IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU	**C OF A (CIV) 11/2019**

In the matter between:

THUTO NTŠEKHE	**APPELLANT**

And

PUBLIC SERVICE TRIBUNAL	**1ST RESPONDENT**
MINISTRY OF EDUCATION & TRAINING	**2ND RESPONDENT**
PRINCIPAL SECRETAY - EDUCATION	**3RD RESPONDENT**
PUBLIC SERVICE COMMISSION	**4TH RESPONDENT**
GOVERNMENT SECRETARY	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

CORAM: DR K E MOSITO P

DR J VAN DER WESTHUIZEN AJA

N T MTSHIYA AJA

HEARD : 25 OCTOBER 2019

DELIVERED : 01 NOVEMBER 2019

SUMMARY

Administrative law – judicial review of decision of Public Service Tribunal — High Court reviewing decision of tribunal in absence of record of proceedings and confirming same.

Rule 50 of the High Court Rules, 1980 — First Respondent to file record of proceedings within 14 days— Appeal upheld— Costs of appeal to be paid by respondents , including costs consequent upon employment of two counsel.

JUDGMENT

DR K E MOSITO P

Introduction

[1] This appeal concerns the ambit of the powers of the first respondent, the Public Service Tribunal (the Tribunal). In the Court a quo as well as this Court, this appeared to be the crux of the dispute. More about this later.

[2] On 2 March 2018, the appellant launched an urgent application in the High Court seeking to set aside the decision of the first respondent. Although inelegantly drafted, on closer examination, the prayers reveal that this was an application for review in terms of Rule 50. The court below (Peete J), found in favour of the respondents. It is that decision against which the present appeal is directed. The background is set out hereafter.

Parties

[3] The appellant is the Chief Education Officer – Primary in the Ministry of Education since 2010. The first respondent is cited as the Public Service Arbitration Tribunal. However, the proper name of the Tribunal as *per* s4 of the Public Service (Amendment) Act, 2005[1] is the Public Service Tribunal. The function of the Tribunal is, in law, to deal with appeals instigated by either a public officer, registered public officers' association, or employer arising from a grievance and disciplinary action. The second, third and fourth respondents are the Ministry of Education and Training, the Principal Secretary and the Attorney General respectively. In addition to the functions vested in the Principal Secretary under s 96 of the Constitution, the Principal Secretary is by law, the chief accounting and overall supervising officer of the Ministry under his or her supervision.[2] The Attorney general is cited as the Legal representative of the Lesotho Government.

Factual matrix

[4] The factual background leading to this appeal is not complicated. At all times material to this appeal, the appellant was a public servant, employed as Chief Education Officer-Primary. On 27 June 2012, she was served with a letter of suspension from office based on the allegation that, she had verbally instructed some officers to pay contractors for schools which had not been built or completed.

[1] Which amends s20(1) of the Public Service Act,No.1 of 2005.
[2] s 13(1) of the Public Service Act No. 1 of 2005.

[5] Appellant was subsequently charged with two counts of indiscipline. The first count was that, she had contravened s15(1)(a)(i) of the Public Service Act, 2005 read with s3(2) of the Public Service Code of Conduct,2008 in that she unlawfully failed to discharge her duty to the financial prejudice of the government, to the tune of M1,756,,698.33. The second count was that, she had contravened s15(1)(a)(i) of the Public Service Act ,2005 read with s3(2) of the Public Service Code of Conduct,2008 in that she had unlawfully and with intention to deceive the Ministry of Education and Training and its donors, requested funds to pay some outstanding invoices for some contractors, while she was privy to the fact that funds were still available to cover the outstanding invoices.

[6] The appellant was subsequently brought before a Disciplinary Panel on the two counts. After the disciplinary enquiry, she was found not guilty and was released. Dissatisfied with the outcome, the Department took an appeal to the first respondent against the decision of the Disciplinary Panel. The first respondent ultimately heard and upheld the appeal against the present appellant on 30 June 2017.

[7] On 15 August 2017, the second respondent wrote a letter dismissing the appellant on the strength of the decision of first respondent 30 June 2017. On 17 May, 2018, Peete J granted an order declaring as unlawful, 'invalid and of no force and effect', the 'decision of the 3rd respondent to terminate the salary of applicant'.

He further ordered that, '[t]he issue of reinstatement of applicant is deferred until finality of the application of review proceedings.'

[8] The present appellant then approached the High Court on review. As her grounds of review, she complained that, (a), the Tribunal had not been properly appointed. (b), she complained of discrimination against her. (c), She challenged the authority of the legal officer of the Ministry to appeal against her acquittal, when in terms of clause 9(6) of the Public Service Code of Conduct, 2008 only the public officer (meaning herself as opposed to the department) was in law entitled to appeal. In this way, she was questioning, not only the authority of the department to appeal, but also the jurisdiction of the Tribunal to entertain the appeal. (d), She also questioned the procedural regularity and propriety of the first respondent relying on extraneous material (which was not part of the evidence that served before the Disciplinary Panel) to convict her.(e), She also challenged the competence of the Tribunal to hear evidence that had not been presented before the Disciplinary Panel.

[9] Although the respondents opposed the application, no record of proceedings as contemplated by Rule 50 of the High Court Rules was dispatched to the Registrar of the High Court to be reviewed, corrected and set aside. Curiously, the High Court (Peete J) heard the application for review on the 15 May 2018 and handed down its judgment on 6 February 2019.

[10] The appellant approached this Court, with leave of the Court below (Peete J), concerns the ambit of the powers of the Tribunal.

Issues

[11] The two main issues that fall for determination in this appeal are:

(a) Whether it is legally permissible to exclude a record of appellate tribunal's deliberations from a Rule 50 of High Court record?

(b) Whether High Court applied its mind to grounds of review before it in determining the powers of the first respondent, the Public Service Tribunal (the Tribunal).

The law

[12] There are two main legal issues necessary for the resolution of this appeal. They are: (a), the ambit of Rule 50 of the High Court Rules, 1980 and, (b), the powers of the principles relating to the powers of the Public Service Tribunal.

[13] Rule 50 of the High Court Rules 1980, provides that in all applications for review, an applicant should call upon the decision-maker to show cause why a decision or proceedings should not be reviewed and corrected or set aside, and to despatch the record of proceedings sought to be reviewed together with its reasons. As Maya DP put it in Helen ***Suzman Foundation v Judicial Service Commission and Others***,[3] the primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court,

[3] Suzman Foundation v Judicial Service Commission and Others [2017] 1 All SA 58 (SCA); 2017 (1) SA 367 (SCA) para 13.

administrative functionary or State organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court.[4]
The procedure for review as laid down under Rule 50 of the High Court Rules 1980, is such that the applicant simply files a notice of motion with the High Court, calling upon the decision-maker to dispatch to the Registrar, within fourteen days of the receipt of the notice, the record of proceedings sought to be reviewed. Otherwise an applicant's case is contained in a founding affidavit.

[14] The dispatch or non-dispatch of a record of proceedings under rule 50, implicates the right of access to court which – in the context of civil proceedings – is often referred to as the right to a fair trial.[5] It concerns the interpretation of the statutory power of the tribunal to determine its own procedure. The consequences non-dispatch of a record of proceedings may prejudice the proper administration of justice.

As was correctly pointed out in ***Jockey Club of South Africa v Forbes***:[6]

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[4] Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 661H-I and 662G-H; Cape Town City v South African National Roads Authority & others 2015 (3) SA 386 (SCA) para 36. See also D E van Loggerenberg & E Bertelsmann Erasmus: Superior Court practice (Original Service, 2015) at D1-700; Derek Harms Civil Procedure in the Superior Courts (2016) para B53.8; Andries Charl Cilliers, Cheryl Loots & Hendrick Christoffel Nel Herbstein and Van Winsen: Civil Practice of the High Court and the Supreme Court of Appeal of South Africa 5 ed (2009) at 40-1291.
[5] S 12(8) of the Constitution provides: "[a]ny court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority the case shall be given by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time."
[6] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) (*Jockey Club*) at 661.

> *"Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for [Rule 50] he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit."*

[15] Thus, a Rule 50 record has been held to be is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded *ex post facto* justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function."[7] The current position in our law is that – with the exception of privileged information – the record contains all information relevant to the impugned decision or proceedings.[8]

[16] The second legal issue relates to the powers of statutory tribunals such as the first respondent. It is a fundamental principle of our law that public power can only be exercised within the bounds of the law.[9] Repositories of power can only exercise

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[7] *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 37.

[8] *Muller v The Master* 1991 (2) SA 217 (N) at 219J-220C.

[9] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) and *Pharmaceutical Manufacturers Association of South Africa & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC).

such power as has been conferred upon them by law.[10] This is a description of the principle of legality. As the court pointed out in ***R v Port of London Authority, Ex Parte Kynoch Ltd***[11], 'there are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy ..., if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course.'

Evaluation of the appeal

[17] As I indicated above, there were a number of complaints contained in the founding affidavit of the review applicant. Those complaints served as grounds of review. I have meticulously read through the judgment of the High Court and I am of the view that **Peete J** did not consider the grounds of review placed before him by the applicant in the review application. What he did was to consider the proceedings of the Disciplinary Panel (panel of the first instance) and not of the first respondent (appellate tribunal), whose proceedings he had been called upon to review.

[18] When this issue was raised at the hearing of this appeal, Advocate Tsóeunyane (with whom appeared Advocate Mofoka) sought to argue that, the proceedings before the first respondent were appeal proceedings, what else was there to be produced by way of a record of proceedings?! There are two answers to this submission. The first is to be found in the following remarks in the

[10] Paras 56-58 of *Fedsure* and paras 17-20 of the *Pharmaceutical* case.
[11] R v Port of London Authority, Ex Parte Kynoch Ltd (1919) 1 KB 176 at 184.

following judgment of the Transvaal Provincial Division in ***Johannesburg City Council v The Administrator Transvaal***:

> The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. *Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it.* It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it.[12] (Emphasis added.)

[19] The second answer is that, there was uncontroverted evidence on record and also contained in the judgment of the first respondent that, it *mero motu* accessed a website in order to check what would ordinarily be contained in the job description of a project manager. There was also an answer which was filed for the first time before the appellate tribunal, on the basis of which it

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[12] *Johannesburg City Council v The Administrator Transvaal (1)* 1970 (2) SA 89 (T) at 91G-92B.

ultimately judged the case. All these and those contained in the extract above, would form the content of the record of proceedings.

[20] In my opinion, this is a kind of case where the decision-maker through an error of law misconceives the nature of his functions and thus fails to apply his mind to the true issues in the manner required by law, with the result that the aggrieved party is in that respect denied a fair hearing.[13] S 12(8) of the Constitution of Lesotho provides that:

(21) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

[22] Since the learned judge in the Court a quo did not apply his mind to the issues raised as grounds of review by the appellant, the cumulative effect of this misdirection of judgment is itself a failure of justice on the appellant.

[23] In terms of rule 50(1)(b) of the High Court Rules, 1980, the first respondent was required to file the record of the "proceedings sought to be corrected or set aside, together with

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[13] see, for example, *Goldfields Investments Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551; *Visser v Estate Collins* 1952 (2) SA 546 (C).

such reasons as [it] is by law required or desires to give or make" with the Registrar of the High Court.

In ***Bridon International GMBH v International Trade Administration Commission***, [14] it was remarked that:

> *"[W]ithout knowing the basis for the decision, Casar [the review applicant] will have to mount [its] challenge in the dark against an opponent with perfect night vision, in that it knows exactly what information it had considered. For example, Casar will hardly be able to contend that the decision was irrational; that irrelevant considerations were taken into account; or that the decision was taken arbitrarily or capriciously."*

[24] I agree with the remarks by Madlanga J[15] in ***Helen Suzman Foundation v Judicial Service Commission***[16]that, the filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. The institution of the review application by the applicant in terms of rule 50 automatically triggered certain procedural rights in her favour and imposed obligations upon the first respondent, in its capacity as the decision-maker. The respondents opposed the application.

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[14] *Bridon International GMBH v International Trade Administration Commission* [2012] ZASCA 82; 2013 (3) SA 197 (SCA) (*Bridon*) at para 31:

[15] With whom Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J and Theron J concurred.

[16] Helen Suzman Foundation v Judicial Service Commission 2018 (7) BCLR 763 (CC) at para 18.

[25] This Tribunal has been in existence for the last fourteen years and yet, there are still no procedural rules in place to facilitate its functioning. It is unwise for a Tribunal of this importance not to have rules of procedure. One wonders how such things as: the language of the Tribunal, procedure for filing appeals or applications before the tribunal, presentation and scrutiny of processes, contents of processes, submission of documents, service of notices and processes issued by the Tribunal, actions on default, *ex parte* hearings and disposal of matters, adjournments, form of orders, publication and communication of orders, sitting and working hours, return of documents, contempt of the tribunal, compelling attendance, right to legal representation, nature of evidence, registers, rescission etc. Rules on the above aspects will make the Tribunal function better and make proper keeping of records possible.

[26] The Tribunal is empowered by s 20(7)(a) of the Public Service Act to regulate its own procedure. The language of the section suggests that the Tribunal is responsible and controls the process through which cases are presented to it for consideration. The reason for this is that it is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. It is of course, understandable that, for a proper resolution of a case before the tribunal to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed.

When this happens it is the tribunal in which the case is instituted that decides whether a specific procedure should be permitted. However, the tribunal ought to be cautious about the exercise of this statutory power to regulate its own procedure. In my mind, this power to regulate its own procedures is exercisable subject to the Constitution, the Act and rules of natural justice. Its power to regulate its own process does not extend to the assumption of jurisdiction which it does not otherwise have.

[27] The 1st respondent had no competence to alter the decision of the Disciplinary Panel upon the strength of the job description which it itself, downloaded from the website. This was a fatal irregularity.

Disposition

[28] In light of the foregoing discussion, I am of a strong view that there has been a mistrial in this matter in the High Court because the merits of the application for review was not heard in respect of its merits. Consequently, the following order is made:

(a) The appeal is upheld.
(b) The judgment of the High Court on the review application is set aside and substituted with the following:

“*(i)* *The Applicant’s application is granted with costs*

(ii) *The decision of the 1st Respondent is reviewed and set aside.*

(iii) *The decision of the Disciplinary Panel is reinstated."*

(c) The respondent is to pay the appellant's costs of appeal, including the costs of two counsel, in this Court.

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I Agree

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DR J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I Agree

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N T MTSHIYA
ACTING JUSTICE OF APPEAL

For Appellant: Adv CJ Lephuthing
With TM Matheka

For Respondents: Adv ME Ts'oeunyane
With Adv Mofoka