IN THE HIGH COURT OF LESOTHO

CONSTITUTIONAL CASE NO 15/2013

In the matter between:

NONKULULEKO ZALY	**APPLICANT**
And	
THE PRIME MINISTER	**1ST RESPONDENT**
GOVERNMENT SECRETARY	**2ND RESPONDENT**
MINISTRY OF COMMUNICATIONS, SCIENCE & TECHNOLOGY	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

JUDGMENT

Coram : Honourable Justice T.E. Monapathi (ACJ)
Honourable Justice A.L. Molete
Honourable Justice E.F.M. Makara

Dates of Hearing : 15 May, 2014

Date of Judgment : 29 July, 2014

Summary

A constitutional application brought against the respondents for a declaratory order that the Disciplinary Inquiry proceedings conducted against her inclusive of its decision which recommended for her dismissal be reviewed and set aside since her *right to a legal representation* and concomitantly to a *fair trial* were the process violated. The record of the disciplinary proceedings revealed that the Chairperson had interpreted S. 8(2) of the Codes of Good Practice to exclude a right to a representation by a legal practitioner. The Court found that the Chairperson had wrongly assigned a *literal meaning* to the section

without a realisation of his *residual discretionary powers* to have considered the indispensability of a legal practitioner in the circumstances of the case. Consequently, her procedural right to a legal representation and to a *fair trial* under S. 12 (8) of the Constitution were found to have been violated.

Held:

1. The Disciplinary Inquiry proceedings in respect of the Applicant held on the 28th and 31st August 2013, 9th September, 2013 and 6th November, 2013 are on review set aside.
2. It is declared that S. 8(2) of Part III of the Codes of Good Practice Notice 2008, is inconsistent with S. 12 of the Constitution to the extent that it does not accommodate the residual discretionary powers of the Chairperson to allow representation by a legal practitioner under deserving circumstances.
3. The Court refuses to declare that S. 15 (8) of the Public Service Act No.1 of 2005 is unconstitutional to the extent that it does not accommodate the residual discretionary powers of the Chairperson to allow representation by a legal practitioner regardless of the circumstances.
4. The Applicant is awarded costs on a party to party scale.

ANNOTATIONS

CITED CASES

Max Hamata and Ano v Chairperson, Peninsula Technikon Internal Disciplinary Committee and ors 2002 (5) SA 449,
S v Looij 1975 (4) SA 703 (RA) 705 ED
Pett v Greyhound Racing Association LTD (1969) 1 QB 125 @ 133 D
Powell v Alabama (1932) 287 US 45
Attorney General v 'Mopa LAC (2000-2004) 427

LEGISLATION

The Constitution of Lesotho
Public Service Act No1 of 2005
The Constitutional Court Rules 194 of 2000
Codes of Good Practice Notice 2008

MAKARA J

[1] The Applicant has initiated constitutional proceedings against the respondents and the Court had in recognition that the litigation was in both

content and form of a constitutional nature, reciprocated by sitting as a Constitutional Court in accordance with the Constitutional Litigation Rules.[1]

[2] In seeking for a constitutional relief underneath the shelter of this Court, the Applicant prayed for a *rule nisi* in which the Respondents are in the main directed to show cause why an order couched in the following terms shall not be made:

1. That the disciplinary inquiry in respect of the Applicant held on the 28th and 31st August 2013, 9th September 2013 and 6th November 2013 be reviewed and set aside.
2. The declaratory order that section 8(2) of Part III Codes of Good Practice Notice 2008, is inconsistent with section 12 of the Constitution of Lesotho read in conjunction with section 19 thereof; to the extent that it does not permit legal representation in disciplinary inquiries irrespective of the circumstances of the matter under the inquiry.
3. That Applicant be granted further and/or alternative relief.

[3] Against the posture of the prayers as they stand above, the Applicant had after filing her affidavits and after they had been responded to by the Respondents; filed a notice of motion to amend the prayers. The move was calculated at the reinforcing prayer 2 to accommodate the declaration sought for therein to be extended to Section 15(8) of the Public Service Act, 2005.

[4] There is *ex facie* the papers before the Court and its minutes, no indication that the desired interim order was ever issued. On the contrary, the Respondents filed their intention to oppose the application and subsequently the matter featured before Peete J. He in an endeavour to expedite the hearing of the case

[1] The Constitutional Court Rules No. 194 of 2000

ordered the Respondents to file their answering affidavits on or before the 27th December 2013 and reciprocally that the Applicant should provide the Court with her replying affidavit on or before the 16th January 2014. These were all complied with as directed.

[5] The background facts which precipitated the Applicant's series of lamentations before this Court in search of its intervention, originate from her official relationship as a Principal Secretary of the 3rd Respondent at all material times. She in that capacity encountered several episodes of a misunderstanding between herself and the Minister of Communication, Science and Technology under whom she served. Apparently, this was occasioned by a confusion between the parameters of the powers of the political authority and the Principal Secretary. The author of the crisis is seemingly lack of clear guidelines which provide a practical demarcation between their powers and responsibilities respectively. The impasse culminated in the preference of disciplinary charges instituted against her by the Government Secretary acting in his capacity as a Public Officer vested with disciplinary powers over the Principal Secretaries. It is revealed from a record of the disciplinary proceedings that the Applicant was confronted with 7 charges which she ultimately had to answer before the Public Service Disciplinary Inquiry.[2]

[6] In a nutshell, all the seven charges levelled against the Applicant are that she had breached the Code of Good Practice 2008 (The Code). Under Counts I, II and III the allegations were that she contravened Part 1 Clause 3 (2) (f) of the Code; under Count IV she contravened Part 1 Clause 3 (1) (k) of same; under Counts V and VI, she contravened Part 1 Clause 3 (1) (e) and lastly under Count VII was that she contravened Part 1 Clause 3 (1) (d).

[2]The Disciplinary Inquiry provided for under S. 8(1) of The Code.

[7] In summarised terms, the particularisation of the charges could be interpreted to range from the allegations of her undermining of the authority of the Minister; her demonstration of indignation and disrespect to him; abuse of her authority and misuse of public funds to the prejudice of the Government of Lesotho and the embezzlement of State funds.

[8] A dimensional development in this case is that the Respondents had mounted an application to strike out a paragraph in the Applicant's replying affidavit. She had therein averred that the Respondents were at the Disciplinary Inquiry proceedings represented by the 2nd Respondent who happens to be an experienced lawyer. The averment was intended to demonstrate that the scales of justice were unbalanced to her detriment. The incidental Application was based upon the reasoning that the Applicant had in her replying affidavit introduced a new matter to the irreparable prejudice of the Respondents in that this has been done at a stage where the papers between the parties had been completely exchanged and therefore, could not react to it.

Common Cause Facts

[9] It transpires from the papers before the Court and through their elucidation in the parties' *Heads of Arguments* and the viva voce advocacy thereon, that the material background facts are not disputed. Their genesis unfolds from a foundational position that the Applicant had at all material times been the Principal Secretary for the Ministry of Communications, Science and Technology. The appointment into office was on a three year contract. This is exhibited in the document annexed to the founding affidavit and headed *The Kingdom of Lesotho Form of Agreement For Officers Employed on Local Contract Terms* signed by the Government Secretary on behalf of the Government and the Applicant.

[10] Her normal service in the Ministry was suddenly interrupted by a disciplinary charge with which she was served on the 30th May 2013. Subsequently, she was on the 13th June 2013 suspended from office. On the 17th June 2013 she served her letter upon the Minister of the 3rd Respondent and the Chairperson of the Disciplinary Inquiry, in terms whereof she requested to be furnished with a dossier which was going to be tendered in evidence at the inquiry. In the same letter, she requested to be accorded the right to engage a legal practitioner to represent her in the said matter. The ground for the latter request was that the case has potential far reaching consequences which would render it unfair that she be denied legal representation at the disciplinary hearing.

[11] At the commencement of the disciplinary hearing on the 16th July 2013, the Applicant through her Counsel Adv. Koto, reiterated her request for legal representation by a legal practitioner of her choice. The Chairperson ruled that the right to a representative is confined to such assistance being rendered by the Applicant's colleague or workmate. The Counsel replied that he subscribes to the Act but that he is asking that he represents the Applicant not as a right but as a practice as this has happened in the past. Finally, the Chairperson stated that he as an ambassador and mathematician follows the issue and the law. He then ordered Adv. Koto **to go out**.

[12] After Adv. Koto had been expelled from the proceedings, the hearing continued starting with the Chairperson reading the charges to the Applicant who pleaded not guilty to all of them. Since the presiding officer had to take a journey, the hearing was rescheduled for the 28thAugust 2013.

[13] On the 28th August 2013, the Applicant introduced one Mr Makoanyane as her representative in the proceedings. The Chairperson ruled that Mr Makoanyane lacked the credentials for representation as provided for under S. 15(7) of the Public Service Act No.1 of 2005 since he was just her driver but not

employed in the Ministry. On that reasoning, he was like Adv. Koto directed **to go out**.

[14] It should suffice to indicate that at the end of the hearing, the Chairperson concluded thus:

1. The facts on the table clearly show that on counts I, II and III, the officer contravened the Code, Part 1 Clause 3(2) (f).
2. On Count IV, the officer did not show any courtesy to the Minister as specified and required by the Code Part 1 Clause 3(1) (k), and therefore she was in contravention of it.
3. I was unable to reach conclusion on Count V, because I did not have a complete sequence of events or enough evidence.
4. On Count VI, I could not say whether or not Clause 3(1) (e) of the Code was violated and so Clause 3(2) (f).
5. On Count VII, my conclusion is that the officer did not use good judgement, when she claimed from the government coffers for hosting members of the delegation who also had *per diem* allowances like her during the trip. The lack of good judgement and the act that followed violated the Code's Clause 3(1) (d).

[15] Consequently, the Chairperson after having in vain invited the Applicant to say anything in mitigation, held that the Applicant was totally unsuited for the position she held and recommended from a purely humanity stand point that a suitable position be found for her elsewhere.

[16] On a transitional note to the issues, the parties are in harmony that their point of divergence emanates from the constitutionality or otherwise of S. 8(2) of Part III of the Code and S. 15(8) of the Public Service Act, 2005 which *prima facie* provide for absolute prohibition of Legal representation of an officer in disciplinary hearings by a legal practitioner regardless of the circumstances of

each case. In the same logic, they appreciate that the determination hereof, will almost automatically address the fate of prayer 1.

Issues

[17] These are already telescoped in the immediate preceding paragraph. They in simple terms translate into the question of the constitutionality or otherwise of S. 8(2) of Part III of the Code and S. 15(8) of the Public Service Act. The corresponding issue is consequently, whether the denial of the Applicant to be represented by a legal practitioner of her choice amounted to a violation of her procedural right to a fair trial under S. 12 of the Constitution and incidentally also on equality before the law.

Arguments Advanced by the Parties

[18] The Applicant developed her arguments from the foundation that the constitutional relief she is seeking for deserves to be granted. Her first contention in this regard is that the Chairperson had, in disallowing a legal practitioner to represent her in the hearing, misconceived the constitutional imperatives associated with S. 15(8) of the Public Service Act and S. 8(2) of Part III of the Code. She charged that the Chairperson had misinterpreted the sections to prohibit in absolute terms the representation of an officer by a legal practitioner irrespective of the complexity of the case.

[19] She in an endeavour to reconcile the two legislative instruments with the Constitution argued that the Chairperson ought to have appreciated that under S. 12(8) of the Constitution, legal representation is an integral component of the *right to a fair trial*. Thus, he should in that perspective have realised that the statutory provisions under consideration, cannot be construed to be absolute exclusions of practising lawyers in the proceedings. In her submission, the Chairperson ought to have applied his mind to the merits of the case to assess its

complexity or otherwise and then bearing in mind S. 12(8) of the Constitution, make an informed **discretionary based** determination on the indispensability of the services of such a lawyer in the matter.

[20] She submitted that the absolute prohibition of the right to legal representation, regardless of the circumstances of the disciplinary matter as ingrained in the impugned legislative provisions, is unconstitutional. In the same breath, her other complain is that her right to a fair trial was further compromised by the Respondents' unnecessary refusal to allow her to have access to the appropriate documentation in order to prepare for her defence.

[21] The jurisprudence propounded in **Max Hamata and Ano v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Ors 2002 (5) SA 449**, was heavily relied upon in support of the proposition advanced by the Applicant.

[22] The Respondents mounted a diversity of legal oriented attacks against the arguments and the submissions tendered by the Applicant. Interestingly, in major respects he agreed with her but challenged her accuracy in their application.

[23] From the onset, their Counsel Adv. Sekati, questioned the timing of the application by charging that it was prematurely brought before the Court since the disciplinary process had not reached its final decision. To illustrate the point, he drew to the attention of the Court S. 8 (2) of the Code which 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.

In applying the law to the facts, it was cautioned that the Head of Department commands the powers which tantamount to a rehearing of the matter in that he

could confirm or set aside the decision as he may deem it just. In the circumstances, he submitted that the intervention asked from the Court could be academic because the process has not yet reached its finality. He relied upon **Max Hamata and Ano v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Ors (supra)** where it was stated at para 463A that:

> If a rehearing of the charges results in a finding which is not adverse to the Appellant or the imposition of a penalty in a finding which is not disposed to appeal against, the declaration will have been academic.

[24] The second leg of the contention is that the Applicant is barred from bringing the application because she had acquiesced[3] to the proceeding of the Disciplinary Inquiry in that after the ruling on the right to a legal representative, she did not approach the Court to timeously challenge it. It was highlighted that she had ample time between July 16th when the ruling was made and August 28th when the proceedings recommenced to challenge the ruling.

[25] On the question of the absolute prohibition of legal representation under S. 8(2) of the Code, it was said that the section does not absolutely prohibit legal representation but that it is simply restrictive in its application. The suggestion was that for this to be perceived with accuracy, the rules of interpretation would have to be invoked. This would project a discovery that the Applicant had mistakenly read the section in isolation with the rest of the provisions in the Code to understand the intention of the legislature. Reference was in support, made to **S v Looij 1975 (4) SA 703 (RA) 705 ED** where McDonald J.P pontificated that:

> To determine the purpose of the legislature, it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the exclusion of

[3] Herbstein and Van Winsen, Civil Practice of the Supreme Court of South Africa, Juta, pg 887 defines acquiescence thus, "Acquiescence can be inferred from any unequivocal act inconsistent with the intention to appeal. It is not necessarily to show an agreement not to appeal, conduct that would estop the appellant from denying acquiescence, or abandonment of an appeal."

> all others. To treat a single provision as decisive of the legislative's intention might obviously result in a wholly wrong conclusion.

S. 8(2) of the Code was then interlinked with S. 4(1) of same and further with S. 16 and S .19 of the Public Service Act which is the enabling Act of the Code. The strategy was to demonstrate that a holistic reading of both instruments, sustains the position that the right to legal representation is not necessarily disallowed but restricted in application. There was in particular, reference to S. 4(1) (a) of the Code in which it has been inscribed clearly that a public officer shall have a fair hearing. The position is foreshadowed under S. 16 of the Public Service Act in which it is detailed that.... *a party to the dispute may be represented by a legal practitioner.*

[26] The thesis of the Counsel's interfacing of S. 4(1) and 8(2) of the Code together with S. 16 of the Public Service Act, is that notwithstanding the prohibition under S. 8(2), the Chairperson had from the interpretational perspective, the residual discretionary power to determine the appropriateness of a legal practitioner. On this basis, he submitted that S. 8(2) is not unconstitutional for its alleged inconsistency with S. 12(8) of the Constitution. He, however, in concert with the Applicant's legal understanding, recognised the value in the jurisprudence developed in **Max Hamata and Ano v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Ors (supra).** It addressed the discretionary authority of a Tribunal to allow a legal practitioner's representation in disciplinary proceedings despite an internal provision to the contrary. He hastily cited Marais J's pronouncement from the same judgement that:

> ...constitutionally, the law requires flexibility to which I have referred to... the absence of any expressed provision in the rules conferring discretion does not matter. The question is rather whether there is sufficient indication in the rules that any such residual discretion is to be excluded.

The Findings and the Decision

[27] It deserves for the logical comprehensiveness of this judgement to preliminarily record the ruling of the Court which it delivered in an *impromptu* manner in relation to Respondent's *application to strike out paragraph 4.2.2.1of the Applicant's replying affidavit*. The paragraph related to her averment that the participation of the 2nd Respondent, who happens to be a legal practitioner of a substantial experience, had rendered the scales of justice to be tilted against her. The application was dismissed upon the reasoning that the Respondents could apply for leave to lodge a supplementary affidavit and ask the Court to punish the Applicant with costs for introducing a controversial subject at a wrong stage. The Court further reasoned that the question on whether or not the 2nd Respondent was in addition to his official standing, a legal practitioner who commanded a substantial experience in the practice of the law, could be easily resolved through its taking a *judicial notice* of that. This is so because all the lawyers who practise before the Kingdom's courts are admitted and struck from the roll of the legal practitioners by it. A *judicial notice* was consequently, taken that the 2nd Respondent was a legal practitioner of a recognisable experience in that arena and that his name remains in the roll of the advocates of this Court.

[28] The ruling signalled the significance of the professional status of the 2nd Respondent to the Applicant's protestation about the detrimental imbalance to which she was relegated at the hearing since the Respondents effectively had the benefit of an experienced Counsel while she was denied a legal representation.

[29] A record of the disciplinary proceedings represented a foundational book of reference for the guidance of the Court on the merits of the case particularly on the intervention sought for by the Applicant and its resistance by the Respondents. This is because the Tribunal which was seized with the matter is one of record - hence the developments were somehow comprehensively recorded and this Court has been provided with a compiled version of same. A

concentration here has been on the parts relating to the recorded conversation between the Chairperson and the Applicant either directly or through her Counsel. This has also been perceived through the relevant background correspondence and the subsequent developments around the subject. The revelations thereof have been interfaced with the law.

[30] The history behind the idea of a legal representation in this case is that the Applicant had **incontrovertibly** well in advance of the hearing addressed a letter to the Minister requesting that she be allowed to secure the services of a lawyer to represent her at the Disciplinary Inquiry. The correspondence was duly copied to the Chairperson regardless of who it was at the time. The Court finds, therefore, that she had introduced the subject prior to the sitting of the Disciplinary Inquiry.

[31] It is discovered from the record that the Applicant had pursued her quest for a dispensation to be represented by a Counsel at the commencement of the proceedings where one Adv. Koto introduced himself as her representative in the matter. At this stage, it becomes necessary to depict a *verbatim* conversation between the Chairperson and the Applicant. It goes:

> Chairperson: Miss you have a right to a representative who can either be your workmate or a colleague.
>
> Representative (Adv. Koto): Mr Chairman as per Public Service Act 2005 Subsection 7 where it talks about this issue and section 8 where it reads, "the right to representative under Subsection 7 does not include the right to be represented by a legal practitioner". **I agree with the Act** but I ask that I represent Ms. Zaly not as a right but as a practice. This has happened in the past. (Emphasis supplied)
>
> Chairperson: I follow an issue as an ambassador, as a mathematician but I also follow the law. **You can go out.**

[32] There is no indication whatsoever from the conversation that the Chairperson had ever addressed his mind to the fundamental question of the complexity or simplicity of the proceedings to determine the indispensability of a

practising lawyer. The expectation would be that the nature of the assignment before him would be the determining factor. It is clear from the text that the Chairperson had not considered the grounds advanced by the Applicant in her motivation of the request to be represented by Counsel. She had indicated that the proceedings had adverse potential far reaching consequences upon her. Perhaps, he deserves some relative consideration in his resolute approach. The lawyer that featured before him at the commencement of the proceedings, did not tactfully seize the opportunity to appraise him about his inherent discretion in the matter and the challenge for him to be presented with **the requisite jurisdictional facts** for its exercise. Had he been properly cautioned about that, there is a likelihood that he would have appreciated the complexity of the task before him and then decided accordingly. This would obviously facilitate for an application for a review in the event of a misdirection.

[33] The approach adopted by the Chairperson to the request presented before him by the Applicant on the subject, demonstrates that he was not conscientious of the far reaching parameters of *the right to legal representation* and its significance including interrelation with her *right to a fair trial.* He had understandably, relied solely upon his impeccable educational enlightenment in interpreting the impugned provisions. He had in that regard, simplistically applied the *literal rule of interpretation*[4]in his endeavour to identify the intention of the legislature under S. 8(2) of the Code. Resultantly and logically, he assigned to it a meaning that it absolutely excludes representation by a legal practitioner. This explains his decision to order Adv. Koto **to *go out***.

[34] The Chairperson's literal comprehension of the wording employed in S. 8(2) of the Code, deprived him of a realisation that the law did not expressly or by necessary implication exclude his discretion to allow a legal practitioner. This was

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[4] This refers to the interpretative approach in which the intention of Parliament is indentified through the ordinary grammatical meaning of words.

dependable upon his assessment of the complexity of the challenge before him which would include the adverse potential consequences against the Applicant.

[35] It further appears that it had escaped the wisdom of the Chairperson to have realised that the *right to legal representation* has its roots in S. 12(8) of the Constitution and its operational instrumentality to the attainment of *a fair trial*. He ought to have demonstratively accorded the Constitution its predominance as provided under its *S. 2 supremacy clause*[5]. This denotes that a constitutionally provided right cannot easily be compromised by an ordinary Act of Parliament except to the extent to which it is constitutionally limited. **The paradox here is that, technically, the ruling purported to render a constitutional right to be circumscribed by the Code which is a subsidiary legislation.** It is precisely against this backdrop that the Chairperson had an inherent jurisdiction to discretionarily decide the issue concerning the appropriateness of the legal practitioner in his ruling on the intensity or the straightforwardness of the case.

[36] In the Court's view, had the Chairperson been mindful of his *residual discretionary powers* in law over the request which the Applicant presented to him and the *prima facie* meaningfulness of her apprehension about the potential danger which may result from the inquiry; he would have attached significance to the plea. The consideration would have presented a revelation that this would be justified by the fact that her high official standing and her being a single parent may have a catastrophic effect upon her in the event of a possible dismissal. The record evidences that the Applicant was overwhelmed by the challenge of having to represent her self in a case in which her future was at stake. This is indicative of a high possibility that she could not competently ventilate her defence which would compromise justice. It was in this consideration that Lord Denning M.R. in **Pett v Greyhound Racing Association LTD (1969) 1 QB 125 @ 133 D** cautioned that:

[5]It provides that, "this constitution is the supreme law of Lesotho and if any law is inconsistent with this constitution, that other law shall, to the extent of the inconsistency, be void".

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or weaknesses of the other side. He may be tongue tied or nervous, confused or wanting in intelligence....

The importance of lawyers towards the attainment of justice and the limitations of a layman to comprehend their strategic relevance for the same purpose, was explained by Mr Justice Sutherland in **Powell v Alabama (1932) 287 US 45** thus:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by Counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.

[37] It could from the above explanation transpire that Chairperson who is a professor of imminence did not in **good faith** realise that the mathematical principles and their logic may not be in consonance with the principles of legal science and the attainment of justice. The same would apply to a scholar of linguistics or a diplomat. Legal understanding and reasoning is a phenomenal challenge in its own right and requires its own scholasticism. The Court, however, fully appreciates the thoughtfulness which the Chairperson has demonstrated in addressing the merits of the case. *Ex facie* the record, he appears to be blessed with a good sense of justice. This is acknowledged without necessarily agreeing with his decision.

[38] The analysis and the views expressed by the Court on the point under consideration enjoy a support from a catalogue of the decisions within Lesotho and other jurisdictions. This applies to the analogously similar challenges which have been decisively resolved and, therefore, provide precedents. A leading case within the jurisdiction is **Attorney General v 'Mopa LAC (2000-2004) 427**. This was a case in which S. 20 of the Central and Local Courts Proclamation of 1938 had its constitutionality challenged on the basis of its inconsistency with *the right to legal representation* provided for under S. 12(8) of the Constitution. On the face of the wording in S. 20, it expressly excluded *the right to legal representation* in civil proceedings before the concerned courts. Gauntlett JA at para 22 resolved the issue in these terms:

> The question..... now arises as to whether the Constitution...... provides a foundation for claiming an entitlement to legal representation in civil proceedings, either generally or in appropriate circumstances. In my view **it does so, in appropriate circumstances**. The protection has not been created by entrenching such a right *per se*. The protection lies in the provision for a **right to a fair hearing** in civil proceedings. That entitlement will not automatically found a claim under Constitution to legal representation in all cases. **It will however do so when the requirements of a fair hearing in turn make legal representation appropriate.** (Emphasis added)

The same jurisprudence was reiterated in **Hamata v Chairperson Peninsula Tech Internal Disciplinary Committee and Others (supra)** where Marais J stated:

> ....constitutionally, the law requires flexibility...... the absence of any expressed provision in the rules conferring discretion does not matter. The question is rather whether there is sufficient indication in the rules that any such residual discretion is to be excluded.

[39] On the intriguing argument raised by the Respondents regarding the constitutionality of S. 15(8) of the Public Service Act, the Court upholds the submission that when the section is read in conjunction with S. 16 it projects the intention of the legislature to allow legal representation by a legal practitioner.

[40] In few words, the Court agrees with the Applicant that the participation of the 2nd Respondent who is a legal practitioner of a standing experience in that field, was one of the factors which the Chairperson should have taken into account before considering his ruling against a representation by a legal practitioner. It should have been an eye opener to him especially when *ex facie* the record, he had consulted him on the issue raised by the Applicant concerning the time when she should have been furnished with a dossier to prepare for her defence. He had afterwards, following the advise of the 2nd Respondent, ruled that the papers would be provided to her *on as and when need arises basis*. It has become trite law that a defendant has *a procedural right* to be given the papers

which would be used at the trial and that this must be done well in advance to enable him to have adequate time to prepare for his defence. A resultant picture is that the *pendulum of justice* was not at all balanced and the proceedings were inescapably destined towards a procedural injustice.

[41] Now the Court towards its final decision starts by pronouncing itself on what it interprets as the Respondents' special defences. On the question of the *prematurity* of the application, the Court finds no merit in the argument since the move was against the impropriety of the procedure which led to the decision of the Disciplinary Inquiry to recommend the Applicant's dismissal. There is further no sound basis in the point raised by the Respondents that the Applicant is *estopped* from asking for the relief from the Court because she had *acquiesced* to the commencement of the Inquiry. The record indicates otherwise in that it reflects that she had from the beginning of the process asked the Chairperson to accord her the procedural rights by considering her request for the legal representation. After the decision to recommend her dismissal, she resorted to this Court for its intervention against the ruling on her deprivation of legal representation. The Applicant is in the circumstances of this case, found to have qualified to initiate the review application.

[42] The Court is in the state of affairs, confronted with a difficult task of determining the appropriateness of costs against the litigant who has lost the case. Normally, this Court is reluctant to award costs in a constitutional litigation. Be that as it may, there has been a consideration that this case involves an ordinary citizen who finds herself in a predicament of having to initiate constitutional proceedings against the Government to vindicate her violated constitutional right.

[43] In the premises, the final decision on the merits of the application is that:

1. The Disciplinary Inquiry proceedings in respect of the Applicant held on the 28th and 31st August 2013, 9th September, 2013 and 6th November, 2013 are, on review set aside.
2. It is declared that S. 8(2) of Part III of the Codes of Good Practice Notice 2008, is inconsistent with S. 12 of the Constitution to the extent that it does not accommodate the residual discretionary powers of the Chairperson to allow representation by a legal practitioner under deserving circumstances.
3. The Court refuses to declare that S. 15(8) of the Public Service Act No.1 of 2005 is unconstitutional since S. 16 of the legislation expressly allows a right to a legal representation by a legal practitioner.
4. The Applicant is awarded costs on a party to party scale.

[44] The Court registers its gratefulness to the counsel for their comprehensive and systematic research and assistance for the advancement of our constitutional jurisprudence.

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E.F.M. MAKARA
JUDGE

I concur:

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T.E. MONAPATHI
ACTING CHIEF JUSTICE

I concur:

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A.L. MOLETE
JUDGE

For Applicant : Adv. Z. Mda KC inst. by Messrs T. Mahlakeng & Co.
For Respondents : Adv. M. Sekati inst. by the Attorney General's Chambers