IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) 45/2014

In the matter between

'MARAPELANG RAPHUTHING	**APPELLANT**

And

CHAIRMAN OF THE DISCIPLINARY HEARING	**1ST RESPONDENT**
PS CABINET OFFICE (ECOMONIC AFFAIRS)	**2NDRESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

CORAM: K. MOSITO, P
P. DAMASEB AJA
M. CHINHENGO AJA

HEARD **:** 31 JULY 2015

DELIVERED **:** 7 AUGUST 2015

SUMMARY

Public Service – Public Officer charged on twelve counts of misconduct in terms of the Public Service Act 2005 – Having been dismissed, the officer brought application for review to the High Court – Appellant appealing to the Court of Appeal on various complaints of misconduct – Head of Section charged with Head of Department as complainant and witness in appellant's disciplinary inquiry and also as decision-maker in appellant's dismissal.

Held: *Appeal succeeds with costs on account of the violation of the principle of nemo index in sua causa (the rule against bias).*
Disciplinary hearing set aside.

JUDGMENT

CHINHENGO AJA

[1] The appellant, a public officer in terms of the Public Service Act 2005, was charged on twelve counts of misconduct by the 2nd respondent and appeared before a disciplinary hearing under the chairmanship of the 1st respondent. She was found guilty of the charges and dismissed from employment as Director of Finance and Administration in the Prime Minister's Office, her employer in terms of the Public Service Act. She took the matter to the High Court on review and her application was dismissed with an order that she pays the costs of suit. She now appeals to this Court on

the grounds that the learned Judge erred or misdirected herself in that-

(a) she delved into the merits of misconduct when she had not been invited to do so in the review application;

(b) without properly analyzing the facts pleaded and appearing in the record of the disciplinary proceedings, she made a finding of fact to the effect that the appellant was given time in excess of 48 hours to prepare her defence;

(c) she failed to make a determination of the allegations of personal interest, bias and malice on the part of the 2nd respondent as pleaded;

(d) she made a finding that the report which formed the basis of the charges was given to the appellant within a reasonable time and was neither complex or technical to warrant the involvement of an ICT expert to make her understand it;

(e) she made a finding that the appellant breached the Public Procurement Regulations, an issue that she had not been called upon to decide;

(f) she made a judicial pronouncement on the merits of the misconduct and thus treated the matter as if it was an appeal and not a review; and

(g) she did not make a finding on the undisputed averment by the appellant that the chairperson did not advise her of her right to submit in mitigation of punishment.

[2] The complaint of the appellant, both *a quo* and on appeal, is premised on alleged breaches by the employer of the Code of Good Practice made under the 2005 Public Service Act. I consider that ground of appeal (c) above is critical in this appeal and may dispose of the appeal rendering it unnecessary to address all the other grounds. The appellant eloquently set out in paragraph 7.5(ii) of the founding affidavit the allegation that the 2nd respondent had an interest in the matter that disqualified her on the basis of bias from confirming the appellant's dismissal from employment. In this connection the appellant stated-

> *"In terms of section 8(6) of the Code of Good Practice 2005 the Head of Section recommends dismissal to the Head of Department who shall, after adequate investigation, confirm the dismissal. I was the Head of Section; therefore the 2nd respondent was my Head of Department. Second respondent is the person to recommend my dismissal, which should be confirmed by the Government Secretary. It defies logic, offends against procedural regularity and absence of bias for the 2nd respondent to receive a recommendation from the first respondent and for her to act on the said recommendation. This is*

> *particularly the case because the 2nd respondent testified against me at the hearing. I respectfully submit that it was a gross irregularity for the 2nd respondent to frame the charges against me, be a witness thereto and to finally be the one to dismiss me. 2nd respondent had so associated herself with the issues against me at the hearing which thing interfered with her impartiality, or in the least her conduct created a reasonable suspicion that she was not impartial in her approach to my case."*

[3] The response to this allegation of serious impropriety on the part of the 2nd respondent is given, not by the 2nd respondent, but by the 1st respondent. The response appears at paragraph 7.5 (ii) of the answering affidavit. It is, in substance, dismissive of the appellant's complaint. It is to this effect:

> *"The contents are denied. For practical purposes it was logical. Applicant being the Head of Section and one charged, she could not chair, that is why some other independent person was appointed, but of course, of a senior status than the applicant. In the ordinary course of duties, all reports are directed to the Head of Department by heads of sections, in which case, all misbehaviour by the officers are known before hand by the Head of Department. This is why there is a provision that he/she must make adequate investigations before dismissing. And it is not complained that she did not adequately investigate before dismissing because she did. It was not the 2nd respondent who determined the verdict but the 1st respondent. Her role was just to dismiss after the recommendation. The law gives power to the Head of Department to dismiss and this is the law and was accordingly followed to the letter."*

[4] In her closing address at the disciplinary hearing the appellant reiterated her allegation of the apprehended malice and hatred towards her on the part of the 2nd respondent. At this stage of the proceedings the 2nd respondent curtly dismissed the allegations with the statement: *"I don't have any vendetta on her."*

[5] The facts are clear that the 2nd respondent was the appellant's superior as Head of Department[1] when the appellant herself was the Head of Section. Now, section 8(3), and (6) of the Code of Good Practice, 2005, Circular Notice No. 13 of 2005 ("the Code") provides that –

> *"(3) The following persons shall attend a disciplinary –*
>
> *(a) the public officer's head of section shall be the chairperson;*
> *(b) the public officer's immediate supervisor (complainant);*
>
> *(c) the public officer (defendant);*
>
> *(d) the representative of the Human Resources Department who shall be the secretary and advisor on policy issues at the hearing;*
>
> *(e) witnesses if any.*
>
> *....*
>
> *(5) At the end of the inquiry the Head of Section shall decide on a penalty, which may be –*
>
> *(a) a final written warning, which shall be signed by the officer, and be recorded in his or her file and is valid for a period of twelve months from the date of issue;*
>
> *(b) any other sanction that may be reasonable in the circumstances.*
>
> *(6) Where the dismissal of a public officer is being contemplated, the Head of Section shall recommend such dismissal to the Head of Department who shall, after adequate investigation, confirm the dismissal."*

[6] The difficulty which the respondents faced with this disciplinary case, if in fact it was a difficulty at all, was that the appellant was a

[1] Defined in section 4 of the Public Service Act 2005 as a 'public officer who is in charge of a

very senior officer in the Prime Minister' Office. She was the Head of Section and the one who would normally chair disciplinary proceeding against public officers under her. After conducting the hearing she would, in that capacity, make findings of fact and law, determine the verdict and the appropriate penalty. If the penalty were a dismissal, she would then recommend to the 2nd respondent that the public officer concerned be dismissed. The 2nd respondent would, in turn, carry out an investigation as required by s 8(6) of the Code, satisfy herself about the correctness of the penalty and confirm the dismissal. The situation before the 2nd respondent this time around was that the Head of Section was the subject of the disciplinary hearing and the 2nd respondent herself was the complainant. She could not therefore chair the disciplinary hearing, be the complainant in her capacity as the immediate supervisor and be a witness all at the same time, and then ultimately decide on the penalty and make a recommendation to herself that the appellant be dismissed, investigate the propriety of the dismissal and confirm it. The 2nd respondent did well to ensure that the disciplinary hearing was chaired by another person, the 1st respondent and confined herself to being the complainant and witness in the matter. The 1st respondent successfully chaired the proceedings, decided on the penalty of dismissal and recommended the dismissal to the 2nd respondent. In my view this is where the 2nd respondent acted unprocedurally and in breach of an important tenet of natural justice: no one shall be judge in her own cause. The 2nd respondent received the recommendation of the chairperson seriously

mishandled the proceedings. She received the recommendation of the chairperson of the disciplinary hearing and, one would suppose, without carrying out any further investigation, confirmed the dismissal. Section 8(6) of the Code provides that the person to whom a recommendation that a public officer be dismissed is made, and that person is ordinarily the Head of Department, *shall, after adequate investigation, confirm the dismissal.* This means that the person making the final decision that an officer be dismissed from the public service must not only investigate the matter but must also satisfy himself or herself that the penalty of dismissal is warranted. To my mind, what the 2nd respondent did in this case was in violation of the principle *nemo iudex in sua causa.*

[7] In her papers, particularly paragraph 7.5 (ii) earlier referred to, and during the disciplinary hearing, the appellant complained that the 2nd respondent was biased against her. The 2nd respondent did not, as correctly submitted by appellant's counsel, depose to any affidavit in order to challenge the allegations of personal interest and bias made against her. It should be noted that it was incumbent on the 2nd respondent to have dealt with the allegations of interest and bias because it is only she who would know if the allegations were of any substance. Her failure to depose to an affidavit in this regard can be construed as an admission of the allegation. In **Kebinye v Clerk of the Maseru Magistrate's Court & Others, LAC (2009-2010) 474,** the appellant alleged that he had been intimidated and assaulted by the police. No opposing affidavit was filed by any member of the police who was present during the detention of the

appellant. At p. 477E-G of the report, **Ramodibedi P** commented on the omission as follows-

> *"[9]…Such an affidavit would have been able to deal issuably and sensibly with the appellant's allegations. Instead, the respondents strangely relied on the answering affidavit of… presiding magistrate himself. As could well be imagined he had no personal knowledge of what had transpired during the detention of the appellant and his co-accused. He was not in a position to deny the allegations of threats and assaults in question. Regrettably the learned judge a quo failed to pick up this lacuna in the respondent's case.*
>
> *[10] In the light of these considerations, I am driven to the inescapable conclusion that the appellant's allegations of threats and assaults remained uncontroverted. As such they had to be admitted as correct for the purpose of the review application. Once this conclusion is reached, it follows that the appeal must succeed."*

[8] Much the same can be said about the 2nd respondent's failure, *in casu,* to answer the appellant's accusations of personal interest in the matter and bias. Those accusations remain unanswered despite the feeble denial of them by the 2nd respondent at the stage of final submissions to the disciplinary hearing. Further support for this conclusion is to be found in the approach that was initially taken by the respondents. Alive to the fact that the 2nd respondent was the appellant's immediate supervisor, the Government Secretary [2] authored the letter of suspension on 21 February 2011. That was the proper thing to do. The Code is a flexible guide to public officers in their relationships and dealings with their employer and the public

[2] Appointed in terms of section 11 of the Public Service Act 2005.

and, because it recognizes in s 4 that a public officer is entitled to a fair hearing and that the rules of natural justice shall apply, there is ample scope for adapting the procedures under the Code in order to meet the overriding objective of achieving fairness.

[9] Now, after the 2nd respondent had herself charged the appellant and testified at the hearing, it was hardly the correct thing for her to have received the chairperson's recommendation and then for her to have confirmed the dismissal. Section 8(6) of the Code is mandatory in regard to the need for the person making the final decision to dismiss a public officer to carry out adequate investigation before confirming a dismissal. I accept as correct in law the submission by counsel for the appellant that-

> *"… it was wrong for the 2nd respondent to sign and endorse the dismissal letter of the applicant yet she was also the complainant in the proceedings. The right person who ought to have signed the document is the Government Secretary who had rightly signed the letter of suspension, not the 2nd respondent. The 2nd respondent became the arbiter and complainant and as a result violated the basic principle of nemo iudex in sua causa (the rule against bias)."*

[10] The respondents made an unconvincing argument against the violation of the *nemo iudex* principle. They stated at paragraphs 6.1.1 to 6.1.3 of the heads of argument that –

> *"6.1.1 The applicant was the Head of Section and the one charged. She could not be the chairperson as required by the Codes. Another person had to be appointed to chair. The recommendation is made by the chair to the Head of Department.*

> *6.1.2 It is submitted that for purposes of a fair hearing, neither the appellant nor the 2nd respondent would be suited to chair the proceedings. However the power to dismiss reposes in the 2nd respondent. That is how the law is structured.*
>
> *6.1.3 Of paramount importance is whether or not the hearing was fair, in that, was the appellant given a hearing before an unbiased panel.*
>
> *It is submitted that the requirements of a fair disciplinary process was accorded to the appellant."*

[11] What, in my view, the respondents completely failed to recognize and appreciate, is that the final decision maker is required to carry out an "adequate investigation", apply his or her mind to the matters before him or her, and only then, confirm the dismissal. Additionally there does not appear to be any logic in the argument that the power to dismiss reposes in the 2nd respondent by law, and as the argument must be, it does not matter how conflicted the 2nd respondent may be, and she must exercise that power regardless of the unfairness doing so works to the affected public officer. The learned judge in the court below did not address this issue at all despite it having been raised in the affidavits. All she dealt with at paragraphs 46 to 49 of the judgment is the propriety of the suspension letter having been authored by the Government Secretary. She therefore stopped short of addressing the critical issue arising from the application of section 8(6) of the Code. The learned Judge thus clearly erred.

[12] From the foregoing I consider that this appeal should succeed. It would, however, be remiss of me not to comment on the other grounds of appeal. They are all sufficient bases for allowing the appeal and setting aside the order of the court a quo. I will briefly deal with at least two of them in order to drive home the point that this appeal is bound to succeed.

[13] The appellant complained that the judge *a quo* improperly delved into the merits of the misconduct when she was not called upon to do so because of the nature of the proceedings. Indeed the judge devoted an inordinately long portion of her judgment to the merits of the case. Except in exceptional circumstances, review proceedings are not concerned with the merits of the case but with correcting erroneous decision-making. If a public body exceeds its powers, the court will exercise restraining influence. If it acts mala fide or with unreasonableness so gross as to be inexplicable except on assumption of mala fides or ulterior motive, the court is entitled to intervene. But if the decision has been honestly and fairly arrived at upon a point lying in discretion of a body or person who decided it, the court has no function whatsoever – it cannot interfere simply because decision is one which it itself would not have made, **African Reality Trust Ltd v Johannesburg Municipality 1906 TS 908 at 913**; **Davis v Chairman, Committee of Johannesburg Stock Exchange 1991 (4) SA 43 (W) at 46F – 48G; Hira and Anor v Booysen and Anor. 1992 (4) SA 69(A) at 93 – 94B; and Ndamase and Anor v**

Minister of Local Government and Land Tenure and Anor. 1995 (3) SA 235 (TK) at 238 C –D. This last case, at 238C, makes the point clearly that *"the function and purpose of judicial and purpose of judicial review is to correct erroneous decision-making"*. Delving into the merits of the case may have the result, and often does, that the judge's focus is removed from the real issues before him and may be influenced by the correctness of the decision on the merits to the prejudice of the regularity or validity of the method of arriving at the decision, which is the purpose of review. The judge, in my view, was influenced by the alleged offence to the detriment of a proper consideration of issues germane to a review. That may explain why the learned judge did not, in her judgment, deal sufficiently, if at all, with the appellant's complaint of interest and bias.

[14] The appellant challenged the decision of the judge *a quo* on the finding that she was given adequate time to prepare her defence. It is not in dispute that, before the hearing commenced, the appellant pleaded repeatedly to be afforded another 2 days to prepare her case. The request was not granted despite the fact that even the appellant's attorneys had made the same request on her behalf. The appellant was given two working days to prepare her defence. She was served with a forensic report, prepared for the respondents by a specialist ICT South African company, and which report formed the basis of all the 12 charges against her at

the door of the hearing, so to speak. The appellant's plea at the hearing could not have been more eloquent:

> *"… I need more time to prepare my defence or even to consult my legal advisors notwithstanding the lengthy and elaborate counts (12) waged against me specially because I am currently on suspension and hence incapacitated from accessing the relative documentation from my office to fortify my defence. I request at least two days more to prepare. For this request my attorneys also added their voice in their letter annexed hereto as 'RM2'."*

[15] The respondents' answer was that she had been given the minimum 48 hours and she could not ask for more. In this regard the respondents relied on the decision in **Supreme Furnishers (Pty) Ltd& Another v Letlafuoa Hlasoa Molapo, C of A (CIV) 13/95**. I do not see anything in that case, which supports the respondents' contention. Section 8(1) of the Code obliges the supervisor of the public officer charged with misconduct to "give the officer adequate notice of at least 48 hours or 2 working days before a disciplinary inquiry is held." Two working days is the minimum yet the judge *a quo* relentlessly hammered at the point that the appellant was given more than enough time. At paragraph [18] to [21] of the judgment she said –

> *"[18]…. In the instant case, the applicant was served with a notice by which she was informed about the date for prosecution of the disciplinary inquiry against her on the 14th July 2011. The actual hearing or prosecution of the said inquiry was scheduled for the 19th July 2011. This is a period of five days from the 14th July. In short instead of two days, applicant was afforded an extra three days before the actual prosecution of the disciplinary inquiry against her. This disposes of the issue raised at paragraph 2.1 of her written submissions, because there was adherence to the law.*

> *[19] She complains that the 48 hours period given her to study comprehensively, the report compiled by Nexus Forensic Services (Pty) Ltd which made emphasis on information technology and which formed the basis of the charges preferred against her was not enough. She deliberately fails to disclose to the court that in effect she was allowed a period far in excess of that stipulated in the relevant provision in the said Codes of Good Practice (Codes).*
>
> *[20] The applicant also decided for unknown reasons, to approach her legal representatives for legal advice a day before the date set for the prosecution of this disciplinary inquiry against her. Refer to annexure 'RM2' of her founding affidavit. This court takes judicial notice of the fact that the 14th July2011 was a Thursday, while the 19th was a Tuesday.*
>
> *[21] The respondent's argument that the law with regard to time frames within which applicant was to be notified of the date for the prosecution of the disciplinary inquiry against her has been complied with and adhered to hold water. It cannot be faulted in any way."*

[16] The appellant's complaint against the learned judge's finding is that she did not properly analyze the facts of the case, which had she done, should have persuaded her to reach a different conclusion. The forensic report was handed to her on the day of the commencement of the inquiry. It was the basis of all the twelve counts of misconduct that she was facing. Three of the charges related to the use by her of a government laptop given to her to use in her work but which, it was alleged, she had used to access pornographic material. ICT experts in South Africa had made that discovery. It was not unreasonable, in my view, that the appellant would have wanted her own experts to examine and advise on the technical evidence in the report.

[17] The Code entitles a public officer accused of acts of misconduct at least two working days' notice before the hearing. The court was not supposed to have taken into account the non-working days included in the period before the hearing commenced. The appellant's request was quite obviously for two more working days. Having regard to the facts of the case, in particular the availability of the report at the commencement of the inquiry and the fact that it had been prepared by a South African company with expertise that the appellant did not personally possess, the denial of more time to prepare her defence as requested, was improper and unnecessarily heavy-handed. The learned judge a quo should have found accordingly.

[18] For purposes of this appeal it is not necessary for me to exhaust all the grounds of appeal. The case for setting aside the judgment of the court a quo has been sufficiently made on the grounds that I have examined. The judgment of the High Court accordingly will be set aside.

[19] Before concluding this judgment I must advert to supplementary heads of argument filed with the registrar by the appellant's counsel a day or so before the hearing of this appeal and only availed to the Court from the bar.

[20] In those heads it is submitted that in the event that the appeal succeeded, this Court should exercise its discretion and

reinstate the appellant with retrospective effect to the date of her suspension. Counsel for the respondent very candidly informed the Court that he was not ready to deal with the point raised for the appellant. He advanced two reasons. The first was that he had not been given sufficient notice that the appellant would raise the issue of reinstatement. He was also given the supplementary heads at the hearing. The second was that the supplementary heads were in fact on new relief that the appellant was seeking for the first time on appeal. That relief had not been sought at any stage before the appeal was lodged. He also submitted that the remedy of reinstatement is not automatic because the position to which reinstatement is sought may have been filled. As such the appellant should have sought damages in lieu of reinstatement

[21] In my view there is merit in the respondents' opposition to the claim for reinstatement. Where a decision of a quasi- judicial body is set aside on review for procedural irregularity and not, as it must be obvious, on the merits, the Court need not go further than merely setting aside the decision. That will leave it open to the employer to reinstate the public officer concerned or institute fresh proceedings. That, in my view, should be the position in this case.

[22] Counsel for the appellant made submissions on costs and prayed that the appellant be awarded the wasted costs incurred on 27 July 2015 when this appeal was postponed because

counsel for the appellant was unable to attend due to certain travelling difficulties he had experienced. He also claimed costs of employing two advocates. I have no difficulty acceding to the prayer for wasted costs. Counsel for the respondents could not attend court on 27 July because he "got stuck" in Mokhotlong due to inclement weather. That is not a good enough reason to deny the other party its cost of attendance on that day. The prayer for the employment of two advocates was not, in my view, is not sufficiently justified. **Adv. Rasekoai** was involved principally to argue the submission on reinstatement. That submission has not succeeded. Even had he been involved in the preparation of argument on other the other issues, which I have no reason to believe he was not, this appeal was not so complex as to justify the employment of two counsel. This was **Adv. Sekati's** contention also. I therefore decline to grant the prayer for costs of two advocates.

1. In the result the appeal succeeds. The judgment of the court *a quo* is set aside and the following order is substituted for the order of that court-

> "1 (a) The appeal is upheld with costs.
>
> (b) The decision in the Disciplinary Hearing chaired by the First Respondent and confirmed by the Second Respondent dismissing the Applicant is hereby set aside."

2. The Respondents shall pay the appellant's cost of appeal including the wasted costs on 27 July 2015.

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M. CHINHENGO
Acting Justice of Appeal

I agree

_____

DR K.E. MOSITO
President of the Court of Appeal

I agree

_____

P.T. DAMASEB
Justice of Appeal

For Appellant : Adv. H. Phoofolo KC

For Respondent : Adv. M. Sekati