CIV/APN/381/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

MR MASUPHA SOLE — **Applicant**

and

THE HONOURABLE MRS DR K.D. RADITAPOLE N.O.
(in her capacity as Minister of Natural Resources) — **1st Respondent**

MR L.B. MOKOTOANE N.O.
(in his capacity as Chairman of the Disciplinary Sub-Committee of the LHDA) — **2nd Respondent**

ATTORNEY GENERAL N.O.
(in his capacity as Representative of the Minister of Natural Resources - Water, Lesotho Highlands Water Project, Energy, Mining, Technology and Environment) — **3rd Respondent**

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY — **4th Respondent**

THE DISCIPLINARY SUB-COMMITTEE OF THE LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY — **5th Respondent**

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 30th day of October, 1996.

This is an application for an order in the following terms:

(a) That the findings and report of the 5th Respondent, as represented by the 2nd Respondent, furnished on the 3rd day of October 1995, and the subsequent decision of the 1st Respondent, dated the 18th day of October 1995, to dismiss the Applicant from the office of Chief Executive of the 4th Respondent, be and is hereby reviewed and set aside in terms of Rule 50 (1) (b);

(b) That the 2nd and 5th Respondents are called upon to dispatch, within 14 (fourteen) days of receipt hereof, to the Registrar of this Court, the Record of the proceedings of the LHDA Sub-Committee Disciplinary Hearing, relating to the Applicant.

(c) That the costs of the Application be awarded against the 1st and 4th Respondents, jointly and severally, the one paying the other to be absolved;

(d) Further and/or alternative relief.

In his founding affidavit the applicant alleges that the second and fifth respondents failed to conduct the disciplinary proceedings in a fair and just manner and in so doing, breached the **audi alteram partem** rule and were grossly unreasonable in the conduct of the proceedings, resulting in a biased and subjective finding upon which the first respondent could not have arrived at a fair and just decision.

It is common cause that the applicant was called upon to face no less than twenty-three charges covering a period from approximately 1988 up until November, 1994, when he was sent on long leave pending an investigations in his alleged wrongful actions.

The disciplinary sub-committee sat for no less than twenty days, excluding the day on which submissions were advanced on behalf of the parties at the conclusion of the hearing. The record of proceedings before the committee, including the documentary exhibits, runs to some 3340 pages.

I do not agree that paragraph 4.2 of the Personnel

Regulations of the 4th Respondent deals with a case in which the Chief Executive is involved in a misconduct which leads to a disciplinary action against him. It deals with disciplinary cases against junior officers and sets out in great detail what the Chief Executive should do. The Personnel Regulations of the fourth respondent never contemplated a situation where the Chief Executive himself was involved in a misconduct requiring the institution of disciplinary action.

The applicant goes on to say that the first respondent saw fit to proceed against him, represented by a firm of attorneys, with both senior and junior counsel, notwithstanding the provisions of the Personnel Regulations.

I have already stated above that the provisions of Regulation 4 were not applicable to the present case.

He says that the very nature and extent of the charges, evidence and exhibits and the duration of the enquiry, coupled with the involvement of a very expensive and experienced team of lawyers is in itself grossly unreasonable and has led to an unfair and unjust hearing, during which the rules of natural justice were not observed. What eventually transpired must be seen against the background of what the first respondent and subsequently the fifth respondent initially intended, namely that he was called upon to attend a meeting of a sub-committee of the Board of the fourth respondent to answer certain charges and that it was placed on record that he would be entitled to

representation.

For the sake of convenience the letter which invited him to the hearing of the said irregularities is reproduced hereunder.

"NR/4/1

Ministry of Natural Resources,
P.O. Box 772,
MASERU

29 Maarch, 1995.

Mr. Masupha Sole
Chief Executive
Lesotho Highlands Development Authority
P.O. Box 7332
MASERU 100

Dear Mr. Sole,

You are hereby called upon to attend a meeting of sub-committee of the Board of the Lesotho Highlands Development Authority, chaired by Mr. B.T. Pekeche on Tuesday 18th day of April 1995 to answer the charges set out in the annexure hereto relating to breaches of your contract of employment and the LHDA Regulations.

The procedure to be followed by sub-committee shall be decided by its chairman. However, you will be entitled to representation, should you deem this to be necessary.

The chairman of the sub-committee is instructed to make findings in relation to the charges made against you which are to be submitted to me. You will be entitled to make any written representations in respect of those findings to me. Once I have had an opportunity to consider the charges, any record of the sub-committee's meeting, the sub-committee's findings and your representations I shall make a decision in respect of your position as Chief Executive of the LHDA.

Yours sincerely,

L.A. Motete
ACTING MINISTER
MINISTRY OF NATURAL RESOURCES.

It seems to me that the above letter made it quite clear that the applicant would be entitled to legal representation. There was never any suggestion that such legal representation would be paid for by the first respondent. The applicant was entitled to legal representation of his own choice at his own expense That is what happened at the commencement of the enquiry. He was represented by counsel and an attorney of his own choice. **Mr. Fischer** appeared for him having been instructed by Messrs Harley and Morris.

When the enquiry proceedings commenced the parties agreed that lawyers were going to be involved in the conduct of the proceedings. It was agreed that the proceedings were going to be formal. I wish to quote at length what **Mr Penzhorn** said regarding the procedural aspect of the enquiry. At pages 431-433 of the enquiry record he said:

> "There is obviously documentation upon which our witnesses are going to rely and obviously in order for Mr Sole to be properly represented my learned friend Mr Fischer is entitled to look at the documents and to properly present his case and cross examine the witnesses, some of the witnesses are most substantially in the sense that they will be testifying to the lot of documents. Some of the witnesses obviously will simply give factual evidence but truly

the extent that the witnesses will rely on documentation we will make every effort to facilitate Mr Fischer properly presenting his case. It is correct as Mr Harley has said a moment ago that we have indicated that we wish to start by calling an accountant who is present, Mr Davey in regard to his evidence. The substantial documentation which he is going to refer to, no this documentation obviously is all or substantially LHDA documentation so it will not be something that will be completely new, but having said that, obviously my learned friend Mr Fischer is entitled to look at the documentation and in order to cross examine the witness, what we have indicated, as Mr Harley has said, is that we will make the documentation available when Mr Harley said today I understand some of the documentation is in Johannesburg and therefore will be available tomorrow morning that will be couriered down from Johannesburg so when we say today let me just qualify and say either today or tomorrow but we will make it available and but Mr Davey what we propose doing apart from this witness is to the extent that witnesses will be relying on documents we

will make those documents available to my learned friend Mr Fischer in order for him to properly present his case and in that sense he will obviously be entitled to whatever time he reasonably needs to present his case properly and Mr Fischer will no doubt not take unnecessary time to get on the matter has been indicated already. Mr. Chairman, with regard to actual proceeding on Monday what we propose doing is to conduct the matter although some might know in formal manner in the way one conducts a normal trial; what we propose doing subject to your agreeing to this is to call the witnesses, I will call the witnesses I will question them and lead the evidence in chief as is normally done in the trial after which Mr Fischer will have the opportunity to cross examine the witnesses after which I will be entitled to re-examine the witnesses and obviously through out all these you Mr Chairman or any members of the committee sitting with you are entitled to ask the witnesses questions. We propose that the witnesses testify under oath and we propose then handing in the documents as formal exhibits in regard to the documentation. We have had a discussion with our opponents as

to the proof of documents, you know in a normal trial situation you can't detain in document, you have to prove that, that document is what that document on the fact of it is supposed to be; in order to facilitate mattes we have agreed with our opponents that what we will do is the following: - We will let them have the documents in advance and to the extent that they claim or allege that those documents are not what they purport to be they will let us know and then we will have to formally prove documents; in other words let us say we are relying on a Lease Agreement and the lease agreement is in a bundle of documents; if we don't hear from our opponents we will assume and we will ask the committee to assume that these documents are what they are; let us say lease agreement between the LHDA and Mr Sole, we just say a claim form submitted by Mr Sole or one of his drivers or whatever the case may be. If however we are told that it is disputed that the documents is what is purported to be then of course it will come upon us to bring evidence and prove, but we will assume that if we are not told that we needn't do that and that it is accepted that those documents

are what they are."

It was agreed by the parties that the intention was not to prosecute the applicant. It was agreed that the proceedings were that of an in- house inquiry and not a criminal trial. However, it was agreed that evidence as is usually done in a trial - witnesses would be led by the respondent's counsel and they would be cross-examined by the applicant's counsel. It is clear to me that although these proceedings were regarded as an in- house inquiry the procedure was going to be virtually the same as in a formal trial.

The applicant cannot be heard to say that he was taken by surprise when the procedure which was agreed upon by both parties was followed to the letter. The hearing started on the 15th May, 1995 and everybody, including the applicant, seemed to be happy with the procedure which was mutually agreed upon before the hearing started. It was only on the 23rd May, 1995 when the applicant started complaining about the involvement of lawyers in what he calls an in -house inquiry or a talk between an employer and an employee. Part of his letter of the 23rd May, 1995 reads as follows:

> "While I appreciate that you re now giving me an opportunity for a hearing, I am, however, deeply concerned with the involvement of a large and high-powered legal representation which will, no doubt,

be too costly for both parties. I hasten to add that the hearing is not a continuation of the pending court case, but is a separate and different issue.

On the 16th May, 1995, I telephoned you to request that, since this is an internal administrative hearing, the lawyers should be withdrawn. As a matter of fact, the LHDA's Personnel Regulations do not provide for the involvement of external parties in such a hearing. May I, therefore, confirm my request that the lawyers on both sides be withdrawn from this hearing.

As Chief Executive of the LHDA, I am greatly concerned that public (GOL or LHDA) funds are being used in an open-ended manner to engage a large and high-powered team of private sector lawyers. This action puts me under pressure and compels me to use personal finances to employ an equivalent team of lawyers to represent me. With the engagement of five lawyers and given the rate of progress thus far, I estimate that by the time this matter is concluded, in about two to three months over M 800,000.00 would have been expended by both sides on

legal fees. Certainly, I feel that such a high cost is unjustified. May I bring to your attention that the LHDA is 100% financed from public funds.

Honourable, I am willing and perfectly happy, as it serves my interest to clear my name, to reply to the allegations before the LHDA Board Sub-Committee which I feel is adequate and suitably qualified.

With respect, I must inform you that I cannot continue with the next seating of the hearing, which is scheduled to resume on the 30th May, 1995, under the present arrangement which includes lawyers, unless the GOL or LHDA undertakes to meet my legal costs as well. I, therefore, kindly request an urgent meeting, before the next seating, to resolve the issues that I have raised."

(See Annexure "O" to the founding affidavit).

The applicant voluntarily decided to withdraw from the sitting of the sub-committee unless the GOL or LHDA undertook to meet his legal costs as well. This ultimatum was rather belated because an agreement was reached before the hearing started that

lawyers would be involved. In fact they were actually involved and the applicant was represented by Mr. Fischer. The GOL and LHDA were under no obligation to meet the legal costs of the applicant. They were the very people who were suing the applicant and could not be expected to meet his legal costs.

In paragraph 8.3. of his founding affidavit the applicant avers:

> "Broadly, I believe that the Disciplinary Hearing against me was manifestly unjust and that the basic principles of natural justice which are enshrined in the labour Code Order of 1992 and indeed the Common Law of this country, have been denied in the proceedings due to the manner under which they were conducted, namely:-
>
> (a) with charges being levied against me and the disciplinary proceedings being conducted like an ordinary trial, see page 9 of the Record on the 10th day of May 1995;
>
> (b) that I have been unable to address the Disciplinary Committee on the charges directly;
>
> (c) my employer, through the Disciplinary Committee, has refused to hear me directly;

(d) I have been forced to participate in the Disciplinary Hearing under protest as and when I have been able to afford legal representation, on an ad hoc basis;

(f) the evidence in-chief of all the witnesses led by the Minister was uncontested as no finances existed to cross examine such witnesses through the services of my legal representatives;

(g) I have therefore been denied the right to be heard either through legal representation which should have been provided to me by the 1st and 4th Respondents and consequently, I have not been heard to my inability to finance a defence;

(h) alternatively and in addition, I have not been in a position to put my side of the story to the Minister because his Disciplinary Committee has not been prepared to hear me directly in the absence of the Minister's lawyers, present at the hearing;

(i) I therefore submit that I have not been given the benefit of a Disciplinary Hearing and consequently, I have not been heard and

> the legal principle of **audi alterem partem** has not been maintained in these proceedings."

It is true that the inquiry was conducted like a trial. There was no other way in which it could be conducted. Disciplinary proceedings are usually conducted like a trial because first of all charges are laid against the respondent and he is expected to plead to them. At the end of the inquiry the person accused of misconduct is usually found guilty or not guilty. These words are normally used in criminal trial. I do not understand what the applicant means when he says that he wanted to speak to his employer directly during the inquiry. His employer was not a witness and had no personal knowledge of what the applicant was alleged to have done. Witnesses were called to prove what the applicant had done and those are the people to whom he could talk through cross-examination.

The applicant alleges that he was unable to address the Disciplinary Committee on the charges directly. This allegation is altogether incorrect. He went into the witness box and gave his version under oath. He was thereafter cross-examined by **Mr. Penzhorn** very extensively. It is not true that he was not given a chance to be heard. He was given a chance to cross-examine witnesses but failed to take that opportunity on the ground that he was financially hamstrung. I shall deal with applicant's financial position at a later stage in this judgment because it does not seem to be true that he was in serious financial

difficulties.

In his submissions **Mr. Fischer,** counsel for the applicant, submitted that an appeal usually involves the re-hearing of a matter on the merits thereof and the only question to be decided is whether the decision arrived at by the presiding officer was either wrong or right. (See **National Union of Textile Workers v. Textile Workers' Industrial Union (S.A.) and others** 1988 (1) S.A. 925). He further submitted that on the other hand a review involves a somewhat limited rehearing and the question here is essentially whether the procedure adopted was formally correct or not. While an appeal is directed at the result of the trial, a review in essence is in fact aimed at the method by which such result was eventually obtained (See **Primich v. Additional Magistrate Johannesburg** 1967 (3) S.A. 661(T).

He submitted further that the Court of Review will intervene where:

(a) there was an excess of power;

(b) bad faith;

(c) a breach of **audi alteram partem** rule; and

(d) gross unreasonableness.

(**Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd.** 1988(3) S.A. 132).

I agree with the above submissions as being the correct statement of the law. **Mr. Fischer** went on to say that "the fifth

respondent, and accordingly for all intents and purposes fourth and first respondents as well, were **de facto** represented by a firm of attorneys as well as both senior and junior counsel. The applicant was at all material times represented by both an attorney and junior counsel. I do not agree with **Mr. Fischer** that the fifth respondent was represented by a firm of attorneys as well as both senior and junior counsel. The fifth respondent is a disciplinary sub-committee of the third respondent and the second respondent was its chairman. In other words, it is a tribunal appointed by the first respondent to make the enquiry. It was not represented by an attorney or counsel in the matter because it was the tribunal that had to decide the matter. It is unfair to accuse the fifth and second respondent was its chairman. In other words, it is a tribunal appointed by the first respondent to make the enquiry. It was not represented by any attorney or counsel in the matter because it was the tribunal that had to decide the matter. It is unfair to accuse the fifth and second respondents of having been parties to the dispute. They needed no legal representation. It is like saying that an arbitrator in a matter was represented by one of the counsel representing one of the litigants.

To say that the fifth respondent, as chaired by the second respondent was nothing more than an extension of fourth respondent acting on the instructions of first respondent, is not a true statement. The second respondent was not a Principal Secretary in the Ministry of Natural Resources. He was Principal Secretary in a different ministry. The accusation is unfounded.

It is true that the second respondent's predecessor placed on record that the enquiry "must not be turned into a kind of inquisition and that the enquiry should in fact be conducted along the lines of an in- house discussion of issues." I regret to say that his understanding of the instructions of the Minister of Natural Resources was wrong. In his letter of the 28th November, 1994 addressed to the applicant the Honourable Minister used two words, namely, "an enquiry" and "investigations". Again in the letter of interdiction of the applicant dated the 28th February, 1995 he used the words: "a detailed investigation". (See annexures "C" and "D" to the founding affidavit).

It will be necessary to look at the meaning of "investigation" and "inquiry" in the Shorter Oxford English Dictionary. Investigation is defined as "the action of investigating; search; inquiry; systematic examination; minute and careful research." Inquiry is defined as "the action of seeking for truth, knowledge, or information concerning something; search, research, investigation, examination; the action of asking or questioning; interrogation."

In my experience as a judicial officer since 1975 I have had a number of commissions of inquiry involving very senior officers in the civil service and parastatals. The procedure is always the same. The employer leads the evidence to show what the employee is alleged to have done. The latter is given the opportunity to cross-examine the employer's witnesses either

personally or through his counsel. After the close of the employer's case the employee may give evidence and lead his own witnesses.

The above procedure is the standard procedure followed in almost all the enquiries and investigations I have come across. The so-called in- house inquiry has no special procedure which is different from the above.

Legal representation in any quasi-judicial proceedings is a right which cannot be denied any person who appears before any court or tribunal unless the law establishing the court or tribunal provides that legal representation is prohibited. A typical example of a law which prohibits legal representation in civil proceedings is section 20 of the Central and Local Courts Proclamation No.62 of 1938. The respondents were entitled to a legal representative of their own choice. The applicant was also entitled to legal representative of his own choice. That is what happened at the commencement of the proceedings before the fifth respondent chaired by the second respondent.

As the proceedings went on the applicant started to raise the question of legal costs and suggested or requested that the hearing be conducted on more informal basis. He suggested that legal representatives by both parties be withdrawn because he could no longer afford to pay his legal representatives. This application was refused by the fifth respondent and the hearing continued until the applicant withdrew his counsel from the

proceedings and indicated that he (counsel) would appear on what I may call **ad hoc** basis. He indicated that his counsel would come back to lead the defence case. He (applicant) also withdrew from the proceedings. The respondents' legal team made an undertaking that despite the withdrawal of the applicant and his counsel they would transcribe the evidence recorded in the absence of the applicant's counsel and send the record to him punctually so that he could be ready to conduct their defence as soon as the respondents closed their case. The respondents' legal team kept their promise and supplied **Mr. Fischer** with the record.

Mr. Fischer submitted that there is nothing to suggest whatsoever that any due consideration was given to the fundamental rights of applicant which had earlier been recognised by respondents, namely that he was entitled to a fair hearing, a just opportunity to state his case and legal representation of his own choice. He submitted that the only inference that can be drawn here is that the fifth and second respondents were acting grossly unreasonably and in fact breaching the **audi alteram partem** rule. He submitted further that it is imperative for this Court not to lose sight of the fact that the hearing was being conducted like a trial and that the applicant would only be afforded an opportunity to state his case once all the evidence on behalf of the fourth respondent had been led against him. It is against this background that applicant saw fit to employ his funds to present his own case rather than to spend such cross-examining numerous witnesses. He submitted that it

is without foundation to suggest that under the circumstances applicant forfeited his rights to cross-examine.

I have considered the evidence and have found no excess of power. The second and fifth respondents exercised their discretion judicially and in accordance with terms of their reference or what the first respondent expected them to do. There was no evidence of bad faith on their part. They were not unreasonable in any manner whatsoever, nor did they breach the **audi alteram partem** rule. It seems to me that it was the applicant who was most unreasonable. There was no reason why he decided to withdraw from the hearing even if he had run out of funds to retain his counsel. He ought to have appeared personally to show his interest in the matter. He could easily cross-examine the witnesses because he is a very brilliant person judging him by what he said in his defence. It was a wrong decision not only to withdraw from the hearing but also not to cross-examine witnesses. He ought to have spent whatever resources/funds he had to pay his counsel for the proper cross-examination of the respondents' witnesses. The evidence of a witness who has not been challenged by cross-examination can hardly be rejected by the court.

In any case it was not the fault of the second and fifth respondents that witnesses were not cross-examined. It was the applicant who deliberately decided to withdraw from the hearing. I am just about to show that it is not true that he was in any financial difficulties. He is actually a very rich man according

to the evidence before this Court. But before I deal with his wealth I propose to quote from **Reckitt & Colman (S.A.) (PTY) LTD v. Chemical Workers Industrial Union & Others** (1991) 121LJ 806 (L.A.C) at p.813 C-D where Harms J. said:

"If the employer and the employee have entered into an agreement regulating disciplinary enquiries and providing for internal appeals, it would appear that under normal circumstances an employee who is to be disciplined has to attend and partake in those proceedings. If he refuses to do so, he could hardly allege that the proceedings and the outcome of the proceedings were unfair or amounted to an unfair labour practice. There may obviously be occasions when employees with reason could refuse to attend such proceedings. However, in this case no reasons were proferred why the first eight employees (the parties to the first application) refused to attend the disciplinary enquiry and refused to use their right of appeal."

In the present case the reasons given by the applicant for his withdrawal from the hearing are not convincing.

I shall now come to the financial status of the applicant at the relevant time. At that time the applicant was still earning his full monthly salary as well as all the benefits due to him as the Chief Executive of the fourth respondent. That salary can under no circumstances be regarded as peanuts. He could have well paid his counsel out of it even if his properties

were excluded. There is further evidence that the applicant is worth in excess of M1 million. He has not specifically denied this allegation and has failed to take the Court into his confidence by disclosing his financial position. The evidence before this Court is that the applicant is a man of some considerable substance.

Another example that the applicant was not in any financial difficulties is the fact that while the present case was still proceeding he bought a brand new Mercedes Benz Car for R236,775-97 and made a deposit of R31,491-00.

The problem which the applicant has is that he cannot make a good decision about his priorities. It is clear that he had enough funds to pay his lawyers for the hearing of the enquiry but he got his priorities wrong. It seems to me that he regarded the enquiry as the least important thing in his future. He did not seriously think that he could be disgracefully dismissed from the position of Chief Executive of the largest authority in Lesotho. He was not prepared to sell one of his several properties, nor to spend all his salary on the enquiry in order to defend his reputation.

I have come to the conclusion that the enquiry was properly conducted and that no procedural irregularity was committed. The applicant cannot unreasonably withdraw his lawyers from the enquiry and later take that as a breach of the **audi alteram partem** rule.

In the result the application for review was dismissed on the 30th October, 1997 with costs such costs to include the cost of two counsel.

J.L. KHEOLA
CHIEF JUSTICE

7th January, 1997

For Applicant - Mr. Fischer
For Respondents - Mr. Penzhorn