IN THE HIGH COURT OF LESOTHO

CIV/APN/93/2014

In the matter between:

'MATAU FUTHO – LETSATSI **APPLICANT**

And

P.S MINISTRY OF GENDER AND YOUTH, SPORT AND RECREATION **1ST RESPONDENT**

'MAPULENG SECHECHE (Chief Gender Officer) **2NDRESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

Coram	:	Honourable Mr.Justice E.F.M. Makara
Dates of Hearing	:	25 March, 2014
Date of Judgment	:	11 April, 2014

Summary

The Applicant suspended from office by the 1st Respondent. This done without a demonstration that the measure was based upon any of the *jurisdictional facts*, stating the legislation upon which he was intending to proceed against her and without having accorded her a *fair hearing* before the decision was reached. The decision declared *null and void and of no legal force and effect and ultimately set aside.*

CITED CASES

Motaung v Principal Secretary & Others LAC (1995 – 1999) 452; Matebesi v Director of Immigration & Others LAC (1995 – 1999) 616 and to Solicitor General v Mocasi LAC (1980 – 1984) 220.

Matebesi v Director of Immigration & Others LAC (1995 – 1999) 616

Solicitor General v Mocasi LAC (1980 – 1984

Pine Town Council v President Industrial Court 1984 (3) SA 173.

STATUTES

The public service Act No. 1 of 2005
The Public Service Act No. 7 of 2005
The Legal Notice No. 194 of 2008

[1] The applicant has through a Notice of Motion sought for refuge underneath the shelter of the justice of this Court seeking in the main for its issuance of a *rule nisi* directing that:

1. .....

(a) The 1st Respondent's decision to suspend Applicant contained in the letter dated 20th February, 2014 be reviewed and set aside;
(b) The 1st Respondent's decision to suspend the Applicant be declared as null and void;
(c) There be a restoration of the key of the office to the Applicant and that she be allowed to continue performing her official functions.
(d) .....
(e) Further and / or Alternative relief.

[2] She has, in a nutshell, asked for the intervention of the Court on a lamentation that the 1st Respondent has, without extending to her the *audi alteram partem rule,* suspended her from the public service employment where she holds a position of a Director of Gender. This has in the main been clearly articulated in her founding affidavit and illuminated in her heads of argument.

[3] The Respondents have reacted to the application by filing their notice of intention to oppose and the apposite opposing affidavit to resist it. A gist of their resistance is that the Applicant had been given a fair hearing before the decision before the impugned decision was taken.

The Common Cause Facts

[4] It transpires from the papers before the Court that the parties predominantly share a consensus of minds on the material factual background which precipitated this case. The revelations hereof unfold that the Applicant has at all material times and hitherto been a Director of Gender in the Ministry of Gender, Youth, Sports and Recreation and that she is in that capacity a head and the Accounting Officer.

[5] The regimes of laws which directly govern her employment are the Public Service Act,[1] the Public Service (Amendment) Act[2] and the Codes of Good Practice Legal Notice[3]. Thus, the determination of justice in this litigation will primarily turn on the imperatives of these laws as their relevant provisions are interfaced with the *natural law principle of fair hearing.*

[1] The public service Act No. 1 of 2005
[2] The Public Service Act No. 7 of 2005
[3]The Legal Notice No 194 of 2008

[6] These proceedings have been occasioned by the 1st Respondent's indefinite suspension of the Applicant on full pay on the 20th February 2014. The decision was communicated to her through a letter addressed to her and this was implemented as a precautionary measure pending investigations and potential disciplinary proceedings.

[7] The Respondents have in their answering affidavit detailed the reasons for the suspension of the Applicant. These in summarised terms are that she is insubordinate to the 1st Respondent in that she does not obey his lawful instructions, influences her subordinates to do likewise and thereby frustrates the Ministry in the execution of its mandate.

[8] **S 15 (10) of the Public Service Act** has been acknowledged by the parties as a provision of significance for the determination of the key question in the matter. The common understanding was that the Court would interface the factual landscape with the Section and then from its interpretational perspective, decide if the 1st Respondent should have followed the *rules of natural justice* or acted otherwise. In the event that the answer is in the affirmative, the next logical assignment would be on the finding on whether the hearing had been duly extended to the Applicant before the decision was taken.

The Issues for Determination

[9] In the foregoing introductory and factual scenario, an emergent primarily and determinative issue to be resolved by this Court turns on whether *ex facie* the papers before the Court, the 1st Respondent had before deciding to suspend the Applicant, given her a *fair hearing*. This unfolds into a secondary question on whether the pertinent legislation obliged him to have observed that dimension of the *rules of natural justice* before reaching the decision.

The Arguments Advanced for the Parties

[10] The Counsel for the Applicant has basically proceeded from the premise that the 1st Respondent had not given the Applicant a *fair hearing* before he had decided to suspend her. On that basis, he maintained that the legislative scheme and the circumstances surrounding the incidence; entitled the Applicant to the common law *fair hearing dispensation.*

[11] It was argued for the Applicant that S 15 (10) circumscribes in objective terms the jurisdictional grounds upon which the 1st Respondent could invoke the powers to *inter alia* suspend the Applicant pending whatever investigations. A submission tendered in this connection was that the prescribed conditions therein were the conditions precedent which the 1st Respondent as a repository of the powers under the Section; should have unambiguously confronted the Applicant in writing about the relevant ones, assigned the corresponding particulars in support of each charge. Thus, the

contention culminated with a proposition that this would be *sine qua non* for the Court to judge on the rationality of the decision and the legality of the process relied upon in reaching the decision.

[12] It was with reference to S 15 (10) further submitted on behalf of the Applicant that there must be clear evidential revelation that the 1st Applicant had before deciding to suspend the Applicant complied with the precedent conditions. There was emphasis on the point that a written testimony would be a reliable basis in determining a compliance with the Section.

[13] The averment by the 1st Respondent that the Applicant had been *orally engaged on the charges before the decision was taken,* was described as not being demonstrative that the requirements were satisfied. It was on the contrary maintained that *ex facie* the text of the stated verbal interaction, the concentration of the 1st Respondent was on the *insubordination of the Applicant and her inciting campaign to her subordinates to undermine his authority.* What was highlighted here is that the conversation was deficient in that it is not reflective that in the process accentuated *a call for the Applicant to submit representations why she may not on the strength of S 15 (10) be suspended from office pending the investigation of the transgressions attributed to her.* This was advanced as an indispensable dimension contemplated under the Section to demonstrate in clear terms that the conversation was couched in *fair hearing terms.*

[14] The picture presented is that in the light of the identified deficiency in the conversation between the 1st Respondent and the Applicant, the former had as an afterthought included the Section while executing the suspension letter. This was argued to indicate that the 1st Respondent had, from the onset never proceeded from the Section.

[15] Lastly, the Applicant has introduced into the picture another *natural law* dimension that the 1st Respondent has in addition to the violation of her *audi alteram partem right* also undermined the *nemo debet esse judex in propria causa* common law principle. This was supported by the indication that the papers before the Court demonstrate that he is the accuser, the investigator and the judge in his own cause.

[16] It should suffice to acknowledge that the Applicant has in support of her arguments referred the Court to the locally well known cases **Motaung v Principal Secretary & Others LAC (1995 – 1999) 452; Matebesi v Director of Immigration & Others LAC (1995 – 1999) 616 and to Solicitor General v Mocasi LAC (1980 – 1984) 220.**

[17] On the other hand, the Counsel for the respondents commenced with his arguments by stating that the 1st Respondent had in deciding to suspend the Applicant pending the investigations mounted against her, acted in accordance of S15 (10). In seeking to demonstrate that he told the Court that the Applicant had in that

endeavour been invited to make verbal representations against the idea of taking the measure against her. It was on that basis explained that the decision was made after she had expressed her views on the matter. Consequently, the impression portrayed is that the Applicant had been accorded the hearing under consideration. It was precisely in that background that the 1st Respondent made an extensive reference to the Section and vehemently maintained that he had complied with it before deciding to transfer the Applicant.

[18] The Counsel had interestingly in advancing the case for the respondents introduced the concept of *pre cautionary suspension* which he described as an interim intervention calculated for the maintenance of *good administration.* He cited the case of **Koka v Director General: Provincial Administration North West Government.[4] Here the remarks by Denning MR in Lewis v Hefer & Others.[5]** An aspect of significance which was emphasised here was that in these cases, there was recognition of the powers of the employer to **unilaterally make a precautionary suspension which has been preceded by the application of the *audi alteram partem principle.*** He consistently in this background maintained that the 1st Respondent had in suspending the Applicant acted within the powers entrusted upon him under the Section.

[19] The other decision of note upon which the respondents rested their case was the one made in Dladla v Council of Mbombela Local

[4] [1992] 7 BLLR 874 LC
[5] Lewis v Hefer & Others (1978) 3 ALL ER (CA) @ 364 c – e.

Municipality and Ano.[6] The relevant aspect of the judgement here is that the Court had in interpreting a provision similar to S 15 (10) ruled that once there exists a serious misconduct to trigger the operation of the Section, the Municipal Manager who believes that the act may jeopardise the investigations has the discretion to intervene accordingly. On the strength of this decision, he submitted that the powers are *subjectively* and not objectively invoked. This was consistent with the earlier proposition that the 1st Respondent had properly acted subjectively in his interim action against the Applicant.

The Findings and the decisions

[20] The Court finds that the matter should foundationally be decided upon the imperatives provided for under S 15 (10). It sets out the jurisdictional facts upon which a Head of the Department may suspend an officer in these *verbatim* wording:

[21] The Head of the Department is empowered to suspend an officer on full pay pending a disciplinary enquiry having regard to:

(a) The safety and security of persons or public funds or property;
(b) The process of investigation, and
(c) Other circumstances.

[22] Appreciably, the suspension of an officer by the Head of the Department has with the advent of the Act become a statutorily

[6] Dladla v Council of Mbombela Local Municipality and Ano. (2008) 29 ILJ 1902 (LC) paras 19 & 21.

managed process. This is indicative that there has been a paradigm shift from the common law position and, therefore, the question of the compliance or otherwise of the decision to invoke the power would have to be analysed with reference to the Section.

[23] In the perception of the Court, S 15 (10) has provided a procedure to be followed by the Head before he could suspend an officer. The initial requirement to be satisfied is that there must be one or all of the listed jurisdictional facts on the ground. The *fair hearing procedure* is, in the view of the Court, indirectly in built within the Section itself. This is attributable to the readable fact that the repository of the powers would have to disclose to the concerned officer the ground relied upon together with its particulars. This would unavoidably have to be complemented with a call for the officer to show cause why the provided suspension cannot be imposed. Otherwise, the stated key jurisdictional facts would be rendered meaningless and that would be a recipe for arbitrariness.

[24] The telephonic conversation through which the 1st Respondent explains that he had invited the Applicant to make her representation does not provide the Court with a comprehensive *form and content* of that communication. This leaves the Court in a state of uncertainty regarding the compliance with the Section. The 1st Respondent has the *onus* to demonstrate that he had satisfied the statutory requirements. In the absence of such on the balance of probabilities,

the Court finds that it would have no basis for holding that there had been a procedural or substantive compliance with the Section.

[25] It does not emerge from the papers that the 1st Respondent had objectively speaking given the Applicant sufficient time for her to prepare for the defence. This is one of the key essentials in considering whether the authority who exercised the *quasi judicial powers* had practically accorded the aggrieved person a *fair hearing.* The decision made at the end of the controversial conversation does not appear to have afforded the Applicant a reasonable time to contemplate on her defence or to consult with her legal counsel so that she could respond upon the informed basis.

[26] Moreover, there is no convincing evidence that the 1st Respondent had from the onset alerted the Applicant that he was proceeding against her pursuant to the powers entrusted upon him under S15 (10). This was important for her to ascertain if the provision was being adhered to in both *content* and *form.* It has in this respect been postulated in these paraphrased words:

> The person called upon to make representations must be properly appraised of the information and the reasons that underlie the impending decision, the circumstances on which the complaint is founded as well as the legislative provision in terms of which any action is proposed.[7]

[7] Hira v Booyesen 1992 (4) SA 69 (A)

[27] It is, nevertheless, acknowledged with emphasis that the 1st Respondent has a statutory based authority to suspend the Applicant from work with pay pending the investigations and for good administration. This has received a judicial endorsement in **Lewis v Heffer & Others (supra)** and reiterated in **Manamela v Dept. Of Cooperative Governance & Others (supra).** Whilst that is so, there are in those cases the prescribed jurisdictional conditions to be satisfied by the repository of the powers before the measure could be activated. These are the procedural essentials which are *sine qua non* for the exercise of the authority. It would, therefore have to be satisfied that those methodological processes had been followed to justify the decision. The same by analogy applies to the instant case.

[28] At this juncture, the Court turns to address the central question as to whether the 1st Respondent was in the circumstances of this case, obliged to observe the *rules of natural justice.* The interpretation which this Court assigns to S 15 (10) is that it intrinsically has an in built mechanism for the ascertainment of adherence to the *rules of natural justice* particularly their *fair hearing principle.* These are manifested in the form of the jurisdictional procedures prescribed before a decision to suspend an officer could ultimately be taken.

[29] There hitherto an abundance of case law literature on the subject of the applicability of the *rules of natural justice* in relation to the parameters of the powers of the principal secretaries whenever

their decisions have a propensity to impact adversely against the rights of their subordinates.

[30] The cases relied upon by those aggrieved with the apposite procedural defects are basically the same and the judgements thereof have assumed a simple narration of the earlier ones. A common denominator in those Administrative Law decisions is that the authority who has been entrusted with the exercise of the *quasi judicial* powers or those though purely administrative could impact adversely on the rights of the officer concerned; must observe the *rules of natural justice.* A corresponding qualification is, however, that this could be dispensed with where the empowering enactment expressly or by necessary implication provide otherwise.

[31] The stated principle could be illustrated by reference to the case of **Matebesi v Director of Immigration & Others LAC (1995 – 1999) 616** where the Court of Appeal had postulated that:

> Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by necessary implication indicates the contrary, that person is entitled to the application of the *audi alteram partem principle.*[8]

[32] In Solicitor General v Mocasi LAC (1980 – 1984) 220; the Court of Appeal has cautioned:

> .....where a power is conferred upon a body or official to do an act which could, unless properly exercised, be potentially

[8] Matebesi v Director of Immigration & Others LAC (1995 – 1999) 616 @ p621 – 622 F.

> gravely prejudicial to an individual. The procedural rules within the confines of which that body's or official's power is required to be exercised are designed to avoid such prejudice.[9]

[33] A direction on the significance of the *jurisdictional facts* was articulated in the **Pine Town Council v President Industrial Court 1984 (3) SA 173.** It was in a nutshell it has there been explained that the authority who is bestowed with the power which in its exercise other people may have their rights adversely affected, must firstly be seen to have premised his decision upon the *jurisdictional facts.* These could be of a substantial or procedural character.

[34] It has already been found that the 1st Respondent has failed to demonstrate that he had before reaching the decision relied upon any of the *jurisdictional facts* and on that basis accorded the Applicant a hearing. In this background, the Court has benefited from the learned authorship of Wade & Forsyth on Administrative Law where they have *inter alia said:*[10]

> "Suspension without pay, in particular, may be a severe penalty, and even suspension with pay may gravely injure reputation. In principle the arguments for a fair hearing are unanswerable. They were recognized by the Privy Council when quashing the suspension of a judge by the Chief Justice of Trinidad and the recommendation of the judicial services commission, made without giving him any notice or hearing that his removal ought to be investigated. The suspension was unlawful under the constitution and the recommendation was contrary to natural justice which, it was held, might apply similarly in other cases and not merely in the case of judges."

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[9] Solicitor General v Mocasi (1980 – 1984) 220 @ 226 F – G.

[10] Wade & for syth Administraative law 8th edition p 535; Devenish et al (2001) Administrative Law and Justice in South African (Durban: Butterworths) p 306

[35] The Court declines to pronounce itself on the eleventh hour argument introduced by the Applicant on the question of the status of the 1st Respondent who according to her is the *accuser, the investigator* and the *decision maker.* The charge being that this undermines the *Nemo debet esse judex in propria causa principle.* It is found that the issue has not been sufficiently addressed.

[36] In the premises, the stated legal reasoning dictates that the application should be granted as prayed.

E.F.M. MAKARA
JUDGE

For Applicant : Adv. Sakoane K.C.

For Respondent : Adv. Moshoeshoe