IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV)NO. 49/11

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS	**1ST APPELLANT**
ATTORNEY GENERAL	**2ND APPELLANT**
And	
TSEPO MAKHAKHE	**RESPONDENT**

CORAM : RAMODIBEDI, P
SCOTT JA
HURT JA

HEARD : 13 AUGUST, 2012
DELIVERED : 3 SEPTEMBER, 2012

SUMMARY

Court a quo purporting to review and set aside a tribunal's decision without affording it an opportunity to be heard and when the validity of its decision was neither raised in the pleadings nor canvassed at the trial – grounds of review relied upon in any event misplaced.

JUDGMENT

SCOTT JA

[1] The respondent (the plaintiff in the Court a quo) was formerly employed in the Ministry of Foreign Affairs as First Secretary in the Lesotho High Commission, Pretoria. In 2004, following a disciplinary inquiry held under the Public Service Act 1995, he was dismissed from his employment. The charges on which he was convicted were, first, absenting himself from work without a valid excuse in contravention of section 14 (1) (d) of the Public Service Act and, second, knowingly making a false, misleading or inaccurate statement in an official document in contravention of section 14 (1) (f) of the Act. The gravamen of the second charge was that he had falsely presented a document at the Italian

embassy purporting to emanate from the Ministry of Foreign Affairs in which assistance was sought to obtain travel passports for some Chinese citizens to travel to Italy. The appellant did not challenge the decision that he be dismissed.

[2] In addition, the respondent was charged with fraud in the Magistrates' Court arising out of the events which formed the subject matter of the second charge preferred against him at the disciplinary inquiry. On 27 January 2006 he was acquitted by that court. The Crown sought to appeal and on 8 February 2006 served a notice of appeal on him. The appeal was, however, never prosecuted, apparently because the clerk of the court was unable to produce a transcript of the proceedings. In August 2008, some two years later, the respondent applied to have the appeal dismissed for lack of prosecution. It was then that he discovered that the appeal had never reached the High Court.

[3] Against this background the respondent instituted an action for damages against the present appellants,

being the Director of Public Prosecution and the Attorney General. In essence, the respondent's claim, as formulated in his Declaration and pursued in evidence, was that during the period between 8 February 2006 when he was served with a notice of appeal and August 2008 when it transpired that there was no appeal he was unable to obtain alternative employment and could not have "peace of mind" owing to the "supposedly pending appeal against him". He claimed M350 000 for loss of income during this period and "general damages" in the sum of M200 000. The claim was founded in delict. He alleged that the DPP's conduct had not only been reckless or negligent but also actuated by malice. There was however, nothing in the evidence to suggest that the DPP had been actuated by malice. The claim for non-pecuniary damages was therefore without merit and nothing further need be said about it. As far as the claim for loss of income is concerned the appellant referred in his evidence to two occasions on which he applied unsuccessfully for employment during the period February 2006 and August 2008. On the one occasion his application was turned down because his referee,

i.e. the Ministry of Foreign Affairs, stated that "they had a matter with me in court" and on the other occasion because his would-be employer would not entertain his application "until he had been cleared of all wrongdoing". But the true cause of the appellant's difficulty in obtaining employment was not the abortive appeal but the fact that he had been dismissed because of the finding at the disciplinary inquiry that he had acted in breach of the provisions of section 14 (1) (f) of the Public Service Act, a breach which involved making a false representation. Until that finding was set aside he could not be "cleared of any wrongdoing", nor could his former employer give him a clean reference. A subsequent acquittal of fraud under the common law in the Magistrates' Court would have had no effect on that finding, whether the acquittal was subject to an appeal or otherwise. Significantly, the respondent in his Declaration made no mention of the disciplinary inquiry.

[4] Notwithstanding the obvious difficulty which confronted the respondent, the matter went to trial. Mofolo AJ came to his assistance by purporting to

review and set aside the decision of the disciplinary tribunal rendering him "free to consider the merits of the plaintiff's case". In doing so, the learned judge quite clearly erred. First, he held that the disciplinary tribunal went beyond its jurisdiction because its jurisdiction was limited to disciplinary cases "spelled out by the code" and did not extend to trying criminal cases. This is not correct. The disciplinary tribunal in the present case found that the respondent was in breach of the provisions of section 14 (1) (f) of the Public Service Act. It was empowered to do so. Whether the conduct of the respondent amounted to an offence at common law or not was of no consequence in so far as its jurisdiction was concerned. If there were any doubt about the matter it is removed by the provisions of section 18 (5) of the Act which reads:

> "The acquittal or the conviction of a public officer by a court of law upon a charge of a criminal offence shall not be a bar to proceedings against him under this Act on a charge of breach of discipline, notwithstanding the fact that the

allegation in the disciplinary charge would, if proved, constitute the offence set forth in the criminal charge on which he was acquitted or convicted or on another offence on which he might have been convicted on his trial on that criminal charge".

[5] The second respect in which the learned judge erred was to make a finding on an issue which was neither raised in the pleadings nor canvassed at the trial. The respondent's cause of action was never the invalidity of the disciplinary tribunal's decision and his consequent dismissal. It was founded on the DPP's notice of appeal and failure to prosecute the appeal. It was therefore not open to the Court a quo to review the tribunal's decision. Thirdly, the court a quo purported to review and set aside the tribunal's decision without notice to it and without affording it the opportunity to be heard.

[6] It follows that not only was the learned judge's purported review of the tribunal's decision ill

founded, it was also not open to him to embark upon its review.

[7] The appeal is accordingly upheld with costs. The order of the Court a quo is set aside and the following substituted in its stead.

"The plaintiff's claim is dismissed with costs."

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D.G. SCOTT

JUSTICE OF APPEAL

I agree _____

M.M. RAMODIBEDI

PRESIDENT OF THE COURT OF APPEAL

I agree _____

N.V. HURT

JUSTICE OF APPEAL

For the Appellant : Adv M. Sekati

For the Respondents : Adv. M.A. Kumalo