acted the way he did**". He referred to earlier occasions on which the appellant had resisted a transfer and that both the director and the appellant's immediate supervisor were "**expecting you to appeal to them before making your request to the Ministry**". He stated that without their recommendations he could not "**reverse the decision to transfer you**".

Thereafter the Deputy Principal Secretary wrote to attorneys apparently acting for the appellant on 30 December 1994, (this letter is marked "without prejudice"; quite why is not apparent, there being no indication that the letter related to any settlement negotiation between the parties which could justly have conferred that status upon it) responding to a letter which is not part of the record. The letter of 30 December 1994 also refers to past resistance by the appellant to transfers, and asserts that in relation to the present dispute "**she also had the benefit of negotiating with the administrator in this regard**". The letter refers, too, to the Ministry's experience of "**dire problems as civil servants generally do not want to work in the districts**", with the consequence that it had "**no option but to, as far as possible, rotate our staff as the people in the districts require services**".

The letter of 30 December 1994 furthermore records that the appellant, contrary to the provisions of section 10(1)(j) of the Public Service Order, 21 of 1970, had "**made official representations of a personal nature to the Principal Secretary**

without going through the Director of Immigration", and that she moreover had had the benefit of an audience with the Minister himself.

The appellant asserts that on 19 December 1994 she presented herself at the office of the Deputy Director of Immigration in Maseru, where she was very directly instructed to take up the transfer to Mokhotlong. She did not do so. She says that "**[w]hilst awaiting an amicable consideration and settlement of my problems I was to my dismay served with a letter of dismissal from service, dated 11 May 1995**".

The terms of this letter are as follows:

"I am directed to advise you that the Public Service Commission has resolved that you be removed from service by way of dismissal following upon an unauthorised absence from your office and official duties contrary to section 10(1)(i) of the Public Service Order 1970".

It is signed on behalf of the Principal Secretary: Home Affairs.

It is common cause that the appellant was accorded no hearing before being dismissed. The first respondent's deponent testifies that this was because it was "**not necessary**" to do so, and furthermore that her whereabouts after she failed to take up the new posting were not known, "**thereby making it difficult to get in touch with her**". In reply the appellant does not pertinently deny that her

whereabouts were unknown, asserting only that later she "**was found with ease**" when "**served**" with her letter of dismissal.

The founding affidavit contends that the dismissal was unlawful on three grounds:

(a) The notice of 11 May 1995 did not "**disclose the period covering the alleged period [sic] of absence from office**". This disclosure, the appellant explains in her written submissions, "**would have been material to [her] right to prepare her defence....**".

(b) The appellant had not been given an opportunity to be heard in relation to "**the alleged unspecified period of absence**"

(c) The reason for her absence in respect of "**the period known to me**" was sick leave arising both from the illness of her infant and in respect of herself and was "**covered by the medical doctors and known to my employers**".

The court below (Guni, J) rejected all three grounds of attack, and accordingly dismissed the application.

The appellant contends in her notice of appeal that the learned judge misdirected herself in the following four respects (which I reproduce verbatim):

"(1) **The Honourable Judge misdirected herself in construing that the material time relied upon in dismissing Appellant from the Public Service need not have been specifically set out on the letter of dismissal (see annexure "C" to the founding affidavit).**

(2) **The absence of any charge of misconduct based on undisclosed period of absence from duty prior to dismissal from Public Service denied the Appellant an opportunity to be heard before her employment rights were adversely affected.**

(3) **The Honourable Judge misdirected herself in holding that section 6(3) of Public Service order No.21 of 1970 excluded the application of the rules of natural justice inasmuch as the said section calls for such absence from duty being without leave or valid excuse which facts platform an enquiry and representation.**

(3) **The 1st Respondent ignored to give proper consideration to the reasons concerning Appellant's difficulties with Mokhotlong transfer inasmuch as Appellant's difficulties with Mokhotlong transfer inasmuch as Appellant was not refusing a transfer but requested a reconsideration of an alternative transfer in the light of Appellant's medical problems pertaining to her child which called for Maseru based medical specialist".**

It will be noted that the fourth ground is not one squarely covered by the founding affidavit (it appears to amount to a contention that the first respondent failed duly to apply his mind to the question of her transfer). Once again it is necessary to say that an applicant's case must be squarely made out in the founding affidavit, and that it is only in exceptional circumstances that this requirement is relaxed (see High Court Rule 8(1); **Director of Hospital Services v Ministry 1979 (1) SA 626 (A) at 635H - 636F; Herbstein & Van Winsen Civil Practice (4th ed 1997) 364-7,** and further authorities there collected). I revert to this aspect later.

Before proceeding further, it is necessary to note the clear focus of the case the appellant chose to make out on the papers. While in the course of the narrative in her affidavits she criticises the decision to transfer her, she does not contend that that decision was invalid, and that as a result the decision to dismiss the appellant was vitiated. The founding affidavit, and the grounds of appeal (even including the fourth ground) assert the invalidity only of the decision to dismiss the appellant. This appeal must accordingly proceed on the basis that the antecedent decision to transfer the appellant was valid.

The central inquiry raised by the first three grounds of appeal is whether the appellant was entitled to be heard before she was dismissed. The arguments advanced on both sides, and certain observations in the judgment of the court *a quo*, make it necessary to restate the principles relevant to that primary issue.

In summary, the principles are these:

(1) Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by implication indicates the contrary, that person is entitled to the application of the *audi alteram partem* principle (**Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A) at 661A-B; S A Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)**

at 10J-11B; Du Preez v Truth and Reconciliation Commission 1997 (3) SA 204 (A) at 231C-D).

(2) The right to be heard (henceforth "the *audi* principle') is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions (see generally **De Smith, Woolf and Jowell Judicial Review of Administrative Action (5th ed 1995) 378 - 379; Schwarze European Administrative Law (1992) 1358-1370; Joseph Constitutional and Administrative Law in New Zealand (1993) 717 et seq; Hotop Principles of Australian Administrative Law (6th ed 1985) 168 et seq**). The *audi* principle has ancient origins, moreover, traced back to Seneca, Hammurabi and even what have been described as the events in the Garden of Eden (see further **Rakhoboso v Rakhoboso unrep. C of A (CIV.) 37/96, 19 June 1997**). It has traditionally been described as constituting (together with the rule against bias, or the *nemo iudex in re sua* principle) the principles of natural justice, that "**stereotyped expression which is used to describe [the] fundamental principles of fairness** (see **Minister of Interior v Bechler; Beier v Minister of the Interior 1948 (3) SA 409 (A) at 451**). More recently this has mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in **Ridge v Baldwin [1964] AC 40**, particularly in **Administrator, Transvaal v Traub 1989 (4) SA 731 (A)** and more recently, **Du Preez v Truth and Reconciliation Commission supra** and

Doody v Secretary of State for the Home Department [1993] 3 All ER 92 (HL) at 106d-h).

(3) In Lesotho that right is also made applicable to private employment relationships by section 66(4) of the Labour Code Order, 1992. As regards public sector employment, there is the same express statutory protection, at least in instances of the termination of employment ("**....he or she shall be entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made unless, in light [sic] of the circumstances and reason [sic] for dismissal, the employer cannot reasonably be expected to provide this opportunity": section 66(4)).** The Code applies to all Lesotho public servants, save those in a disciplined force as defined (section 1(2)(a) and (b)), or such other public servants as the Minister responsible for administration of the Code may specify.

(4) The *audi* principle is underpinned by two important considerations of legal policy. The first relates to a recognition of the subject's dignity and sense of worth. As the leading United States constitutional writer **Lawrence Tribe Constitutional Law (2nd ed 1988) at 666** explains:

"the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome: these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one".

Or, as Donaldson LJ put it in **Cheall v Association of Professional, Executive, Clerical and Computer Staff [1983] QB 126, "natural justice is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'".**

Secondly, there is the pragmatic consideration that the application of the *audi* principle is inherently conducive to better administration. As Milne, JA summarised both considerations in **South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 13B-C:**

"the *audi* principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power" (emphasis supplied).

(See also **Administrator, Natal and Another v Sibiya and Another 1992 (4) SA 532 (A) at 539C-D** and **Minister of Education and Training and Others v Ndlovu 1993 (1) SA 89 (A) at 106C).**

(5) Because both these considerations underpin the *audi* rule, the so-called "**no difference argument**" (ie., that a hearing would have made no difference to the result) is now generally regarded as legal anathema. This argument is nonetheless one advanced on behalf of the respondents, reliant on **Glynn v**

Keele University [1971] 2 All ER 89 and Cinnamond v British Airports Authority [1980] 2 All ER at 374-5, to which may be added Beukes v Director-General, Department of Manpower, and Others 1993 (1) SA 19 (C) at 27C and 28J-29C. It is accordingly necessary to consider it here.

Why courts resist accepting that there is no right to a hearing when it is unlikely to affect the correctness of the outcome was elucidated in Administrator, Transvaal and Others v Zenzile and Others 1991 (1) SA 21 (A) at 37C-F where Hoexter JA said:

"It is trite...that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade Administrative Law (6th ed) puts the matter thus at 533-4:

'*Procedural objections are often raised by unmeritorious parties. Judges may* then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly'.

The learned author goes on to cite the well known *dictum* of Megarry J in John v Rees [1970] Ch 345 at 402:

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion , suffered a change'".

(The "no difference" argument has also been rejected in **Friedland and Others v The Master and Others 1992 (2) SA 370 (W) at 378A-C; Muller and Others v Chairman, Ministers' Council, House of Representatives, and Others 1992 (2) SA 508 (C) at 514F-G; Yates v University of Bophutatswana and Others 1994 (3) SA 815 (BG) at 838A-E; Fraser v Children's Court, Pretoria North and Others 1997 (2) SA 218 (T) at 231H-233B; Yuen v Minister of Home Affairs and Another 1998 (1) SA 958 (C) at 969J-970G).**

The earlier approach in **Glynn** and **Cinnamond supra** has, it may be noted, also been the subject of criticism in the United Kingdom (see particularly the analysis by Professor Jowell QC in **Jowell and McAuslan (eds) Lord Denning: The Judge and the Law (1984) 228-231).** It was implicitly repudiated by Lord Morris of Borth-y-Gest in **Ridge v Baldwin [1964] AC 40 at 127. R v Chief Constable of the Thames Valley Police Forces, ex parte Colton [1990] 1 IRLR 344** is now "**[r]ecent authority [which] has come out strongly against the reviewing court taking into account whether the hearing would have made any difference, and this decision is to be welcomed" (Craig Administrative Law (3rd ed 1994) 301)** and see also **De Smith, Woolf and Jowell op cit 498-502).**

The respondents' reliance on **Glynn** and **Cinnamond supra** is in any event misplaced for another reason. They overlook the fact that in English law,

arising from the prerogative writs of *mandamus* and *certiorari* judicial review is a discretionary remedy (for which prejudice may be relevant to the decision whether or not to grant a review: see **De Smith et al op cit 498-500),** while in the law of Lesotho it is not (see especially **R v Padsha 1923 AD 281 at 308; Harnaker v Minister of the Interior 1965 (1) SA 372 (C) at 376-380).**

(6) The *audi* rule applies to employment rights, where the employer is a public authority (see (3) above, and further **Zenzile supra** and **Sibiya supra).** Recently this court has held that it also applies even in the context of temporary employment, for rights, however temporary, not only exist but are in principle important to those to whom they accrue (see **Rakhoboso v Rakhoboso unrep. supra** and see too now **Ntshotsho v Umtata Municipality 1998 (3) SA 102 (Tk);** and **Muller and Others v Chairman, Ministers' Council 1992 (2) SA 508 (C)).** Two observations need to be made however. As already noted, it is a right to be heard before dismissal, not transfer, which

the appellant asserts on the papers, and it is a contended breach of that right which the appellant says vitiates her dismissal. The second aspect is that in any event the appellant was heard - by the Principal Secretary, "the administrator" and the Minister himself - before the transfer was due to be implemented.

(7) The right to *audi* is however infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation (**Blom, supra at 662H-1** and **Baxter Administrative Law (1984) 569-570.** (Thus in appropriate instances fairness may require only the submission and consideration of written representations; the right to be heard is not necessarily to be equated with an entitlement to judicial - type proceedings, with their full attributes). Or while a statute may not per se exclude the operation of the rule, it may confer an administrative discretion which permits that result. Or the operation of the rule may be ousted or attenuated by a particular set of facts, where it cannot practicably be implemented, at all or to its fullest extent, respectively. As is apparent from (3) above, section 66(4) of the Labour Code, 1992 provides this expressly.

It is apparent that in the circumstances of this case, the *audi* rule in principle applies. The question is then whether the statute excludes it, expressly or impliedly, or if not, whether it permits its exclusion in appropriate circumstances, and accordingly whether in the circumstances of this case it has been excluded.

In my view, there can be no doubt that the terms of section 6(3) of the Public Service Order, 1970 permit the displacement of the *audi* rule in appropriate circumstances. They do not however themselves oust its operation *ex lege* and in all cases. This is the provision:

> "(3) **If an officer has contravened the provisions of this Part [Part 2 which includes section 10] in respect of absence from his office or from his official duties he may without delivery to him of a formal charge or any other proceedings prescribed in these rules be removed from office by way of dismissal or other termination of appointment**" (emphasis supplied).

While the disciplinary provisions of the Order lay down no express procedure for hearings, there are several *indicia* which make it plain that in the ordinary course, a form of hearing appropriate to the circumstances is to take place (see for instance sections 5(1), (2), (3), (4); 6(1)). Section 6(3), in contrast, confers a discretion (as opposed to the creation of a power coupled with a duty to exercise it: see **De Smith, Woolf and Jowell op cit at 300-302 para 6-011 to 6-013; Baxter op cit at 410-414)** to depart from the *audi* rule.

This provision would appear to be underpinned by the practical difficulty which will often arise in an instance of protracted absenteeism or desertion. Either undermines the capacity of the employer to investigate the situation properly **and** expeditiously. The ability of the employer conveniently and swiftly to ascertain from the absentee employee why she is absent must nearly always be difficult, if

not impossible. On the facts of this matter, that was indeed the case here.

For these or other reasons, it has evidently been determined that a provision permitting summary dismissal should exist in circumstances of "**absence from his office or from his official duties**". Obviously this does not relieve the employer from ensuring that this state of affairs indeed exists, as a jurisdictional fact for the exercise of the discretion, and materially so (thus a *de minimis* absence, or one which is in no way culpable would not *per se* attract the admittedly harsh consequences of section 6(3)). But, as has been noted, it permits the employer in its discretion not to hear the employee before dismissing her. On the evidence of the first respondent it was indeed established prior to the decision to dismiss that the appellant was absent from her "**office or.....official duties**". The reason was also established: she refused to accept both the decision to transfer her, and the fact that her extensive representations to officials up to the level of the Minister had failed. She had not thereupon sought to challenge <u>that</u> decision by competent proceedings (nor, as noted, does she even now). Her whereabouts in any event could not readily be established. As already noted, this is not denied by the appellant, and no evidence is advanced that she had left an address, or that her then residence was known. The appellant's response is only an oblique and cryptic argument: that (in circumstances she does not describe) the letter of dismissal itself reached her, which (she says) demonstrates that it was not impossible for her to be found. That argument does not address the allegation that as a fact her

whereabouts were not known and that accordingly she was not readily to be reached. In these circumstances, section 66(4) of the Labour Code, 1992 squarely has application, reinforcing what the common law (and indeed, common sense) would suggest; that in such circumstances any right to *audi* is displaced.

In these circumstances the appellant has failed to establish that by virtue of the fact that she was not given a hearing before being dismissed for absenteeism, the decision to dismiss her is invalid.

In my view the remaining two grounds on which the dismissal was attacked in the founding affidavit (as amplified also in reply) are also bad. There is no statutory provision, or general requirement of fairness, which requires the letter of dismissal itself to specify the period of absence. There is considerable confusion of thought in the contention that the letter of dismissal had to enable the appellant to answer the grounds on which the decision to dismiss - which had obviously by then already been taken - rested. The appellant's remedy was to seek reasons for the decision, which she has not done in all probability because she was well aware of them. The decision to dismiss was not invalid merely because its initial recordal does not fully state the reasons which underpin it (**see Baxter op cit 741** and the authorities collected in note 456). The reasons have since been recorded, in the opposing affidavit.

Finally, as regards the invocation by the appellant of sick leave, as analysed by Guni, J in her judgment, the period for which some excuse may have existed (assuming this in the favour of the appellant: it has to be said that the medical certificate proffered is of an extremely vague kind) is very confined. It is evident from the opposing affidavit that it was considered, but that it was concluded that no acceptable excuse had been advanced in relation to the general extent of the period of absenteeism. Again, in my view it cannot be said that the decision was not taken duly.

To sum up. As a matter of general principle a public servant is entitled to be heard before being dismissed. That is so at common law, and it is spelt out by section 66(4) of the Labour Code, 1992 in the terms quoted above. That principle however yields to statutory limitation. Section 6(3) of the Public Service Order, 1970 is just such a limitation. It does not itself oust all operation of the *audi* principle in all circumstances. It however confers a discretion which permits that result in appropriate circumstances. The evidence in the present case establishes that the decision to dismiss was taken after it was determined that the appellant refused to take up her transfer, after her representations in that regard had failed and after she had chosen not to institute legal proceedings to challenge that decision. The jurisdictional fact for a decision in terms of section 10(1)(i) of the Order - culpable absenteeism - was clearly considered and established. The sick certificate on its face provides no adequate explanation for the absenteeism. The appellant's

whereabouts were in any event uncertain. In such circumstances the decision to dismiss was not vitiated by the determination not to accord her some form of hearing in relation to the latter decision.

The conclusion which I have reached on the merits of the matter makes it unnecessary to deal with a further matter. It is evident that several issues in the litigation concern the discharge by the Public Service Commission of its duties in terms of Part 5 of the Order read with section 2(7)(b) thereof. In short, the decision to dismiss had to be taken in consultation with the Public Service Commission. So viewed, the Public Service Commission was an integral part of the decision-making as regards the dismissal. It is a body with an identity and functions apart from those of the other respondents, presided over by its own head. It has a direct and substantial interest in its own right in the matter. Yet it was not joined.

There is one last matter which required comment. This is the disquieting delay in obtaining a final determination in this matter. It concerns a dismissal effected more than three years ago. It is inherently undesirable for a matter involving employment status to take years to be resolved. The sole explanation the appellant's attorney offered - and this in an affidavit only handed in at the hearing of the appeal - is that he "lost touch " with her for nearly two years. There is no suggestion that either made any effort to contact the other. Both this sort of explanation, and this degree of delay, will not in future be tolerated.

I would dismiss the appeal with costs.

GAUNTLETT, JA

I agree. It is so ordered.

STEYN, P.

I agree.

VAN DEN HEEVER, JA

For the Appellant:

For the Respondent:

Delivered in open court this 31st day of July, 1998.