CIV/APN/228/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

MASUPHA MOHALENYANA SEEISO MAAMA	APPLICANT
and	
CHAIRMAN CHIEF DISCIPLINARY COMMITTEE	1ST RESPONDENT
MABELA SEEISO MAAMA	2ND RESPONDENT
MINISTER OF HOME AFFAIRS	3RD RESPONDENT
ATTORNEY-GENERAL	4TH RESPONDENT

For Applicant : **Mr K Mosito**

For Respondents : **Mr M Mapetla**

REASONS FOR JUDGMENT

Delivered by the Honourable Mr Justice T Monapathi on the 22nd day of August 2001

The following are the reasons for my ruling of the 12th April 2001. In this application the Applicant sought the following orders:

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

2. Directing the First Respondent to dispatch a record of the disciplinary proceedings held against Applicant on the 11th June 1998 to this Honourable Court and delivering same to the Registrar of this Court within fourteen days (14) for review.

2. A *rule nisi* be issued returnable on a date and time to be determined by the above Honourable Court calling upon the Respondent to show cause why:
   (a) The disciplinary decision by the 1st Respondent against Applicant handed down on the 11th June 1998 shall not be reviewed corrected set aside and be declared null and void.
   (b) The operation of the said decision shall not be stayed pending finalization hereof.
   (c) The purported filling of the chiefly position of the Applicant by another person shall not be declared null and void.
   (d) The Respondent shall not be restrained from filling the chiefly position with another person pending finalization hereof.
   (e) Applicant shall not be granted costs hereof in the event of opposition."

So protracted became this litigation.

The Applicant had raised a point of law that in terms of section 17(j) of the Chieftainship Act No. 22 of 1968. It was that there ought to have been a recommendation by the Court (Majara Local Court) which convicted Applicant of a criminal offence to the effect that disciplinary action be taken against him. And that in the absence of such recommendation the Committee had misdirected itself in taking action against Applicant. At the first hearing of the application the Applicant's Counsel has to concede that the proposed point of law was misconceived inasmuch as the said section 17(j) had been amended by section 8(2)

of the Chieftainship (Amendment) Order 1972. This amendment did away with the requirement that there shall be a recommendation by a convicting Court before disciplinary action could be taken against a chief convicted of a criminal offence. Consequently, the Crown submitted that the application stood to be dismissed on that ground.

Applicant's Counsel had further contended that he was going to apply for calling of *viva voce* evidence on ground that the witness had not been allowed to give evidence and when the Court rejected the request to lead evidence the Court had been unduly influenced thereto. The Respondent's Counsel had indicated that this approach was going to be strongly opposed. There were a number of reasons on which the Respondents wanted to show that the request was devoid of merit. The request was not pursued. This may presumably have been because on the last day of hearing the record of proceedings which had not been put before the Court then surfaced.

The discovery of the record of proceedings must have suggested to the Applicant that he ought to amend his notice of motion (which amended notice he duly filed) and pursue the only ground or grounds related to the additional prayer in that amended notice of motion. It was said the amendment was made in terms of Rule 50(4). The notice of motion was accompanied by the supplementary affidavit of Masupha Mohalenyana Seeiso Maama (the Applicant). It was couched in the following terms:

" 1. Declaring the disciplinary committee that heard the Applicant's disciplinary case culminating in his suspension as wanting in jurisdiction by reason on the ground that if not independent and imported as contemplated by section 12(8) of the Constitution of Lesotho 1993.

2. Granting Applicant such further and/or alternative relief as this Honourable Court may deem fit."

The question being asked was whether that Disciplinary Committee which tried the Applicant (validly appointed by the Minister in terms of section 15(2) of Chieftainship Act 1968) constituted as it was by people including public officers (civil servants) the committee lived up to the import of section 12(8) of the Constitution. It was argued that if the appointees to the Committee (or some of them) were civil servants appointed by the Minister there cannot be any:

> "Strong contention in favour of civil rights and obligation of a person being determined by a committee of public officers."

The section 12(8) of the Constitution reads:

> "(8) Any Court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil rights or obligations shall be established by law and shall be independent and impartial, for such determinations are instituted by any person before such a Court or adjudicating authority, the case shall be given a fair hearing within reasonable time." (My underlining)

Mr Mosito contended, notwithstanding that he conceded that the Committee was constituted in terms of the law, that the appointment (even though allowed by that law in question) this cannot be enforced because it is not supported by the Constitution. If it was the express intention of the legislature that the committee shall be independent and impartial there could be no valid argument that a Committee so constituted was independent. Reference was made in that regard to the Zimbabwean Supreme Court case of SEKAI HOLLAND AND OTHERS v THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE NO. SC 15/97. The case makes interesting reading and was only relevant in advising of the correct approach by the Counsel in matters involving "the existence

or extent of their civil rights and obligations". I agreed that the matter of the discipline or misconduct of the Applicant involved his civil rights and obligations. See pages 4 and 5 of the judgment. And the learned author C E Devenish in **South African Law Journal 1981** would add:

> "Where freedoms and rights of individual are involved, the Courts in accordance with the ethos of our Roman Dutch Law have emphasized their peremptory nature."

The second ground was that to the disciplinary hearing against the Applicant was heard in the office of Mr. Nthako a public servant and an officer in the Ministry of Home Affairs. That this was so was borne out by the record of proceedings which indicated further that the decision was made in that office. The question was therefore whether, as Mr. Mapetla submitted, even if the office was not a public place strictly speaking it was a place where the public normally had access to. The relevant provision in of the Constitution was section 12(a) which read as follows:

> (a) Except with the agreement of parties thereto, all proceedings of every Court and proceedings from the determination of the existence of any civil right or obligation below any other adjudicating authority, including the announcement of the decision of the Court or other authority, shall be held in public." (My underlining)

I respectfully agreed in that if it was unarguable the dispute about the chieftainship rights and their abrogation which was the subject of the present dispute in its generally was a matter of civil rights and obligation of the Applicant. And that this was within the contemplation of the section 12(8) of the Constitution. Those rights should in general be more strictly protected and where there is a doubt be interpreted in favour of liberty of the individual (*in favorum libertatis*). I would add

the following that:

> "It has been clearly established that in our law where a statute authorizes judicial or quasi-judicial powers which may influence individual or property rights there is a preemption that in the absence of an express provision or a clear intention to the contrary, the powers so given are to be exercised in accordance with the principles of natural justice. Baxter explains the position by stating that "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 have first developed."

This is to say that in all challenges as Mr. Mosito argued there has to be peremptory compliance with what is prescribed in the Constitution lest the result in an illegality where there is that non compliance which would bring about an illegality. The question whether there has been prejudice or not does not arise. The decision has to be struck down as a nullity as Counsel submitted further.

As Applicant argued further the question of the fact that the hearing was not held in public is indicative of a fair hearing having been denied. I would instantly comment about the factual situation Mr. Mapetla agreed that the hearing and the decision was announced from one of the offices of the Ministry of Home Affairs. But he argues that it was in public because the public generally had access to that office (See **S v Sibanda 1972(4) 88 (RAD)** (place to which public have access). Supposing the question was what kind of access the public had to that office the answer would be in the purposes for which the office catered for the public. But it would not certainly be that the office was intended for the purpose of hearings such as that of the First Respondent's proceedings. Perhaps the office can be adapted or arrangements be made for hearings such as that against Applicant. Still the question would still be what arrangements were those and how was the general

public made aware of the particular proceedings. I thought Mr. Mapetla was not able to convince the Court that arrangements had been made for the general public to be aware that they had access to the office for that purpose. May be office doors were open into the office, and may be there was an official announcement to that effect. I doubted if there were such arrangement. It was only fair to decide in favour of the Applicant on this fact and as to the true factual situation. I would say right away that I would find that on the facts it cannot be that the hearing was in public.

That would not be the end of the story. Applicant's Counsel argued that because the Disciplinary Committee dealt with the determination of the existence of any civil right or obligation by any other adjudicating authority the Committee was in the same standing as a court of law and that in the circumstance of the proceedings having been heard in an office the hearing amounted to one being held *in camera.* That the hearing could not have been a fair one.

Fairness being the cornerstone of any judicial hearing or administrative action the question remained to be whether the hearing in the office of Mr. Nthako was necessarily procedurally unfair because it was not held in a room or space that was at the same time accessible to the public in the way proceedings in Courts of law are held for those proceedings to be said to have been held in public. In South African Constitution the provision nearing our own section 12(a) is to be found in section 34 which says:

> "Everyone has the right to have a dispute that can be resolved by application of law decided in a <u>fair public hearing</u> before a Court or <u>where appropriate another independent and impartial tribunal or forum.</u>" (My underlining)

I have particularly underscored "a fair public hearing" for the purpose of my

committee was impartial, nor was it being said that Applicant was prejudiced. All that was said was that objectively the committee could not have been independent. One would have found impossible to pronounce on the issue of independence unless the content of its absence was disclosed in a more issuable rather than in the abstract approach that could only be termed far-fetched and strained, as Applicant's argument exhibited itself to be in this case. With respect this was untenable and on that ground the application ought to be dismissed.

The application was dismissed with costs.

T. Monapathi
Judge

22nd August, 2001

decision. Again a similar provision in the Constitution of South Africa is to be found in section 35(3) (c) which says:

"Everyone who is arrested for allegedly committing an offence has the right:

(1) .....

(2) .....

(3) .....

(a) .....

(b) .....

(c) To a public trial before an ordinary Court.

(d) .....

(e) .....

Hlophe J and Brand J in dealing with an almost similar objection or point raised by applicant in **Hamata v Peninsular Tecknikon Internal Disciplinary Committee (2000) 3 All SA 415** said at 433

(59) However, be that as it may. For the contention that administrative proceedings *in camera* are procedurally unfair, Mr *Farlam* proposed only one legal basis. That legal bass being a reference, by way of analogy, to the provisions in the Constitution with regard to court proceedings. More specifically, Mr. *Farlam* pointed out that in terms of section 34 of the Constitution, court hearings are to be held in public. Similarly that, in terms of section 35(3)(c), accused persons have the right to a public trial.

(60) It has already been pointed out earlier in this judgment that it is not permissible simply to transpose the rights created by section 35(3) on administrative hearings. The same goes for the provisions of section 34. An administrative tribunal is not a court of law. It therefore cannot be required of an administrative tribunal to follow the procedure insisted upon in courts of law. Different considerations may

apply". (My underlining)

The learned judges had previously, with regard to other objections, commented that they were "high sounding" meaning that they were "pretentious and bombastic". See **Concise Oxford Dictionary**. I would have added they were far-fetched. For the same reason and that no prejudice was demonstrated I would dismiss the objection.

I would comment further that things to consider may be that such investigations or inquiry is essentially that they are not strictly public and convenience dictates that they may not be dealt with like open court hearings. That does not make them necessarily unlawful, unreasonable and procedurally unfair just because they were held in an office space.

The last point taken by Applicant would indeed attract quite a brief comment. When an issue of disciplinary nature or misconduct "affecting chiefs" arises the Minister for Chieftainship Affairs will appoint a committee in terms of section 15 of Chieftainship Act 1968. The Minister appoints a chairman and such additional members as the minister "may think fit" to appoint. In the first place there is no mention for appointing "fit and proper people" (which is not an excuse for appointing wrong people) it is nevertheless expected that people of competence, experience and indeed fit and proper people will be appointed by the Minister. Secondly, the Minister has an unfettered power to appoint who "he may think fit". This means that he has a discretion as to who to appoint. They should only be capable of doing the functions envisaged in the mentioned section and will not be confined to any class of persons. As to another interpretation of "as he thinks fit" see **Arkell v Carter N.O and Others** 1971(3) SA 243 (SR).

It was conceded by the Applicant that the Committee was rightly constituted

in terms of the law. However it was contended that the law in question (section 15) cannot be enforced as against the Constitution. In addition that the committee members should perform their functions "under this Constitution or any other law, be independent and far from interference and subject only to this Constitution and any other law." See section 118(2) of the Constitution. See a similar contention in the comment about "an independent Court martial" in **2nd Lieutenant Rantšo Josias Sekoati and 4 Ors v President of the Court Martial (Lt Col. Lekanyane and 2Others of A (CIV) No 18/1999 (full Court)** where it was said that:

> "If it was the express intention of the legislative that the committee shall be independent and impartial there can be no valid argument that a committee so constituted is independent the main reason as already stated was that as appointees of the minister the committee would not be reason of such appointment be objectively independent much as the inquiry was concerned with civil rights and obligations of the Applicant then could not be any strong contention in favour of the rights. (My emphasis)

In the present case it was not even necessary to show a likelihood of bias which would be the case where lack of impartiality was charged against the committee. There was no such a charge. In that other case (where lack of partiality and bias was suspected) one would speak of subjective independence. That must have been the complaint.

From whichever angle one chose to look at the problem, that even if it were to be thought as a requiring objective as against subjective independence, the reality is that tribunals such as the one subject of this case is not a court of law strictly

speaking. But likewise what is expected is the tribunal's independence which in substance is like:

> "The generally accepted core of the principle of judicial independence of individual judges to hear and decide cases that come before them without interference from any outside. See **Queen In Right of Canada v Beaugegard (1986) 30 DLR (4th) 481 SCC at 491**. See also **Law Society of Lesotho v Prime Minister and Another (1986) LAC (Const.) 481 (CA) at 493-4."**

See **2nd Lieutenant Rantšo Josias Sekoati's** case at page 18. What is important for our purpose is that:

> " The conditions of independence are however susceptible to flexible application in order to suit the needs of different tribunals. The question in every case is whether an informed and reasonable person would perceive the tribunal as independent. See **Genereux** supra. In **Genereux** the Supreme Court of Canada was called upon to construe the impact of section 11(d) which of the Charter of Rights on the constitutionality of the National Defence Force Act section 11(d) guarantees a person charged with an offence the right:
>
> > "To be presumed guilty according to law in a fair and public hearing by an independent and impartial tribunal."

Second Lieutenant Rantšo Josias Sekoati and 48 Others case at page 48.

I would pertinently remark that nothing has been specially alleged to have

impeached the independence of the committee except that it was said to be under "influence and shadow of the Minister who appointed the tribunal". One of the things being said was that much as the members constituting the committee were as civil servants appointed by the Minister" no fairness would be expected. In my view nothing of significance could be pointed out as derogating or militating against a perception that the tribunal was independent. The attack was surely far-fetched and farcical and out to be dismissed as such.

I would refuse to equate the committee with the qualities of judges or magistrates who are appointed upon stringent terms and conditions as the Constitution provides. That kind of purity that is expected from the independence and impartially of civilian courts that the Court of Appeal commented about a court martial has most realistically been expressed in **2nd Lieutenants Rantšo Josias Sekoati and 48 Others** case at page 20 where the Court said:

> "In our judgment a proper contention of section 118(2) read in the context of the Constitution as a whole and in particular having regard to section 24(3) a Court Martial in order to comply with section 118, cannot be completely lacking in independence, nor can it be completely subject to outside interference. On the other hand it is not required to have the same degree of independence nor to enjoy the same degree of freedom from interference as is required of an ordinary civilian court."

I repeat that this was a most realistic way of putting the situation in the thoroughness that was not easy to surpass.

Most unfortunately in the present case there was no charge that the

committee was impartial, nor was it being said that Applicant was prejudiced. All that was said was that objectively the committee could not have been independent. One would have found impossible to pronounce on the issue of independence unless the content of its absence was disclosed in a more issuable rather than in the abstract approach that could only be termed far-fetched and strained, as Applicant's argument exhibited itself to be in this case. With respect this was untenable and on that ground the application ought to be dismissed.

The application was dismissed with costs.

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