IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO 30/2019

CIV /APN/101/2018

HELD AT MASERU

In the matter between:

PRINCIPAL SECRETARY MINISTRY OF MINING	**1st APPELLANT**
CHAIRPERSON OF THE DISCIPLINARY HEARING	**2nd APPELLANT**
(Head of Mining Section)	
COMMISSIONER OF MINES MINISTRY OF MINING	**3rd APPELLANT**
MINISTRY OF MINING	**4th APPELLANT**
ATTORNEY GENERAL	**5th APPELLANT**
AND	
NOBENDI GUGUSHE	**RESPONDENT**

CORAM: DR K E MOSITO P

DR.P MUSONDA AJA

T N MTSHIYA AJA

HEARD: 16TH OCTOBER 2020

DELIVERED: 30TH OCTOBER 2020

SUMMARY

Principal Secretary and Commissioner of Mines giving assurance that the Respondent study leave will be approved- Their successors charging the respondent for absenteeism and dismissing her without a hearing- an individual must be heard before a decision which will adversely affect him/her is made.

JUDGMENT

DR. P. MUSONDA AJA:-

[1] This is an application to condone the late noting of an appeal. The respondent opposed the application. However on the date of the hearing, the opposition was withdrawn at the bar so the matter fell to be decided on the merits. The Appellant did not file their heads. Advocate Tlebere insisting that the appeal should be decided on the papers.

The Factual Matrix

[2] The respondent was an employee of the appellant as Senior Government Representative deployed in the Ministry of Mines. She was being supervised by the commissioner of Mines in the Ministry and directly answerable to him as decreed by **Section 45 of Act No 4 of 2005:** She made a formal application for study leave to the Principal Secretary, Ministry of Public service U.F.S Commissioner of Mines and Principal Secretary Mining for a two year study leave in Australia to pursue Environmental Management at Masters level.

[3] The Commissioner of Mines Mr. Mpooa Mpooa strongly recommended the respondent, so did the Mining Engineer Ms P.Q. Tjatja. When she realized in January 2015 that her time for departure was approaching, she approached the Principal Secretary Mining, who called the human resources officers and directed them to follow up on her application. They were not successful. She approached the Principal Secretary and her immediate supervisor who assured her that since they had recommended her they saw no reason why the Ministry of Public Service would reject the application.

[4] The respondent proceeded to Australia before the Ministry of Public Service could formally approve her study leave. The new Principal Secretary in the Ministry of Mines charged her with absenteeism contrary to Public **Service Act section 15 (1) (3)** read with section 3 (1) (g) of the Codes of Civil Practice, which says that a Public Officer shall place his/ her time at the disposal of Government and section 3 (2) (b) of Codes of Good Practice, which says that a Public Officer shall not absent himself or herself from his or her official duties during office hours without leave nor be late for duty without a valid excuse, the validity of which shall be determined by immediate supervisor or Head of Department.

[5] The appellants despite knowing that the respondent was in Australia, were sending letters of invitation to the disciplinary proceedings using her Lesotho address. They then alleged that

several attempts had been made by her Supervisor to locate her so that she can make representation. The Respondent was not heard before dismissal from the Public Service.

Court a quo

[6] In the court below the case fell to be decided on legitimate expectation, as there were positive assurances by the then Principal Secretary of the Ministry and by the then Mining Engineer. The learned Judge held the view that the legitimate expectation was reasonably entertained and it was not for the Mining Principal Secretary Ms Mochaba to treat the applicant as if she had deserted her own department on her own frolic.

[7] The learned Judge went on that after having shuttled to and from the Ministry of Public Service, the decision refusing the application for study leave was mysteriously communicated on 13th January 2015 a day or two after she had boarded a plane to Australia. It was not for Ms Mochaba as a new Principal Secretary to judgmentally disparage the recommendations made by her predecessors, who made those recommendations in their official capacities.

[8] The application in this court was not premised on challenging the decisions of the Ministry of Public Service to refuse her

application for study leave, but is about the legality and propriety of disciplinary proceedings taken against her after her departure to Australia by her Ministry now manned by the new Principal Secretary Mochaba, so the Court a quo reasoned.

[9] Legitimate expectation entertained by the respondent was not a mere illusion but had a factual foundation based on the official assurances made by the sitting Principal Secretary and Mining Engineer. What was clear was that the respondent's departure for Australia was not disrespectful and unlawful, so the learned judge determined.

The Appellant's case

[10] Ms Ntahli Matete, current Principal Secretary of the Ministry of Mining swore the founding affidavit in support of the application.

[11] He averred that advocate Mhlekoa who was handling and representing the appellants during the hearing in the Court a quo had left the Attorney General's Office. There was therefore no one to communicate to the Ministry about the existing Court order and judgment. After the departure of Adv Mhlekoa, there was a delay in the reallocation to the present Advocate, which file was later allocated to Advocate Brown, who also left for Maternity leave shortly thereafter.

[12] The deponent became aware of the court reinstating the respondent order, when the respondent resumed her duties on the 18th march 2019.

[13] On or around 16th day of April, he instructed Advocate Tlebere to go and give instructions to the Office Attorney General Law office to note the appeal. However, Advocate Tlebere was advised by Advocate Moholoki that time to note an appeal from the High Court to the Court of Appeal had expired .They were advised to make an application for condonation for the late filing of the appeal .the delay was not willful.

[14] The appeal had the prospects of success The Court a quo erred and misdirected itself by holding that the respondent went to Australia under the impression that her study leave was impliedly approved by her supervisor and the Principal Secretary, despite the fact that the ministry of Public Service is the one which has the authority and empowered to approve or disapprove the study leave of public officers.

[15] There was misdirection by the Court a quo as it entertained a legitimate expectation based on the officer's assurance by the Principal Secretary and the Mining Engineer. This cannot insulate

her from disciplinary proceedings taken against her by the new Principal Secretary in her absence. The learned judge of the court a quo ruled in favour of the respondent despite the fact that the Principal Secretary and the Mining Engineer are not responsible for approving study leave for public officers and consequently the respondent cannot invoke legitimate expectation.

[16] This Court has dealt with some aspects of the condonation application dealing with merits, in absence of Appellant's heads, which despite Adv. Brown and Adv Tlebere appearing before us and given time to file them, they have failed to do so.

RESPONDENT'S CASE

[17] It was submitted that when the heads of argument by the respondent herein was served and filed the appellants had not yet served and filed the pleadings that have not been incorporated in the record of proceedings. Be as it may the respondent's Counsel was ready to argue the merits of the appeal so as to uphold the principle that there should be finality to litigation.

[18] The respondents attack the constitution of the disciplinary committee as the Chairperson, the Commissioner of Mines Mr. Mohale Ralikariki was the immediate superior of the respondent. Respondent contends that yet he is the very same person who issued

the notice of disciplinary inquiry when he was the Complainant. This was contrary to the Codes of Good Practice Regulation 8(3), which is couched in these terms: The following persons shall attend a disciplinary inquiry:

a. The Public officer's Head of section who shall be the Chairperson;
b. The Public Officer's immediate Supervisor (Complainant);
c. The Public Officer (Defendant)

The hearing could not be said to be fair, so it was argued.

[19] Advocate Setlojoane has cited a plethora of authorities on the right to be heard as denoting fairness. Learned Counsel cited the case of ***Cheall v Association of Professional executive Clerical and Computer staff.***[1] Most importantly he cited this Court's decision in ***Matebesi v The Director of Immigration and Others,***[2] where we said:

> *"The right to be heard is a very important one, rooted in the common law not only in Lesotho, but of many jurisdictions. The Audi principle has ancient origins, moreover traced back to Seneca, Hammurabi and even what have been described as the events in the Garden of Eden. It has traditionally been described as constituting the principle of natural justice, that "stereotyped expression which is used to describe the*

[1] (1983) QB 126
[2] LAC (1995-1999) 616

> *fundamental principles of fairness (see Bechler v Minister of the Interior [1948] (3)SA 409 (A) at 451. More recently this has mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in Ridge v Baldwin [1964]."*

[20] It was argued for the respondent that the appellants were estopped from deriving an advantage of disciplining the respondent after misleading her, Schalk Van Merwe was cited for that proposition, when the learned author said:

> *"in terms of estoppel, someone who has been brought under an incorrect impression (in other words who has been misled) by another and who in reliance on that impression has acted to his detriment may prevent (estop) the other person from relying on the correct state of affairs before a Court of law. If estoppel is raised successfully it has the effect the incorrect impression is maintained as if it were correct. Estoppels thus functions by means of fiction."*

[21] Advocate Setjoloane attached the answering affidavit of Mr. Mochaba as his affidavit amounted to hearsay as he was not working in the Ministry then. He cannot assert the truthfulness of events of which he was not a perception witness. This Court's judgement in ***Nqojane v National University of Lesotho***,[3] was cited for that proposition where it was said:

---

[3] [1994] LSCA 13 (22 January 1994)

> *" in law a witness cannot rely on a statement of a non-witness if such a statement is to be used testimonial, that is, if such a witness intends to rely on the truth of its contents."*

[21] **The issues**

(i) What is the effect of failure to observe the rules of natural justice; and

(ii) Was there Legitimate Expectation.

The Law

[22] This appeal falls to be determined as to whether the, failure by the administrative tribunal to hear the respondent was fatal, and whether the respondent can rely on legitimate expectation whose birth were assurances by the Principal Secretary and Mining Engineer, which are common cause.

Consideration of the Appeal

[23] (30) The Principal Secretary admits the Respondent was not heard. She was denied the audi. A series of Apex Court decisions, which have been distilled in a lexlife passage state;

> "*principal of natural justice in India are referred to as the minimum fair procedure that needs to be followed by administrative authorities*

> *in order to upload the prevalence of law and represents higher procedural principals developed by the courts, which every Judicial quasi-judical and administrative agency must follow while taking any decision adversely affecting the rights of a private individual. The principles of natural Justice safeguard the sanctity of the judicial process. They are laid down majorly by the courts and need to be kept in mind by every Judicial, quasi-judicial and administrative body while carrying out its functions. Natural justice helps maintaining the faith in the rule of law".*

[24] (31) In ***Ridge V Baldwin***,[4] a leading decision in the commonwealth, the House of Lords said;

> *"Whenever a body can affect the right of subjects, there is a duty to act judicially you do not distinguish what is administrative and judicial per Lord Reid"*

At stake in the respondent's case was the deprivation of her livelihood which is a fundamental right.

[25] (32) the landmark case played a major role in permanently incorporating principles of natural justice into administrative law. Before this case, natural justice principles were not applicable as law in administrative decision issues. It was therefore mandatory to have heard the Respondent .The applicants were sending notices to an address in Lesotho, when they very well knew she was in Australia and was coming back at the terminal of her studies. The violation of the audi was fatal.

---

[4] (1964) AC 40

Recently in ***Commissioner of Police and Others v Makamohelo Bereng-Nkongoane and 36 others***[5], we said:

> *"The Commissioner unlawfully decided to cancel the lawful promotion of the 36 Officers and to withhold the salaries they were entitled to, according to the ranks to which they had been promoted. The appeal against the order of the High Court on the basis pleaded and argued must fail."*

[26] The learned judge in the court a quo anchored his decision on the concept of legitimate expectation though he did not go into depth that, I now do so, in order to paint a picture with broad strokes.

Giving of Assurances

[27] In ***Attorney General For Hong Kong v Ng yuen shiu***,[6] the applicant had been an illegal immigrant for some years. He was eventually detained and an order was made for his deportation. The Director of Immigration had made a public undertaking that illegal immigrants like Ng Yuen Shiu, would not be deported without first being interviewed .The assurance was also given that each case would be treated on its merits. Lord Fraser of Tullybetion, in the Privy Council, ruled that there was no general right in an alien to have a hearing in accordance with the rules of natural justice. Nevertheless, a legitimate expectation had been created accordingly the breach of

[5] C of A (CIV) No. 50/2019 [2019] LSCA 51 (01 November 2019)

[6] 1956 AC 736

fairness justified the order for this removal from Hong Kong to be quashed.

[28] Fairness may involve the due consultation of interested parties before their rights are affected. In ***R v Liverpool Corporation ex parte Liverpool Taxi fleet operators Association,***[7]

> *The corporation had given undertakings to the taxi drivers to the effect that their licences would not be revoked without prior consultation. When the corporation acted in breach of this undertaking, the court ruled that it had a duty to comply with its commitment to consultation.*

Acting in a Manner to Create an Expectation

[29] A public body may act in a manager which created an 'expectation' in the mind of a person. In ***R v Secretary of State For health Ex Parte US Tobacco Internation Inc,***[8].

> *"The company had opened a factory in 1985, with a grant for the production of oral snuff. The Government made the grant available notwithstanding its awareness of the health risks. In 1988, however, the Government, having received further advice from a committee, announced its intention to ban snuff. The company sought judicial review relying on 'legitimate expectation' based on the Government action."*

---

[7] (1986) QB 111

[8] 1983 2 AC 629

[30] Legitimate expectation is an assurance from the authority the individual is subjected to. The assurer should be an individual in authority. The Principal Secretary and the Engineer Mining fall in that category.

[31] The philosophy underlying legitimate expectation explained by lord Diplock in the very famous case of ***Council of Civil Service Union v Minister For Civil Service***.[9]

> *The doctrine of legitimate expectation, both in procedural and substantive contexts.* ***Procedural****: The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before a decision is made.* ***Substantive****: The substantive part of the theory is that if a representation has been expressly made that a benefit of a substantive nature will be granted or if any person is already in receipt of any benefit, it will be continued and will not be substantially varied to the disadvantage of the recipient.*

[32] The respondent was advised that the documents would be forwarded to the Minister of Public Service as a formality. The commissioner of Mines had not only recommended respondent to pursue a Masters, but said he had been encouraging her to pursue a Masters. The Mining Engineer also added a vibrant recommendation. They had all made her believe that her going to Australia to pursue a

[9] (1984) UKHL 9

Master's degree was a "matter of course". These were very senior officials to whom she was subjected to.

Conclusion

[33] The substantive appeal has not been prosecuted robustly as no heads were filed, Advocate Tlebere suggested that the appeal be decided on the papers and Advocate Setlojoane consented. There was violation of the rules of natural justice which is anchored on procedural fairness. The concept of legitimate expectation has become part of modern administrative law jurisprudence. The philosophy underlying it is consistency, integrity and predictability in running government affairs. The violation of any of the two is fatal and the decision arrived has to be quashed.

[34] I make the following **Order:**

The appeal is dismissed with costs.

DR. P. MUSONDA

ACTING JUDGE OF APPEAL

I agree

DR. K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree

T N MTSHIYA

ACTING JUDGE OF APPEAL

FOR THE APPELLANT: ADV T TLEBERE

FOR THE RESPONDENT: ADV. SETJLOANE