

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C of A (CIV) 49/2022
CIV/APN/232/2021**

In the matter between –

PRINCIPAL SECRETARY, MINISTRY

**OF MINING
APPELLANT**

1st

**MINISTRY OF MINING
APPELLANT**

2nd

**CHAIRPERSON OF THE DISCIPLINARY INQUIRY
(MINING SECTION)
APPELLANT**

3rd

MINING ENGINEER

**(MS BOITHATELO MOTHOLO)
APPELLANT**

4th

**ATTORNEY GENERAL
APPELLANT**

5th

And

NOBENDI GUGUSHE

RESPONDENT

CORAM: KE MOSITO P
J VAN DER WESTHUIZEN AJA
NT MTSHIYA AJA

HEARD: 17 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

In terms of section 39(1) of the Public Service Regulations, 2008, the respondent resigned lawfully, with immediate effect, from the public service by submitting a letter of resignation, indicating that her salary for one month should be retained in lieu of the notice period of one month, which she did not serve out. The waiving of her salary met the requirement in the provision for payment in cash. Disciplinary proceedings against her, which commenced after the resignation, are unlawful and invalid.

JUDGMENT

J VAN DER WESTHUIZEN AJA:

Introduction

[1] This appeal against a judgment of the High Court deals with the question whether the respondent, Ms Nobendi Gugushe, lawfully resigned from the service of the second appellant, the Ministry of Mining. Depending on the outcome of that enquiry, the questions whether disciplinary proceedings against her were lawfully instituted may have to be addressed.

Factual background

[2] The respondent was employed as a public officer in the Ministry since 2009. On 11 May 2021 she was served with a “show cause letter” based on her alleged absenteeism from work since March 2021. This was said to contravene section

3(2)(b) of the Code of Good Practice of 2005. She was given until 14 May 2021 to respond.

[3] On 17 May 2021 the respondent requested “further particulars” to enable her to respond. A day after she had responded, she received a letter, titled “Stoppage of Salary”. It indicated that her salary was going to be terminated with effect from 24 June 2021. The salary was indeed stopped.

[4] Following the receipt of the “stoppage” letter, the respondent submitted a letter stating that she resigned with immediate effect, from 21 May 2021. In the resignation letter she stated that she tendered her salary of one month, *in lieu* of the required one month notice period. Her letter was served on the Ministry.

[5] In a letter of 1 June 2021 the first appellant before this Court, the Principal Secretary of the Ministry, informed Ms Gugushe that her resignation was not accepted, because the resignation letter did not comply with the requirements for a valid resignation, contained in section 39(1) and (6) of the Public Service Regulations of 2008. Section 39(1) states that an officer may resign by “*giving notice of one calendar month, or paying an amount in cash in lieu of notice, which shall be the equivalent to his or her gross salary*”.

[6] Subsection (6) states that *“where an officer who has been charged with breach of discipline resigns from the public service before the charge has been dealt with to finality in accordance with the ... Disciplinary Code, the disciplinary proceedings on the charge of discipline shall continue against him or her notwithstanding the officer’s resignation”*.

[7] On 25 June 2021 the respondent was served with a letter inviting her to a disciplinary hearing scheduled to take place on 8 July 2021. She then approached the High Court.

The High Court

[8] As the applicant in the High Court, the respondent approached that court on the basis of urgency, with what was essentially an application to review the disciplinary proceedings that had been instituted against her. As interim relief, pending the finalization of the application for review, she pleaded for the first and second respondents to be restrained and interdicted from conducting any disciplinary hearing or inquiry; the fourth respondent to be restrained and interdicted from proceeding with the disciplinary process; and the first respondent to be ordered to dispatch the record of proceedings that had resulted in the decision to hold a disciplinary hearing and his rejection of her resignation from the public service. The interim relief sought, was granted.

[9] As to the review, the High Court identified two questions. The first was whether the appellants (the respondents before that court) had the right to refuse the resignation. The second is whether the Ministry's decision to hold disciplinary proceedings after Ms Gugushe's resignation is lawful.

[10] The High Court interrogated the legal nature and effect of a resignation. It is, amongst other things, a unilateral and final act, which must be clear and unequivocal. An employer neither has to accept it, nor may refuse it. Once given to an employee, the right to resign cannot be withdrawn without the employee's consent. The refusal to accept a resignation could amount to a form of indentured labour. Section 9 of the Constitution of Lesotho expressly forbids forced labour. The High Court referred to case law, such as *Kragga Kamma Estate CC and Another v Flanagan* 1995(2) SA 376 (A); *SALSTAFF obo Bezuidenhout v Metrorail* (2001) 9 BALR; *Selloane Mahamo v NedBank Lesotho Ltd* LAC/CIV 04/20 and several other cases.

[11] As to disciplinary proceedings and the rejection of a letter of resignation the High Court referred to *Morongoe Nketsi v Principal Secretary, Ministry of Finance and Others* CIV/APN/70/2016, where - on review - the rejection of a resignation letter and the continuation of a disciplinary hearing were held to be wrong.

[12] The High Court pointed out that the respondent in this case was invited for a disciplinary hearing more than 30 days after her resignation. The court found the rejection of her resignation to be unfair. The judge was not persuaded by the argument that her resignation letter did not comply with section 39(1) because she did not pay hard cash *in lieu* of one month's notice.

[13] The application in the High Court succeeded, with costs. The refusal of the resignation was declared unlawful and of no legal force. The disciplinary proceedings were reviewed and set aside.

This Court

[14] In this Court the respondent supported the judgment of the High Court

[15] The arguments on behalf of the appellants resembled those presented in the High Court. The core contention is that the respondent's resignation was rightfully rejected, because she did not give the required notice of one month, or, in lieu thereof, pay "an amount in cash" equivalent to one month's salary, as demanded by section 39(1).

[16] The appellants submit that the amount was not paid in cash. Counsel argued that she merely tendered payment. In response to questions from the Bench, counsel conceded that the words “in cash” does not require hard cash as in banknotes being handed from one party to another. Indeed, such a requirement would be bizarre in today’s world. Counsel argued that an electronic bank transfer would suffice.

[17] This artificial argument is wholly unconvincing. The respondent did not tender or make an offer that had to be accepted first. Translated into plain language, she said: “Keep the money you would have to pay me as a salary for my notice month”. Arguably, this is an even more direct “cash payment” than an electronic transfer from one bank account to another. The money is already in the possession of the Ministry. All they have to do, is to keep it. The cash payment requirement in section 39(1) would make sense if it is interpreted to mean that someone should not be allowed to resign without the month notice and then pay the amount owed off in instalments over a period. The respondent’s resignation was unlawfully refused.

[18] Section 39(6) does not apply. The respondent had not been charged with any disciplinary transgression before she resigned. The invitation to a disciplinary process came long after the valid resignation. The unconvincing argument presented by counsel for the appellants that the proceedings commenced during the notice period is based on the

assumption that she did not pay in cash and was thus still in the public service, to which counsel attempted to attach a rather strange way of calculating “one calendar month”.

Conclusion

[19] The High Court’s judgment and order by Monapathi J cannot be faulted. The appeal has to be dismissed. Costs should follow.

Order

[20] In view of the above, the appeal is dismissed with costs.



**J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

I agree:



**KE MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree:



NT MTSHIYA
ACTING JUSTICE OF APPEAL

For Appellants: Adv M Moshoeshoe

For Respondent: Adv LR Malefane