

IN THE HIGH COURT OF LESOTHO

CIV/APN/36/2017

HELD AT MASERU

In the matter between

THUSO MAKHALANYANE

APPLICANT

And

PRINCIPAL SECRETARY – FINANCE

1ST RESPONDENT

MINISTER OF FINANCE

2ND RESPONDENT

PUBLIC SERVICE COMMISSION

3RD RESPONDENT

MINISTER – PUBLIC SERVICE

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

JUDGMENT

CORAM : S.N. PEETE J

HEARD : MAY AND JUNE 2017

DELIVERED: 11TH AUGUST 2017

SUMMARY

Public Service Act – 2005 A Private Secretary engaged under contract – Termination of contract for unsatisfactory performance – Conduct subject to Public Service Act, Regulations and Code of Good Practice – Whether a “show cause” letter constitutes a hearing –

Where a Private Secretary to a Minister of Government is engaged under a contract which subjects his conduct to Public Service Act, Regulations and Code of Good Practice, and there is a fall-out between him and his Minister who thereupon recommends terminations of engagement, a show cause letter and response thereto does not constitute a hearing as envisaged under the Public Service Regulations 40 and Codes of Good Practice.

Annotations

Fifth Amendment to the Constitution Act No.8 of 2004

Public Service Act No. 1 of 2005

Public Service Regulations 2008

Code of Good Practices 2008

Cases

Matebesi vs Director of Immigration and Others - LAC (1990)-1999)616)

Lucy Sekoboto vs Principal Secretary for Water C of A (CIV) No. 32 of 2016

Morokole – LAC (1995-1999) 82.

Peete J.:

- [1] This rather unique case involves the erstwhile Foreign Minister of Government of Lesotho and his Private Secretary. Entered into on the 7th day of April 2015, a “*Local Contract*” reads:

“THE KINGDOM OF LESOTHO FORM OF AGREEMENT FOR OFFICERS EMPLOYED ON LOCAL CONTRACT TERMS”

Agreement made this 07th day April 2015 between the Government of Lesotho (hereinafter called “the Government”) and MR. THUSO MAKHALANYANE OF MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL RELATIONS (hereinafter called “the person engaged”).

1. *The person engaged undertakes that he/she will diligently and faithfully perform the duties of **PRIVATE SECRETARY** in the Public Service of Lesotho for the turn of his/her engagement and will act in all respects according to the instructions and directions given to him/her by the Government through the Head of Department or other duly authorised officer. In this agreement the Head of Department shall mean the person for the time being holding or acting in the office of Head of Department.*

2. *The person engaged shall commence to draw salary at the rate of M234,360.00 of Grade I rising to M276,324. Per year by annual increments, which will be determined by the officer's performance.*

3. *This agreement is subject to the conditions set forth in schedule hereto annexed, and the schedule shall be read and construed as part of the Agreement.*

4. *This Agreement shall be deemed to come into effect on the day the officer assumes the duties of his/her office.*

Signature
PRINCIPAL SECRETARY

Signature
(of the person engaged)

Name of Witness

Name of Witness

.....

.....

Address

Address:

.....

.....”

- [2] The applicant had applied on the 24/07/2015 for the post of “*Private Secretary*” in the establishment of the Public Service and had subsequently been invited to attend an interview on the 22nd July 2015.
- [3] Applicant’s interview before the Public Service Commission was successful and on 25th August 2015, the Principal Secretary (*Foreign*) had written to

applicant requesting him to begin his service as Private Secretary to the then ***MINISTER OF FOREIGN AFFAIRS - TLOHANG SEKHAMANE***.

[4] The Principal Secretary had thus signed on behalf of the Government of Lesotho.

[5] The ***SCHEDULE OF AGREEMENT NO.: MPS/P/76101*** read:-

***“1. Terms of
Engagement***

(1) Subject to the provision of this Contract the engagement of the person shall be linked to the tenure of the office of the Honourable Minister responsible; effective from the date he/she assumes full duties and responsibilities of the post. The contract may be extended or renewed on the Minister’s recommendation as provided in the Public Service rules and Regulations in force.

(2) The conduct of the person engaged, shall at all times, be governed by the code of conduct as contained in the Public Service Regulations.

2. Duties

(1) The duties of the person engaged shall be as reflected in the job description of the office in which he/she is engaged. The person engaged shall devote the whole of his/her time and attention to the office of the Minister. He/she shall use his/her utmost exertions to promote the interest of the office of the Minister and the Public Service.

6. Termination of

Engagement

(1) *The contract of the person engaged shall be terminated on grounds of ill-health (not caused by his/her own misconduct or negligence) on his/her being certified by a duly constituted medical board appointed by the government that he/she is incapable by reason of any infirmity of mind or body to render further efficient service to the Public Service.*

(2) *If the person engaged shall at any time after the signing hereof neglect or refuse or from any cause (other than ill-health not caused by his/her own misconduct or negligence, as provided in Clause 5) become unable to perform any of his/her duties or to comply with any order, or shall disclose any information respecting the affairs of the office he/she occupies to an unauthorised person or shall in any manner misconduct himself/herself, the Minister may recommend termination of his/her engagement or dismissal from the service and hereupon all rights and advantages reserved to his/her by this Agreement shall cease.*

(3) *The person engaged may at any time after the commencement of any service, terminate his/her engagement on giving the Government one month notice in writing or paying to the Government one month salary in lieu of such notice. (my underline)*

[6] It is important to detail the duties and functions of a “*Private Secretary*” which are founded on loyalty and trust. The Private Secretary had the following duties:-

(a) *The Private Secretary assists the Honourable Minister to achieve his mandate by formulating developmental, programs, interpreting relevant policies and follows-up their application, provides information and advice and oversees the operational effectiveness of his office.*

(b) **MAIN DUTIES:-**

1. *Participate in the Development of Policies and Program.*

1.1. *Researchers analyses information and undertakes consultation to identify part policies.*

1.2. *Complies reports and advises the Honourable Minster to guide formulation of relevant policies.*

1.3. *Formulates a developmental program/project to address problems relating to the Honourable Ministers portfolio.*

1.4. *Presents approved findings to the Principals Secretary for inclusion into ministerial goals and activities.*

2. *Coordinates Implementation of Approved policies and programs.*

2.1 *Outlines and interprets approved policies and terms of reference for approved programs pertaining to the Honourable Minister’s Portfolio.*

2.5. *Advises the Honourable Minister on progress relating to implementation of approved policies and programs.*

3. *Provides guidance and advise on policy questions and administrative problems addressed to the Honourable Minister.*

- 3.1. *Screens requests for meetings with the Honourable Minister addresses or refers queries to the relevant officer/s and follow-up.*
- 3.2. *Advices individuals on the proper understanding of the Government Laws procedures and the obligations of the Honourable Minister.*
- 3.3. *Maintains close contact with the constituency and provides information and remedial measures on matters of concern.*
- 3.4. *Directs investigations to establish facts and circumstance relating to matters of concern provide feedback to the Honourable Minister.*
- 3.5. *Writes and responds to correspondence as directed by the Honourable Minister.*
- 4. *Acts as an information and Public Relations executive for the Honourable Minister.*
 - 4.1. *Directs compilation and retrieval of information on matters relating to the Honourable Minister portfolio.*
 - 4.2. *Prepares speeches briefs and other statements for presentation by the Honourable Minister.*
 - 4.3. *Appraises and revises information submitted by Publicity writers for accuracy and approval.*
 - 4.4. *Attends business meetings Pitso's special functions and acts as ex-officio member on Honourable Minister's charitable organizations.*
 - 4.6. *Organizes meetings special functions and meets visitors to promote favourable publicity on behalf of the Honourable Minister.*
 - 4.6. *Accompanies the Honourable Minister of official trips/visits as required.*

5. *Manages the internal Administration of the Office of the Honourable Minister.*
- 5.1. *Develops annual operational plan, justifies budget requirements in accordance with the approval plan.*
- 5.2. *Controls expenditure and oversees efficient use of resources.*
- 5.3. *Oversees the recruitment development, discipline and welfare of staff appointed for the Honourable Minister.*
- 5.4. *Directs operational procedures and supervises staff in the office of the Honourable Minister.*
- 5.5. *Ascertains that the general needs of the Honourable Minister are attended to (Health, safety, and transport).*

[7] Thus, the Private Secretary is the right handman of the Minister and is his “*confidante*”. The Minister is a Member of Cabinet and also a Member of the National Assembly or of the Senate. The Private Secretary has multitudinous functions and duties some political, some administrative, indeed some personal.

[8] At the onset it is important to determine whether the “*Local Contract*” entered into by applicant on the 7th April 2015 is a contract *sui generis* and a “*stand alone*”.¹ A stand alone is contract which stands on its own and is not dependent on other conditions extraneous to itself.

[9] It is quite clear that whereas other aspects such as salary, gratuity, leave, terminal benefits are provided for in the contract, the “*official conduct*” is

¹ *Lucy Sekoboto vs Principal Secretary – Ministry of Water (CIV) - C. of A (CIV) NO.32 of 2016*

strictly circumscribed under clause 1(1) and 6. In particular, clause 1(2) reads (2):-

“The conduct of the person engaged, shall at all times, be governed by the code of conduct as contained in the Public Service Regulations.”

- [10] The effect of this clause is to subject the discipline or conduct of the applicant to the disciplinary processes under the ***Public Service Act No.1 2005, Regulations and Code of Practice.***

The Law

- [11] The ***Fifth Amendment to the Constitution Act No.8 of 2004*** reads:-

“1. *Subject to the provisions of the Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), and the power to terminate appointment of such persons, save to power to discipline and terminate the appointment of such persons for disciplinary reasons, is vested in the Public Service Commission.*”

Section 6 of the *Public Service Act No. 1 of 2005* in turn also reads:-

“6. *Subject to the provisions of the Constitution, the power to appoint persons to hold or act in offices in the public service (including power to confirm appointments) and the power to terminate appointments of such persons, save to power to*

discipline and terminate appointments of such officers for disciplinary reasons, is vested in the Commission.

The disciplinary processes under the *Public Service Act* and *Regulations* as well as the *Code of Good Practice* are founded on natural justice principles of fairness in the termination of employment for disciplinary reasons. A golden thread of fair hearing – *audi alteram partem* – is prominent in the processes. Thus, arbitrary or summary termination of employment is not permitted.

- [12] The effect of the *Fifth Amendment of Constitution of Lesotho* (*supra*) and *Section 6* of the *Public Service Act 2005* is to vest the disciplinary processes in the head of department or ministry. The latter powers had been hitherto been exercisable by *Public Service the Commission*.

The Facts

- [13] On the 15th December 2016, the Principal Secretary for Finance wrote to the applicant as follows:-

Ministry of Finance

P.O. Box 395

Maseru 100

FIN/P/76101

15TH December, 2016

Mr. Thuso Makhalanyane

Private Secretary

Ministry of Finance

Dear Sir,

INTENTION TO TERMINATE YOUR CONTRACT AS
PRIVATE SECRETARY

The purpose of this letter is to ask you to show cause why I cannot terminate your contract as the Private Secretary of the Honourable Minister of Finance.

The reasons that prompt me to consider terminating your contact are listed here below as follows:

The Honourable Minister informs me, and I verily believe that:

1. *In April 2016, you were instructed by the Honourable Minister to prepare a table indicating the young job-seeking members of the Mokhotlong No.79 Constituency by name, branch, age and academic qualification. Several times when he asked you, you said you had completed this assignment, but up to today, more than a year later, you still have not submitted that table to him; and you have not even bothered to explain why you did not deliver on an instruction given to you by the Honourable Minister. In this regard you may wish to look at Code of Conduct, 2005, Clause 3(1)(e) and 3(2)(f).*
2. *On 16th August 2016 you promised to deliver to him a report on your trip to observe elections in Zambia. He expressly told you that he would be waiting to receive your report as promised, up to now, well over three months later, you still have not submitted that report. Here too, you have not bothered to explain why you are not delivering on an instruction given by an appropriate authority. Refer to the Clause of the Code as in One above.*
3. *On a number of occasions you have taken action to directly contradict and oppose Honourable Minister's clearly expressed decisions, and have also verbally opposed his decisions in very strong words. A clear example is when you and him held different opinions about the election of the current Chairperson of the Constituency Mr. Thusang Mokete. The Hon. Minister make it clear that he would like him (Mr. Mokete) to be re-elected as Chairperson because, in his opinion, Mr. Mokete is very competent. But you opposed him directly and said to him that you would do everything in your power to make*

sure that Mr. Mokete does not get re-elected as Chairperson of the constituency. Furthermore, you actually went out to buy a four-wheel drive vehicle to enable you to oppose his re-election. In other words, you and the Honourable Minister became equal political adversaries, fighting openly against each other. That is, you were by your own admission, openly insubordinate to him as your supervisor.

4. *You have, on occasion, addressed Hon. Minister with disrespect and outright contempt. On 16th May 2016, you wrote to him an SMS in which you maliciously and very unfairly accused him of insinuations, criticized him heavily condemned his discretion, and made very open threats to people who were working under his instructions in the Constituency. Refer to Clause 3(k) and (i) of the Code above.*

As a result of your generally negative attitude towards Hon. Minister and your excessive indiscretions as above, it makes it very difficult, if not impossible, for you and him to work smoothly together. All his attempts to get rid of your deep-seated and inexplicable negative attitude towards him have failed. Consequently his work both at the Constituency and at the Office is suffering severely.

You may wish to comment on all the foregoing; and is so, please make it in writing, within seven days of receipt hereof, addressed to me at the above-mentioned address.

RECEIVED A COPY HEREOF:

NAMES IN FULL

SIGNATURE

TIME

DATE

Yours faithfully,

Tom Mpeta
Principal Secretary of finance

Date:

[14] To this letter, the applicant replied as follows:

Thuso Makhalanyane

P.O. Box 120

Mokhotlong 500

ATT: P.S. Finance

Box 1387

Maseru 100

Dear Sir,

INTENTION TO TERMINATE YOUR CONTRACT AS PRIVATE SECRETARY

May I kindly pass greetings and intimate that I have read the letter addressed to me on the above captioned subject matter and wish to respond thereto as follows;

1.

AD PARA 1 THEREOF

I can confirm that I complied with the instruction to prepare a table indicting young job seeking members of Mokhotlong No.79. It was delivered to the Honourable Minister through a Memo on the 24th of April, 2015. The Minister even appended his signature on the memo on the same date which depicts receipt.

2.

AD PARA 2 THEREOF

On the issue addressed in Para 2, I respectfully submit that I submitted a report on my trip to Zambia to observe elections. It should be appreciated that it was a report from SADC Electoral Observation Mission on Zambia. It had to be a standard report as it was prepared by the Secretariat to avert any form of inconsistencies if reports were compiled by individual observers, so I was informed by the Secretariat of SADC, and I did all that in line with clause 5.1.15 of SADC Principles and Guidelines Governing

Democratic Elections. The Honourable Minister signed the report on the 15th September 2016 and there is proof.

3.

AD PARA 3 THEREOF

Contents herein are respectfully denied. I should specifically point out that I acted within the realm of my duties as was instructed by the Honourable Minister to handle issues pertaining to Mr. Thusang Mokete and protruding problems experienced in the constituency. I have never held any contrary view to views held by the Honourable Minister, I simply acted on advice and instructions, I reported accordingly. I should specifically mention that I was instructed to reconnoitre the problem in the constituency caused by Ntate Thusang Mokete as the chairman of the constituency. I did all that and reported. I am not aware that at any given point in time the Honourable Minister ever intimated to me that Mr. Mokete is very competent. I however deny opposing that directly even in that issue as intimated.

*I deny buying a four-wheel drive vehicle to oppose his re-election as I cannot rationally expend so much of my resources to fight one man who is not ever my adversary at all. It is my family vehicle and I did not buy it to score any political points against anyone. I deny being an equal political adversary to the Minister and I have neither openly fought against him in any fora nor have I ever been insubordinate to him as my supervisor. There is a report written on the **14th of October 2015** ad regards issues I have canvassed. What is of utmost importance is this that, he (the Minister) directed me to continue pursuing the matter to its logical conclusion as borne by his minute.*

4.

AD PARA 4 THEREFORE

Contents herein are denied as well. I should point out that practice of sending text messages was sanctioned by the Honourable Minister, and I reckon it would have been prudent to pinpoint and or identify the specific SMS so that its contents are read and

interpreted openly and that has not happened. It becomes difficult therefore to scrutinize the assertion and get down to the bottom of the said allegations especially as regards the insinuations, criticisms and the condemnation of the discretion of the Honourable Minister. I however deny the allegations in their entirety as I have never done anything of the sort. Contrary to what has been said, I have professionally performed my duties as was expected of me and I have relied on the code of conduct in its totality.

I wish to intimate that I have never harboured any negative attitude towards the Honourable Minister and I have never shown any indiscretions and thus far, I believe our working relations are still smooth although it is said he hold a contrary view. I aver that the work of the Honourable Minister is not suffering severely as intimated.

6.

Having responded as requested, I must point out that I am not sure that letter addressed to me was an attempt to give me an opportunity to make representations as I have merely been requested to comment, which I did, it is important to appreciate that I have been employed through the Public Service Commission and I remain a public servant upon appoint. It my legitimate expectation that matters relating to my employment or termination thereof, will be done in strict compliance with the Public Service Act the relevant codes of good practice.

It does not immediately become clear if the Honourable Minister, who is my immediately supervisor, if the complainant in this matter or the Principal Secretary, who is the Chief Accounting Officer of the Ministry.

I believe it would have been prudent that there is sufficient clarity on the issues I have raised going forward. Sir, please receive my highest regards.

Yours sincerely,

Thuso Makhalanyane

- [15] On the 23 January 2017, the Principal Secretary Finance wrote the letter addressed to applicant effectively terminating the Local Contract of employment of Applicant as Private Secretary.

*Ministry of Finance
P.O. Box 395
Maseru 100*

23rd January 2017

FIN/P/76101

*Mr. Thuso Makhalanyane
Private Secretary
Ministry of Finance*

RE: TERMINATION OF YOUR CONTRACT OF EMPLOYMENT AS A PRIVATE SECRETARY TO THE HONOURABLE MINISTER OF FINANCE TLOHANG SEKHAMANE (MP)

The above refers.

I acknowledge receipt of your letter I received on the 22nd December 2016. I have carefully gone through your presentations and applied my mind thereto. I hereby respond as follows:

-I-

The Honourable Minister denies ever receiving your MEMO on the 24th April 2015 purporting to inform him of the Mokhotlong Constituency youth seeking employment. It goes without saying that if he did not receive any MEMO he therefore never appended his signature to any document acknowledging receipt. He further informs me that your attached document purporting to prove you have done the assigned duty borders on fraud hence why he has already reported the matter to the Police for investigations. He finds it mind boggling that he himself as a former public officer in the highest echelons in the Public Service, to wit, Government Secretary, he even as a Minister could ever sign or sign for reports submitted to him by members of his own staff. He contends, borne out of long experience that it would be a very strange way of operating within the Public Service; more so at the level of a Minister. In any event, he points out that ordinarily, where documents have to be signed for to serve as evidence is in the courts of law because there evidence is very important that service has been effected; but he

cannot imagine that he himself, with such wide experience in the way that the Public Service works, could possibly allow such antics as to sign or sign for reports of his members of staff, he finds your allegations beyond comprehension. He is shocked by your actions and has reported the matter to the police to go deep into how his signature got to appear into the documents in question.

-2-

The Honourable Minister acknowledges having received the SADC electoral Observation Mission on Zambia report prepared by the Secretariat. However, you have still not submitted your personal report on your own observations and experiences. Clause 5 of the SADC Principles and Guidelines Governing Democratic Elections deals with the general code of conduct for election observers. Clause 5.1.15 which you have specially referred to as having acted in line with by not compiling your report reads as thus:

...must provide their reports on time to their supervisors and attend any debriefings as required ... (My underlining)

Clause 5.1.5 reads as follows:

Will base all reports and conclusions on well documented, factual, and verifiable evidence from multiple number of credible sources as well as their own eye witness accounts... (My underlining)

It follows from the above that your explanation/excuse of not submitting your report is neither here nor there. There is nowhere in the SADC Principles and Guidelines Governing Democratic Elections where it is expressly or impliedly stated that individual observers are prohibited from compiling their personal report for their respective supervisors for fear of inconsistencies. In fact the use of the word 'reports' and 'all reports' suggest that everyone is allowed and encouraged to compile their respective reports as long as they are in line with the principles as enunciated in the guidelines. A further look at clause 5.1.5 directly contradicts your explanation altogether; how then can one express their eye witness account of events in a single

report prepared only by the Secretariat? In any event, the fact that you again allege that he signed the SADC report is meaningless in regard to the foregoing in paragraph 1 above.

-3-

The Honourable Minister reiterates his earlier sentiments about your attitude alluded to in paragraph 3 and 4 and I wish to refer you to the attached transcribed Short Message Service (SMS) sent to the Minister from your mobile number 62116473, which is self-explanatory.

-4-

You may wish to note that the Public Service Commission is mandated to terminate employment of public officers from reasons other than matters of discipline. Further, the suggestion that the conventional disciplinary machinery should be set in motion in your case is a misconception of the nature of your contract of employment. In consequence, please be informed that after careful consideration of your said representations I am not convinced that your contract of employment should not be terminated. Accordingly, acting pursuant to clause 6 (2) and 6 (3) of your employment contract, I have taken a decision to terminate your contract with immediate effect upon receipt hereof on payment in lieu of notice of one (1) month.

I would like to take this opportunity to wish you well in your future endeavours.

Yours faithfully,

T. MPETA (MR)

PS, MINISTRY OF FINANCE

DATE

RECEIVED A COPY HEREOF

NAMES IN FULL

SIGNATURE

TIME

DATE

[16] The termination of the contract of engagement was thus effected without oral hearing but through “*show cause why*” correspondence. This novel process is not envisaged under the *Public Service Regulations* or *Code of Good Practice*.

[17] The present application was filed on the 7th February 2017. It is couched as follows:

- “1. *That ordinary modes and periods of service prescribed by rules of this Honourable Court be dispensed with on grounds of urgency hereof.*
2. *That a rule nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to come and show cause, if any, why:-*
 - (a) *The decision of the first respondent, alternatively the second respondent, in terminating applicant’s employment be stayed and the applicant be reinstated to the position which he holds, namely Private Secretary in the Ministry of Finance pending finalization hereof.*
 - (b) *The decision of the first respondent to terminate the employment of the applicant respondents shall not be reviewed, corrected and set aside as being both procedurally and substantively unfair and irregular.*
3. *It is declared that the first respondent acted unlawfully in dismissing the applicant from his employment without affording him a hearing in violation of the principles of natural justice and the Public Service Code of Good Practice of 2008.”*

[18] After the ***Fifth Amendment to the Constitutions of Lesotho Act No.8 of 2004***, the Head of Department (Principal Secretary) is vested with power to terminate employment for disciplinary reasons and in the exercise of his power the

Principle Secretary must comply – I would say strictly - with the *Codes of Good Practice*.

[19] The ultimate and crucial inquiry is whether the applicant was afforded a fair hearing in accordance with the *Public Service Regulations* and *Code of Good Practice* as provided under clause 1(2) of the contract of engagement.

[20] It is clear from tenor of the letters referred to above, a fall-out had occurred between the Minister and his Private Secretary and the crescendo was reached when a mysterious *SMS* was dispatched to the Minister from the *cellphone* of the applicant.

[21] It is clear that in this scenario, applicant was not afforded an oral hearing before the Principal Secretary terminated the *Local Contract*. What has to be decided is whether a show cause letter and response thereto constituted a minimum requirement of the *audi principle*. It is clear that the conduct of the applicant was at stake and the disciplinary due process came into play by operation of clause 1(2) of the contract.

[22] To the observation from court that it was important to bring a clear distinction whether the facts of the case amounts to “*a termination of contract*” or *a dismissal for misconduct*. It seemingly was the latter.

[23] In the present case the relationship between the Minister and his Private Secretary was governed by the contract of engagement. What occurred in this case is that the Minister had lost confidence and trust in his Private Secretary and he had recommended the termination of the local contract. The allegations levelled at the Private Secretary were, quite serious and incompatible with

cordial relationship that ought to exist between the Minister and his Private Secretary.

Submissions

- [24] **Mr. Nthontho**, for the applicant, strongly submitted that the contract of engagement could only be terminated in accordance of with clause 1(2) and clause 6 of the contract and that this brought into play the *Public Service Regulations* and *Code of Good Practice*.
- [25] **Mr. Nthontho** submitted that a full effect must be given to clause 1(2) and clause 6 of the contract of engagement and that it would be improper to regard this clause as “*non scripto*” or “*non sequitur*.” Moreover the contract must be interpreted fully and rationally under the ***parole evidence*** Rule of the common law. Thus if due process is guaranteed under *Public Service Act* and under *Code of Good Practice*, the applicant should not be deprived of fair hearing just because his contract is described as “*sui generis*” or “*stand alone*”.
- [26] **Mr. Nthontho** submitted that if clause 1(2) is given full effect to, there is no way the applicant could be deprived of from the due process under the *Public Service Act, Regulations* and *Codes of Good Practice*.
- [27] **Mr. Nthontho** quoted the often cited case of ***Matebesi v Director of Immigration and Other – LAC (1990-99) 616 per Gauntlett*** for his submission that applicant was not treated fairly in having his contract terminated summarily without an oral hearing over the damaged relations with his Minister. **Mr. Nthontho** submits further that the applicant was not given a “*Regulation 40*” hearing and oral hearing as required by *Section 8 Code*.

- [28] That the applicant was interviewed and appointed by the Public Service Commission admits no doubt and that the applicant would always act in all respect according to “*the instructions given to him by the Government through the Head of Department or other authorised officer.*” The distinguishing feature of the “*Local Contract*” is that is imposed a plethora of duties, functions and responsibilities which involve trust, respects and obedience.
- [29] **Mr. Moshoeshoe** for the respondent has strongly submitted that the local contract in this case is one *sui generis* and “*a stand alone*” and that the disciplinary process under the *Public Service Act 2005* is inapplicable to this case. He submits that the applicant’s, conduct is solely to be assessed and determined within the parameters of the “*Local Contract*”.
- [30] **Mr. Moshoeshoe** submits that the main question is whether the applicant was heard prior to the termination of his contract of enjoyment. It is not in dispute that since the *Fifth Amendment of the Constitution by Act No.8 of 2004* (amending *Section 137* of the Constitution) the power to discipline and power to terminate employment was henceforth reposed under the Head of Department,² who had to act in accordance with regulations and dictates of the *Code of Good Practice*.
- [31] Indeed the Private Secretary is accountable to the Head of Department i.e. the Principal Secretary. Clause 1 clearly stipulates:-
- “1. The person engaged undertakes
- [32] The “*Local Contract*” is certainly not a “*stand-alone*” contract to offer certain services; it is a special contract within the “*Public Service of Lesotho.*” There are three personalities involved: The Minister, The Principal Secretary and the Private Secretary whose “*conduct of the ... shall at all times be governed by the*

² *Section 6 of the Public Service Act of 2005.*

code of conduct contained in the Private Service Regulations” and the Code of Good Practices. There is no cogent reasons to treat the applicant any differently from other public officers.

- [33] The passing of the *Public Service Act No.1 of 2005* was intended to develop and maintain a stable, efficient and effectively managed Public Service. The ethos of fairness and due process (*Rule of Law*) was the bed rock of the Act.
- [34] In determining whether fair hearing is necessary before the termination of contract can be justified the following cases are worth reading: *Mohafa v. Ministry of Foreign Affairs*³, *Morakole*⁴ *Mohapeloa*⁵. At the end of the day, the question the applicant was “*treated fairly*” and this ultimately revolves around the particular circumstances of each case.⁶
- [35] In Lesotho, a novel practice has evolved in the public service where administrative head of department having decided to terminate employment or contract, writes a letter – often calling upon the employee “*to show cause*” why the contract should not be terminated. A fair hearing involve an impartial arbiter before whom the affected party is afforded an opportunity to present his/her case. This due process is guaranteed anted by the *Public Service Regulations* and *Code of Good Practice* that ensure fairness. I am not convinced that the applicant was fairly treated in according to the above cited *Regulations* and *Code of Good Practice*.
- [36] Regard being had to the fact that the conduct of the applicant was governed by *Public Service Law, Regulations* and *Code of Good Practice*, it cannot be said

³ C of A (CIV) No.2 of 2015

⁴ LAC (1995-1999) 675

⁵ *Matebesi v Director of Immigration and Other – LAC (1990-99) 616 per Gauntlett*

⁶ *Lucy Sekoto v. Principal Secretary of Water C of A (CIV) No. 32/2016*

that he was afforded a fair opportunity similar to other transgressing public servants.

[37] The local contract *in casu* is not “*stand alone*” but contract for specific performance within the Public Service. The post of Private Secretary is also listed in the Establishment list of the Public Service.

[38] Unlike in the case of **Morokole**⁷ (supra) the Public Service are in regard to the conduct that may result in the termination of the contract. In the case of **Morokole**, **Kotze JA** had this to say:

“We have heard extensive argument on both sides. Such argument, in the main, turned on the question whether the respondent was, by reason of the provisions of Clause 11 of the contract of service, deprived of the protection of having recourse to the disciplinary procedures afforded him by the Public Service Regulations imported into the service contract by Clause 5 thereof.

In the view that I take, the answer to the question referred to in the preceding paragraph is that the disciplinary procedures referred to, do not form part of the agreement. The Public Service Regulations are excluded in regard to termination (which is a concept wide enough to embrace disciplinary procedures) because termination is provided for in Clauses 9 and 11 of the agreement. Unless extended, the contract terminates after effluxion of a two year period or by three months’ notice by either party or by payment of salary by the employer in lieu of three months’ notice.”

[39] The full import of clause 1(2) must be given full effect to, otherwise they are rendered *non scripto*. Clause 1(2) must be read conjunctively with the termination clause 6, in so far it applies to termination of contract for misconduct

⁷ At page 86

of the Private Secretary. This accords well with the rule of law within the Public Service.⁸

[40] In my view and I so hold, the provisions of clause 1(2) of the contract of engagement were not complied with in dealing with the applicant.

[41] This court should emphasise that the natural justice principle of *audi alteram parterm* should be given an expansive and benevolent interpretation and meaning and statutory/contractual provisions should be restrictively applied in so far as they impact or attenuate on the *audi principle* otherwise the principle is rendered illusory.

[42] I find it difficult to reject **Mr. Nthontho's** submission that under the contract the conduct of the Private Secretary subjected to Public Service Act, Regulations and Codes of Good Practice. Clause 1 (2) of the contract is clear and should not be taken as *non scripto* and this clause has an umbilical effect between the contract and the Public Service Act and other Regulations and Codes'.

[43] The application succeeds with costs.

S.N. PEETE
JUDGE

FOR APPLICANT: Mr. *Nthontho*

FOR RESPONDENTS: Adv. *Moshoeshoe*

⁸ Section 20 of the Constitution of Lesotho.