LESOTHO

IN THE COURT OF APPEAL OF LESOTHO HELD AT MASERU

C OF A (CIV) 36 OF 2023

CIV/1/129/2024

In the matter between:

PALAMANG MATLOTLO **APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

CORAM: DAMASEB AJA
MUSONDA AJA
VAN DER WESTHUIZEN AJA

HEARD: 18 APRIL 2024

DELIVERED: 3 MAY 2024

SUMMARY

Administrative law - Review of decision- dismissing the appellant from the public service based on conviction of theft Section 15(6) read with section 15[11] of the Public Service Act of 2005- Contention by appellant that Section

15(11) violates the Constitution and the Code of Good Practice 2008 which advocates for a fair hearing. *Appeal destitute of merit.*

JUDGMENT

MUSONDA AJA

Introduction

[1] The appellant, a senior driver employed by the government of Lesotho and attached to the office of the Attorney General, was dismissed from his employment on 29 June 2009. He initiated legal action in the court below to contest his dismissal, arguing that he was not given the opportunity to present his case before being terminated. He sought reinstatement or payment of M3446.00 as monthly salary from July 2009 onwards, with adjustments for increments up to the date of judgment.

[2] The defendant strongly disputes this allegation, arguing that the Public Service Commission is not legally required to provide a hearing to an officer who has been terminated due to a criminal conviction.

Background

[3] The appellant, a 56-year-old man, had a distinguished career as a senior driver at the Attorney General's Office, earning a monthly salary of M3,446.00. He was charged for theft and convicted by the Local Court

on his own admission. However, he was charged by his superior and asked to show cause why he should not be dismissed due to his conviction. This was on December 11th 2008.

[4] On that very day, the appellant responded admitting the charge of theft. He regretted his action. He asked for mercy, due to the illness of his wife which prevented her from working and stressed his social burden of providing for his two school-going children.

[5] The Ministry of Law and Constitutional Affairs promptly responded on 11th December 2008, stating that there were no grounds to stop the disciplinary action contemplated under **section 15(11)** of **the Public Service Act, of 2005 (the Act)**.

[6] The appellant clearly stated in a letter dated 9 February 2009 that he had thoroughly researched and investigated the subject matter at hand and firmly believed that he was unfairly charged and convicted without the approval of the Director of Public Prosecutions. Due to these circumstances, he felt that he should still be considered a public servant and requested the management to review the decision.

[7] The Ministry of Law and Constitutional Affairs (the Ministry) wrote a letter on 15th February 2009 responding to the appellant's claims of 9th February 2009. In their

response, they reiterated that they were going to abide by the provisions outlined in **section 15 [11] of the Act.** Furthermore, they emphasized that it is irrelevant whether the appellant committed the offense during the course of employment or not. According to the Act, any public officer who has been convicted of a criminal offense by a competent court is subject to summary dismissal.

[8] Based on the correspondence provided to it by the Ministry, the Public Service Commission (the PSC) made the decision on 17th June 2009 to dismiss the appellant. Subsequently, on 29th June 2009, the Ministry officially notified the appellant about the termination of his employment, in accordance with **Section 15 (11) of the Act**.

The Applicant's case in the court a quo

[9] The appellant had contended in the court a quo that the PSC unjustly denied him procedural justice and hearing, asserting that the dismissal was unlawful due to a violation of his fundamental rights. Additionally, he, through his legal representative argued that sending correspondence to the appellant by the Ministry via Mr. Kolane, did not constitute a hearing, as the authority to dismiss lies solely with the PSC. According to the appellant, in terms of **section 6 of the Act**, such powers cannot be transferred to lower-ranking officials.

[10] The appellant further argued that based on the Code of Good Practice [**Legal Notice Number 194 of 2008**] commission of a criminal offense amounts to misconduct, and for that reason, he ought to have been subjected to a disciplinary action prescribed in the disciplinary code prior to his dismissal. Appellant's counsel, Adv Ntlhoki KC submitted that the conviction by the Local Court coupled with dismissal amount to double jeopardy.

The Respondent's case in the court a quo

[11] The respondent argued that the Appellant's dismissal was lawful as they followed the required procedural justice throughout the process. The law governing public service order does not mandate a hearing by the PSC under section 15(11) of the Act, which, on the contrary, allows for summary dismissal. Therefore, the Plaintiff is not entitled to reinstatement or payment. The Respondent relied on the cases ***Malebohang Neko v Ministry of Public Works And Transport And 3 Others***[1]***, Selebalo v Commission of Police and Another***[2] and ***Principal-Secretary Ministry Of Mining v. Gugushe***[3] for the proposition that if a dismissal of a public servant was procedurally fair, the question of reinstatement does not arise.

1 CIV/APN/143/2020 {2021} LSHC

2 (2021) LSHC 15

3 C of A (civ) 30 |19(2020) LSCA 33 (30 October 2020)

The High Court

[12] The court below was of the opinion that the primary question to be answered was whether the Plaintiff's dismissal was lawful. Intrinsically connected to the lawfulness of the dismissal were a triad of sub issues, which are: [a] whether the disciplinary procedure outlined in the code of good practice ought to be employed subsequent to a conviction by

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the criminal court, [b] whether the appellant was denied a hearing by the PSC before his dismissal and (c) whether the plaintiff was subjected to double jeopardy.

[13] The learned trial Judge opined that the answers to these questions lied in the provision of the **Act**, regulating the conduct of public officers, the grounds for dismissal and the procedure to be followed when dismissing an officer from the public service.

The Powers of Dismissal

[14] The trial judge held that in terms of **section 6 of the Public Service Act 2005**, the power to dismiss public officers is vested in the Public Service Commission. It reads:

> *"subject to the provisions of the Constitution, the power to appoint persons to hold or act in offices in the public service [including the power to confirm appointment] and the power to terminate appointment of such officers for disciplinary*

reasons is vested in the commission."

[15] The learned judge added that this section was amended by **Public Service [Amendment) Act No.7 of 2005**. The amendment inserted **Section 6A**, which reads as follows:

> "*6A [1] The power to discipline public officers is vested in the management and is to be exercised in accordance with the procedure set out in the discipline code made under section 15.*
>
> *(2) notwithstanding subsection (1) the power to terminate appointment of public officers for disciplinary reasons is vested in the Head of Department and is to be exercised in accordance with procedure set out in the discipline code made under section 15."*

[16] The word "management" is defined in **section 2** of the Act, to mean the head of department, head of section, or any other public officer, responsible for organizing, controlling, planning, directing and monitoring the work of others.

The Procedure for Dismissal

[17] According to the learned trial judge section 15 [1] of the Act empowers the minister of public service, after consultation with such persons or bodies, who are in his position, representatives of the interested, concerned to: —

(a) Prepare and issue codes of practice for the purpose of providing practical guidance in respect of this Act, including the following code:

i). Code of conduct, which shall be primarily a guide to public officers in the conduct of their relationship, and dealing with their employers and the general public;

ii) Disciplinary code which shall prescribe the procedure to be followed in instituting disciplinary action against a public officer, who has committed a misconduct.

[18] The learned judge reasoned that the breach by a public officer of **section 15(6) of the Act,** renders the public officer, liable to proceedings and sanctions, as set out in the code of good practice.

[19] Furthermore, the learned trial judge went on to define what disciplinary action means in terms of **section 2** of the Act. *Section 2* to provide:

"In this code, disciplinary action means a formal or informal action taken by management of public officer, who fails to conform with the rules and regulations governing public offices and has committed misconduct."

[20] The Learned judge relied on **section 15(11)** of **the Act of 2005**, which provides that notwithstanding **section 6** of the Act:

> *"an officer who has been convicted with a criminal offense, shall be Summarily dismissed from the public service on the basis of that conviction."*

To augment this proposition the learned Judge relied on the case of ***Solicitor General v Mocasi***[4] where this court had to decide whether an inquiry in terms of **rule 5** is condition precedent in the dismissal of an officer.

[21] To answer this question the court below was of the view that where dismissal of an officer is based on the conviction of a criminal offense the words 'notwithstanding in **section 15(11)** means that the holding of an inquiry in the disciplinary code is not a condition precedent to the dismissal of such an officer.

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[22] Furthermore, the court below, directed its mind to plethora of case law on the right to be heard. Inter alia, the learned trial judge relied on this Court's decision in ***Matebesi v Director of Immigration and Others***,[5] where this Court interpreted section **6(3)** of the **Act**, which is couched in these terms:

> *6(3) If an officer has contravened the provision of this part [part 2] which include section 5[10] in respect of absence from his office, or from his official duties he may without delivery to him, a formal charge or* ***any***

4 LAC (1995-99) 616

5 LAC (1995-99) 616

other proceeding, prescribed in these rules*, be removed from office by way of dismissal, or other termination of appointment.*

[23] The learned judge also referred to the cases of ***Commander of Lesotho Defense force and others v Pakiso Paul Mokoena and others***[6] and the case of ***Chobakoane v Judicial Service commission***[7] where the appellant was dismissed from the magistracy by the Judicial Service Commission following his conviction of assault, with intent to cause grievous bodily harm. An argument was raised that in exercising its discretion to dismiss him, the Commission failed to follow the correct procedure. The court in that case stated at page 866 that:

> *"In this context, it should be born in mind that rule 29[1] [a] provides that where the officer has been convicted of a criminal offense the disciplinary*
>
> *proceedings set out in the judicial service commission rules are not required to be instituted."*

[24] The learned judge, based on these authorities, came to a conclusion that **section 15 (11)**, means that the disciplinary action and procedure outlined in the disciplinary code need not to be employed where the officer has been convicted of a criminal offense. A formal charge need not be delivered, nor the procedure prescribed in the disciplinary code be followed. To augment this position, the judge added that despite the

6 LAC [2002 to 2004], 593

7 LAC (2000-04) 860

limitation permitted in the rules the plaintiff was invited to make representation per letter dated 11th December 2008. The exchange of correspondence clearly demonstrates procedural fairness of the dismissal process.

[25] Lastly, the judge addressed her mind to the reliance on double jeopardy. The Judge relied on the case of ***Commander, LDF and Others v. Ramokoena and Others***[8] where this Court stated that this doctrine of criminal law as embodied in **section 12 (5)** of the Constitution of Lesotho of 1993 essentially dictates that no person who has been tried by a competent court for a criminal offense and either convicted or acquitted shall be tried again for the same offense or for any other criminal offense which he could have been tried, or convicted for a trial in the first offense.

[26] The court a quo dismissed the application as there was no procedural injustice.

[27] Aggrieved by the decision of the court a quo, the appellant filed ten grounds of appeal. They include the alleged failure by the PSC to give a hearing to the appellant; that the dismissal after conviction amounted to double jeopardy and the unconstitutionality of section

8 LAC (2005-06) 320

15(11). These are the issues that the written the Heads of argument and oral submissions speak to.

[28] It needs to be placed on record that although the appellant had sought an order that the appeal be struck from the roll because of the respondent's failure to have satisfied a costs order obtained below, Advocate Ntlhoki informed the court that the parties had agreed on the settlement of outstanding costs and condonation. They wanted to delve into the substance of the appeal.

The Appellant's case on appeal.

[29] The nub of the appeal is that the court a quo misdirected itself by coming to a conclusion that the appellant was given a hearing by the repository of power, namely the PSC before dismissing him from the public service. He argued that this was not so. To buttress this proposition, Advocate Ntlhoki argued that a right to hearing (*audi* rule) is a fundamental right which has its origin in the Bible. In Lesotho it is embedded in section 12 of the Constitution, therefore the appellant ought to be have been heard.

He further argued that the Act conflicts with "the codes of good practice Notice No.194 of 2008, which provides for a right of hearing.

[30] It was the appellant's case that the correspondence shared between the parties does not constitute a hearing, in this regard he relied on the cases of ***Commander of Lesotho Defence force & others v Momenta & others***[9]***, Matebesi v Director of immigration & others*** [10] ***, Commander of Lesotho defence force & others v Rantuba & others***[11]***, Sopeng & Others v Minister of Interior & others***[12] and the South African case of ***South Africa Road Board v Johannesburg city Council***[13] to buttress his argument.

Respondent's case on appeal.

[31] Advocate for the Respondent Mr Thakalekoala argued that the court a quo was on firm ground when it dismissed the appellant's case pursuant to **section 15(11) of the Act.** He argued that the section does not provide for a right of hearing because the said provision provides for summary dismissal. Counsel cited the cases of ***Moleboheng Neko v***

Ministry of Public Works and Transport and 3 Others[14] and ***Selebalo v Commissioner of Police and Another***[15] and ***Principal Secretary Ministry Of Mining v Gugushe***[16] and concluded that the applicant is not entitled to reinstatement or payment of the money

9 (2000-04) p.539 et seq

10 LAC (1995-99) 616

11 LAC 1995-99

12 LAC (1990-94) 507, also reported in (1991-96) LLR14(CA)

13 1991(4) SA 1 (A)

claimed. He however, graciously said in case the appeal is dismissed he will not insist on costs.

Issues

[32] The issue that falls for determination is whether the Appellant was denied a hearing. Connected to this is the question whether the constitutionality of section 15(11) of Act 2005 is properly before us.

The Law

[33] Section 15 (11) of the Act 2005 is couched in these terms:

> *Notwithstanding subsection 6, a public officer who has been convicted of a criminal offence shall be summarily dismissed from the public service on the basis of that conviction.*

The section uses the phrase, *"shall be summarily dismissed"*.

The provision is mandatory. In ***Matebesi V the Director of Immigration and others***[13] Gauntlett JA stated that:

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[14] CIV/143/2020 LSAC [15] (2021) LSHC 15 [16] Cof A (CIV) 30/19 (2020) LSCA 33, 30 October 2020

"The right of audi is however infinitely flexible. It may be expressly or implied ousted by the statute or greatly reduced in its operation [blom, supra at page 662 H-J], and Baxter, administrative law [1984] 567-590] thus; in

13 LAC (1995-99) 616

appropriate instances fairness may require only the submission and consideration of written representation. The right to be heard is not necessarily need to be equated with an entitlement of judicial type proceedings with full attributes or while a statute may not per se exclude the operation of the law, it may confer an administrative discretion which permits that result or the operation of the rule may be ousted or attenuated by a particular set of facts where it cannot practically be implemented at all or to it's fullest extent respectively."[the underlined is for my emphasis]

[34] Coming to an issue of whether section 15 [11] limits the right to be heard where an officer has been convicted with a criminal offense, this court's decision in the case of ***Chobokaene v Judicial service commission****, supra* provides guidance.

[35] This holding in my view is supportive of respondent's submission. That there was no procedural injustice. The conviction, the basis of his dismissal, was after a trial, where a fair hearing was conducted. This was not a run-of-the-mill disciplinary case there was a conviction based on a voluntary confession, which confession was repeated to the Head of department.

Consideration of the appeal

[36] Given all the circumstances of the case could it be said that the Applicant was not accorded a hearing? I don't think so. The applicant was given an

opportunity to show cause why the authority he was subjected to should not dismiss him based on his conviction. The Applicant in his final letter of 2009 was remorseful. He implored the authority to show mercy. This court acknowledges that without procedural justice the disciplinary process would be stripped of its substance.

[37] Advocate Ntlhoki mounted a challenge to

constitutionality of section 15(11) of the Public Service Act. According to him it flies in the teeth of section 12 of the Constitution which provides for a fair trial. This Court has no jurisdiction to determine, the constitutionality of an Act, of parliament. In terms of section 22 of the Constitution, that jurisdiction is reposed in the High Court. In any event, it was not raised in the High Court.

[38] It was strenuously argued for the appellant that a conviction in the criminal trial and the administrative disciplinary proceedings exposed the appellant to double jeopardy. The argument is destitute of legal authority. The United States Supreme Court, in ***Benton v Maryland***[18] said:

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[18] 395 U.S. 784 1969

The right against double jeopardy precludes only subsequent criminal proceedings. It does

> *not preclude subsequent civil proceedings. Courts have distinguished between criminal proceedings and civil or administrative proceedings. The distinction is based on each proceeding's different purposes. Because civil, administrative, and criminal proceedings serve different objectives. Criminal proceedings are punitive in nature such cases involve alleged violations of criminal law. Their purpose is to deter future criminal acts and to enact justice for the crimes. Civil and administrative proceedings are remedial. Their primary purpose is to right wrongs rather to deter.*

There was no reindictment in this case so as to offend double jeopardy or simply put he was not being prosecuted twice for the same offence.

[39] The basis for the appellant's dismissal is a statutory provision. The appellant's superiors, the PSC and the court a quo relied on section 15(11), which is cast in mandatory terms.

[40] It couldn't be said the appellant was denied *audi*, when he pleaded guilty before the trial Court, which convicted him upon his own confession, and he pleaded guilty to his superiors. This appeal is destitute of merit.

Disposal

(i) Appeal is dismissed

(ii) There is no order as to costs

_____ MUSONDA AJA ACTING JUSTICE OF APPEAL

I agree

_____ PT DAMASEB ACTING JUSTICE OF APPEAL

I agree

_____ VAN DER WESTHUIZEN ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: MR. M. NTLHOKI KC **FOR THE RESPONDENT:** ADV. PTBN THAKALEKOALA