# IN THE COURT OF APPEAL OF LESOTHO

**C OF A (CIV) NO. 31/2019**

**HELD AT MASERU**

In the matter between:

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| **DIRECTOR GENERAL NATIONAL SECURITY SERVICE** | **1ST APPELLANT** |
| **THE MINISTER OF DEFENCE** | **2ND APPELLANT** |
| **PUBLIC SERVICE COMMISSION** | **3RD APPELLANT** |
| **THE ATTRNEY GENERAL** | **4TH APPELLANT** |

And

| | |
|---|---|
| **LIETSISO MOTHALA & 76 OTHERS** | **RESPONDENTS** |

**CORAM:** DR. K.E. MOSITO P
DR. P. MUSONDA AJA
N.T. MTSHIYA AJA

**HEARD**: 17 OCTOBER, 2019

**DELIVERED**: 01 NOVEMBER, 2019

## ***SUMMARY***

***Administrative Law –*** *Non observance of Rule 50 – failure of the High Court to hold a factual inquiry to determine whether there was demonstrable evidence to imperil national security and whether the respondents were ill-qualified to be members of the NSS – affidavits sharply contradicting each other – duty of the court to determine the merit – matter remitted to the High Court – both appellants and respondents allege failure by the court a quo to give them an opportunity to make meaningful representation – the High Court deferring jurisdiction to the NSS Board of Enquiry propriety of law.*

## BACKGROUND

[1] This is an appeal against the High Court Judgment (Peete J). I shall refer to the parties as they were in the court below. The applicants commenced their action in the High Court by way of motion proceedings. They sought review and the dispensing of ordinary rules in relation to notice and service of process on account of urgency[1]. The direction that the respondents produce a record of proceedings, if any, pursuant to which a decision to terminate the applicants appointments in the National Security Service was reached to the Registrar for review pursuant to Rule 50 of the ***High Court Rules 1980***[2]. Thirdly, it sought to set aside the termination of the applicants' appointments in the National Security[3], fourthly, to reinstate the applicants in their former positions in the National Security Service[4], fifthly to direct the respondent to

[1] Notice of Motion Prayer
[2] Prayer 2.2
[3] Prayer 2.3
[4] Prayer 2.5

pay applicants' salaries from the purported date of reinstatement[5], sixthly to pay costs[6] and seventh to grant applicants any other alternative relief[7].

**THE FACTS**

[2] It is not in dispute that the seventy seven (77) applicants were employees of the National Security Services in the Ministry of Defense and were trained in self-defense and the use of arms and ammunition. The first respondent during the month of August wrote letters requiring the applicants to show cause why he should not terminate their employment with the National Security Service.

[3] The applicants sought counsel from Mr. Teele KC, who on 18th August 2017 wrote to the first respondent. The Kernel of Mr. Teele's letter was that his clients furnished the national Security Service vide their application forms the correct age and qualification. The National Security Service was not misled and couldn't be misled with the capabilities the service processes. There was no law which prescribes that only those between 18 and 25 years could be employed. In the absence of any illegality in departing from the specifications in the advertisement, employment of the applicants was valid for all intents and purposes.

[4] In any event only a court of law can have the applicants' appointments set aside. This is applicable even if the appointments were unlawful, though Mr. Teele did not concede that the appointments were unlawful. The letters to show cause were received by some applicants who had met the qualifications prescribed by the advertisement.

[5] Prayer 2.6
[6] Prayer 2.7
[7] Prayer 2.8

[5] The applicants had signed contracts and were already receiving salaries from the consolidated fund. The import of this statement was that the applicants had accrued rights as members of the National Security Service.

[6] On diverse dates in the months of December 2017 and January 2018, the applicants received letters of discharge. They then filed the notice of motion and sought the prayers in 2.1 to 2.8.

[7] The applicants through the affidavit sworn by Lietsiso Mothala, which affidavit the seventy six (76) other respondents aligned themselves with, stated that they had been legally advised and verily believed that the first respondent or the other respondents cannot lawfully terminate their contracts, which were concluded before the first respondent took office. The reasons cited by the first respondent were irrational.

[8] The tenor of the answering affidavit of the first respondent was that his predecessor was engaged in criminal conduct, which included him being a suspect in bombing the first lady's home. His predecessor undermined the service by ceasing to fund operations. There was created a counter-intelligence unit that bought and sold information contrary to National Security Service principles. This unconventional conduct had the blessing of the then Army Commander LT Gen Tlali Kamoli and Commissioner of Police Molahlehi Letsoepa. The underlying objective was to take over the Agency. There was militarization of the leadership, the training and recruitment at the Agency. The deponent went on to state that some of the applicants were overage, overqualified, politically exposed, corruptly recruited, had criminal records, fraudulent qualifications, had specialized skills from Universities,

which vulnerated the Agency to infiltration. The applicants were a security risk.

[9] The first respondent when answering that the applicants were a security risk relied on an intelligence report. He tenaciously accused his predecessor of militarizing the Agency, violating the recruitment procedures and engaging in criminal activities. The deponent anchored his rationalization for terminating the service of the applicants, substantially on the conduct of his predecessor, in terms of recruitment and training.

[10] The Director of Operations Makhotso Mathiase, who was Director Training, then aligned himself, to the first respondent's affidavit save and except that he restated that among the applicants who were recruited, were those with criminal records and others accused of crimes appearing in the courts of law, while others were overqualified.

[11] The recruitment of the respondents was done in the absolute discretion of the then Director General, Colonel Tumo Lekhoula without engagement and concurrence of the Staff Board in line with Section 9 of the ***National Security Act No 11 of 1998***. In Clause 8.3 of his supporting affidavit he lists 9 names of individuals among the respondents who were overqualified.

[12] The Minister of Defense and National Security deposed in his supporting affidavit, that the Former Director General of the National Security Service has been implicated in a number of crimes. The termination of the former Director General's employment was his decision, which was approved by the Prime Minister, and so was the termination of the applicants' employment for reasons stated in the answering affidavit of the incumbent Director General.

[13] The first applicant Lietsiso Mothala in her replying affidavit stated that the incumbent Director General's affidavit contains speculations as he was not employed by the NSS during their recruitment. She answered that the deponent was estopped from denying that they were employed following the proper procedures. The alleged deviation from policy is an internal matter for management, which the applicants were not aware of. They abandoned all their affairs to take up employment to their prejudice believing that the proper procedures were followed.

[14] The replying affidavit focused on non-compliance with section 11(3), of the Act, which requires the holding of an inquiry. The termination of their employment could not be done without the blessing of the Courts of Law and Section 11 (3) of the Act and the Regulations alluded to by the Minister in para. 1.2 of his affidavit. The procedure thereunder contemplates an inquiry which was never held. In her view their contract termination was because of their political incorrectness.

[15] There was a counter-application by Mr. Rasekoai in Terms of Rule 8(12) as read with Rule 8(16) of the ***High Court Rules 1980*** to declare the engagement of respondents in the National Security Service as unlawful. It was prayed that the engagement be reviewed and set aside. Reliance for the counter application was on the affidavits of Pheello Ralenkoane, Makhotso Mathiase and Sentje Lebona in the main application.

[16] The learned Judge in the court below held the view that, the proper procedure was followed according to law and the appointments were valid. The applicants acquired a vested status or accrued rights as members of the National Security Service, whose tenure is protected by Section 19 of the Act.

The status could not be extinguished without due process of law and lamented the politicization of the service.

[17] The court cited with admiration section 25 in the NSS Act, which is couched in these terms;

25(1) A member shall not

1. Be an active member of political party;
2. Speak in public about any political party;
3. Take an active part in support of a candidate in an election or;
4. Do anything by.. or deed.

The salutary effect or message of this section is to insulate the NSS from political infiltration, control or capture. These are very commendable-men of integrity and of unquestioned neutrality and intelligence, so the learned judge said.

[18] The learned judge went on to say that:

> National Security Services as an organ is part of the public service of Lesotho and is subject to the ***Constitution of Lesotho 1993*** and ***National Security Service Act No. 11 of 1998*** and the Regulations made thereunder.

[19] Section 10(1), provides that the Minister may, acting in accordance with the advice of the Director General appoint any person as a member or promote, demote, transfer or discharge a member in accordance with the Act. Provide for the appointment of the members of the National Security Services probably on permanent and pensionable terms.

[20] Crucial to the learned Judge's decision was the first respondents non-compliance with section 11, which obligates the first respondent to empanel a Board of Enquiry, if circumstances arise where the individual concerned may imperil national security for clarity I quote the section in extensio;

> *11(3) "…… if the Director General obtains information that there is a possibility that a person who is a member is a security risk, or that he may act in a way prejudicial to security interest of the state, he shall discharge the members from the service if after an enquiry, in the prescribed manner, as to whether the possibility exists, the Director general is of the opinion that the possibility does exist."*

The Court being of the opinion that there was no enquiry granted all the prayers and dismissed the application for leave to file a counter application by the respondents to declare the appointments illegal without the Board of Enquiry having been empanelled to determine the security risk factor. He deferred to the Board of Enquiry to determine whether the appellants were a security risk.

[21] Aggrieved by the granting of all the prayers to the applicants and the denial of the application for leave to file a counter-application by the respondents, for the court to declare the appointments illegal, the respondents noted an appeal to this court.

**APPELLANTS ARGUMENT**

[22] The respondents filed six grounds of appeal. However grounds 1 and 2 are similar as both attack the refusal by the learned Judge to grant the respondents leave to file a counter-application as a wrong exercise of discretion, as this was not an ordinary case of employment, but dealt with national security.

Grounds 3 and 4 fault the learned Judge for granting an order of reinstatement without assessing whether that was practical or feasible as the applicants had been out of employment for over a year.

[23] The order for reinstatement was not a competent ancillary relief over an application for review. Ground five dealt with the learned Judge's failure to assess the merits and demerits of the dismissal, but only restricted himself to the procedural flaws. In ground 6, the respondents were aggrieved by the failure by the Learned Judge to give in-depth consideration to the prejudice to National Security of the irregular appointment of the applicants to the National Security Service.

It was argued for the respondents that the court *a quo* when discussing both an application for leave and that of filing counter-application misdirected itself. The court proceeded on the footing that the respondents were lawfully appointed. The lawfulness of the engagement of the respondents was the basis of the defence of the government agency. The court in its judgment even went further to state that the enquiry of the propriety of their appointment is not something that fell within the jurisdiction scope of the court.

[24] The judge was oblivious to the fact that the Respondents were discharged because their stay in the Agency was prejudicial to the security interests of the state as stipulated by section 11(3) of the Act.

[25] It could safely be concluded that the court below shut the door to the considerations of the merits and demerits of the case pleaded by the NSS, that the respondents were a security risk and various incidental grounds which vitiated their appointment, because in his view, such enquiry could only be undertaken by the Board of Enquiry and not the High Court.

[26] In attacking the rejection of the application the respondents put the matter in historic perspective. The Judge was of the view that the application was inordinately belated. The NSS knew as far back as August 2017, when the respondents authored a letter through their lawyer, what the proper approach was. The nullification could only be done by way of a court order, but otherwise rested on its laurels. The counter-application was prejudicial to the applicants. In any case the counter-application would not be tenable because that falls within the purview of the Board of Enquiry not the High Court.

[27] The dismissal of the counter-application was premature as it had not been heard. That was a grave and patent error on the part of the learned Judge. The counter-application was not interlocutory to be drawn in the net of section 16(1) (b) of the ***Court of Appeal Act No.10 of 1978***. What was interlocutory is the application to file a counter application so the argument went. The dismissal of the counter-application was final order, as defined in section 16(1) (9). The finality of the order can be discerned from the order itself in which the learned Judge dismissed the counter-application, which application he was not seized with. A final order is the one that settles the dispute between the parties.

[28] The application was filed before the High Court on the 26th February 2018. The Notice of intention to oppose was filed on the 28th February 2018 and simultaneously served on the even date. The answering affidavits were filed on the 22nd March 2018 and served a day earlier. The replying affidavits were filed on the 6th April 2018 and filed on even date. A day earlier (5th April 2018) an application for intervention was filed and was not opposed. On the 20th April 2018 the parties appeared before court and there was no argument. The matter was postponed in order to allow for the respondents' attorney to

take instruction on the proposal that the opposition be withdrawn and that an independent application challenging the appointment of the applicants be filed. In the alternative, for the respondents to explore the application for leave to stage a counter-application if they deem necessary. The matter was then postponed for three days, later on 23rd April 2018 parties appeared before court and the court was advised that the instructions were to the effect that an application for leave to stage a counter-application would be sought and wasted costs for the day were granted. The matter was then postponed to the 25th April 2018 and on the given day the said application was filed accordingly and a ruling was made that the main application would proceed nevertheless and the application for leave would be argued in the due course and the necessary opposing papers could be filed. The matter was consequently argued against the above-described background. An *ex tempore* ruling was first, dismissing the application for leave and it was followed later by the judgment.

[29] The respondents harboured the notion of filing an independent application seeking nullification of the appointments of the applicants if leave was denied. In the alternative, the Director General would have to explore the establishment of the Board of Enquiry to probe the propriety of the appointments of the applicants. The outcome of that enquiry would still be subject to review by the court.

[30] In respect of grounds 3 and 4, it was strenuously argued by the respondents that the respondents anchored their argument on procedural impropriety and not the merits and heavy reliance was placed on this court's decision in

***Raphuthing v. Chairman of the Disciplinary Hearing and Others***[8], in which we said:

> *"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."*

On the basis of Raphuthing case supra; Mr. Rasekoai valiantly argued that prayers 4 and 5 should collapse.

[31] For the respondents, it was argued that assuming but not conceding that the first grounds on leave for counter-application are unsuccessful, the respondents had made a good case in the court *a quo* on the merits to justify the discharge, had the learned Judge interrogated the merits, instead of deferring to the Board of Enquiry, rendering the defence of NSS ineffectual.

[32] The procedural impropriety committed by the Director General NSS or an assumption that the cited ultra vires cannot oust the jurisdiction of the of the court to inquire into the merits. The decision of De Wet J was cited in support of that proposition when he said:

> *"....the effect of the relevant authorities, held that he could find no reason to imply an intention in the particular regulation before him that the courts' jurisdiction should be limited in the sense that the court should only be entitled to entertain review proceedings after the*

[8] C of A (CIV) 45/2014 (2015) LSCA

*aggrieved person has exhausted his remedies under the regulations. In course of his judgment the learned Judge expressed the view that:*

> *"the mere fact that the legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a court of law should be barred until the aggrieved person has exhausted his statutory remedies"*[9].

This court understood Mr. Rasekoai as saying there are exceptions to the exhaustion of internal remedies, moreso that the High Court has unlimited jurisdiction.

[33] The Respondents anchored their case on procedural impropriety and did not address the defenses advanced by the NSS. The lower court accepted that position. This court's decision in ***Mothobi and Another v. The Crown***[10] was referred to where Scott JA said:

> *"But it is also well recognized that in certain circumstances the validity of an administrative act can be challenged not only directly in review proceedings but also indirectly or, as it is sometimes said, collaterally, i.e. in proceedings which are not themselves designed to impeach the validity of some administrative act or order… Other examples would include where there was "manifest absence of jurisdiction" for the administrative act or order that was the subject of the challenge".*

[9] Golube v. Oosthuizen and Another (1955)(3) SA 1 (T) cited with approval in Smally Trading v. Matšaba C of A CIV 17 of 2016 [2016] LSCA 40 28th October 2016.
[10] 2009-2010 LAC

[34] Mr. Rasekoai, as we understood him by placing reliance on Jafta JA's minority opinion in ***MEC for Health Eastern Cape and Another v. Kirkland Investments (Pty) Ltd***[11], which the learned Judge said:

> *"Despite the finding that the approval was invalid and its scathing criticism of the MEC and the Acting Superintendent General, the Supreme Court of Appeal left the invalid approval intact after reviewing the High Court's order that set the approval aside. The court held that it lacked jurisdiction to set aside Dr. Diliza's decisions because they have never been taken on review."*

It was apparent from the record that the Supreme Court of Appeal adopted an unduly narrow approach to the matter. In doing so it left intact an administrative decision which that court had found to be invalid. Despite the decision was described as having been made under circumstances described by the Supreme Court as "a sorry tale of mishap, maladministration and at least two failures of moral courage". What is being canvased is we leave the decision of the 1st Respondent intact.

[35] The conduct of the 1st Respondent's predecessor was unlawful in terms of sections 9 and 10 of **National Security Act No.11 of 1998** and the court *a quo* ought to have so found. There was an averment that the applicants did not qualify. By not so doing, the corrupt practices were escaping the reach of our court solely on the basis that no application to have that set aside was made. If the validity of a corrupt decision was raised in the pleadings, a court

[11] 2014 (3) SA 481 (CC)

is duty-bound to declare it invalid if that is established by evidence so the argument went.

[36] The filed Heads were arguemented by oral submissions. We will not quote Mr. Rasekoai's hypothetical case, but allude to its tenor. The point he was making was that if an employer catches the employee red-handed and dismisses him without being compliant to the laid down procedure, can the labour court say, it has no jurisdiction. The Judge deferred jurisdiction to the Board of Enquiry. He conceded that the matter should be sent back to the court below. The issue whether there was employer/employee relationship was not interrogated. The Staff Board under section 9, was not constituted and the appellate court cannot interrogate the merits.

[37] The respondents as we understand them concluded their submission by stating that there should be 'judicial deference' to the public officials in matters of national security. They prayed for allowing the appeal, set aside the dismissal of the counter-application, and that they be granted leave to file a counter-application and they be allowed to prosecute the counter-application.

**RESPONDENTS ARGUMENT:**

[38] The applicants challenged the inappropriate noting of the appeal on respect of grounds 1 and 2. Being an interlocutory matter the obtaining of leave of the court was mandatory in accordance with section 16(b) of the Court of Appeal Act No. 10 of 1978. The refusal of leave by the High Court was not final order notwithstanding that the respondents could have brought the application independently and separately without the need to seek leave of Court.

[39] The applicants' application was a review based on procedural impropriety of the actions of the first respondent. A decision in review being procedural in

nature would not preclude an application by the first respondent on the merits, that is to say where he sought the Courts decision to set aside and terminate applicants' employment.

[40] It is trite law that the Court of Appeal will not entertain an appeal without leave where leave is requisite. The **case of *Sekhoane V Sekhoane*[12], *Mphalane & Another V Phori*[13] *and Mantsoe V R*[14]** was cited in support of that legal proposition.

[41] Put it differently the grounds of appeal numbers 1 and 2 are not dealing with a final judgment as contemplated in section 16 (1) (a) of the Court of Appeal Act.

[42] In ***South Cape Corporation (Pty) Ltd V Engineering Management Services***[15], The appellate Division, in considering the test to be applied to determine whether or not an order is interlocutory, summarized the general effect of series of decisions in this regard Cobert CJ said:

> *"In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Court upon matters incidental to the main dispute, preparatory to, or during the progress of the litigation. But orders of this kind are divided into two classes, (i) those which have a final and definitive effect of the main action, and (ii) those, known as simple (or purely) interlocutory order or interlocutory orders proper which do not go to the fabric of the ma*in *action."*

[43] Statutes relating to the appealability of Judgments or orders (whether it be appealability with leave of appealability at all) which use the word

[12] 2009-2010 LAC 104
[13] 2000 – 2004 LAC 49
[14] 1990 – 1994 LAC 193
[15] 1977 – (3) SA 535

interlocutory or other words of similar import, are taken to refer to simple interlocutory orders. In other words it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the case may be final orders including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation.

[44] Simply put, the kernel of the argument is that this court has no jurisdiction to entertain grounds 1 and 2 as they deal with a counter-application, which was an interlocutory matter in respect of which leave of this court was required.

[45] A counter application may only be brought pursuant to Rule 8(16), which incorporates by reference the provisions of Rule 22(5)(a) provides that where there is a counter-claim in an action which may extinguish wholly or in part the judgment. Rule 8(17) reposes into the judge discretionary power to hear the application and Counter application concurrently. The respondents having not conceded the applicants case and having not sought a stay of judgment, so as to activate the common law rule of stay of execution pending the counter application, the Judge could not be faulted in the manner he exercised his discretion.

[46] The respondents in their counter application has sought to use the answering affidavit filed in support of the main actions, which was prejudicial to the applicants as that was not contemplated when the applicants filed founding and replying affidavits. More significant, the affidavits focused on procedural review and did not deal with the merits of the decision of the first respondent. The applicants' affidavit sharply focused on the fact that the first respondent cannot review and set aside his predecessors' decision. A plethora of

authorities were cited in support of that proposition. It is only a court that can do so. ***Attorney General & Another V Moletsane and Others[16], Mothobi & Another V The Crown[17], Audekraal Estates (Pty) Ltd City of Cape Town[18], MEC for Health. Eastern Cape & Another V Kirland Investments (Pty) Ltd, Economic Freedom Fighters V Speaker National Assembly & Other[19].***

[47] It was Adv. Teele KC's case that this court in Mothobi's case supra held that:

> Para 14 It is well established that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside in proceedings for judicial review.

[48] The point which was being made was that the employment of the Respondents by the predecessor of 1st respondent was a valid administrative act, until set aside by a court of law. The 1st respondent had no legal mandate to set it aside.

[49] In his oral submission on behalf of the appellants Adv. Teele KC argued that an ordinary review pursuant to Rule 50 was sought and if they were availed with the record, they would have examined and amended the Notice of Motion. The appellants did not file the record they filed an answering affidavit. They said the matter was so sensitive and that it had to be in camera. The respondents refused to bring information, this is why the Judge said this is a matter for the Board of Enquiry. The merits of the review could not be delved into. We are strangers to the truth.

[50] The 1st respondent averred that the applicants were discharged pursuant to section 11 (3). The respondents were not relying on section 11 (3), that was

[16] 2002-2004 LAC 116
[17] 1995-1999 LAC 578
[18] 1970-1979 LAC 302
[19] 1985 AC 980

ammunition provided by the respondent. The applicants' ammunition was the principle this court set out in ***Mothobi***. By discharging the applicants pursuant to section 11 (3) the Director General was acknowledging that they were members of the NSS.

[51] In response to Mr. Rasekoai's submission that the minority opinion in *Kirkland Investment* case be adopted, Adv. Teele KC said, "you do not set aside a decision without going to court and the court was unanimous on that point. The decision to appoint the applicants is still valid, but if evidence of invalidity surfaces, then the court must make such a determination. All the averments made by the respondents are insufficient. If the Director General had gone to court he would have taken advantage of the **Plascon rule**.

[52] Some of the applicants were invited for interview, but they declined. The respondents would have been conscious of the contestation of their termination, so the argument went.

[53] In ground 5 and 6, the applicants challenged the legality of the terminations as being non-compliant with section 11(3) and legal notice No 4 of 2000, which sets out the Regulations governing the enquiry, where there is an allegation of a member being a security risk. It is trite law that when a public official's act is not valid then it is null and void. The decisions in ***Swissborough Diamond Mines* V *Ltd HAA***[20]***, Lesotho Hotels International (Pty)* **V Minister of** ***Tourism, Sport and Culture and others***[21]***, 'Maseribane & Others V Kotsokoane***[22], were cited in support. Once the first respondent had acted ultra vires his powers, the decisions he took were null and void and

[20] 2002-2004 LAC 116
[21] 1995-199 LAC 578
[22] 1970-1979 LAC 302

there was no need for the court *a quo* or this court to speculate about matters of National Security as suggested by the respondents. There is in any event no evidence of threat to National security. A court of law will not act on mere say so of a party, that national security is in peril, but will require evidence ***Council of Civil Service Unions & others V Minister for the Civil Service***[23].

[54] In respect of grounds 3 and 4, it was canvassed that once the respondent has acted ultra vires his powers under the statute, it followed that the status quo existed before the action prevailed, because his action was void and could not be accorded any effect.

**ISSUES IN THIS APPEAL**

(i) What is the effect of non-compliance with Rule 50?

(ii) Failure by the court *a quo* to interrogate the merits and demerits by deferring jurisdiction to the Board of Enquiry of.

**THE LAW**

[55] This Court acknowledges from the outset that, every nation has a right to protect itself from those that are or may be bent on its destruction. However, there must be demonstrable evidence that national security will be imperiled or evident intent to imperil national security before the citizen's liberty or livelihood can be deprived. We adopt the dictum of the Zambian Supreme Court decision in ***Joyce Banda v. Attorney General***[24]. The point being made is that the doctrine of judicial deference or judicial restraint, which is a principle of deference to administrative experience and expertise has been recognized in English common law and Roman Dutch law. Sir Thomas

[23] 1985- AC 980
[24] 1978 ZA 101

Bingham MR in a case where homosexuals had been discharged from the navy under the policy of the Ministry of Defense banning such people from the armed force said;

> *"where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations…. While the court must properly defer to the expertise of responsibility decision-makers, it must not shrink from its fundamental duty to do right to all manner of people."*[25]

The tenor of Bingham MR's statement if that under no circumstances, whether the issue before the Judge is policy-laden or national security, should a Judge abdicate jurisdiction.

## CONSIDERATION OF THE APPEAL

[56] In this appeal the law has not been substantially contested. It is the facts that have been significantly contested. Both parties are mutually aggrieved that they were deprived of an opportunity to canvass facts and the law in support of their cases. Mr. Rasekoai combatively attacked the refusal of leave to file a counter-application. Advocate Teele KC, laments the failure by the appellant to comply with Rule 50 by laying before the court the documents governing the termination of the applicants' employment.

[57] In our view non-compliance with Rule 50 in an application under that Rule is fatal. It deprived the respondent to lay before the court as they had desired in camera, an intelligence report. The applicants were deprived of an opportunity to make a meaningful representation to allegations contained in that report. We say without hesitation that this was a mistrial. Matters of

[25] Baeli, British and Irish Legal Information Institute

national security need 'judicial serenity' when handling them. In a Rule 50, application the judge had no option but follow the Rule to the letter.

[58] In ***Abubaker v. Letuka***, where this court deprecated the court *a quo* proceeding said to proceed to make a decision on the merits without affording parties an opportunity to address him on the merits, Smallberger JA said:

> *"The judge a quo proceeded to decide the main application, without affording counsel for the parties an opportunity to address him on the merits of the application. In those circumstances the judgment of the court a quo undoubtedly falls to be set aside."*

[59] It must be realized that Rule 50, is intended to capacitate the respondents/applicants to make a meaningful representation against the allegations levelled against him/her/them. That is not possible without having sight of the papers on which the decision was based nor could the respondents cogently justify their decision without laying such documentation before the court.

[60] There was total failure of the court *a quo* to interrogate the merits and demerits of the application before it. A haste decision was made. This court cannot fathom what was the appellants' case or the respondents' case in the lower court. The court is therefore unable to ascertain the correctness of the decision.

[61] Both respondents and applicants would like us to hold as valid decisions favourable to them until corrected and set aside, the decision to terminate the employment of the applicants and the decision to employ the respondents respectively. We are unable to do so. If we did that we will be fettering the 'decisional independence', of the learned Judge who will determine all issues in this controversy. In our view the Judge should be at large to exercise the

unlimited jurisdiction of the High Court rather than exercising circumscribed jurisdiction by this court, which could fly in the teeth of section 119 (1) of the Constitution.

**DISPOSITION**

[62] The appeal succeeds, the orders of the court *a quo* are set aside and substituted with the following:

(i) The matter is remitted to the High Court for hearing before a different judge;

(ii) There will be no order as to costs.

**DR. P. MUSONDA**
**ACTING JUSTICE OF APPEAL**

I agree**:**

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

I agree

**N.T. MTSHIYA**
**ACTING JUSTICE OF APPEAL**

**For the Appellants**: Mr. Rasekoai

**For the Respondents**: Adv. Teele KC