# IN THE HIGH COURT OF LESOTHO

**HELD AT MASERU** **CIV/APN/326/2020**

In the matter between:

**PROFESSIONAL LOGISTICS INTER-NATIONAL (PTY) LTD** **APPLICANT**

**AND**

**THE MINISTER OF TRADE AND INDUSTRY** **1st RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF TRADE AND INDUSTRY** **2nd RESPONDENT**

**THE COMMISSIONER OF TRADE AND INDUSTRY** **3rd RESPONDENT**

**THE CHAIRMAN, TRADING ENTERPRISES BOARD** **4th RESPONDENT**

**THE ATTORNEY GENERAL** **5th RESPONDENT**

**Neutral Citation**: Professional Logistics International Pty Ltd v The Minister of Trade and Industry and 4 others (CIV/APN/326/2020) [2021] LSHC 01

## JUDGMENT

**CORAM:** **MOKHESI J**

**DATE OF HEARING:** **02ND DECEMBER 2020**

**DATE OF JUDGMENT:** **18TH FEBRUARY 2021**

## SUMMARY

**ADMINISTRATIVE LAW:** *Exhaustion of local remedies- Held, party not bound to follow internal remedies where a challenge is directed at the illegality and irregularity of the decision-making- Whether every noncompliance with peremptory statutory decrees should be visited with nullity-Held strict noncompliance with the statute does not always lead to a declaration of nullity where the purpose of the provision has been achieved- Reasonableness and Rationality, whether an administrative decision can be challenged on the basis of proportionality in the absence of the violation of the Bill of rights- Held, the administrative decisions cannot be challenged on the basis proportionality where the decision does not raise rights issues- The doctrine of deference applied.*

## *ANNOTATIONS*

### *Legislation*

1. *Trading Enterprises Order 1993*
2. *Trading Enterprises Regulation 1999*

### *Cases*

1. *Welkom village Management Board v Leteno 1958 (1) (AD) 490*
2. *Koyabe and Others v Minister of Home Affairs and Others 2009 (12) BCLR (CC); 2010 (4) SA 327 (CC)*
3. *President of the Republic of South Africa and Others v South African Rugby Union and Others 2001 (1) SA 1*
4. *Unlawful Occupiers of the School Site v City of Johannesburg (036/2004) [2005] ZASCA 7; [2005] 2 ALL SA 108 (SCA) (17th/03/2005)*

5. *Nkisimane and Others v Santam Insurance Co. Ltd. 1978 (2) SA 430 (A)*
6. *Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA)*
7. *Leach v Secretary for Justice, Transkeian Government 1965 (3) SA 1 (E)*
8. *Katofa v Administrator-General for SWA and Another 1985(4) SA 211*
9. *Union Government v Union Steel Corporation 1928 AD*
10. *National Transport Commission v Chetty's Motor Transport (PTY) Ltd 1972*
11. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 1 KB 223*
12. *Koatsa v National University of Lesotho LAC (1985-1989) 335*
13. *Brigadier Mareka and Others v Commander LDF (C of A (CIV) 52/2016) [2016] LSCA 9 (29 April 2016).*
14. *R v Secretary of State for the Home Department ex parte Brind (1991) 1 All ER 720; [1991] 1 AC 696*
15. *Council of Civil Service Union and Others v Minister for the Civil Service [1984] 3 WLR 1174 (HL)*
16. *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) (CCT21/01) [2007] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002)*
17. *Smit v Minister of Justice and Correctional Service and Others (CCT/235/19); 243/19) [2020] ZACC 29 (18TH December 2020)*
18. *Bato Star Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)*
19. *Mofoka v Lihanela LAC (1985 – 1989) 326*
20. *Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA)*
21. *Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)*

**MOKHESI J**

**INTRODUCTION**

[1] The applicant is a Logistics Company duly registered as such since June 2019. On the 05th March 2020 an association known as Road Freight Association of Lesotho (RFAL) lodged a complaint to the 2nd respondent to the 2nd respondent in his capacity as the Principal Secretary, Ministry of Trade and Industry (PS Trade). RFAL members are freight operators whose business entirely subsists on orders for transportation of goods from the manufacturing companies based in the Lesotho for delivery to the ports in the Republic of South for onward shipping to the international markets. Complaints of RFAL to PS Trade rested on a number of bases, including but not limited to acts of intimidation and suspension meted out on RFAL members, and unfair business practices between the applicant company and another company by the name of Professional International (PTY) Ltd which predominantly trades as a risk management company for provision of protection, audit and loss investigation, research and provision of support to textile factories in Lesotho who export finished products and containers through the Durban harbor in the Republic of South Africa. This latter company owns a controlling stake in the applicant.

[2] The second respondent acted on the request for its intervention by issuing an invitation to the applicant company on the 11th August 2020 requesting the latter's response to the allegations against it on or before the 13th August 2020. The applicant company did not respond within the time span given in the invitation but had instead responded on the 19th August 2020 . The allegations about which the applicant was requested to make representations were couched as follows (in relevant parts):

"***RE: COMPLIACE WITH TRADING ENTERPRISES LAW***
*You are hereby invited to note and act accordingly with respect to the following issues:*

***1. Presentation of Transfer of Expertise Contracts***
*The trading Enterprises Board is engaged in evaluating contracts relating to transfer of expertise in the transport and logistics sector. The Board therefore invites you to submit all contracts relating to transfer of expertise entered into and implemented by Professional Logistics International (PTY) Ltd in the last three years. Your submission should be made by end of business on Thursday 13 August 2020 to the office of the Principal Secretary Ministry of Trade and Industry.*

*2.* ***Allegations of unethical and unfair Business Practices***
*We are in receipt of a letter of complaint from the Road Freight Association of Lesotho. The Association reports that Professional Logistics International (PTY) Ltd, in collaboration with other enterprises is engaged in unfair, unethical, unconscionable and dishonest behavior in its dealings with the Association. The unethical and unconscionable behavior is demonstrated by the following:*

*a. Arbitrary suspension by Professional International (PTY) Ltd of services of some of the members of the Association from providing services to the factory firms in Lesotho: i.e. Atlantic Freight, Pumpkin Carriers and SS Carriers were arbitrarily suspended;*

*b. Arbitrary revolution by Professional International (PTY) Ltd of loads allocated to some of the members of the Association i.e. SS Carriers, J Logistics and Mac Freight.*

*c. The allocation of loads and vetting of transporters is conducted by Professional International (PTY) Ltd, yet it also provides freight transport service;*

*d. Professional International (PTY) Ltd allocates the loads unfairly such that some members of the Association have not been allocated any loads since February 2020.*

*e. Questionable exchanges of loads in RSA – Lesotho border towns i.e. Maseru and Ficksburg and*

*f. Unfair pricing in the sector where similar services are charged differently.*

*These are serious allegations of dishonest conduct and unfair practices which threaten the smooth operations in the sector."*

[3] After receipt of the applicant's representations, on the 24th August 2020, the 4th respondent (Trading Enterprises Board) issued a suspension of the applicant's trader's licence and this suspension was accordingly communicated to the applicant company. Essentially the basis of the decision to suspend the applicant's trader's licence was based on a number of reasons which I intend to reproduce verbatim (in relevant parts):

*"a. The Board learned of the allegations of unfair trade practices in the transport and logistics sector where Professional Logistics (PTY) Ltd is alleged to the involved. The Board decided that on the available evidence, Professional Logistics International (PTY) Ltd. appears to be engaged in unfair business practices as alleged. The evidence indicates that Professional International (PTY) Ltd and Professional Logistics International (PTY) Ltd are related companies; further, the two companies are related to major textile and garments producers in Lesotho and this relationship raises concerns of preferential treatment in favour of Professional International (PTY) Ltd in the pricing rate and provision of transport services.*

*b. These allegations are very serious and threaten to disrupt operations in the provision of freight transport and logistic service in Lesotho; the allegations also threaten the advancement of business undertakings owned by citizens. Therefore, the suspension is intended to allow the Board to confirm or disapprove (sic) the allegations and to ensure effective provision of these services in Lesotho in a manner that is conducive for advancement of business undertakings owned by citizens. The Board expects full cooperation of Professional Logistics International (PTY) Ltd in this regard.*

*2. The suspension is with effect from the day following the receipt of this notice and shall be effective for a period of 30 days. During this period, Professional Logistics International (PTY) Ltd shall not provide transport and logistics in Lesotho.*

> *3. During the period of suspension, the Board reserves the right to revoke the suspension if the Board is satisfied that the reasons for the suspension no longer exists, please wait for further notice in this regard. At the end of 30 days the Board may extend the suspension or cancel the licence if the Board deems it necessary to do so.*
>
> *4. You are advised that if you are not satisfied with the decision of the Board as communicated herein, you may appeal to the Minister of Trade and Industry within 14 days of receipt of this letter pursuant to* ***Section 21 of the Trading Enterprises Order 1993.*** *Should you decide to appeal, please furnish the office of the Director of Trade with copy of the appeal."*

[4] Meanwhile during the period of suspension the Ministry of Trade (1st respondent) conducted investigations and compiled a report relating to the allegations mentioned above. It would appear that the representations from the applicant company were taken into consideration, such as load allocation because they did not form part of the adverse findings contained in the report. The formal meeting in which representations were made was on the 11th September 2020.In the report recommended either the taking of remedial action or cancellation of applicant's trader's licence. It is on the basis of this report that the Board on the 28th September 2020 convened and resolved to cancel the applicant company's trader's licence.

[5] Initially on an urgent basis, the applicant had sought to review the decision to suspend its licence, but when the matter was pending to be heard, the 4th respondent cancelled the applicant's trader's licence. In view of this reality the applicant amended its founding affidavit to now base its review on the cancellation of the licence. The reason which occasioned the delay in determining the initial matter related to transcription of record of the proceedings of the 4th respondent, and when suspension morphed into cancellation that

compounded matters even further for the applicant. It is on the basis of cancellation of its trader's licence that the applicant is seeking to set aside as null and void that decision, and a declarator that the said decision to cancel is unlawful for violating the principles of natural justice especially the *audi alteram partem* rule. The applicant's complaint with regard to *audi* principle is not that he was not given any hearing, but rather that he was not afforded adequate time to respond to the allegations. It is the applicant's further argument that in the event the preceding argument fails, the decision is impugnable on the basis that it was not made by the Board and that it did not consider or take into account the applicant's representations; That the notices of suspension and cancellation by the licence were issued by the Principal Secretary instead of the Director of Trade, in violation of **S. 20(5) of the Trading Enterprises Order, 1993( the Act);** that the letter issued on the 21st August 2020 by Deputy Principal Secretary – Mrs. T. Mojela to members of the Board telling them that "the ministry recommends that the Board resolve to suspend the Trader's licenses ….. issued to" the applicant, constitutes unlawful dictation; non-compliance with **Regulation 25(2) of Trading Enterprises Regulation 25(2) of Trading Enterprises Regulation 1999;** illegality; Unreasonableness on the part of the Board for adopting *'a harsh'* approach of cancellation instead of requiring remedial action. I deal with the issues raised in due course.

[6] In opposition, the respondents rely on the facts articulated in the preceding paragraphs to justify their decision, and had raised points in limine which were later abandoned as they had been overtaken by events. On the merits, the respondents had raised a defence that the applicant had approached this court without first exhausting internal remedies.

[7] **<u>EXHAUSTION TO LOCAL REMEDIES</u>**

The respondents had raised a point that the applicant has not exhausted local remedies before approaching the court for review, the argument being that under s.21, the Act provides for an appeal procedure by the person aggrieved by the decision of the Board. The appeal against the Board's decision lies to the 1st respondent. Under common law, a mere existence of internal remedies in of itself is not a ground to suggest that the legislature intended that they be exhausted first before approaching the courts of law. The question is always whether the reading of the provision in question by necessary implication, require that internal remedies be exhausted, or that the court's jurisdiction is ousted or excluded until internal remedies will have been exhausted. Where the challenge relates to illegality or irregularity of the decision-making process, courts' jurisdiction will not be taken as excluded or delayed (**Welkom Village Management Board v Leteno 1958 (1) (AD) 490 at 503B – C**), and further at 503 D – E the court (ibid) made the following apposite remarks:

> *"In my judgment, the necessary implication in question can seldom, if indeed ever, arise when the aggrieved person's very complaint is the illegality or fundamental irregularity of the decision which he seeks to challenge in the courts."*

[8] As already said the Act provides for an appeal channel to the person aggrieved by the decision of the Board, to the Minister of Trade, within 14 days of the receipt of notification of the decision. My reading of this provision is that it provides for a typical appeal channel to the Minister to deal with matters which are incidental to the application of the Trading Enterprise Order. In respect of those matters which are incidental to the application of the Order, the jurisdiction of this court to exercise its review powers is deferred until the

internal appeal process is completed, but not when the challenge pertains to the illegality or irregularity of the administrative decision. There is a reason why the internal administrative processes should be given a chance, in the absence of illegality and irregularities. Those reasons were stated in **Koyabe and Others v Minister of Home Affairs and Others 2009 (12) BCLR (CC); 2010 (4) SA 327 (CC)** at paras 36 – 37, as follows.

> *"36. First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasized that what constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of a particular case. Thus, the need to allow executive agencies to utilize their own fair procedures is crucial in administrative action. In* ***Bato Star****, O'Regan J held that –*
>
> > *'a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker… A decision that requires an equilibrium to be stuck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker.'*

*Once an administrative task is completed, it is then for the court to perform its responsibility, to ensure that the administrative action or decision has been performed or taken with the relevant and other legal standards.*

*37. Internal administrative remedies may require specialized knowledge which may be of a technical and/or practical nature. The same holds true for fact-sensitive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record."*

The instant matter concerns issues of illegality and irregularities which are justiciable only in this court. I therefore consider that the point on non-exhaustion of internal remedies should fail. I turn now to consider the applicant's grounds of attack of the decision to suspend and ultimately cancel its license.

[9] **FAILURE TO AFFORD THE APPLICANT THE BENEFITS OF *AUDI ALTERAM PATERM RULE***

It is the applicant's case that it was not afforded adequate time to respond to allegations levelled against it. Reference in this regard is made to the fact that it was given only a day to respond. The letter requesting the applicant to make representations pertaining to the allegations against it was issued on the 11th August 2020 requiring it to make representations by the 13th August 2020. The applicant was given barely a day to respond, but as was stated in the narration of background facts to this case, the applicant did not heed this awfully short time presented by the 2nd respondent to respond, but instead dealt with the allegations on the 19th August 2020. The Board only convened

to make its decision after receiving the applicant's written representation on the 24th August 2020.

[10] Although the request for representation was given an awfully short period, the applicant responded within the time it considered enough to deal with the allegations levelled against it. In the circumstances, I consider that a challenge to adequacy of time is formalistic. It needs to be recalled that fairness must not be applied as matter of rote in every conceivably identical situation, but instead, should always be judged according to the circumstances and nature of each case. This point was highlighted in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2001 (1) SA 1 at para 219.**

> *"[219] the requirement of procedural fairness, which is an incident of natural justice, though relevant before tribunals, is not necessarily relevant to every exercise of public power…. What procedural fairness requires depends on the circumstances of each particular case …"*

In the circumstances given that the applicant tendered its representations at the time it considered adequate, a challenge based on the sufficiency of time to make representations should fail.

[11] **P.S ISSUING NOTICES OF SUSPENSION AND CANCELLATION CONTRARY TO S. 20:**

The applicant contends that both the letters of suspension and cancellation of its Trader's license is illegal to the extent that it was issued by the 2nd respondent (PS Ministry of Trade) instead of the Director of Trade contrary to **S. 20(3)** of the Act. It is true that in terms of the Act, notice of suspension should be signed and served upon the defaulting trader by the Commissioner

of Trade. In terms of the Act, the Commissioner of Trade (Now Director of Trade) serves as a secretary of the Board(4th respondent), and among his or her powers under s.8 (1) of the same Act, is to communicate the decisions of the Board. At this point it is apposite to reproduce the legislative scheme under which licenses are either suspended or cancelled by the Board, and this regime is found under s.20 of the Act, and it provides:

> *"20. (1) Subject of subsection (2), the licenses prescibed in the regulations shall be of full force and effect in respect of the premises and the type of enterprise in relation to which they have been granted.*
>
> *(2) Subject to the other provisions of this section, the Board may,*
>
> *(a) On the advice of the Commissioner [Director of Trade], if the continuance of any trade or occupation constitutes a danger to public health or public morality; or*
>
> *(b) Where it is satisfied that the contract submitted to it under section 19 concerning the trade or occupation is not conducive to the development and promotion of trade in Lesotho, suspend or cancel any license in relation to the trade occupation.*
>
> *(3) The Notice of suspension shall state the reasons for that suspension and the period for which it is to be effective.*
>
> *Provided that the period so specified may be extended by the Board as it deems necessary but the total period of suspension shall not exceed 60 days.*
>
> *(4) The Board may revoke a suspension if it considers that the necessity for the suspension no longer exist*
>
> *(5)* ***The suspension of the license and the revocation of that suspension shall be by notice in writing signed by the commissioner and shall be served on the license holder at his place of business or, in his absence or if he cannot be found, on any person apparently in charge of the enterprise to which the license relates****.*
>
> *(6) ....*

*(7) The Board may, in its discretion, cancel a license if the reasons for which it was suspended have not been charged before the expiry of the suspension." (emphasis provided)*

[12] To be read with S. 20 (above) is **Regulation 25 of Trading Enterprises Regulations 1999,** which provides:

*"25. (1) every license holder shall conduct his business affairs –*

*(a) In a manner compatible with good standards of honesty and good salesmanship;*

*(b) ....*

*(2) The Board or Local Licensing Board may, in writing, give notice to the license holder specifying matters, under this regulation, which it considers have to be remedied and requiring him to remedy them to its satisfaction within a specified period.*

*(3) The Board may, subject to Section 20 of the Order, suspend or cancel license where license holder fails to comply with this regulation."*

[13] it is common ground that the letters in issue were not signed by the Director of Trade but instead by the 2nd respondent being the Chairperson of the 4th respondent. The question to be answered in this regard is whether in view of a clear wording of s.20(5) of the Act, the fact that the letters were signed by an unauthorized person should visit their issuance with nullity. In order to answer this question an interpretative exercise of s.20(5) must be undertaken. It is trite that the process of legislative interpretation seeks to attribute meaning to the words used in the provision by having regard to ordinary rules of grammar and syntax, and also by taking into account the context and purpose of such provision **(Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 ALL SA 262 (SCA) ; 2012 (4) SA 593**

**(SCA)** at para.18). It is the applicant's contention that S.20 (5) is peremptory as it decrees that the notices of suspension or cancellation of a trader's license shall be in writing signed by the Commissioner (Director of Trade). It is common cause that in the instant matter, the notices were signed by the PS Trade not the Director, contrary to s. 20 (5). In my judgment, the fact that this section has not been complied with does not visit the suspension or cancellation with nullity on that account alone. The purpose of this section as I understand it, is merely to make it mandatory the form of the decision (in writing and signed by the Director) and how that decision is to be communicated to the affected party. Both the PS and the Director are members of the Board, with the former being the Chairman and the latter, the secretary. In my view even though the mandatory statutory form of the Board's decision has not complied with, does not mean that the purpose of the provision has not been achieved – which is to communicate the decision of the Board to the person who stood to be adversely affected by it. This approach to statutory interpretation was captured in **Unlawful Occupiers of the School Site v City of Johannesburg (036/2004) [2005] ZASCA 7; [2005] 2 ALL SA 108 (SCA) (17th/03/2005)** at para. 22, where Branch JA said:

> *"[22] As to the first and second objections pertaining to the contents of the notice, it is clear that the reference to S. 4(1) of PIE was a mistake. To that extent the notice was therefore defective. I am also in agreement with the contention that the grounds for the application stated in the notice were too sparse to meet with the requirements of S. 4(5) (c). The respondents should at least have been told that their eviction was alleged to be in the public interest. As the appellants also correctly pointed out, it was held in* ***Cape Killarney Property*** *(1227E – F) that that the requirements of S. 4 (2) must be regarded as peremptory. Nevertheless, it is clear from the authorities that even where formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision has been achieved*

> *(See e.g.* ***Nkisimane and Others v Santam Insurance Co. Ltd. 1978 (2) SA 430 (A) 433 H – 434B; Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA) para. 13).”***

[14] In this matter, what the PS did was to sign the decision of the Board contrary to the Act, but given that I consider the main purpose of S. 20 (5) is to communicate the decision of the Board to affected persons, the fact that there was a defect in the formalities does not detract from the conclusion that the main purpose of the provision has been achieved. This is more so because the applicant is not complaining about not being served with the decision of the Board. It follows that this point ought to be dismissed.

[15] **<u>THE BOARD ACTED UNDER UNLAWFUL DICTATION:</u>**

During the period of the applicant's suspension, on the 21st August the 2nd respondent authored a letter directed to Board members. In the said letter, the PS made it plain that the Ministry of Trade had *"considered the response of the two companies and noted that it is evident a relationship exists between Professional International (PTY) Ltd and Professional Logistics International (PTY) Ltd. That relationship seems to create a conflict of interest and affords unfair advantage to Professional Logistics International (PTY) Ltd when allocation of loads are considered."* The letter also highlighted that the director of the applicant is also an accountant for Nien Hsing Group (Group) which owns various textile factories in the Kingdom. This Group *"is a major client in freight transport services. Therefore, it appears that the Director could influence the price rates and load allocation decision in favour of Professional Logistics International (PTY) Ltd to the disadvantage of the Basotho transporters…"*

[16] Furthermore, the letter in a part relevant to these proceedings concluded by saying:

> *"With respect to other allegations, there is need for further investigations and there are conflicting views from the Road Freight Association of Lesotho and the two companies. The Board may decide after interrogating these matters.*
>
> *For reasons stated above, the Ministry recommends that the Board resolve to suspend the Trader's License No. 124 issued to Professional Logistics International (PTY) Ltd pursuant to the powers of the Board under Section 20 of the Trading Enterprises Act 1993 read with Reg. 25(3) of the Trading Enterprises Regulations 1999."*

[17] It is after this letter was circulated among Board Members that, on the 28th September 2020, the Board convened and resolved to cancel the applicant's trading license. The above recommendation of the Ministry of Trade's that a resolution be made by the Board to cancel the applicant's license which the applicant alleges constitutes unlawful dictation by the Ministry to the Board.

[18] When the law bestows discretionary powers on the public functionary, those powers must be exercised by him or her alone, and not upon dictation by anybody else even if the latter person occupies a more authoritative position to that of the lawful decision-maker. Any decision made upon dictation by a person not authorized to make it constitutes an unlawful dictation and that decision stands to be reviewed on that basis alone (see: **Leach v Secretary for Justice, Transkeian Government 1965 (3) SA 1 (E) at pp 12 – 13).**

[19] Apart from the letter PS wrote to the Board members, the Ministry had also commissioned investigations into the workings of the applicant, Professional International, their directorships and clients (factories). This report is marked

Annexure “I”. It deals with issues of anticompetitive behavior alluded to above, transfer of expertise and directorship of Mr. Barnard in both applicant and Professional International. The results of this investigation had nudged the PS to write the impugned letter which it is alleged constitutes an unlawful dictation. The investigation had made three optional recommendations, and they were: the taking of a remedial action in the form of the Board requesting the applicant and Professional International to separate risk management activities from freight transport activities to the satisfaction of the Board in terms of Reg. 25 (2) or giving the two companies 7 days to submit an action plan on how to deal with the issues raised; the last recommendation was that the Board may exercise its discretion to cancel the trader’s licenses in terms of S. 20 (2) (b) of the Act if it is satisfied that the impugned conduct submitted to it concerning trade or occupation is not conducive to development and promotion of trade in Lesotho.

[20] Whether there was an unlawful dictation must be determined in the context of the facts of this case. Formalistic approach which tends to larch on to one apparently sensational aspect of the facts in total disregard of all others must be avoided. In terms of S.20 (2) (b) read with S. 20 (7) of the Act and Regulation 25 (3), the Board *may,* where it *is satisfied* that the contract submitted to it in terms of S. 19 of the Act - or conduct which it is alleged contravenes the Regulations - is not conducive to development and promotion of trade in Lesotho, suspend or cancel the license in relation that trade. Where the discretion was exercised to suspend the trader’s license, if before the expiry of the suspension period, the Board is satisfied that the reasons which necessitated suspension have not been changed, the Board in its discretion *may* cancel the license.

[21] In performing its function under s..20(2) (b) and (7), the Board must be "satisfied" that the impugned conduct placed before it for consideration is not conducive to trade development and promotion or that it contravenes the Regulations, and that during the period of suspension the reasons for such suspension of the licence have not been changed. The words to be "satisfied" imply an objectively determinable basis upon which the decision is to be based:

> *"To be 'satisfied' the Administrator-General must have reason to be satisfied. In other words, objective reasonable grounds must exist to make him satisfied and he must apply his mind to the consideration thereof .... (citations omitted)"* **Katofa v Administrator-General for SWA and Another 1985 (4) 211 at 221 H – I.**

[22] The applicant's license was suspended for alleged anticompetitive behavior between itself, Professional International and Mr. Barnard (their director), who is also an accountant for the Group. Annexure "I" alluded to above, details out this concern. This report together with the recommendations was tabled before the Board, and it exercised its discretion to cancel the applicant's license. The minutes of the Board meeting which resolved to cancel the applicant's license (Annexure "M") states the basis of the decision to be:

> *"After extensive deliberations, the Board was unanimous it would be in the best interests of justice that the license be cancelled as there has been overwhelming evidence that Professional Logistics International (PTY) Ltd has been engaging in unfair business practices. Moreover, the Board noted the advantage Professional Logistics International (Pty) Ltd had by having one of its directors as senior officer at one of the manufacturing firms…"*

[23] The reasons for cancellation were clearly and, in more detail, outlined in the letter notifying cancellation of trader's license (Annexure "N"). The concerns raised in the letter of cancellation are not disputed, i.e., the apparent conflict of interest situation in relation to Mr. Barnard, the relationship of the applicant, Mr. Barnard, Professional International and the Group. The Board stated why it considers this relationship to be anticompetitive when it issued a suspension notice. These concerns remained extant even during the period of suspension. The findings of the investigations by the Ministry of Trade which report was placed before the Board and, based on these findings it was satisfied that this relationship inhibited development and promotion of export freight trade in Lesotho. The impugned PS's letter may have said that the Ministry was desirous of having the Board cancel the trading licenses, but on a broader scheme of things, the Board appears to have exercised its discretion based on uncontroverted evidence before it. It follows that it is not correct to suggest that the Board acted under dictation from the Ministry of Trade. The ensuing discussion will among other matters show that the Board was bound to cancel applicant's trader's licenses once there was evidence of breach of the Act and its Regulations.

[24] **<u>REASONABLENESS AND PROPORTIONALITY ARGUMENT:</u>**

The applicant's contention in this regard as garnered from its heads of argument goes like this:

> *"11.1 The right to reasonable administrative action includes the elements of rationality and justifiability* ***as well as the element of proportionality.*** *Objectively considered, a justifiable decision is one based on reason and although there is a certain subjective element in every decision, the decision must nevertheless be capable of objective substantiation.*

> *11.2 It is submitted with respect that both decisions of the board [decision to suspend and cancel trader's license] in casu fails the above test. Instead of following its own recommendations it decided to adopt a harsher approach without any explanation (which exhibit bias and irrationality)."*

[25] I deliberately reproduced the applicant's argument in this regard to highlight the legal perspective form which the argument is made. The applicant's argument relating to applicability of proportionality test to review administrative decision-making is problematic and quite plainly ill-conceived. In the context of a review of administrative decision-making, proportionality review applies only in cases raising human rights violation not in ordinary review of administrative action(**R v Secretary of State for the Home Department ex parte Brind (1991) 1 All ER 720; [1991] 1 AC 696).** The same approach is to be found in South Africa (see; **Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)**). Proportionality assessment does not therefore arise in the instant proceedings where the impugned decision does not raise rights issue. I turn to deal with unreasonableness argument. The test applicable to review based on reasonableness of administrative decision should be pre-democratic (common law) or English law on the subject. Under common law, reasonableness is not a ground of review *per se*, but on unreasonableness being a symptom of either bias, ulterior motive etc. Unreasonableness merely serves as a pointer to the existence of the usual grounds of review. This was stated in **Union Government v Union Steel Corporation 1928 AD 220 at 237** where court said:

> *"[N]owhere has it been held that unreasonableness is sufficient ground from interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that is 'inexplicable except on the assumption of mala fides or ulterior motive' ... or that it amounts to*

> *proof that the person on whom the discretion is conferred has not applied his (sic) mind to the matter."*

In **National Transport Commission v Chetty's Motor Transport (PTY) Ltd 1972 (3) SA 726 (A) 735G** the same court endorsed the standard of gross unreasonableness, that the "decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind."

[26] This is the highest standard which is extremely difficult to surmount. The gross unreasonableness standard is based on the English *Wednesbury unreasonableness* test for unreasonableness, an acronym for the famous case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 1 KB 223** where Lord Green MR stated the test as follows:

> *"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."*

[27] This decision has been followed in this jurisdiction in **Koatsa v National University of Lesotho LAC (1985 – 1989) 335 at 339 E – F; Brigadier**

**Mareka and Others v Commander LDF (C of A (CIV) 52/2016 [2016] LSCA 9 (29 April 2016).**

[28] In **Council of Civil Service Union and Others v Minister for the Civil Service [1984] 3 WLR 1174 (HL)** (the CCSU case) at 1196 D – E Lord Diplock equated 'unreasonableness' with irrationality, and made the following remarks:

> *"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness "(see* ***Associated Provincial Picture Houses Ltd v Wednesbury Corporatio [1947] 2 ALL ER 680, [1948] 1 KB 223****. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."* (This decision was followed in the case of **Brigadier Mareka and 22 Others v Commander (supra)**

[29] Against this legal backdrop I turn to consider whether there is merit in the applicant's contention that the decision to cancel its license was unreasonable/irrational. As already seen, the irrationality argument is based on the assertion that it was "harsh" for the 4th respondent to cancel the applicant's license without first requiring it to remedy the concerns it may have in terms of Regulation 25 (2). The gist of the applicant's argument as I understand it, is that Regulation 25 (2) read with S. 20 as regards suspension and cancellation of trader's licenses, creates, a hierarchy of remedies, which must first start with the invocation of Regulation 25(2) requiring the applicant to deal with the Board's concerns regarding its carrying on its business.

[30] The use of the word *'may'* in Regulation 25(2) that the Board "may, in writing" require a licensee to remedy any matters which infringe the regulation, to its satisfaction within a specific time, seems to me to suggest that that Board is given a discretionary power whether to invoke this route. Nothing suggests that this word should be regarded as imposing an obligation on the Board to first require the licensee to take remedial action. The Board has a choice whether to invoke Regulation 25 (2) or to invoke S. 20 of the Act. My reading of the Act and the Regulations makes it plain that the Board has two options when faced with transgressions of the Regulations and the Act. It is given a discretion under Regulations 25 to order the guilty party to take remedial action in respect of the conduct complained about, secondly, where the contract (or conduct) placed before it inhibits trade promotion and development, the Board may proceed in terms of s.20 of the Act by suspending the defaulting party's licence. If the Board chooses the first option, it must state in the notice for remedial action the period within which the infraction must be remedied to its satisfaction. Because Regulation 25(2) procedure is discretionary, failure by the defaulting party to remedy the transgression entitles the Board to invoke the second option (s.20 procedure) which commences with the suspension of the licence route up to the point where the licence may be cancelled.

[31] In terms of S. 20 (7) the Act provides that:

> *"(7) Board may, in its discretion, cancel a license if the reasons for which it was suspended has not been changed before the expiry of the suspension."*

[32] Although this section at face value may suggest that the Board has a discretion whether or not to cancel a license where the license flouts the prescripts of the Act or the Regulations, that reading will lead to absurdity that the Board will have a discretion not to carry out its statutory obligations under S. 4 read with S. 20 (2) (b) of the Act regarding cancellation of trader's license where jurisdictional ground exists for such a move. My reading of the presence of the word *"may"* in this section is that it merely confers power to cancel the license on the Board and the duty to exercise it once jurisdictional facts that the licensee's conduct does not comply with the Regulations or that the contract (or conduct) submitted to it is not conducive to the development and promotion of trade in Lesotho. This construction is consistent with the scheme of the Act read together with the Regulations. On the use of the word *"may"* in a different context, in **S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) (CCT21/01) [2007] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002)** at matter involving a challenge among others, institutional independence of the Magistrate's Courts in South Africa, at paras 181 – 182 the court said:

> *"[181] As far as the Act is concerned, if "may" in section 13(3) (aA) is read as conferring a power on the Minister coupled with a duty to to use it, this would require the minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so. In that event the reference in Section 13 (3) (c) to a report on the reasons for the suspension would be construed as referring to the Commission's reasons for its decision.*
>
> *[182] In my view this is the Constitutional construction to be given to be given to Section 13 (3) (aA). On this construction, the procedure prescribed by Section 13(3) of the Act for the removal of a magistrate from office is not inconsistent with judicial independence. It would be similar to the process prescribed by the Constitution for the removal of judges…"* (This decision was followed in **Smit v Minister of Justice and Correctional Service**

**and Others (CCT235/19; 243/19) [2020] ZACC 29 (18TH December 2020) at para. 124).**

The argument that the Act and the Regulations have created a hierarchy of remedies which must commence with the invocation of Regulation 25(2) procedure is therefore unsound.

[33] Two issues are involved in this matter. They are; (a) the matter of a relationship between the applicant, Professional International and the exporters and Mr. Barnard, the accusation being that the business of the applicant and the latter company is being conducted inconsistently with the standards of honesty, due to its anti-competitiveness, and (b) the contract for transfer of skills. The Board cancelled the applicant's license on these grounds based on the following findings:

> *"d. The Board learned of the contract between Professional Logistics (PTY) Ltd/Professional International (PTY) Ltd and the exporters. The Board considers this contract anti-competitive. The contract restricts competition and perpetuates a situation of limited competition in this sector. This is because for the contracted loads, the contract creates an exclusive situation where other transporters are excluded. It gives Professional Logistics International (PTY) a competitive advantage which has a negative impact on economic efficiency benefits in this sector. It exacerbates challenges with regard to access to information and weaker bargaining position of other transporters in their dealings with the exporters; Noting that the two companies appear to have inside information while RFTA members still do not have contracts with exporters and are given loads based on oral understandings. Further, the contract price, which is higher than the industry price rate, by almost 100% (hundred percent) indicates that the industry price rate might have been underrated. The contract has signs of dishonesty to the extent that it excludes other transport providers from operating on an equal footing.*
>
> *e. The Board noted that Professional Logistics International (PTY) Ltd indicated that it trained only two employees since it started*

*operating in Lesotho and did not submit and contract relating to transfer of skills."*

[34] The unsavory nature of the relationship between the two companies and its impact on the freight sector was further captured in the reasons for cancellation of the license thus:

> *"b. The relationship allows the companies to control and monitor the freight transport sector. It is unfair for a competitor to allocate work and monitor its competitors. Professional Logistics International and Professional International (PTY Ltd, between themselves monitor other transporters through the vetting system; they set requirements for transporters, their drivers, trucks, tracking systems, and have the power to allocate loads and suspend transporters while providing transport services themselves."*

[35] It cannot seriously be argued that the nature of the conduct laid out in the reasons for cancellation (above) of the applicant's trader's licence irrational/unreasonable. The decision is one which a reasonable decision-maker in the position of the Board could reach. I have closely examined the applicant's case on these findings, but I have not found the applicant to seriously dispute that Mr Barnard is the director of both companies, with Professional International doing risk assessments and monitoring of freight business for the Group, while the applicant in which the Professional International has a controlling stake is a competitor in the freight business; Mr Barnard also works for the Group - the two companies' biggest clients. To a reasonably discerning mind, this relationship, even on the face value, is disquieting. This is one case where the decision of the Board should be accorded due deference given its intimacy with the facts surrounding the matter, its expertise and the largely indisputable factual support for its decision. In the scenario the salutary remarks of O'Regan J in **Bato Star Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and**

**Others (CCT27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para. 48,** are apposite:

> *"[48] In treating the decisions of administrative agencies with appropriate respect, a court is recognizing the role of executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give due weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."*

[36] **COSTS**

When both Counsel appeared before me for argument, the respondents' head of argument had not been filed as directed by the court. Mr. Thakalekoala, for the respondents, only filed his heads of argument a few minutes before the hearing. Mr. Thakalekoala had an ample time to file his heads of argument, his excuse for not doing so on time was the lame excuse that this matter is complex and therefore necessitated extensive research. I disagree. Even if the matter was complex , Mr Thakalekoala seems to have forgotten that signing up to be a lawyer is tantamount to being in pressure cooker, pressure is an order of the day in this field and counsel are expected to develop requisite

coping mechanisms, simply put, counsel must at all times be in step with the demands of the profession to aid in the swift and efficient delivery of justice. The respondents' counsel conduct is deserving of this court's censor. For this reason, I made it clear to him that as the matter was scheduled to be heard on that day, that in the event that the respondents are successful in opposing the matter, they will be deprived of their costs. Support for this approach is sourced from the decision in **Mofoka v Lihanela LAC (1985 – 1989) 326 at 329 D – E** where **Mahomed JA** said:

> *"Dr. Tsotsi's full and helpful heads of argument are dated 9 December 1988 and were timeously filed but the heads of argument on behalf of the first respondent were not filed until 19 January 1989 at we saw them for the first time when the matter was argued. There was no good reasons why this could not have been done earlier. The court has previously emphasized the importance of filing heads of argument timeously. Where it is the respondent who has failed to do so it would not be fair to the matter struck off the roll. The respondent can, however, be deprived of the costs to which he ordinarily would be entitled ..."*

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

(a) The application is dismissed with no order as to costs.

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**MOKHESI J**

**FOR THE APPLICANT:** **ADV. T. MPAKA Instructed by Du Preez Liebetrau & Co. Attorneys**

**FOR THE RESPONDENTS:** **ADV. THAKALEKOALA from Attorney-General's Chambers**