CIV/APN/114/2012

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:

QHOBELA SELEBALO Applicant

And

THE PRINCIPAL SECRETARY – LOCAL GOVERNMENT 1st Respondent

ATTORNEY GENERAL 2nd Respondent

JUDGEMENT

Coram : Hon. Acting Chief Justice T. E. Monapathi
Date of Hearing : 16th October 2013
Date of Delivery : 8th January, 2014

SUMMARY

Where objection is made against action for payment of salaries and benefits, sufficient and fair hearing shall have been granted where an applicant is heard through his lawyer where the action is thereby challenged and justified by Respondents. The principle of "audi alteran partem" is not an inflexible rule. An applicant can still be heard after the step has been taken.

CITED CASES

'Mamonyane Matebesi v Director of Immigration and Others LAC (1995-96) 616
Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623

[1] This is an application wherein Applicant approached the court for an order in the following terms:

a) That First Respondent pay to Applicant the amount of Eighty Eight Thousand Seven Hundred and Fifteen Maloti and Ninety Eight Lisente (M88,715.98) being the amount of money unlawfully deducted from Applicant's gratuity/pension benefits purported to be salary over-payment during Applicant's pensionable service in the Lesotho Public Service;

b) Payment to Applicant of interest at the rate of 18.5% per annum from date of this application to date of payment;

c) Cost in the event of opposing;

d) Further/or alternative relief.

[2] It is Applicant's case was that when he retired from the public service he was wrongly paid his pension benefits less M88,715.98 after his pensionable service. The issues became two-fold. Firstly, whether such deductions were properly made and secondly, whether Applicant was properly given a hearing when he objected, i.e. after deductions were made.

[3] Applicant contends further that the First Respondent sent him a letter informing him about the alleged above overpayment. It spoke of the deductions and the amounts to be deducted from his pension benefits. He indicated that he was invited to make objection only after he queried such deduction. He thereafter objected that the deductions that First Respondent was proposing were unlawful as they were in conflict with Laws of Lesotho.

[4] The matter was lodged with the court when it was decided that his retirement benefits be paid and only lawful deductions be made. Applicant alleges that his salary was never overpaid throughout his service. He further alleges that he was never given an opportunity to be heard regarding withholding, or reductions in amounts or suspension of his pension benefits. Furthermore that the First Respondent had never shown proof that Public Service Commission has concurred with the deductions from his pension benefits.

[5] The Applicant states that First Respondent failed to show how many monthly overpayments were made to him. Further how much money was paid in each of the overpayments when they were made and in which months in which years were the overpayments made. He further states that it is unlawful for the First Respondent to make him pay for the neglect or fault of some other person who has caused loss, if any, of public revenues or effected improper payments of public monies.

[6] However, it is Respondent's case that the deductions which were effected were lawful and legitimate and they were those monies that Applicant was not supposed to receive or be paid. The said monies could not have been easily noticed immediately because such overpayments were a result of Applicant's salary having been wrongly notched. That is, there was a mistake about the correct scale of Applicant's salary when payments were being made.

[7] Furthermore, as Respondent contended the Applicant was reinstated on the 2nd of February 2004 after having gone for a secondment. Upon reinstatement Applicant was to earn M109,903.00 per annum as reflected on government salary structure of 2004 and instead he was erroneously placed on the last notch of Grade I which was M130,716.00. Applicant then retired on the 1st August 2007 and he was to serve a three months notice. As a result two months salary was even deducted as payment in lieu of notice.

[8] Respondents also contended that even though Applicant retired on the 1st of August 2007, he was erroneously paid for the month of August and September 2007. It is further Respondents' case that Applicant was informed that the overpayments were as a result of the monies he received after he retired. Further that, as aforesaid, he was erroneously placed on the last notch of Grade I which was M130,716.00. Apart from that the other deductions were as payment in lieu of notice.

[9] Respondents contended that the dispute which the court in terms of annexure "D" determined was not on purported deduction but was on payment of terminal benefits. Respondents further state that Applicant never personally appeared despite being called by the Respondents to discuss on the deductions. He never appeared in person but his legal representative appeared on his behalf at all times.

[10] Respondents gave a response as to whether Applicant was not afforded a hearing before deductions of overpayments. It is trite that before any adverse

decisions could be taken one has to be given a hearing first to make a representation on his behalf before the decision is taken. See ***Mamonyane Matebesi v Director of Immigration and others. LAC (1995-1999) 616***.

[11] It is Respondents' submission that Applicant was given a hearing before the deductions were made as Applicant was given a chance to give his objection in terms of annexure "B" to his founding affidavit. The Applicant thereafter gave his objection per annexure "B" to his founding affidavit. The Applicant thereafter gave his objection per annexure "C" to his founding affidavit per his legal representatives. In the face of the absence of a denial to these serious contention this court concluded that the Applicant was duly given a hearing and participated in his objection through his lawyer. I considered that it was not necessary in the circumstances nor had it been practical that the Principal Secretary should have heard the Applicant before taking action subject of the dispute.

[12] Respondents submitted furthermore that it is therefore surprising for Applicant to say that Applicant was not given an opportunity to be heard in regard to his pension benefit. He also states that there were further deliberations between his counsel and official of the Local Government Ministry. See Para 8 at Para 8.3 of the Founding Affidavit. However, the fact that Applicant objected through his lawyer does not mean that the action to deduct the amount of overpayments could not be effected. It was to enable him to raise his concerns if there were any but his only counsel virtually admitted that his client should be paid what is legally due to him.

[13] It seems to be correctly submitted that the deductions that were done to Applicants terminal benefits were lawful and legitimate as they were monies that Applicant was not suppose to receive or to be paid. However, the fact that the payments may not have been reconciled immediately did not mean that salary over payment did not occur in respect of the Applicant or salaries were not paid erroneously. Therefore, it follows that Applicant cannot be allowed the amount he claimed as what was due to him after deductions were submitted to him. Furthermore, it would be unjust enrichment to give Applicant public funds which he does not deserve. Respondents consequently prayed that this application be dismissed with costs.

[14] On the same principle enunciated in ***Mamonyane Matebesi's*** case (*supra*) the Court of Appeal had to say at paragraph 7:

> "The right to *audi* is however infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation (Blom, *supra* at 662H-I and Baxter Administrative Law 1984 (569-570). (Thus in appropriate instances fairness may require only the submission and consideration of written representations; the right to be heard is not necessarily to be equated with an entitlement to judicial-type proceedings with the full attributes). Or while a statute may not per se exclude the operation of the rule, it may confer an administrative discretion which permits that result. <u>Or the operation of the rule may be ousted or attenuated by a particular set of facts, where it cannot practicably be implemented, at all or to its fullest extent, respectively</u>. As is apparent from (3) above, section 66 (4) of the Labour Code 1992 provides this expressly." (my emphasis)

Indeed as *audi* is about fairness and justice the hearing that is provided or comes after the taking of the step may be sufficient. I concluded that this was so in the present case.

[15] Indeed again this proceedings would even be properly be dealt with in accordance with the rule enunciated in ***Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623***, that is the version in the answering affidavit has to be accepted. This should be more so where the answering affidavit has not been challenged because no replying affidavit was filed.

[16] This application is dismissed. Costs are awarded the Respondents.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Applicant : Mr. B. Thabane
For Respondents : Mr. K. Mokhena
Judgement noted by Adv. K. Mosito and Adv. Rethabile Setlojoane