

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/215/19

In the Matter Between:-

NTHABISENG KHOTLE

APPLICANT

AND

THE PRINCIPAL SECRETARY MINISTRY OF FINANCE

1ST RESPONDENT

THE CHAIRPERSON OF THE DISCIPLINARY HEARING

2ND RESPONDENT

MINISTER OF FINANCE

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 16TH OCTOBER 2019

DATE OF JUDGMENT : 14TH NOVEMBER 2019

CASE SUMMARY: *Administrative laws – Applicant dismissed from work after apparently pleading guilty to the charges – Chairperson of the disciplinary committee convicting the applicant without ensuring that she really admitted guilt of the alleged breaches – No outline of facts being made- Role of chairpersons of disciplinary committees when the accused employee pleads guilty to the charges.*

-Held: It was irregular for the chairperson of the disciplinary committee to the applicant merely on the basis that the pleading guilty to the charges without satisfying himself that indeed the facts disclosed commission of the alleged breaches of discipline.

ANNOTATIONS:

BOOKS: *John Grogan, **Workplace Law**, 12th Ed.*

STATUTES: *Public Service Act 2005*

Codes of Good Practice 2008

CASES : *Director of Public Prosecutions v Ntsoele LAC (2005 – 2006) 385*
Monare v South African Tourism and Others (JA 45/14) [2015]
ZALAC 47; [2016] 2 BLLR 115 (LAC); (1016) 37 ILJ 349 (LAC)

Per Mokhesi J

[1] Introduction

This is an application for review of disciplinary proceedings held against the applicant. In this application the applicant is seeking relief in the following terms:

1. Directing First and Second Respondents to dispatch the record of proceedings in the disciplinary case against the Applicant to the Registrar of this Honourable Court within fourteen (14) days hereof;
2. Directing and ordering that the proceedings and decision in a certain disciplinary case against the applicant be reviewed, corrected and set aside;
3. Directing and ordering the Respondents to reinstate the Applicant to her position as Pensions Accountant without loss of salary and /or benefits, remuneration and rank;
4. Directing and ordering the Respondents to pay Applicant's salary from the date of the purported dismissal to the date of reinstatement with 12.5% interest per annum thereof.
5. Directing and ordering the Respondents to pay costs hereof Attorney and client scale.

[2] Factual Background

This application is opposed. In a nutshell the factual background to this case is as follows: The applicant was employed as Pensions Accountant in the Ministry of Finance since the year 2013 until the 01st November 2016. She was formally dismissed following the disciplinary hearing which was instituted against her. In the disciplinary hearing she faced three counts, viz, a) contravention of clause 3(2) (n) of the **Codes of Good Practice 2008** which states 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."; (b) contravention of clause

3(2) (f) of the **Codes of Good Practice 2008** which provides that a public officer shall not “by any act or omission wilfully fail to comply with, or willfully disregard, any provision of a law or any lawful instruction given by any proper authority.”; (c) contravention of clause 3(2)(g) the **Codes of Good Practice 2008** which states that a public officer shall not “knowingly make any false, misleading or inaccurate statement either orally or in any official document or book, or sign any such document, or destroy any document or book whether electronically stored or otherwise or erase any entry with intent to deceive.” What transpired at the hearing which ultimately led the 1st Respondent to dismiss the applicant is contested, but the bottom line is that the Public Service with effect from 01st October 2016. The applicant was advised accordingly that she has a right to appeal, a route which she followed. However that appeal is pending before the 1st respondent even today. The appeal has been marred by several postponements. Frustrated by lack of progress on the appeal, the applicant reverted to this court to seek relief in the manner outlined above.

[3] Parties’ respective cases: (Applicant’s case)

It is the applicant’s case that the Principal Secretary of the Ministry of Finance (PS – Finance) dismissed her not based on the recommendation of the Head of section as the proceedings were unconcluded. She further contends that she never pleaded guilty to the charges even though it is recorded as such in the record of proceedings. She says she merely said she understood the charges against her.

[4] Respondents’ case:

Mr. Thabo Ramochela who chaired the disciplinary avers that after the conclusion of a hearing he made a recommendation for the dismissal of the applicant, and he attached annexure ‘AG2’ which he says is a recommendation for dismissal of the applicant. This ‘recommendation’ is not dated nor signed, and its authenticity is questioned by the applicant. The applicant alleges that it was manufactured to frustrate the applicant’s case as the record of proceedings has not been challenged as not being a true

reflection of what actually transpired at the hearing. I revert to the issue of the record in due cause.

[5] Issue for determination:

a) Whether there were any gross irregularities in the conduct of disciplinary hearing capable of vitiating the proceedings.

I now turn to address the irregularities complained of to determine whether they are so gross as to vitiate the disciplinary proceedings. But before I do that it is worth reproducing the proceedings (in relevant parts) so that a clearer picture of what happened can be appreciated. A fair translation of the proceedings was made and this is what transpired:

“...CHAIRPERSON read the charge and said, “I read the charge fast because it has been with us for a long time and we are conversant with it. Defendant, after I read the charge, are you guilty or not of the charge?

DEFENDANT: I AM GUILTY NTATE

Chairperson: You are guilty. Alright. Complainant, as the complainant we hear the defendant say she is guilty but, for the sake of our understanding on these issues, can you say what was the issue, can you say what was issue here, so that we can hear what mme Nthabiseng is guilty of or let me put it this way starting with her, mme Nthabiseng, what happened?

DEFENDANT: Because I did not come when I was called because I was sick. Further, that time I took was long for me to come and report that I was sick. So when I wrote to answer Mme (Ntsoaki/witness), it was after a long time. The receipts I do not know, I might have misplaced them I do not know where they are.

CHAIRPERSON: For how long has this issue of the receipts been inquired?

DEFENDANT: I think it is from Wednesday that I was told on.

CHAIRPERSON: Mme Salome, what can you say? I want you to remember that Mme Nthabiseng said she is guilty. Can you highlight what is the key issue here?

COMPLAINANT: What actually happened is that at the time of reconciliation, when the financial year of last year ended and we reconciled things of revenue people and we had to check money we have collected in the office and that which went to the bank. When we checked the records and the receipt book we use to collect and the deposit book we take money to Central Bank with, we found out that there is a shortage of money and found out also that there is money that did not go to Central Bank. Actually we take money to Central Bank or LRA. When we take money to LRA, we do not use deposit book, we take it there and LRA gives us receipts showing that it has received such money. So it would seem according to my thinking that now that there is a shortage in respect of 'm'e, the shortage was found with the receipts from LRA and we discussed with 'm'e Nthabi before she left that we need to check the receipts before she left but due to the fact that there was a lot of work paying the pensioners she left before we could check them. The Friday she left, when she had to start at Pensions Unit on the following Monday, we wrote it now that she left when there was no complete handover...Chairperson interferes)

CHAIRPERSON: Excuse me, 'm'e Nthabiseng said she is guilty. I was saying the details including the evidence would have been an issue if she had said "I am not guilty!" Now she said she is accepting the guilt. My understanding is that 'M'e Nthabiseng accepts the guilt, she is aware of the charge and accept those facts!. As the complainant, when you put facts it was just to put the major facts. My understanding Mr HR and Mrs HR is that when one has admitted to guilt we do not need to delve deep into the facts, you will advice me.

I was thinking that if 'm'e Nthabiseng had said these issues are not true and I do not know them. I think that that would be then that we go along with the evidence whether written or verbal so that we can be clear as to what is the major issue and hear from the defendant as to her own story. It's true we have it, it is written, we see it. What I wanted was just a summary of clarity on the issue.... (witness shows to have something and it is given chance to speak)

.....Alright! Mr HR and Mrs HR, unless you will advice me otherwise, I take this case automatically closed. We will belabor the issues. 'M'e Nthabiseng acknowledged the charge and I also find her guilty as charged...

CHAIRPERSON: There is something you said; M'e Nthabiseng about whether you can be given documents, that is correct? (defendant agrees). If that is where the context of that is going, no 'M'e that chance is no longer available. At this stage, there is nothing like that anymore. I am learning that that chance was available at the time you were given and you could have used it for that. Secondly, it is true I have said to you, as the chairperson of this disciplinary hearing, you have acknowledged, and I have found you guilty as you admitted. So this will be reduced into writing and you will receive them too. That said ladies and gentlemen, I ask that we close this case until 'M'e Nthabiseng will get a written verdict."(sic)

[6] **Applicable Law**

When conducting disciplinary proceedings "[p]residing officers should be wary of simply accepting an employee's plea of 'guilty' to a charge, without assessing whether the plea really amounts to an admission. A mere statement that the employee had 'done wrong' was held not to amount to a plea of guilty to a charge of fraud. As in criminal proceedings, a plea of guilty must cover all the elements of the charge" (**John Grogan, *Workplace Law*, 12th Ed. at p. 254**).

[7] The requirement that a presiding officer must assess whether the plea really amounts to an admission is to provide a safeguard against wrong convictions. The presiding officer can only make assessment whether the plea of guilty amount to an unequivocal admission if after the ‘accused’ has pleaded guilty, an outline of facts is laid before such a presiding officer. It is only when the full spectrum of evidence is laid out before him and by questioning the ‘accused’ whether she or he accepts the outline of facts that he /she can satisfy himself that the employee has pleaded guilty to the charges. Where the accused is facing multiple charges as in this case the importance of following these simple procedure is heightened. Where the outline of facts does not disclose the commission of offences or breaches, the presiding officer should return a verdict of not guilty. ***Director of Public Prosecutions v Ntsoele LAC (2005 – 2006) 385.*** In this case it was highlighted that “the function of the trial judge when the summary of the case is presented to him ‘is not merely a passive one’. If the outline of the facts is deficient in its detail he should request the parties for additional information” to enable him to return a well-founded verdict (***ibid at para. 5***). The outline of facts is but one of the safeguards against wrong convictions. The other safeguard is the questioning by the presiding officer of the accused. I am saying these mindful that disciplinary proceedings are not criminal proceedings.

[8] Within the area of labour law, the position regarding utilization of safeguards against wrong conviction following a plea of guilty, was correctly stated as follows, in ***Monare v South African Tourism and Others (JA 45/14) [2015] ZALAC 47; [2016] 2 BLLR 115 (LAC); (1016) 37 ILJ 349 (LAC) at paras. 71-73.***

“[71] Even though it is recorded in the disciplinary proceedings that the appellant pleaded ‘guilty’ to charge 2, one needs to examine that record carefully in order to establish whether he indeed pleaded guilty as contemplated in law. In order for guilt to have been established, the appellant would have had to freely, voluntarily and unequivocally admit all the elements of the charge. That includes fraud and dishonesty. In his defence at the disciplinary hearing, the appellant explained that he had used the password mistakenly in a situation of

need. He denied being fraudulent or dishonest. He admitted being 'wrong' but denied that his intention in using the password were 'illegal'. Technically therefore, the appellant did not plead guilty to the second charge, because he did not admit all the elements of the charge and the crucial ones remained in issue. To find him guilty in those circumstances would itself have been grossly unfair and irregular.

[72] In the area of criminal law and procedure, where courts are constantly confronted with guilty pleas to serious criminal charges, special safeguards are provided that ensure that an accused persons utterances of a plea of guilty is in fact a proper plea of guilty and an unequivocal admission of guilt..., the presiding officer may have to question the accused person with reference to the alleged facts of the case in order to ascertain whether she or he admits the allegations in the charge to which he or she has pleaded guilty. Furthermore, courts are required not only to be convinced that an accused admits an allegation in the charges, but that the accused appreciates what that admission entails.

[73] Even though the disciplinary inquiry is not a criminal trial, it has certain features akin to such a trial. In a disciplinary hearing, for example, there is (a) charge(s) of misconduct to which an employee may either plead guilty or not guilty, which is similar to a plea to a criminal charge. Fairness and logic dictates that the same safeguards that apply in a criminal trial with regard to a plea of guilty, should also apply in disciplinary hearings where the employee faces dismissal."

[9] Application of law to the facts

It will be recalled that one of the applicant's complaints is that the chairperson of the disciplinary proceedings did not recommend her dismissal. Regarding this issue I am going to proceed from the assumption that indeed the chairperson recommended that the applicant be dismissed. However, this is not the end of the matter. In my considered view the

disciplinary proceedings against the applicant should be reviewed and set aside on the basis of gross irregularities which prejudiced the applicant. Firstly, the applicant did not plead guilty to the charges even though it is recorded as such in the record of proceedings. This is supported by the applicant's explanation of her plea of guilty when she says she pleaded guilty "[b]ecause I did not come when I was called because I was sick. Further, that time I took was long for me to come and report that I was sick. So when I wrote to answer Mme (Ntsoaki/witness), it was after a long time. The receipts I do not know, I might have misplaced them i do not know where they are."

- [10] This answer makes it plain that the applicant did not plead guilty to the charges. Further, during the proceedings the applicant wanted to be given documents on which the charges/some of the charges were based, but the chairperson of the disciplinary hearing ruled that such an opportunity was no longer available to her as she had already pleaded guilty. It is clear that the applicant's appreciation of what was happening was very poor, she was of the view that the hearing was to proceed and that evidence should be availed to her for perusal, however the chairperson was on a different wavelength altogether as he was determined that the proceedings had been concluded on the strength of the applicant's apparent plea of guilty. This case highlighted a dire lack of appreciation of what was expected of the chairperson in conducting the disciplinary proceedings. Even the Human Resource persons who were present were not of any help, and I express these sentiments with utmost humility mindful that the officials involved in these proceedings may not have had any basic legal background.

As already said in my considered view the applicant did not plead guilty to the three charges and was therefore dismissed without observance of requirements of a fair hearing, viz, the decision to dismiss was not preceded by a hearing, in the sense that the applicant was not given an opportunity to lead evidence in rebuttal of the charges and to challenge the complainant's assertions against her or to call witness and to question them, or to lead evidence in mitigation of sentence. Non-observance of these requirements

of a fair hearing rendered the proceedings grossly irregular. Even assuming that I am wrong to conclude that the applicant did not plead guilty, the applicant's case would still be stronger regard being had to the conduct of the proceedings by the chairperson. The chairperson's conduct did not measure up to the standard articulated above, namely, he did not seek to ensure that the plea of guilty really amounted to an admission in respect of the three charges she faced, and to ensure this the presiding officer ought to have utilized the safeguards mentioned above; there was no outline of facts to prove that indeed the applicant had committed the breaches of disciplinary as alleged. To make matters complicated, when the complainant sought to outline the facts she was interjected and stopped on her tracks by the chairperson because according to him it was necessary to "delve deep" into the evidence as the applicant had already pleaded guilty. This is a clear depiction of lack of appreciation of the role the chairperson was enjoined to perform in this regard. This malady surely effected the outcome of the proceedings as it is not clear in terms of which breach the applicant was found guilty. I have found that the conduct of these proceedings in general grossly irregular. To make matters worse, the proceedings were also concluded without granting the applicant an opportunity to lead evidence in mitigation of sentence.

[11] In the result the following order is made:

- a) The proceedings and decision in a disciplinary case held on Friday, 02nd September 2016 be and is hereby reviewed, corrected and set aside.
- b) The respondents are directed and ordered to reinstate the applicant to her position as Pensions Accountant without loss of salary and/or benefits, remuneration and rank.
- c) The respondents are directed and ordered to pay applicant's salary from the date of the purported dismissal to the date of reinstatement with 6% interest *per annum* thereon.
- d) The applicant is awarded costs of this application.

MOKHESI J

**FOR APPLICANT: ADV. SETLOJANE INSTRUCTED BY T. MATOOANE AND
CO. ATTORNEYS**

FOR RESPONDENTS: ADV. TAU FROM ATTORNEY GENERAL'S CHAMBERS