IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 78/2019
CIV/APN/119/2017
CIV/APN/127/2017

HELD AT MASERU

In the matter between

MINISTER OF TRADE AND INDUSTRY	1ST APPELLANT
THE ATTORNEY GENERAL	2ND APPELLANT
LESOTHO NATIONAL DEVELOPMENT CORPORATION	3RD APPELLANT
ACTING CHIEF EXECUTIVE OFFICER -LNDC	4TH APPELLANT

and

LESOTHO NATIONAL DEVELOPMENT CORPORATION BOARD OF DIRECTORS	1ST RESPONDENT
LEBAKENG TIGELI	2ND RESPONDENT
MAKHETHA THAELE	3RD RESPONDENT
MAMPHO TJABANE	4TH RESPONDENT
LEHLOHONOLO CHEFA	5TH RESPONDENT
NTSIUOA JAAS	6TH RESPONDENT
LEFULESELE LEBESA	7TH RESPONDENT
MOSITO NTEMA	8TH RESPONDENT

CORAM : DAMASEB AJA
MUSONDA AJA
CHINHENGO AJA

HEARD: 16 OCTOBER 2020
DELIVERED: 30 OCTOBER 2020

Summary

Minister forming opinion directors of state enterprise unable or unfit to discharge function of office of director – Minister requiring directors to show cause why should not be relived of duties as directors – such directors making representations; Minister relieving directors of appointment thereafter;

High Court setting aside Minister's decision on grounds Minister not entitled to form opinion before hearing directors and audi alteram partem rule not observed;

On appeal, held directors given opportunity to be heard – Minister entitled to, and has to, form opinion before requiring directors to show cause; further, in terms of s 8(7) of Lesotho National Development Act 1967, director ceases to hold office upon Minister forming opinion director is unable or unfit to hold office and instructing director to vacate office;

Approach to consolidation of cases and to joinder of parties discussed

JUDGMENT

CHINHENGO AJA :-

Introduction

1. Lesotho National Development Corporation ("LNDC") is a statutory corporation established by the Lesotho National Development Corporation Act 1967. It is run by a Board of Directors whose members are appointed by the Minister of Trade and Industry ("the Minister"). The members of the Board, 2nd – 8th respondents herein ("the directors"), were relieved of their duties as directors by the Minister before the end of their three- year term. The directors took the Minister on review to the High Court and Minister's decision was reversed by his Lordship PEETE J. This is an appeal from that decision.

2. The sequence of events leading to the decision of the High Court is not entirely clear largely due to the failure of counsel to set out the facts in simple terms and to place before us the full record of proceedings. There are two records of proceedings that relate to this appeal - the record in Case No. CIV/APN/119/2017 and the record in Case No. CIV/APN/127/2017. Unfortunately, these records are not before us and it is difficult to clearly understand the facts underpinning this appeal. What we have is an application on notice of motion for "Joinder and Consolidation of CIV/APN/119/2017 & CIV/APN/127/2017 Reinstatement of Dismissed Directors of LNDC", in which the respondents, as applicants before the High Court, sought an order for the reinstatement of the directors to the Board pending the finalisation of the application; a declaration that the removal of the members of the Board was "null and void"; an order joining the 5th to 8th respondents as parties to "this matter"; an order consolidating CIV/APN/119/2017 and CIV/APN/127/2017, and costs in the event of opposition. By "this matter" the respondents must have been referring to the consolidated matter. This way of handling the consolidation of two cases and the joinder of parties gave rise to at least two of the grounds of appeal, where the appellant complained that the respondents consolidated the two cases and joined the other respondents without the leave of court.

3. The proper way of dealing with consolidation of cases and joinder of parties is to ensure that the record of each case

stands on its own and, until the court orders a consolidation upon application, the two cases must remain separate and distinct. In relation to joinder of parties, the application therefor must also stand on its own until the court orders joinder. What the respondents did in relation to consolidation of cases and joinder of parties created a thoroughly scrambled egg which has become very difficult to unscramble.

Grounds of appeal

4. Before setting out the facts as I have endeavoured to understand them, it is well worth setting out the grounds of appeal first. These are –

> "1. The court erred in not deciding whether the specific prayers in the notice of motion of each application was granted or refused, but instead rather making a global order.
>
> 2. The notice of motion in CIV/APN/119/2017 sought various interdicts in respect of diverse matters which had to be proved, and the court erred in not addressing whether each of those prayers were proved, and had the court *a quo* determined each prayer separately, as it had to, it would have found that all the prayers ought to have been dismissed.

3. Prayer (3) in the notice of motion in CIV/APN/119/2017 sought a declarator, which was not proved.

4. The court *a quo* erred and misdirected itself in not finding that the prayers in the notice of motion in CIV/APN/119/2017 were moot.

5. The notice of motion in CIV/APN/119/2017 sought in prayers 2(a) and (b) interdicts directed at the possible new appointments of replacement board members and the court erred in not finding that when it made its decision the prayers were moot as it was common cause that the new board members had been appointed.

6. The court erred in finding that the first appellant did not act lawfully when he terminated the membership of the respondents as board members.

7. The court erred and misdirected itself in holding that the letter of the first appellant is capable of being construed as prejudging the complaints that the first appellant levelled against the respondents.

8. The court erred in finding that the letter of the first appellant was a pre-judgment especially regard being had to the fact that there is direct authority of the Court

of Appeal to the contrary, in the matter of Econet Telecom Lesotho v Rasekila.

9. The court *a quo* erred and misdirected itself in finding that the applications had any merit and should have dismissed the same with costs."

Whether CIV/APN/119/2017 and CIV/APN/127/2017 were consolidated

5. The two matters sought to be consolidated in the High Court are not before this Court. As is readily discernible, the challenges made to the decision of the learned judge would require some perusal of the record in those cases. The appellants complain that the judge failed to decide whether each of the specific prayers in the two applications was granted or refused; whereas the notice of motion in CIV/APN/119/2017 sought various interdicts that had to be proved, the court failed to decide whether the granting of each of those interdicts was proved; prayer 3 in CIV/APN/119/2017 sought an interdict and the court did not decide whether it was proved or not; the prayers in CIV/APN/119/2017 were moot and yet the court failed to find accordingly; prayers 2(a) and (b) of the notice of motion sought to stop the appointment of new directors of LNDC and yet the court failed to decide that they were moot in light of the fact that new board members had already been

appointed; and finally, the court erred in failing to find that the two applications had no merit.

6. Despite their multiplicity, the grounds of appeal, revolve around one issue only. It is whether the court *a quo* was correct in the finding it made. There is created the impression that the appeal is against the decisions in CIV/APN/119/2017 and CIV/APN/127/2017, when in fact the appeal simpliciter must be against the decision in the matter that was before the court. Counsel for the appellants appears to have abandoned pursuit of most, if not all, the grounds of appeal except one. It is necessary therefore to be clear what case was before the High Court, what relief was sought in that case and what decision the learned judge made in the case before him.

7. Case No. CIV/APN/119/2017 was instituted by the Board of directors, *qua* board, seeking certain reliefs against the Minister. While the pleadings in that case were being filed, the Minister dismissed 2nd, 3rd and 4th respondents from the Board. The three directors then instituted proceedings in Case No. CIV/APN/127/2017 challenging their dismissal. The Minister reinstated the three directors upon realising, whether rightly or wrongly, that he had dismissed them un-procedurally. Thereafter he sent letters to all the directors requiring them to show cause why all of them should not be dismissed for violating their fiduciary duties as directors. After the directors responded to the show cause letters the

Minister relieved them all of their duties as directors. It was after this that the respondents applied for the consolidation of the two cases already pending before the High Court, Case No. CIV/APN/119/2017 and Case No. CIV/APN/127/2017 and sought to join in the proceedings those directors who were not yet parties to the proceedings.

8. From the chronology set out above, it becomes clear that the learned judge was called upon to decide the issue of the consolidation of the two cases and the joinder of the other directors, 5th to 8th respondents. Only after deciding on these two issues in favour of the respondents was the learned judge to consider the merits of the case before him. On 29 May 2017 the learned judge delivered an *ex tempore* ruling in which, without sufficient clarity, he said that he had considered –

> "(1) That under the common law, there exists a rebuttable presumption of "legality of official action" – expressed in Latin as "*omnia praesumuntur rite esse acta*" – it is assumed that an official of the state exercises powers vested in him according to law.
>
> (2) That *in casu* the Minister purportedly exercised his powers under section 8(7)(b) of the Act and it was for the applicant to show that in exercising those powers the Minister had either acted *ultra vires* or violated principles of natural justice.

(3) Granting reinstatement would in effect render the dismissals *non scripto (sic)*.

(4) It has not been disputed that under the law, the Board of Directors of LNDC sits four times a year or quarterly. Their non-reinstatement would in no way prejudice materially the day-to-day management of LNDC. On the other hand, an expeditious and final determination of the impugned legality of the dismissals would perhaps serve the interests of justice than granting a reinstatement which would last until only till the day of final judgment on the legality of the dismissals.

The issues of consolidation and joinder all revolve now upon the legality of the dismissals of the 7 directors by the Minister.

For the reasons stated above the following order is made:-

Order: Prayer I is granted.

Prayer 2(a) is refused."

9. The learned judge's order above shows that by granting prayer 1 he allowed the matter to proceed as an urgent application, and by refusing to grant prayer 2(a), he

determined that the respondents remained relieved of their directorships.

10. It is significant to note that the learned judge, as I have observed above, accepted that the real issue before him was the legality of the Minister's decision relieving the respondents of their directorships. However, the learned judge's conclusion regarding the issues of consolidation and joinder, to wit, that they revolve upon the legality of the dismissals does not tell us whether he, in fact, ordered the consolidation and joinder or he did not. It seems to me that his thought process was that the decision on the merits would dispose of the need to consider those issues separately. In consequence of this, it seems to me that on 3 August 2018 he heard the matter on the merits without hearing further argument on, or deciding, the issues of consolidation and joinder. He delivered his his judgment on the merits more than a year later, on 22 October 2019. In his judgment he did not address the two issues of consolidation and joinder but took them as already granted. See the caption after the judge listed the cases he relied on where he notes –

> "[By agreement between counsel Teele KC and Advocate Maseko, CIV/APN/119/2017 and Case No. CIV/APN/127/2017 were consolidated because the fundamental relief was common."]

and paragraph [7] where he states:

"The main legal issue **in this consolidated application** is the manner and circumstances the Minister of Trade and Industry exercised his powers to dismiss the directors of the board under section 8(7)(b) of the LNDC Act…."

11. A generous interpretation of his approach is that he allowed the consolidation and the joinder applications and proceeded to hear and determine the substantive issue – whether the Minister's decision to relieve the respondents of their duties was correct. It is also reasonable to assume that the learned judge decided in favour of the respondents on the two issues, otherwise there was no way in which he could have proceeded to deal with the matter on the merits. His order also shows that he allowed the consolidation and the joinder. It reads:

"(1) The purported termination of the appointments of each and all the applicants by the then Minister are set aside.

(2) Costs to the applicants **in this Consolidated Applications** (sic)."

12. Counsel for the appellants conveniently labelled the substantive motion that served before the judge as a "combined reference CIV/APN/119/2017 and

CIV/APN/127/2017". I will refer to it simply as "the combined application". The combined application simplified matters for the judge in the sense that he had, as he saw it, to address only the "impugned legality of the dismissals," hence his singular order setting aside the Minister's decision. It seems that the respondents had also adopted the same approach which was consonant with their substantive prayer in the notice of motion- that "the decision of the 1st respondent [Minister] to dismiss the applicants … be declared null and void".

Further background facts

13. After the Minister reinstated the first three directors who he had earlier relieved of their duties, he sent, on or about 3 April 2017, a show cause letter to each of the seven directors, which reads:

> "Dear Board Member,
>
> Re: Request for representations and reasons why you should not be removed from the Directorship of the LNDC
>
> The above matter refers.
>
> I the Minister of Trade and Industry have formed the opinion that you are unfit to hold office of Director

within the Lesotho National Development Corporation (LNDC). You have in the execution of your duties abrogated your fiduciary duty as a member of the said Board in that on or about the 23rd of March 2017 you signed or were part of a resolution that amongst others undermined my authority as the minister and also committed an act of corruption in terms of section 28(1) read with section 34 of the Prevention of Corruption and Economic Offenses Act 1999.

The relevant part of the said resolution is paragraph 2 with the heading and couched as thus:

> 2.2 payment of Director's Retainer Fees "The Board resolved to approve payment of the retainer due to Board Members as calculated in December 2016."

This is despite the fact that you were aware that I as the Minister responsible had declined payment of the same for reasons disclosed to the Board.

This is also despite the fact that you were directly conflicted but failed to disclose such conflict but otherwise dismissed the Chairman from the meeting with the pretext that she was conflicted in the matter.

You are therefore given a period of five working days within which to make representations and to give

reasons why your appointment as LNDC Board Director shall not be terminated.

Your Sincerely

Senator Joshua P Setipa
Minister of Trade and industry."

14. On receipt of the show cause letters the directors responded along the lines of annexure LC 16 dated 25 April 2017, being a response by Lebakeng Tigeli, then a non-executive director. LC16 encapsulates the essence of each of their responses. The gravamen of the response is in the second and third paragraphs where it is stated:

> "It is with deep regret that I am forced to advance representation why I should not be removed … in light of the opinion that the Honourable Minister has already formed regarding my perceived lack of fitness to hold office as director. It is regrettable that the Honourable Minister has already formed such an opinion without having followed the due administrative process of the law in respect of the *audi alteram partem* rule and the request for representations itself follows on an earlier termination of my appointment through a letter from your good office … dated 24 March 2017.

If there was any doubt in my mind that the Honourable Minister had not as yet formed such opinion … and made up his mind to remove me… such doubt was erased by your termination letter dated 24 March 2017."

15. Having made the main point, that they were not afforded the right to be heard before the Minister formed his opinion, the response letter then deals with the accusations in the show cause letter. Suffice it to state that the directors disputed the allegations levelled against them by the Minister.

16. The issue raised in the responses and with which the court *a quo* was seized is captured very well at paragraph 7 of the appellants' heads of argument:

"In spite of the comments that may have been made obiter by the court *a quo* in its judgment, it is clear that the *ratio* of the court *a quo* is that the Minister issued a letter after he had formed an opinion, when he invited the respondents to make representations why the appointments may not be terminated, meant that he had prejudged the issue and therefore the dismissal is vitiated on that account."

17. The respondents' confirms the above submission in heads of argument at paragraph 2.8:

"What is surprising with these requests [to make representations] was that the Minister had written in clear terms that he had already formed an opinion that the Board members were no longer fit and proper to hold the positions of Board Members at LNDC. This happened despite the fact that these matters were *sub-judice* as they were still pending in this Honourable Court."

18. And at paragraph 4.4:

"It is important to note that when the Minister said that he had formed an opinion, that this was before he could hear the applicants and he had actually already decided to dismiss them from office of Director."

19. Respondents' counsel then makes the point, at paragraph 2.10, that the directors submitted their representations, but they were dismissed nonetheless, without being given a hearing. He goes on to identify the issues for decision by this Court as being-

"3.1 Whether the Court *a quo* was correct in setting aside the Minister's purported termination of each member of the Board.

3.2 Whether the Court a quo was correct to hold that indeed the Minister was micro-managing the

corporation contrary to the principles of good governance."

20. It seems to me that these issues, as identified by respondents' counsel, are at variance with what the appellants' counsel considers to be the issue or issues for decision by this Court. The latter submitted that the basis of the learned judge's decision is that, by forming an opinion before hearing the respondents, the Minister had, *ipso facto*, decided against the directors and the show cause letters were merely a cover up for a decision he had already taken: no amount of persuasion was going to induce him to change his opinion. The nature of the representations by the directors was no longer of any consequence. Appellants' counsel did not pursue the other grounds of appeal either in his heads of argument or in his oral submission to the Court.

21. The learned judge stated in his judgment that the main legal issue before him was the manner or circumstances in which the Minister exercised his powers under s 8(7)(b) of the Lesotho National Development Corporation Act to the effect that a director shall vacate his office if, in the opinion of the Minister, he is unable or unfit to discharge the functions of a director. This provision, to my mind, requires the formation of an opinion by the Minister, as a jurisdictional fact, to trigger the process of vacation of office by a director. The language of the provision is intended to ensure that a director, who the Minister considers to be unable or unfit,

shall vacate office upon being instructed by him (Minister) to do so. Properly construed I do not think that the way this provision is framed creates any room for contestation over the opinion of the Minister or how he came to form it and whether or not he has given the persons concerned an opportunity to be heard. It is merely the formation of the opinion by the Minister that the person concerned is unable or unfit to discharge the functions of a director and his instruction that a director vacates office, which is critical. This, to me, is not unreasonable. A director is not in the same position as an employee of the organisation of which he is director. His appointment and his removal by the shareholder must be a much easier task than the removal of an employee. Accordingly, only two things are required to get a director off the Board of LNDC– the opinion of the Minister that he is "unable or unfit" and the Minister's instruction that he must vacate that office. The idea, I hazard to say, was to avoid prolonged contestation or litigation over the removal of a director, such as has happened in this case.

22. It is necessary to quote the relevant provision of the Act in order to illustrate the point I make here. Subsections 8(4), (7) and (8) are the relevant subsections and they provide as follows:

> "(4) A Director appointed under subsection (3) holds office for 3 years from the date of his appointment

unless he sooner resigns, or his appointment is terminated by the Minister under subsection (7).

(7) A Director appointed under subsection (3) **shall vacate** his office of Director –

(a) if he, or the person nominated by him in terms of subsection (12) has been absent from three consecutive meetings of the Board without the permission of the chairman; or

(b) **if he is, in the opinion of the Minister, unable or unfit to discharge the functions of a director, and the Director has been instructed in writing by the Minister to vacate that office;** or

(c) if he no longer has links with the Ministry or entity which he represents.

(8) If a Director appointed in terms of subsection (3) has been instructed to vacate office under subsection (7) or if a director has resigned his office under subsection (6), the office of that Director **is vacant** and the Minister **shall** by notice in the Gazette, fill that office by a new appointment in accordance with subsection (3). A person appointed under this subsection holds office for

the unexpired portion of the term of office of the former Director to whose office he has been appointed."

23. The legislative intention in enacting the above provisions was clearly to oust the *audi* rule in the particular circumstances of the LNDC directors. Quite obviously subsection (7) (a) and (7)(c) do not require a right to be heard; the vacancy is a consequence of indisputable extant facts. The same interpretation must be given to subsection (7)(b) because it is one of three prerequisites for a director to vacate office on the mere occurrence of the event specified. If any of the events in subsection (7) occur, that is, a director is absent from three consecutive meetings without the permission of the chairman or, in the opinion of the Minister a director is unable and unfit to discharge his function and the Minister has instructed him to vacate or, he no longer has links with the Ministry or entity which he represents, then he **shall** vacate office by reason of any of these jurisdictional facts. Subsection (8) then follows to provide that if a director has been instructed to vacate office or has resigned "**the office of that Director is vacant**" and the Minister **shall** fill that office by a new appointment.

24. In interpreting legislation, the golden rule is to give effect to the true intention of the legislature, even where doing so might seem to be unfair. The critical consideration is whether the intention of the legislature has been clearly and unambiguously expressed. In my view, under the terms of s

8(7), once the event occurs, the office falls vacant and needs no intercession for it to be treated as vacant.

25. The reasoning of the learned judge appears at paragraph [15] – [32] of the judgment. He correctly states that the crux of the matter is whether the dismissal of the directors was valid at law. In dealing with this pertinent issue he refers to correspondence emanating from the Minister's office and satisfies himself that the Minister excessively interfered with the day-to-day running of LNDC and was "committed to micromanaging" it, with the result that the relations between the Minister and the Board, soured. He expresses the view that whilst the Minister has power under s 8(7) of the Act to terminate the appointment of directors, he exercised them arbitrarily. Specifically, at paragraph [16], he says:

> "For the Minister to form an opinion this must not be done arbitrarily, maliciously and without a cogent reason. Public power – especially where its exercise affects the rights of other people, must be exercised with full responsibility. In the Lesotho's constitutional dispensation, fair treatment and the rule of law are all essential in public affairs. Board members cannot be just dismissed at a stroke of a pen. He or she must be afforded an opportunity to know what transgression, he or she has committed to call for dismissal and his or her response thereto."

26. The learned judge found that the Minister had earlier "summarily and curtly" dismissed some of the directors only to reverse the dismissals. He could not have abandoned the opinion that he had formed when he soon thereafter dismissed the entire Board. At paragraph [22] *ff*, the learned judge says:

> "[22] There is no evidence that prior to the formation of opinion any of the members of the Board were afforded any opportunity to make any representations to respond to the serious allegations of insubordination (*tello*) antagonism, of arrogance to the Minister and defiance to obey his instructions. Since he had already formed an opinion upon which he justified the termination of their appointments, his later withdrawal of dismissal indeed confirmed his ill-advisedness but also that the show cause letters were but cosmetic certainly made after he had decided to dismiss them *en bloc*. It is difficult to cloak them with any legality or fair play. In my view, the power under section 8(7)(b) was abused and the Board was subjected to unfair treatment. It is not necessary to detail the individual allegations of transgressions or what is alleged in the founding affidavit of Mr. Tigeli.

[23] The internecine friction between the Minister and the board is well demonstrated by acrimonious correspondence exchanged….

[25] Mr Chefa, a Board member, catalogues a series of acts [in] which he describes instances of interference or high-handedness on the part of the Minister of Trade and Industry – and that the Minister was intending to micro-manage (as he puts it) the Corporation.

[26] It need no fine expertise in corporate law to understand that a parastatal corporation as *in casu* needs to function as a separate legal entity from government (its creator) and it needs corporate autonomy (in fact it outlives the Government). It is clear that micro-management by Government Minister was *per se* clearly antithetical to its parastatal corporate autonomy affirmed by section 4 of the LNDC (Amendment) Act No. 7 of 2000. Otherwise the LNDC would perpetually become an extended department of the Ministry of Trade and Industry!

[28] it is not necessary to test each act alleged by Board members against the Minister except to clearly state that the Minister's summary decision to terminate the appointment of the Board of Directors does not pass the muster of legality. It is hereby declared null and void. Gone are the days when Ministerial powers are absolute

and untrammelled. Today if such powers still prevail, they all [have] to be interpreted very restrictively subject to the principles of natural justice and the Court of appeal has gone to the extent that unless the *audi* principle is expressly excluded in the statutes, the courts will assume that it operates.

[29] In the conflict climate that existed between the Minister and the Board, the exercise of power to suspend and finally to dismiss the directors was totally ill-advised, misfired and is *ulta vires* and unlawful."

27. At paragraph [30] the learned judge considered the submission by counsel for the appellants, Mr *Teele*,

"that the law vesting ministerial power was very clear and unambiguous and vouchsafed no formal hearing and that the court could not alter this statutory position."

28. He rejected the submission saying:

"The court takes cognisance of the era [in] which the first LNDC Act was passed… this ministerial power has become fossilised into the corporate structure of LNDC. In [post] 1993 era, … Parliament of Lesotho has valiantly passed laws that recognise natural justice *audi* principle."

29. I think the learned judge was unjustifiably dismissive of Mr. *Teele*'s submission to the effect that s 8(7) was clear and unambiguous and that directors could be dismissed without affording them a hearing. In the particular circumstances of this case, the Minister sent a show cause letter detailing his misgivings about the conduct of the members, thereby affording them an opportunity to make representations, which they did. The allegations that he made against the directors could, conceivably, have been established by an investigation. The allegations that the directors made against the Minister could also have been the subject of investigation. Both had the potential for material disputes of fact to emerge, as submitted by Mr *Teele*. That, however, is not the scheme under s 8(7) of the Act. All that is required is for the Minister to act on the opinion he has formed provided he instructs the directors concerned to vacate office.

30. Counsel for the respondent submitted at length on the *audi alteram partem* rule and the legal necessity to apply it. He referred to a number of authorities in that regard. I find his submissions in that regard irrelevant to the issue before the court, which was determinable on an interpretation of s 8 (7) of the Act.

31. A further contention by the respondents is that the Minister was not entitled to form an opinion before he authored the show cause letters. I do not understand how

any administrative authority can proceed without forming an opinion first and then putting to the target officials his opinion. In my view the step taken by the Minister of forming an opinion first, and then writing a letter for the directors to make representations, was the right way to go, if not the only way. If he had no opinion, on what basis then would he have written the show cause letters to the directors. I am satisfied that, having regard to the clear provisions of s 8(7) of the Act the Minister's actions are vindicated.

32. I think that two issues were unnecessarily confounded in this case. Each of the parties had issues against the other. On the part of the Minister he set them out in the show cause letters in some detail so as to show the basis upon which he formed the opinion that the directors were unfit to discharge their functions. Strictly speaking, his allegations had nothing directly to do with whether he himself excessively interfered with the day-to-day running of the LNDC. Even if he had done so, the directors could not thereby have been exonerated from accounting for their own misdemeanours as laid out by the Minister. It was a rather long shot to rely on as yet unproved allegations of excessive interference by the Minister to found the accusation that he acted arbitrarily and maliciously. This case, if anything, illustrates the vulnerability of an appointment to the LNDC Board until such time as the legislation has been amended to accommodate a resort to the *audi* rule. In any event the show cause letters, and the directors' responses would, in my view, satisfy the

requirements of the rule. In this connection it must be recognised that the Minister is not invariably supposed to change his opinion upon receiving representations. There is no evidence that he did not consider the representations and confirmed his opinion that the directors were unfit to discharge their functions.

33. The appellants submitted that the judge committed the same error that was committed in *Rasekila v Telecom Lesotho (Pty) Ltd* C of A (CIV) No. 41/17. In that case Mtshiya AJA, referred to *Matekane Mining and Investment (Pty) Ltd,* C of A (CIV) 52 of 2013 in which this Court said:

> "13. A hearing thus means an opportunity to be heard. There are no requirements as to how such opportunity is to be structured or when it should be afforded. Plainly, the words do not mean "at the time of dismissal", literally, on dismissal or even immediately before dismissal. As the Labour Appeal Court points out, a hearing could be afforded even before the declaration of an ultimatum.
>
> 14. The law's overriding requirement is that dismissal must be procedurally fair, *cf* Commander of the *LDF v Mokoena* LC 2000-2004 at 545A-F. Assessment whether due fairness was observed in any case depends of the facts and the circumstances of that case. The norm is for the employer to afford the employees to state their

reasons opposing dismissal. However, as s 66(4) shows there may be circumstances where it would not be reasonable to expect the grant of that opportunity.

15.Where the circumstances allow for the opportunity for the employees to be heard, the question is whether in fact the opportunity was given"

34. *Rasekila* was essentially an employment matter and not one dealing with members of a Board of Directors governed by statute, whose situation, I think, should be viewed in a different light. It however makes the point that the giving of an opportunity to be heard is not constricted by hard and fast rules. The essential requirement is that the person concerned should be able to make his representations. In the case before us, the directors were given ample scope to make representations. They did so at length in their written responses. The fact that they failed to convince the Minister to change his opinion is another matter. On all material fronts, in my view, due process was followed, in particular, the Minister acted in accordance with s 8(7) of the LNDC Act. I am also satisfied that the learned judge *a quo* was wrong in basing his decision on a finding that the Minister should not have formed an opinion that the directors were unable or unfit to discharge their functions before writing the no cause letter; in finding that the calling for representations was "cosmetic", and in concluding that the directors were not

afforded an opportunity to be heard. He wrong in his interpretation of s 8(7) of the LNDC Act.

35. For the above reasons, the appeal must fail. Accordingly,

1. The appeal is dismissed with costs.

2. The order of the court *a quo* is set aside, and the following order is substituted-

> "The application in CIV/APN/119/2017 and in CIV/APN/127/2017 as consolidated is dismissed with costs."

MH CHINHENGO

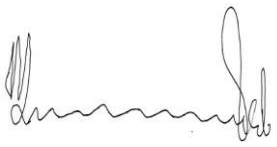
ACTING JUSTICE OF APPEAL

I agree:

PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree:



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P MUSONDA

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT:	ADV: M. TEELE KC
FOR THE RESPONDENT:	ADV: N.B MASEKO