

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/398/13

In the matter between

‘MAPITSO TŠALONG

APPLICANT

AND

PRINCIPAL SECRETARY MINISTRY OF
PUBLIC WORKS AND TRANSPORT
THE MINISTRY OF PUBLIC WORKS
AND TRANSPORT

1st RESPONDENT

THE SENIOR ACCOUNTANT – MINISTRY OF
PUBLIC WORKS AND TRANSPORT
THE CHIEF INFORMATION OFFICER –
MINISTRY OF PUBLIC WORKS AND
TRANSPORT

2nd RESPONDENT

THE HUMAN RESOURCE OFFICER – MINISTRY
OF PUBLIC WORKS AND TRANSPORT
THE ATTORNEY GENERAL

3rd RESPONDENT

4th RESPONDENT

5th RESPONDENT

6th RESPONDENT

JUDGMENT

CORAM: HON. J. T. M. MOILOA J

DATE OF HEARING: 7 NOVEMBER 2016

DATE OF JUDGMENT: 30 OCTOBER 2017

ANNOTATIONS:

Legislation:

1. Public Service Act 2005
2. Code of Good Practice 2008
3. Public Financial Management Accountability Act, 2011

Cases:

1. Raphuting v Chairman of the Disciplinary Hearing and others C of A 45 of 2014

[1] In this matter Applicant seeks an order to the effect that the disciplinary inquiry that led to her summary dismissal be reviewed and set aside as irregular. That she be reinstated into her post as assistant accountant and be paid all such arrear salaries and/or emoluments as might have been due to her but for the purported dismissal.

[2] Disciplinary charges were laid against Applicant on 31 August 2012 as evidenced by “MTI”. The charges were mainly **Contravention of Section 15(6) of the Public Service Act 2005 (the Act)** as well as breach of **Section 3(i) (e) of the Code of Good Practice 194/2008. Section 15(6) of the Act** provides that:

“Failure on the part of a public officer to follow any provision contained in a code of conduct issued under this section shall constitute a misconduct rendering the public officer liable to proceedings and sanctions as set out in the code of conduct.”

The other provision in issue was **Section 3(1) (e) of the Code of Good Practice** which provides that a public officer shall:

“Perform all duties and exercise all powers that have been assigned by a proper authority to his or her office, or that are appropriate at the material time to the grade, designation or classification of that office, diligently and impartially and to the best of his or her ability.”

Applicant was charged also with contravention of **Section 3(n) of the Code of Conduct** which provides that *“a public officer shall not commit*

a criminal offence involving dishonesty, misappropriation of public funds or cause damage to public property or bring public service into disrepute.”

Another charge was alleged breach of **Section 26(2) and 59(1)(b) of the Public Financial Management Accountability Act, 2011** as well six counts of theft.

- [3] Applicant was charged with breach of the aforementioned sections following a forensic audit within the Department of Traffic and Transport (DTT). She pleaded guilty to the charges. Two witnesses had been called to testify in support of the charges. The first one was a Principal Transport Inspector within the DTT. The second witness was the person who had been engaged by the DTT to carry out the forensic audit of the Applicant's section within the DTT. Following Applicant's plea of guilty on all charges, a verdict of guilty on all the charges was returned. A recommendation for her dismissal was made. The disciplinary inquiry resulted in Applicant being summarily dismissed. Applicant then appealed against her dismissal to her Principal Secretary as she was entitled to do. The recommendation for summary dismissal was confirmed on appeal. It is common cause that the disciplinary inquiry was chaired by one Mrs. Lemohang Lekhoba Phitšane holding the position of Chief Information Officer (4th Respondent) instead of Ms. Sebueng Lerotholi holding the position of Financial Controller, who is Applicant's Head of Section. Strictly speaking, Mrs Lekhoba's chairing of the disciplinary tribunal was not consistent with practical guide prescribed in **Section 8(3)(a) of the disciplinary code (the code)** which makes provision for persons who shall attend a disciplinary inquiry; one of them being the public officer's Head of Section who shall be chairperson. The justification given by Respondents for the non-compliance with the mandatory provisions of **Section 8(3)(a)** is that the Head of Section had been part of the

investigating team and received the report. It is also common cause that the chairperson at the appeal hearing was one Mr. L. Phooko instead of the then Traffic Commissioner Mrs. Mathato Makoati. Again Mrs. Makoati had been part of the investigation team as the incidents forming the charges against Applicant were in her Department. For that reason it was prudently decided that in order to give the disciplinary hearing proceedings and its processes necessary neutrality a completely neutral outsider was necessary. In terms of **Section 9(3) (a) of the code** the Head of Department shall be the chairperson at the appeal hearing. In the same vein as the head of section Respondents' justification is that the Traffic Commissioner was part of the investigations and was given the forensic report.

[4] It is against this summary dismissal reached at the disciplinary inquiry as confirmed on appeal that Applicant is before court to have the inquiry and appeal reviewed and set aside as irregular. Applicant's grounds are that:

- 4.1 The inquiry was improperly constituted as it was chaired by the 4th Respondent who was not my Head of Section as my Head of Section was Ms. Sebueng Lerotholi in her capacity as the Financial Controller.
- 4.2 The recommendation to dismiss me was made by a person not vested with powers to do so in terms of Section 8 of the Disciplinary Code as she was a Chief Information Officer and not my Head of Section as contemplated by that section.
- 4.3 The recommendation to dismiss me was based upon wrong or improper considerations to the extent that the alleged breaches of the provisions of the **Public Financial Management and Accountability Act, 2011 and Section 3(2) (n) of the Code Conduct** presupposes criminal conviction within the exclusive jurisdiction of the courts of law duly constituted and applying the relevant criminal procedures and principles.

- 4.4 The advice of 4th Respondent to me to appeal before First Respondent herein was calculated and/or intended to mislead me and the subsequent appeal before First Respondent was improper insofar as the Chairman thereof was not my Head of Department as contemplated by the Public Service Act 2005 as amended read together with the relevant provisions of the Disciplinary Code and Regulations.
- 4.5 The decision to dismiss me is invalid and contrary to the relevant provisions of the Public Service Act 2005 as amended read together with the provisions of the Disciplinary Code insofar as it was not preceded by the required recommendation duly made by the proper authority (my head of section) and confirmed by the proper authority (my Head of Department) the latter being at the time the Traffic Commissioner Mrs. 'MATHATO MAKOATI.
- 4.6 The appeal hearing was improper and invalid as it was chaired not by my Head of Department aforesaid as required by the Disciplinary Code read together with the Regulations.
- [5] As already stated, Respondents' justification for the non-compliance with **Sections 8(3)(a) and 9(3)(a) of the Code** is that Ms. Sebuoeng Lerotholi and Mrs. Mathato Makoati respectively had been part of the investigating team and reports were given to them. Under the circumstances it would have been improper for them to chair the disciplinary inquiry and the appeal respectively. It has to be borne in mind that the codes of good practice are a practical guide to the management and discipline of public officers. Respondents submit that an alternative person was asked to chair so as to observe the principle of *nemo iudex in causa sua*. I accept this argument on the basis of the decision in **Raphuthing v Chairman of the disciplinary hearing and others C of A 45 of 2014**. In that case **Chinhengo AJA** discussed the principle and stated that bias is created where the principle of *nemo iudex in causa sua* is not observed. It is my view therefore, that under the circumstances surrounding this case Ms. Lerotholi would not be an impartial arbiter. It is accepted that her having

been part of the investigations, it would work against principles of natural justice for her to also chair the inquiry following the said investigations. I am mindful of the fact that the provisions of **Section 8 (3) (a) and 9(3) (a) of the Code** are phrased in mandatory terms and do not provide for delegation. I also appreciate the difficulty the Ministry was faced with in having part of the investigating team also chairing the inquiry. This to me is a good enough reason justifying appointment of Mrs. L. L. Phitšane as Chairman of Disciplinary Committee and Mr. L. Phooko as Chairman of Appeals Committee to ensure that the integrity of the disciplinary process was maintained. I therefore uphold the setting of the inquiry under the circumstances as well as the appeal hearing.

- [6] Applicant also avers that the recommendation to dismiss her was based upon wrong considerations. By this she alleges that the alleged breaches of the provisions of the **Public Financial Management and Accountability Act 2011 (PFMA) and Section 3(2) (n) of the Code** presuppose a criminal conviction within the jurisdiction of the courts of law applying relevant criminal procedures. Applicant appreciates the correct position of the law I grant her that. That criminal convictions fall within the exclusive jurisdiction of courts of law applying proper and relevant criminal procedures and principles. She is also right that the **PFMA** presupposes a criminal conviction. It is Applicant's submission that the charges preferred against her were criminal charges under the **PFMA 2011** and that she could only be punished thereon following a conviction by a competent court of law. Of course criminal proceedings would have to be undertaken to secure a criminal conviction. But that does not preclude the employer from dismissing Applicant where Applicant herself has pleaded guilty to serious acts of dishonesty i.e. theft of public funds. It has to be remembered that by virtue of her position Applicant

occupied a position of trust in relation to public funds. A breach of that trust is a serious misconduct and a criminal act. She was liable to criminal prosecution and disciplinary sanction. One of the penalties under the code is a dismissal of a public officer; which is what happened with Applicant. It cannot be correct that they were bound to proceed against her by way of criminal prosecution only instead of the inquiry they conducted. They might as well have done both. There is no prohibition of one against the other.

- [7] Finally, Applicant avers that the advice given to her that she could appeal was intended to mislead her. **Section 9(1) of the Codes of Good Practice** provide that:

“If the public officer is dissatisfied with the decision reached at the disciplinary inquiry, he or she shall file an appeal with the Head of Department within 5 working days from the date on which the decision was made.”

I fail to find anything in support of an allegation of malice in making Applicant aware of her rights.

- [8] This application is accordingly dismissed. There is no order as to costs.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: ADV. THULO

FOR RESPONDENTS: ADV. MOSHOESHOE