

IN THE HIGH COURT OF LESOTHO

CIV/APN/153/2013

In the matter between:

RAMAHOONA MATLOSA

1ST APPLICANT

MPABALLENG MOTJETJEPA

2ND APPLICANT

And

**P.S MINISTRY OF GENDER AND YOUTH,
SPORT AND RECREATION**

1ST RESPONDENT

**MINISTRY OF GENDER AND YOUTH,
SPORT AND RECREATION**

2ND RESPONDENT

NATIONAL YOUTH COUNCEL

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 2 November, 2013
Date of Judgment : 10 December, 2013

Summary

Applicants seeking for declaratory orders and interdicts against the Respondents – Basis being a charge that the 1st Respondent has without affording them a prior hearing terminated their membership to the council created under the National Youth Council Act No 87 of 2008 – Court finding

that the letter addressed to them by the 1st Respondent could be interpreted to terminate their membership and that he lacked the authority to have done that – His acts declared null and void – The Court established that the membership of the applicants had notwithstanding the acts of the 1st Respondent, been terminated by operation of Sec. 5 (i) (g) of the Act read in conjunction with Sec. 6 (i) – Fair hearing determined as being irrelevant- In conclusion, the Court refusing to recognize the applicants as the continuing members of the Council. Each party to bear its own costs.

CITED CASES

Thabo Fuma vs The Commander LDF & 2 Ors CONST.C./8/2011, Lerotholi Polytechnic v Tšenyehelo Ramotsabe & 17Ors CIV/APN/412/2013

Commander Lesotho Defence Force & Ors vs Phakiso Paul Mokoena C.ofA.(CIV) 12/2002

**Lesotho Electricity Corporation v Moshoeshoe LAC 1995 – 1999
Russel v Duke of Norford [1949]**

STATUTES

**National Youth Council Act No. 87 of 2008
Electricity Act No.7 of 1969**

MAKARA A.J

Introduction

[1] The proceedings were brought before this Court by the two Applicant's through a notice of motion in which they in the main sought for its intervention through the issuance of a Rule Nisi Order calling upon the Respondents to show cause (if any) why:

- (a) The Rule as to form and notice shall not be dispensed with on account of urgency;
- (b) The 1st Respondent's decision to terminate Applicants' membership with the National Youth Council with immediate effect and without any hearing whatsoever as set out in his letters of the 18th March 2013, shall not be stayed suspended pending the finalization hereof;

- (c) The 1st Respondent and/or all the Respondents shall not be restrained and interdicted from convening any conference and/or meeting of the 3rd Respondent for purposes of electing the Council of the 3rd Respondent pending the finalization hereof.
- (d) The 1st Respondent's decision to terminate Applicants' membership with the National Youth Council with immediate effect and without any hearing whatsoever shall not be reviewed, corrected and set aside;
- (e) The 1st Respondent's decision to terminate Applicants' membership with the National Youth Council shall not be declared unlawful, null and void and of no legal force and effect;
- (f) The Applicants shall not be allowed and ordered to participate in any conference and/or meeting of the 3rd Respondent for purpose of electing the Council for the 3rd Respondent pending the finalization of the present application;

[2] The Rule Nisi prayed for was granted by my brother Nomngongo J on the 11th April 2013. On the 24th April, 2013 the Respondents reciprocated accordingly by filing their Notice of Intension to Oppose and subsequently answered the Applicants' founding Affidavit. The process culminated in the filing of the Replying Affidavit by the Applicant. The matter was finally heard in the merits for the first time on the 2nd December 2013.

Common cause background

[3] It has *ex facie* the papers before the Court and their argumentation by the Counsel respectively, transpired that the background material facts which have precipitated, the Applicants are of a common cause nature.

[4] A common foundation in this case is that the applicants were at all material times prior to the 18th March 2013 members of the National Youth Council established under **Section 3** of the **National Youth Council Act No. 87 of 2008**). Its composition is prescribed under **Section 5 (i) (g)**.

[5] It is not in dispute that the Applicants had assumed the membership of the Council in terms of **Section 5 (1) (g)**. This is attributable to the facts that they had at the time been nominated by the Lesotho Congress for Democracy (LCD). They latter qualified to make the two nominations by virtue of its command of the majority in the National Assembly during the period in consideration.

[6] The Applicants have ever since their nomination to the Council peacefully enjoyed their representative membership therein. The *status quo* was disturbed by a letter addressed to each Applicant by the Principal Secretary of the Ministry of Gender, Youth, Sports and Recreation who is the 1st Respondent in the matter. The correspondence to each applicant has been annexed to the founding affidavit.

[7] According to the Applicants, the letters amounted to a purported termination of their memberships to the Council. They in the same vein lamented before the Court that the 1st

Respondent's intention to exclude them from the Council was further demonstrated by his subsequent actions. These were manifested by the Applicants' allegations that the 1st Respondent subsequently threw the duo out of the office and barred them from participating in the activities of the Council which had been cited as the 3rd Respondent.

[8] It should at this stage suffice to indicate that the Respondents have vehemently denied that the letters which were addressed to the Applicants tantamounted to be those of their dismissals. They instead maintained that they were purely advisory in that, they in essence, advised the Applicant's that they must be conscientious of the dictates of **Section 5 (i) (g)** and that they should respond accordingly. The impression given was that the Applicants should be aware that their membership had been disqualified by operation of **Section 5 (i) (g)** in that they were no longer representing the Lesotho Congress for Democracy (LCD) which had on the strength of the section nominated them to represent it in the Council.

[9] It should, however, be realized that the Respondents have not in any manner, whatsoever, denied a direct charge advanced by the Applicants that the 1st Respondent has thrown them out of office and barred them from participating in the activities of the establishment. This renders that averment to stand as a fact.

[10] On another terrain, the Applicants have in their papers maintained that in terms of **Section 6 (i)**, they have a right for their membership to the Council to subsist for the period of three (3) years from the date of nomination. On this basis, they have expressed a strong position that they have ever since their nominations attained a legitimate expectation to serve in the Council for three (3) years. They have developed this stance by further asserting that in the circumstances they qualified for a fair hearing in the event of any move to terminate their membership.

The Issues

[11] The projected point of divergence between the parties is firstly and primarily whether the Applicants hitherto qualify to be members of the Council in accordance with the contemplation under **Section 5 (i)(g)**. Secondly, this turns on whether the letters executed by the 1st Respondent were content-wise of a termination nature and correspondingly whether the Applicants could have reasonably interpreted them as such. The last issue is on the question of fair hearing since the applicants have, in passing stated that the 1st Respondent took the explained adverse measures against them without having afforded them an opportunity to be heard.

[12] Against the background the Court has adopted a view that the letters by 1st Respondent addressed to Applicants were equivocal and therefore subject to various interpretations. The one assigned

to them by the Applicants is perceived by the Court to have been reasonable. It was incumbent upon the 1st Respondent to have unambiguously expressed his letter. This is further aggravated by the fact that Applicants allegations and they were thrown out of office and barred from attending to activities of Council had not been denied by the Respondents. The 1st Respondent had not referred to any legal authority authorizing him to have written the letter to the Applicants.

[13] The Court in interfacing **Section 5 (i)** with **Section 6 (i)** finds that the former section is a foundational one and that the nomination provided for therein is a representative one. It is in this background that the Applicants had been nominated by the LCD which had a majority in the National Assembly at the relevant time. In the instant case, it has not been denied that the Applicants had ceased being members of the LCD and that they had not been mandated by that party to be in the Council. The paradox is that they have not in any manner whatsoever, disclosed to the Court the party which they are representing in the Council at the moment. In the understanding of this Court the right to a three (3) year term of office in Council would only operate if the applicants would still be representing the LCD or at least indicate the party which they are representing in the Council by reason of its majority membership in the National Assembly. The question whether a majority should belong to one party or coalition of parties would remain another

assignment to be interrogated and is for the purpose of this case, besides the point.

[14] The Court having considered the imperatives of section 5 (1) (g) of the Act particularly the representative nature contemplated therein, finds that the applicants lost their membership to the Council by operation of Law. This is attributable to the political development which this court could take judicial notice that at present, the LCD doesn't have a majority in the National Assembly. It cannot, therefore, exercise the nomination powers entrusted upon a majority party therein under the section.

[15] The Law is clear on whether the applicants should have been heard before the 1st Respondent wrote them the letter or took any subsequent measures tantamounting to the termination of their membership to the council. In principle, whenever the exercise of the judicial or administrative powers could impact adversely against the status, remuneration or the legitimate expectation of the person to be affected, such a person, there must be compliance with the **Rules of Natural Justice**. These **inter alia** embraces the observance of the **audi alteram** principle before a decision could be reached. The rationale is that the decision must be premised upon a full and balanced information. This is in consonance with according another human kind a right to human dignity which together with right to life represent the core rights.

[16] The Common Law right to fair hearing in an endeavor to avoid condemning a person unheard has reviewed recognition in a catalogue of cases in the Kingdom. The few recent constitutional cases in which the philosophy has been reiterated are **Thabo Fuma vs The Commander LDF & 2 Ors CONST.C./8/2011**, **Commander Lesotho Defence Force & Ors vs Phakiso Paul Mokoena C. of A.(CIV) 12/2002** and **Lerotholi Polytechnic v Tšenyehelo Ramotsabe & 17Ors.CIV/APN/412/2013**

[17] Notwithstanding, the stated salutary rule and its instrumentality in upholding human dignity and fairness, there must be a recognition that it is not absolute in the sense that it doesn't have a universal application. Its limitation could be presented in a statute or by the circumstances of a particular case. In **Lesotho Electricity Corporation v Moshoeshoe LAC 1995 – 1999**, it was decided that fair hearing has been expressly excluded by section 26 (4) of the **Electricity Act No7 of 1969** read in conjunction with section 31 (1)(a)(vii) of same. The sections allowed the Corporation to disconnect a tempered electricity supply without affording the affected person any fair hearing. In **Russell v Duke of Norfolk [1949] All ER 109 Tucker LJ** cautioned:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

[18] It has to be emphasized that **Sec 5 (i)(g) of the Act** contemplates the representativeness of a majority party in the National Assembly. The LCD is not currently in command of the majority of the

members in that house. Thus, the representative status of the applicants in the Council has by operation of the Section when interfaced with **Sec. 6 (1)** automatically terminated.

[19] In the understanding of this Court the termination of the membership of the applicants in the Council by operation of the Law, had on the same strength deprived them of the Common Law necessity of being heard. The recognition of the status would render it imperative for the *audi alteram partem rule* to have been extended to them before any advance decision including the termination of their membership could be taken by the qualifying authority.

[20] The nature of the representation provided for in the Act, excludes any reasonable interpretation that in the circumstances, the applicants could be regarded as holding their previous status.

[21] The judgment must be clearly comprehended that it details that the membership of the applicants to the Council, has been terminated by operation of the law. This has nothing to do with the letter addressed to them by the 1st Respondent and his subsequent actions against them. It has already been stated that he hadn't in that correspondence made reference to any provision in the law which authorized him to have executed it. The Court finds that the applicants were, given the contents of the letter, justified in construing it to tantamount to the termination of their membership.

[22] In the premises, the Court holds:

- (1) The ***rule nisi*** is discharged in relation to prayers (c) and (f).
- (2) The declarations sought for under prayers (b) (d) and (e) are made.
- (3) Each party will bear its own costs.

**E.F.M. MAKARA
ACTING JUDGE**

For Applicant : Adv. R. Setlojoane

For Respondent : Adv. Mosito K.C