IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/224/08**

In the matter between**:**

REABETSOE MPHOLO **APPLICANT**

AND

THE PRINCIPAL SECRETARY MINISTRY OF LOCAL GOVERNEMNT **1ST RESPONDENT**
MINISTRY OF LOCAL GOVERNMENT **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**

SUMMARY

Civil Procedure – Review Proceedings – Applicant dismissed from Public Service pursuant to the provisions of Codes of Good Practice 2005 – Whether the Codes of Good Practice had already been promulgated into law at time of Applicants dismissal – Rules of natural justice not observed – Application succeeds.

JUDGEMENT

Delivered by the Honorable Madam Justice L. Chaka-Makhooane on the 18th February, 2011

[1] This is an Application for the review and the setting aside of disciplinary proceedings which resulted in the dismissal of the Applicant from the Public Service.

[2] The Applicant was prompted to apply for a review based on the following reasons:

(a) The Applicant was charged in terms of the Public Service Codes of Good Practice of 2005, which Codes had not been passed by Parliament at the time of the hearing, as required by Section 15(2) of the Public Service Act of 2005.

(b) The First Respondent lacked authority to chair the disciplinary proceedings since she was the Head of Department, and not the Head of Section, as required by Section 8(3)(a) of the Disciplinary Code.

(c) The Applicant was dismissed by the First Respondent without first recommending such action to the Head of Department,

required by Section 8 (6) of the Disciplinary Code.

[3] The prayers for relief in the notice of motion were couched in the following manner:

1. *The decision of First Respondent dated 6th September 2007 purporting to dismiss Applicant from work shall not be reviewed reversed, corrected and set aside on the ground that it is illegal, ultra vires, void, irregular, improper and outright unlawful in as much as it is directly in conflict with provisions of Laws of Lesotho*;
2. *Applicant shall not be reinstated forthwith to his positions of work with effect from the date of his purported dismissal*;
3. *Applicant shall not be paid salary arrears which are due and payable to him with effect from November 2007 to the date of payment pursuant to Applicant's unlawful dismissal from Service*;
4. *Applicant shall not enjoy his benefits and seniority rights as if he was never dismissed from Public Service*;
5. *Costs of suit*;
6. *18.5 % interest on prayer 3 above*;
7. *Granting Applicant such further and/or alternative relief*.

[4] The Respondents oppose the application but even before the merits could be considered, **Mr. Loubser** for the Respondents raised a point in *limine.* It is contended by the Respondents that the application should be dismissed by reason of the fact that it was filed some nine (9) months after the Applicant had been dismissed, which period they argue constitutes an unreasonable delay for the filing of a review application.

[5] **Mr**. **Makholela** for the Applicant argued that the delay had not been unreasonable as each case is treated upon the peculiarity of its own circumstances. He cited **Maqalika Leballo v Thabiso Leballo and Another 1993-1994L LR-LB 275**. He mentioned that the Applicant did not have funds to brief Counsel and he only became aware that he had been charged on a non- existing law, at the time the application was moved and not before. He showed that there is no time limit laid down within which to bring a review application. However, he concedes that it must be done within a reasonable time. **Mr. Makholela** submitted that in the case of

Setsokotsane Busdiens (Edms) Bpk v Voorsitter, **Nasionale Vervoerkommissie en' n Ander 1986 (2) SA 57 (A)** the lapse of a nine (9) months period was held not to have been unreasonably long.

[6] The court was further asked to exercise its discretion by condoning the application if it were to find that the delay was unreasonably long.

[7] The principles governing the determination of the time frame within which review proceedings can be brought to court have been dealt with in a number of cases. The principle was articulated in the case of **Wolgroeiers Afslaers (EDMS.) BPK. v Munisipaliteit Van Kaapstaad (1978) (1) SA 13** where the appellate division held that:

> "*Where, in an application on motion for the review of a decision of a public body, there being no specific time limit for such an application, it is alleged that the applicant did not bring the matter to Court within reasonable time, the Court has to decide*

(a) Whether the proceedings were in fact instituted after the passing of a reasonable time and

(b) If so, whether the unreasonable delay ought to be overlooked. In regard to (b) the Court exercises a judicial discretion, taking into consideration all the relevant circumstances.

Whilst unreasonable delay per se is not a ground on which a Court could refuse to entertain review proceeding, the fact that a respondent would substantially be prejudiced in the proceedings as a result of such unreasonable delay would be a ground for refusing to entertain review."

[8] In the case of **Radebe v Government of the Republic of South Africa and Others 1995 (3) SA 787** at **798** the court, *inter alia*, established that:

> *"…no such limits have been specified for the institution of review proceedings. In the absence of a statutory limit the Courts have, however, in terms of their inherent powers to regulate procedure laid down that review proceedings have to be instituted within a reasonable time.*

[9] The pertinent question to ask is whether there has been an unreasonable delay on the part of the applicant in instituting

these proceedings. What a reasonable time is, depends on the circumstances of each case. Included are factors *inter alia* such as a reasonable time required to take appropriate steps prior to and in order to initiate the review proceedings, time to consider and take advice from lawyers and the making of the representations where necessary. See **Radebe v Government of the Republic of South Africa and Others** (*supra*).

[10] Annexure "A" shows that the Applicant was served with the letter of dismissal from the Public Service on the 8th October, 2007, dismissing him with immediate effect on the 10th October, 2007. The Applicant approached the court on or around July, 2008. This shows a lapse of about nine (9) months, during which time the applicant is said to have been unemployed and therefore, was without the necessary financial muscle to consult with a lawyer. When he finally did, only then did he become aware that he was dismissed in terms of a non-existing law. Applicant has also prayed for

condonation in the event that the court does not find in his favour.

[11] The court was referred by both parties to the case of **Setsokotsane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en' n Ander** (supra) where it was found that a nine (9) months lapse of time was not unreasonably long. Hefer JA held that:

> *"…finality had first to be reached as regards the unreasonableness of the delay with due consideration being given to all the circumstances and in particular the appellant's explanation for the delay."*

[12] I find that the Applicant's explanation for the delay *prima facie* probable. If he was out of work all that time he possibly did not have the funds to pay for the services of a lawyer. Further more, if at the time he eventually secured a layer, he only found out then that there was a chance he could approach the court, then the nine (9) months delay is not unreasonable in the circumstances. It is reasonable to conclude that he could

only have found out that he had been dismissed under a non-existent law during consultation with his lawyer.

[13] On the strength of the **United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717** at **720 E-H**, I will allow the application for condonation following the Applicant's explanation.

[14] Having allowed for the review of the disciplinary proceedings, I now turn to deal with the merits of the main application.

[15] The applicant invites the court to correct the decision of the 1st Respondent, of the 6th September, 2007 purporting to dismiss him from work and also to set it aside as irregular in as much as it is directly in conflict with the provisions of the Laws of Lesotho.

[16] The Applicant argues that the **Codes of Good Practice 2005** (Codes"), at the time that he was disciplined and dismissed, had not come into being since they had not been laid before the Parliament by the Minister and that they had also not been passed by the Parliament, in contravention of **section 15(2)** of the **Public Service Act**, **2005** ("the Act").

[17] The Respondents refute this and show that the codes had been laid before Parliament and that they became law on the expiration of ten (10) sitting days. This they say is supported by the Supporting Affidavit of the Clerk of the National Assembly – see page 33 of the record read with para 7.2 on page 27 of the record.

[18] The Respondents go further to argue that, even if it were to be said that the codes were not properly passed and are invalid, in terms of **section 6 A (2)** of the Act any dismissal decided upon by the relevant head of department is still lawful and

valid. The Respondents submitted that the head of department must comply with such process as is provided in a disciplinary code, but if no code has as yet been issued, the power can nonetheless be exercised. They further submitted that *in casu* the disciplinary hearing was indeed conducted in accordance with common law requirements of lawfulness and fairness.

[19] **Mr. Makholela** for the Applicant raised another issue that, assuming the codes were properly passed, the 1st Respondent had no authority to chair the Applicant's disciplinary hearing as is contemplated by the codes, see para 5 at page 13 of the Applicant's Heads of Arguments. The court was referred to **Citimakers (Pty) Ltd v Santon Town Council 1977 (4) SA 959** at **960 (H)**.

[20] It is argued that the Applicant protested by requesting that 1st Respondent recuse herself so that the hearing can be properly

constituted as provided by the codes. The 1st Respondent did not heed this objection and went ahead to sit as chairperson even though she was the head of department and not the head of section as envisaged by both the codes and the Act. **Mr. Makholela** further submitted that the 1st Respondent usurped powers she did not have because she had an interest and a malicious motive from prior dealings with the Applicant in another case before the High Court (CIV/APN/260/06), where the Applicant had successfully sued 1st Respondent and others. It is argued that she therefore, had a score to settle with the Applicant.

See **Mathipa v Vista University 2000 (1) SA 396 1**, **The Master v IL Back & Co Ltd 1981 (4) SA 763 (C)** and **UDF v Staatspresident 1987 (4) SA 649 (W).**

[21] It was submitted on behalf of the Applicant that the authorities suggested that the power to sub-delegate a legislative power is not readily accepted, **The Master v IL Black and Co. Ltd** (supra). It was further argued that

according to **UDF v Staatspresident** (supra) such delegation is not permissible and will only be accepted if authorized expressly or by necessary implication by statute. According to the Applicant, it stands to reason therefore, that the Respondents flouted and violated the procedures to the Applicant's detriment.

[22] In response, the Respondents argue that the overriding principle applicable to disciplinary proceedings in terms of **section 4** of the Codes is that a public officer shall have a fair hearing, including the application of the rules of natural justice. In that regard the Applicant was afforded a fair and just hearing despite the fact that it was the head of department who chaired the hearing and not the head of section. It was further argued that 1st Respondent was the immediate supervisor of the particular head of department such that there was no reason why 1st Respondent could not exercise the powers bestowed upon the head of department. Since *in casu* the head of section was the complainant in the

disciplinary proceedings, he could not recommend the eventual dismissal as required by **section 8 (6**) of the codes. The decision to dismiss the Applicant was a legal and valid decision in terms of **section 6 A (1)** of the Act, according to the Respondents.

[23] It is common cause that the Applicant was dismissed from the Public Service in October, 2007, following a disciplinary hearing against him. The Applicant was said to have violated the provisions of **section 3 (1) (i)** of the Codes. It is also common cause that the composition of the disciplinary panel was not constituted as contemplated by **section 8 (3**) of the Codes, which reads in part:

> 8 (3) "*The following persons shall attend a disciplinary inquiry:-*
>
> *(a) the public officer's Head of Section who shall be the chairperson;*
>
> *(b) the public officer's immediate supervisor (complainant);*
>
> *(c) the public officer (defendant);*

(d) the representative of the Human Resources Department who shall be the secretary and advisor on policy issues at the hearing;

(e) the public officer's representative (a colleague at his or department or ministry; and

(f) witnesses, if any.

[24] In the present case and this is not denied by the Respondents, the Head of Section who chaired the panel was the Principal Secretary (PS) for Cabinet (on behalf of PS Local Government) Mrs. Matabane who is infact the head of department.

[25] The Applicant has firstly challenged the validity of the Codes on the basis of which he was dismissed. Even though the Respondents contend that the Codes had already come into being at the time the Applicant was dismissed, no evidence was placed before the court to show that indeed the Codes had already been laid before Parliament and that they had actually been promulgated into law as contemplated by **section 15 (2)** of the Act. **Mr. Makholela** has vehemently argued and I agree

with him that the Codes had not become law at the time the Applicant was charged and ultimately dismissed from Public Service. As such the application of the said Codes was irregularly and improperly invoked against the Applicant.

[26] It is my finding that the Applicant was purportedly disciplined and subsequently dismissed based on a document that had no legal basis. See **Rethabile Masia v Retšelilsitsoe Khetsi and two (2) others CIV/APN/178/2007**(unreported), **Edith Mokhutsoane-Mda v PS Gender and one CIV/APN/35/2005** (unreported) and **Tsietsi Mohohla v PS Ministry of Communications, Science and Technology and two (2) others CIV/APN/82/2007** (unreported).

[27] Going back to the issue on the composition of the disciplinary panel, even if it were to be said that the Codes were valid at the time, I find that the composition was irregular. No explanation by the 1st Respondent can justify why she would

flout the provisions of the said code at **section 8 (3)** to the prejudice of the Applicant. The Respondents have argued that the hearing was fair and it had observed the rules of natural justice. With respect I disagree. Actually the proceedings could have waited for as long as it takes so that the panel could be properly constituted, especially where dismissal was being contemplated. **Section 8 (6)** of the Codes provides that:-

> *"Where dismissal of a public officer is being contemplated, the Head of Section shall recommend such dismissal to the Head of Department who shall after adequate investigation confirm the dismissal."*

[28] The Respondents have not denied that the Applicant protested at the composition of the panel from the onset where the chairperson of the panel was the PS Mrs. Matabane who is the head of department instead of the head of section as provided by **section 8 (3) (a).** Further more the Applicant complained that he had had unsavory previous dealings with the very chairperson of the panel and as such he had asked her to

recuse herself from the panel for fear of bias. The PS refused to recuse herself and went ahead to sit as chairperson in that panel. The net result was that the proceedings could not in any way have been fair to the Applicant. PS Mrs. Matabane as the head of department who also took the role of head of section as chairperson acted as a Judge in her own court, in that **section 8 (6)** of the Codes was not adhered to. The PS was judge and executioner at the same time. The same chairperson reached a decision to dismiss the applicant and no one else would confirm the decision after an investigation since she was also the very same Head of Department who should have performed that function. The PS flagrantly violated the rules of natural justice especially that of fairness despite the provisions of **section 4 (1) (a)** and **(b)** in part III of the Codes which reads:

> *4 (1) "The following are guiding principles which shall be adhered to in handling a disciplinary matter under this Code –*
>
> *(a) a public officer shall have a fair hearing;*
>
> *(b) the rules of natural justice shall apply;*
>
> *(c) …. "*

[29] Having already concluded that the application of the Codes was irregular and unlawful, it is for following reasons that the application must succeed with costs in terms of prayers 1, 2, 3 and 4 as they appear in the Notice of Motion.

L. CHAKA-MAKHOOANE
JUDGE

For Applicant : **Mr. Makholela**

For Respondent : **Mr. Loubser**