

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.64/2018

In the matter between:

‘MAPITSO TS’ALONG

APPELLANT

AND

PRINCIPAL SECRETARY MINISTRY OF PUBLIC WORKS AND TRANSPORT	1ST RESPONDENT
MINISTRY OF PUBLIC WORKS AND TRANSPORT	2ND RESPONDENT
THE SENIOR ACCOUNTANT- MINISTRY OF PUBLIC WORKS AND TRANSPORT	3RD RESPONDENT
THE CHIEF INFORMATION OFFICER - MINISTRY OF WORKS AND PUBLIC TRANSPORT	4TH RESPONDENT
THE HUMAN RESOURCE OFFICER MINISTRY OF PUBLIC WORKS AND TRANSPORT	5TH RESPONDENT
THE ATTORNEY GENERAL	6TH RESPONDENT

CORAM : DR. K. E. MOSITO P.
M. MAHASE ACJ
DR P. MUSONDA AJA

HEARD : 17 MAY 2019

DELIVERED : 31 MAY 2019

SUMMARY

Public Service – Public servant dismissed for a disciplinary offence requiring prior commission of criminal offence as a jurisdictional fact — No such jurisdictional fact existing – Such contrary to the Code.

Appeal succeeding and judgment of the Court a quo – Appeal upheld with costs.

JUDGEMENT

DR MOSITO P

Background

[1] On 8 September 2013, the present appellant approached the High Court for relief couched in the following terms:

1. That 5th respondent dispatch the record of proceedings that lead to dismissal of applicant herein to the Registrar of this Honourable Court within fourteen (14) days hereof.
2. That the disciplinary enquiry that led to dismissal of applicant herein be reviewed and set aside as irregular.
3. That applicant be reinstated into her post as assistant accountant.
4. That applicant be paid all such arrear salaries and/or emoluments as might have been due to her but for the purported dismissal.
5. That respondents pay costs hereof.
6. That applicant be granted such further and/or alternative relief as this Honourable Court may deem meet.

[2] The application was opposed by the present respondents. The matter came before the High Court (Moilola J), who heard the application on 7 November 2016. The learned judge handed down judgment on 30 October 2017. In that judgment, he dismissed the application and made no order as to costs.

[3] Dissatisfied with the said judgment, the appellant appealed to this Court against the whole of the said judgment of the court *a quo* on the following grounds:

1. The Court *a quo* erred and misdirected itself in dismissing the application for review regard being had to the fact that the disciplinary inquiry was improperly constituted as it was chaired by the 4th Respondent who was not the Appellant's Head of Section as contemplated by the law.
2. The Learned Judge in the Court *a quo*, erred in holding as he did by dismissing the application for review regard being had to the fact that the recommendation to dismiss the Appellant was made by a person not vested with powers to do so in terms of the mandatory provisions of the law.
3. The Learned Judge in the Court *a quo*, erred in holding as he did by dismissing the application for review regard being had to the fact that there is evidence on record to demonstrate that the matter was adequately investigated before the Appellant was dismissed and further that there is no iota of evidence to demonstrate that the decision maker had satisfied himself that the penalty of the Appellant's dismissal was warranted.

[4] It is the above grounds that were presented before this Court for consideration in this appeal.

Factual Matrix

[5] The facts giving rise to the application before the court *a quo* were briefly that: The appellant was employed by the government of Lesotho as an Assistant Accountant and stationed at the Traffic and Transport Department in the Maseru urban area.

[6] On 31 August 2012, the third respondent preferred disciplinary charges against the appellant for having allegedly

breached section 15 (6) of the conditions of employment and conduct of public officers” as set out in the Public Service Act. Reference was also made to section 3 (1) (e) of the Code of Good Practice Notice 194 of 2008. Thereafter, a disciplinary enquiry was held against the appellant in terms of section 8 of the Disciplinary Code of the Codes of Good Practice 2005.

[6] Following the said disciplinary enquiry, a recommendation was made for the dismissal of the appellant. The recommendation was duly confirmed by the first respondent on appeal thereby, effectively dismissing the appellant.

[7] The appellant averred in her founding affidavit that the said disciplinary enquiry and appeal were irregular in a number of respects. She complained that:

- (i) The enquiry [panel] was improperly constituted as it was chaired by the 4th respondent who was not my Head of Section as my Head of Section was Ms Sebuoeng Lerotholi in her capacity as the Financial Controller.
- (ii) The recommendation to dismiss me was made by a person not vested with powers to do so in terms of section 8 of the Disciplinary Code as she was Chief Information Officer and not my Head of Section as contemplated by the section.
- (iii) The recommendation to dismiss me was based upon wrong or improper considerations to the extent that the alleged breaches of the provisions of the Public Financial Management and Accountability act, 2011 and section 3(2)(n) of the Code of Conduct presupposes criminal conviction within the exclusive jurisdiction of the courts of law fully constituted and applying the relevant criminal procedures and principles.
- (iv) The advice of 4th respondent to me to appeal before first respondent herein was calculated and/or intended to mislead me

and the subsequent appeal before first respondent was improper insofar as the chairman thereof was not my Head of Department as contemplated by the Public Service Act 2005 as amended read together with the relevant provisions of the Disciplinary Code and Regulations.

- (v) The decision to dismiss me is invalid and contrary to the relevant provisions of the Public Service Act 2005 as amended read together with the provisions of the Disciplinary Code insofar as it was not preceded by the required recommendation duly made by the proper authority (my head of section) and confirmed by the proper authority (my Head of Department) the latter being at the time the Traffic Commissioner Mrs. 'MATHATO MAKOATI.
- (vi) The appeal hearing was improper and invalid as it was chaired not by my Head of Department aforesaid as required by the Disciplinary Code read together with the Regulations.”

[8] It was on the basis of the above complaints that the appellant approached the High Court. The application was opposed by the respondents, resulting in the learned judge a quo dismissing the application.

The Issues

[9] Before us there were two issues which were presented as falling for determination by this Court. These were:

- (a) Whether the court a quo was correct in determining that the appellant was correctly dismissed regard being had to the fact that the Head of Department is alleged not to have confirmed the recommendation made by the Head of Section for the dismissal of the appellant.
- (b) Whether the dismissal of the appellant was valid regard being had to the fact that her dismissal was not based on a criminal conviction made by a court of law, as opposed to the findings and decision of the disciplinary tribunals.

The Law

[10] The **Public Financial Management and Accountability Act**¹ is the predominant legislative tool that introduces processes and standards to guide the use, management and control of public funds. The Act provides for financial management. In addition, aligned to the Act are a number of enabling and operational laws and regulations that are of significance when conceptualizing the comprehensiveness of public financial management and include the **Public Services Act**² and the Public **Service Regulations**.³

[11] Part II of the Public Services Act provides for the conditions of employment and conduct of public officers. Section 15 (1)(a) of the Public Services Act empowers the Minister to, from time to time and after consultation with such persons or bodies which are in the Minister's opinion representative of the interests concerned, prepare and issue, codes of practice for the purpose of providing practical guidance in respect of this Act, including the (i) Code of Conduct which shall be primarily a guide to public officers in the conduct of their relationships and dealings with their employers, and the general public as well as a Disciplinary Code which shall prescribe the procedure to be followed in instituting disciplinary action against a public officer who has committed a misconduct.

¹ The Public Financial Management and Accountability Act, Act 12 of 2011.

² Public Services Act, Act 2005

³ Public Service Regulations, 2008.

[12] In terms of section 15(6) of the Public Services Act, failure on the part of a public officer to follow any provision contained in a Code of Conduct issued under the section constitutes a misconduct rendering the public officer liable to proceedings and sanctions as set out in the Code of Conduct. Section 3(n) of the Codes provides that, ‘a public officer shall not commit a criminal offence involving dishonesty, misappropriation of public funds or cause damage to public property or bring [the] public service into disrepute.’ The codes must be taken to have been incorporated into the public officers' contracts of employment.

[13] The first question is whether section 3(n) of the Codes requires the respondent to have first been convicted by a court of law a “criminal offence” before he or she could be dismissed. As will appear below, my view is that it does. I now turn to consider the grounds of appeal before us.

Evaluation of the Appeal

[14] The first step in the reasoning process in this appeal should be to recognise that, within limits, the employer is entitled to set its own standards of conduct in the workplace having regard to the exigencies of the business.⁴ The employer is also entitled to determine the sanction with which non-compliance with the standard will be visited.⁵

⁴ See the decisions and the literature reviewed in John Myburgh SC and André van Niekerk 'Dismissal as a penalty for misconduct: the reasonable employer and other approaches' (2000) 21 ILJ 2145.

⁵ Ibid.

[15] Before us, appellant complained against the judgment of the Court a quo on the basis that, the court erred in dismissing the application for review regard being had to the fact that the disciplinary inquiry was improperly constituted as it was chaired by the 4th Respondent who was not the Appellant's Head of Section as contemplated by the law.

[16] There is no provision in the Codes as to what should happen where the Head of Section might be conflicted for one reason or other. One must bear in mind that, these matters can all be decided upon general principle. In the absence of any procedural rules or regulations having the force of law it seems to me that it was for the panel to decide upon its own procedure. Subject to the implementation of these rights and to the observance of the principles of natural justice it seems to me that it was open to the panel to follow such procedure as it thought fit. Indeed, there is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts.

[17] The next issue is whether the dismissal of the appellant was valid regard being heard to the fact that her dismissal was not based on a criminal conviction made by a court of law, as opposed to the findings and decision of the disciplinary tribunals. As

indicated above, Section 3(n) of the Codes provides that, ‘a public officer shall not commit a criminal offence involving dishonesty, misappropriation of public funds or cause damage to public property or bring [the] public service into disrepute.’ For a public officer to be found to have committed a disciplinary offence under this Code, he must be found to have committed ‘a criminal offence’. Thus, committing a criminal offence is a jurisdictional fact. It was pointed out in the *South African Defence and Aid Fund and Another v Minister of Justice*⁶ that there are cases in which the exercise of a power is dependent upon the existence of certain so-called jurisdictional facts, ie facts or a state of affairs which must exist before the power may be exercised. What the jurisdictional facts are, depends, of course, on the legislation in question, but they always fall into one of two categories which Corbett J (as he then was) described as follows:

'Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power.... On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the

⁶ *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) at 34F – H.

power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did.'

[18] It depends upon the legislation in question whether a jurisdictional fact falls within the one or the other category. It obviously also depends upon the legislation whether jurisdictional facts are indeed required and, if so, what they are. I turn, therefore, to examine the legislation now under consideration. In my opinion, whether or not the public officer committed a criminal offence is a matter to be determined by the courts of law upon proper evidence presented before a court exercising criminal jurisdiction. The evidence of the existence of conviction will then be presented before a disciplinary tribunal to prove the existence of such a jurisdictional fact.

[19] In the present case, there was no such existence of conviction placed before the disciplinary tribunal. I am therefore unable to agree with the decision of the court a quo that, Whether he was convicted by a formal hearing or by his agreement to be convicted as he did not dispute, or whether he was convicted out of his own mouth by an admission of guilt, the result would be the same - he must have, in fact, been convicted of a criminal offence. On this ground alone, I am of the view that, the recommendation and

subsequent dismissal of the appellant were clearly improper. I would consequently set aside the decision of the court a quo.

Disposition

[20] In light of the reasons above, I would uphold this appeal and give the following order:

- (a) The appeal succeeds with costs.
- (b) The judgment of the Court a quo is altered to read: “the application is granted with costs as per prayers 2, 3, 4 and 5 of the Notice of Motion.”

DR K.E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

M. MAHASE ACJ
ACTING CHIEF JUSTICE

I agree:

DR P. MUSONDA AJA
ACTING JUSTICE OF APPEAL

For the Appellant: Adv L. Masoeu

For the Respondents: Adv. R Moshoeshoe