IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) NO.30/2013

In the matter between

THE TRAFFIC COMMISSIONER **1st Appellant**
MINISTRY OF PUBLIC WORKS & TRANSPORT **2nd Appellant**
ATTORNEY GENERAL **3rd Appellant**

And

KEJELENG MOKOALELI **Respondent**

CORAM: RAMODIBEDI P
HOWIE JA
THRING JA

Heard 10 April 2013
Delivered 19 April 2013

Summary

Public Service Act 2005 – Codes of Good Practice – Code of Conduct – public officer charged with misconduct in contravening s 3 (2) (e) of the

Code read with s 15 (6) of the Act – also charged with contravening s 22 (1) of the Prevention of Corruption and Economic Offences Act 1999 – whether entitled to representation by counsel at a disciplinary inquiry under the Disciplinary Code.

Judgment

HOWIE JA

[1] Kejeleng Mokoaleli is a public officer in terms of the Public Service Act 2005. She was accused of misconduct and required to attend a disciplinary inquiry under the Disciplinary Code, Part III of the Codes of Good Practice made pursuant to the Act.

[2] In terms of s 3 (2) (e) of the Code of Conduct (Part I of the Codes) a public officer shall not, unless authorised by law or the terms of appointment or by the Minister, accept any fee, reward or remuneration of any kind beyond his or her emoluments for the performance of any service of the Government. In terms of the Code such prohibited conduct is referred to as "a misconduct" (Disciplinary Code, s 2).

[3] The charges to be dealt with at the inquiry, so Ms Mokoaleli was informed in a written "Notification of Hearing" addressed to her,

were, firstly, contravention of s 3(2) (e) of the Code of Conduct and, secondly, contravention of s 22 (1) of the Prevention of Corruption and Economic Offences Act 1999. Both charges, it must be inferred, related to the same alleged conduct on her part.

[4] Section 8 of the Disciplinary Code allows an officer to be represented at a disciplinary inquiry by a colleague within the same department or Ministry but not by a legal practitioner. Ms Mokoaleli was informed accordingly in the Notification of Hearing.

[5] Alleging that she was unable to obtain representation by a colleague (those colleagues approached having signified their inability to deal with the complexities inherent in confronting the charges) Ms Mokoaleli applied to the High Court for an order, inter alia, restraining the Traffic Commissioner from interfering with her constitutional right to legal representation. The other cited respondents were the Ministry (sic) of Public Works and Transport and the Attorney General.

[6] The application, which was opposed, succeeded with costs, terminating in an order by Moiloa AJ that the respondents allow legal representation by counsel of choice for the defence against

the charges preferred. Hence this appeal. No judgment, as far as we are aware, was ever delivered.

[7] Before us, counsel for the appellants rightly conceded that inclusion of the criminal charge was irregular. He averred, moreover, that the court *a quo* had been informed that this charge would not, after all, be pursued in the disciplinary inquiry. However, the court below was obviously under the impression, to judge from its order, that both charges would be pursued. Pressed by this Court for a definite undertaking that only the misconduct charge would be dealt with, counsel for the appellants gave such undertaking unequivocally.

[8] It is plain from s 12 (1) of the Constitution that a person charged with a criminal offence must be tried by a court of law. Unsurprisingly, nothing in the Code of Conduct or the Disciplinary Code empowers the trial of a criminal charge. Consequently, if the criminal charge was to be persisted in at the inquiry, the order *a quo* was justified.

[9] As readily made as the concession by counsel for the appellants, was a concession by counsel for the respondent that if only the misconduct charge was to be dealt with at the disciplinary inquiry

he could not contend that legal representation was an entitlement.

[10] The upshot is that the premise upon which the order *a quo* was made has fallen away and this warrants its setting aside without the court below having been in error.

[11] As to the costs of appeal, the expedient which the appellants' advisers should have followed immediately upon the grant of the order was to give the respondent the same undertaking as was given before us whereupon the order could have been formally abandoned. Having persisted in the appeal, the appellants have caused unnecessary costs to be incurred, also by the respondent. The appellants must therefore pay the costs of appeal.

[12] This Court's order is as follows:

1. The order of the court below is set aside.
2. The appellants are to pay the costs of appeal.

C. T. HOWIE
Justice of Appeal

I agree

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M. M. RAMODIBEDI
President of the Court of Appeal

I agree

_____
W. G. THRING
Justice of Appeal

For the Appellants : Adv. M. Sekati

For the Respondent: Adv. R.D. Setlojoane