IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/375/2020**

In the matter between:-

MOTLATSI MOFOKENG **PLAINTIFF**

AND

COMMISSIONER OF POLICE **1st RESPONDENT**
MINISTER OF POLICE AND PUBLIC SAFETY **2nd RESPONDENT**
ATTORNEY GENERAL **3rd RESPONDENT**

Neutral Citation: Motlatsi Mofokeng v Commissioner of Police and 2 Others (CIV/APN/375/2020) [2021] LSHC 40 (22 APRIL 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **18 MARCH 2021**

DATE OF JUDGMENT: **22 APRIL 2021**

SUMMARY

ADMINISTRATIVE LAW: *Review of unterminated disciplinary proceedings- the applicant having brought an application for review of unterminated disciplinary process in the absence of exceptionality- the application dismissed with costs.*

ANNOTATIONS:

Legislation:

Police Service Act 1998

Cases:

Plascon – Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

South African Football Association v Mangope (JA 13/11) [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC) (7th Sep. 2012)

Tony Rahme Marketing Agencies SA (Pty) Ltd and Another v Greater Johannsesburg Transitional Metropolitan Council 1997 (4) SA 213 (W)

Zulu v Minister of Defence and Others 2005 (6) SA 446 (T)

Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 282 (D& CLD)

Ladychin Investments (Pty) Ltd v Santa African National Roads Agency Ltd 2001 (3) SA 344 (N)

Gool v Minister of Justice and Another 1955 (2) SA 682 (C.P.D)

National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC)

Webster v Mitchell 1948 (1) SA 1186 (w) 1189

Camps Bay Ratepayers Association and Others v Augustides and Others (2005/2009) [2009] ZAWCHC 30; 2009 (6) SA 190 (WCC)

Walhaus & Others v Additional Magistrate, Johannesburg & Another 1959 (3) SA 113 (AD)

Mda and Another v Director of Public Prosecutions LAC (2000 – 2004) 950

Koetle v Lesotho National Olympic Committee CIV/APN/42/18 [2018] LSHC 33 (18 May 2018)

Union of India v VICCO Laboratories Appeal (Civil) 5401 of 2007 (11) TMI 21 (Supreme Court)

Masinga and Others v Director of Public Prosecutions (C of A (CRI) No. 11/2011 [2012] LSCA 28 (27 /April 2012); LAC (2011 – 2012) 283

[1] The applicant is a police officer engaged as such since 2002. On the 21st day of October 2020 he was served with a letter wherein the 1st respondent (the Commissioner of Police) alleges that the applicant has a criminal record which he failed to disclose when he applied for a job a police officer, and some correspondence, the 1st respondent wrote a letter in terms of which he sought applicant's representation why he should not be dismissed in view of this fact. The said letter ('show-cause letter') was couched as follows: (in relevant parts):

> *"DEAR P/C Mofokeng*
>
> *RE: LETTER OFREPRESENTATION*
>
> *A receipt of your letter which is dated the 20th October 20202 bearing the above captioned subject matter is acknowledged. You are to note that it is a fact that you were convicted of a crime and further that the said fact is separate issue from the evidence of that conviction. Your conviction could be proved in so many ways including but not limited to the following:*
>
> *(a) Records of Magistrate court*
> *(b) Records of Lesotho Correctional Service where sentence was executed*
> *(c) Lesotho Mounted Police Service Records*
> *(d) Other evidence that could be relevant to prove the said conviction.*
>
> *You will agree that in the present case, you are called upon to make representation on the fact that you did not disclose the fact that you were convicted of a crime when answering a specific question in the Application for Employment into the Police Force Form.*
>
> *You will recall that you requested to be provided with documentation which was duly provided to you. We stated categorically that some of the documents requested could not be found in our custody as we do*

not have any advised you where they are likely to be found. It sis maintained that this information sought is still not in our custody.

Furthermore, note that you eloquently stated on the 12th October 2020 at 357 fm in the Thehatsebe Radio Pragramme anchored by Lebohang Sebata Maketa that you were convicted and sentenced on many incidences which include among others strokes and cleaning of the court premises. You will definitely agree that in these two incidences, you further voluntarily admitted for having been convicted of crime, which is in fact you failed to disclose when you filled the Application for Employment in the Police Force Form and answering a direct question regarding you criminal conviction.

Kindly also receive a copy of the Record of Criminal Investigation (RCI) which depicts you having been convicted for crime reported.

Your representation is expected to reach the Human Resources Office Police Headquarters on the 22nd October 2020 before 1630 hrs. failure to reply as stated, it will be concluded that you have waived your right to make the required representation as appears that your request for further particulars is vexatious, frivolous and intended to derail this process and as such no further disguised excuses will be entertained on this matter."

[2] The above letter was a sequel to an initial letter dated 09th October 2020 requesting the applicant's representation why he should not be dismissed for having misrepresented, when he applied for job as a police officer, that he did not have a criminal conviction when in fact he had one after he was charged with assault of one Thabang Tsubane on the 24th August 1999. The applicant responded to this letter by requesting particulars of the said crime and conviction. The respondent provided the applicant with the record of investigation (annexure "HM2"). This annexure depicts the

following information; in second column reveals that assault was committed on one Thabang Tsubane m/m aged 13 yrs of Sechele Sechele Sechele u/c Mrs. Kuini Mopeli Phaphama near the office of Highland Security residence of Mrs. Tikanelo Tsubane; in the fourth column (date reported): 04th/04/99; fifth column (name of accused); Motlatsi Mofokeng m/m aged 18 yrs of H/m 'Mamohasi Putsoa u/c Bolokoe Motšoene Mabothile: Sixth column, (charge); Assault common: Seventh column (Results of trial or how disposed of): 24.08.99 Accused found guilty as charged and sentenced to 2 strokes; (CR 316/99: RLMP Butha-Bothe Registry Office Date Stamp 10 SEPT.

[3] In opposition, the 1st respondent, in paragraph 11.4.6 of his opposing affidavit makes two critical allegations, *viz*, (a) that the applicant was interviewed on the radio station where he admitted that the assault took place in 1999, and (b) that even the mother of the victim whose names appear on the Police Investigation record, Mrs. Tikanelo Tsubane(the victim's mother), recalls the incident. The statement of Mrs Tsubane was taken and reduced in writing by Detective Sergeant Mapapane Setho and signed by the former. The said statement is annexed to the 1st respondent's opposing affidavit as annexure "HM1". In "HM1" Mrs Tsubane confirms the incident in which her son was assaulted by one Motlatsi Mofokeng who was in consequence convicted and sentenced by Magistrate Nthunya, and that the case was prosecuted by Prosecutor Machoba.

[4] To these allegations, the applicant denies the contents of the 1st respondent's affidavit (in para. 11.4.6) as regards the admission he made in the radio interview. The 1st respondent does not provide proof of the said admission. He merely makes a bald allegation. There is a dispute of fact here, and in my view it should be resolved in favour of the applicant as I

do not find it plausible that the applicant can go on a public platform and confess to having a criminal record knowing fully well of the consequences of such an admission on his career as a policeman. On this aspect the 1st respondent's version should be rejected as being implausible (**Plascon – Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634 – 5).** In respect of the same paragraph now in issue the applicant deals only with one aspect relating to the radio interview, leaving intact the allegations that his criminal conviction is confirmed by the victim's mother. He does make even a flirting attempt to deal with what is said by Mrs Tsubane in annexure "HM1". The contents of Mrs Tsubane's statement not having been dealt with by the applicant leads to no other conclusion than that the applicant admits its contents. It is important to bear in mind the role that is played by affidavits in motion proceedings. Affidavits perform a dual role of containing the pleadings and evidence. They serve the purpose of drawing the battle lines between the litigants, which the court is called upon to adjudicate. The applicant's case must be set out clearly in his founding affidavit. Failure by the applicant/respondent to deal with an allegation made by either party amounts to an admission of same (**South African Football Association v Mangope (JA 13/11) [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC) (7th Sep. 2012) at para 9).**

[5] Faced with the show-cause letter quoted above, the applicant lodged the current application on urgent basis seeking the following reliefs:

> *"1. Dispensing with the rules of this Honourable Court pertaining to modes and periods of service due to urgency of this application.*
>
> *2. A rule nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:*

(a) The 1st respondent shall not be interdicted from invoking provisions of section 31 (1) (b) of Police Service Act No. 7 of 1998 against the applicant pending finalization of this application.

(b) The 1st Respondent shall not be ordered to provide Applicant with the undermentioned particulars in order to enable him to reply to the letter of representation dated the 9th day of October 2020:

(i) Record of proceedings and judgment in CR 316/99

(ii) Docket of investigations in RCI 03/04/44

ALTERNATIVELY:

(c) The court shall not find that 1st Respondent's failure to provide Applicant with the requested particulars renders his intention to invoke provisions of Section 31 (1) (b) as irregular and of no force and effect in law for want of compliance with the prescripts of fair hearing."

[6] In opposition, the 1st respondent raised a number of points in *limine, viz,* (a) that this court should decline jurisdiction at the show-cause stage; (b) Interdict against exercise of statutory powers; (c) abuse of *ex parte* procedure; (d) lack of urgency. The matter served before a Duty-judge, who ordered that prayer 2 (a) of the Notice of Motion operate in the interim, in effect the 1st respondent was interdicted from excercising his powers in terms of the **Police Service Act 1998** (the "Act"). Before me the points *in limine* relating to lack of urgency and abuse of *ex parte* procedure were not pursued. I turn to deal with the points in *limine* raised, but before I do that there is a glaring reason why an interim interdict should not have been granted (in the interim) as sought by the applicant.

[7] It is common cause that the 1st respondent was exercising his powers in terms of s. 31 (1) (b) of the Act when he requested representations from the applicant. The said section provides that:

> *"31.(1) Notwithstanding the provisions of Part V, the Commissioner may, at any time after giving the police officer concerned an opportunity to make representations:*
>
> *(a) …..*
>
> *(b) Dismiss an officer who gains admission into the Police Service following a false statement in reply to any question to section 10 (2);*
>
> *……."*

Section 10 (2) of the same Act provides that:

> *"10. (1) Every member of the Police Service shall, on appointment, be attested as a police by making a declaration before the Commissioner in the form set out in schedule 1.*
>
> *(2) Every person shall, before making the declaration required by subsection (1), answer any questions put to him as to his previous service, career and employment and as to whether he has at any time been convicted of any offence punishable by the laws of Lesotho or the laws of any other country."*

PROCEDURAL ISSUES

[8] As indicated earlier the Duty-Judge granted an interim interdict based only on the *prima facie* view garnered solely from the applicant's founding papers. It may, therefore, appear to be an embarrassment to my learned colleague or to raise issues of *res judicata*, that the issue of the granting of interim order is revisited by this court in these proceedings, however, that

is not the case, based on persuasive authorities such as **Tony Rahme Marketing Agencies SA (Pty) Ltd and Another v Greater Johannsesburg Transitional Metropolitan Council 1997 (4) SA 213 (W)** at pp.215C- 216C, wherein Goldstein J, had the following to say:

> *The applicants seek two interim interdicts pending the determination of review proceedings they intend instituting against the respondent. No answering affidavit has been filed, the respondent arguing that the application ought to be dismissed for reasons of fact and law. Before I address the issues I have to decide, it is necessary to refer to a difference of approach in our case law regarding the test to be applied to disputes regarding interim interdicts have long been authoritatively laid down in such cases as Webster v Mitchell 1948 (1) SA 1186 (W); Ndauti v Kgami and Others 1948 (3) SA (W) at 36-7 and Olympic Passenger Service (PTY) Ltd v Ramlagan 1957 (2) SA 382 (D). Are such principles to apply only in respect of factual and not in respect of legal disputes? In Mariam v Minister of the Interior and Another 1959 (1) SA 213 (T) Roper AJ (as he then was) simply applied Webster to a matter involving disputed legal issues. Viljoen J (as he then was) criticised this approach in Fourie v Olivier en Ander 1971 (3) SA 274 (T). The decision in Webster was intended, he said at 285, to apply only to factual disputes and not legal ones. In the case of the former a final decision would be premature but not in the case of the latter. In such a case the court was obliged to give a decision and conclude the matter finally. Viljoen J went on to say the following at 285F-H:*
>
> *'……'*
>
> ***With respect I differ from the learned Judge. Whilst there may be situations where a Court having to decide on an interim interdict has sufficient time and assistance to arrive at a final view on disputed legal point- in which event it probably ought to express a firm view in order to save costs- situations of urgency arise when decisions on legal issues have to be made without the judicial officer concerned having had the time to arrive at a final considered view. In such a situation he is surely forced to express only a prima facie view. I cannot see how the expression of such a view and grant of interim relief only would conflict with principles of res judicata. I also see no embarrassment in an urgent Court Judge being overridden by a trial Judge. Each of us,***

privileged to hold this high and responsible office, owe, in the wielding of our considerable power, a duty only to truth and justice. The interlocutory decisions of Colleagues, and indeed those of our own, are not binding at the later stages of the proceedings and should, and I trust, do yield easily to persuasive arguments indicating error or oversight…. *(emphasis added)*
(see also: **Zulu v Minister of Defence and Others 2005 (6) SA 446 (T) at p. 461F)**

INTERIM INTERDICT

[9] The legal principles applicable to interim interdicts are trite; (a) there must be a *prima facie* right, (b) well- grounded apprehension of irreparable harm if the interdict is not granted, (c) the absence of any other satisfactory remedy (d) the balance of convenience.(**Setlogelo v Setlogelo 1914 AD 221).** Where the right sought to be protected is *prima facie* right, the approach is to determine the applicant's prospects of success in the main matter and where the balance of convenience lies. Balance of convenience refers to the prejudice the applicant is likely to suffer if the interdict is refused (**Ladychin Investments (Pty) Ltd v Santa African National Roads Agency Ltd 2001 (3) SA 344 (N)** at p.353). His prospects of success on review determines the strength of a *prima facie* right that he ought to have established in interdict proceedings. The greater the prospects of success on review represents the applicant's measure of the strength of his alleged *prima facie* right needing protection by way prohibitory interdict. The weaker the prospects of success the greater the need to for the balance of convenience to favour him **(see: Camps Bay Ratepayers Association and Others v Augustides and Others (2005/2009) [2009] ZAWCHC 30; 2009 (6) SA 190 (WCC)** at paras. 7 – 10 and authorities discussed therein). On the role played by considerations of the prospects of success in a situation where the right sought to be

protected is only *prima facie* though open to some doubt, the court in **Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 282 (D& CLD)** at 383C-F, the court said:

> *It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range from all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary, the court may grant an interdict- it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience- the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if it be granted.*

[10] Crucially, in conjunction with the requisites of interim interdicts, the instant matter concerning, as it does, an extraordinary interdict against the exercise of statutory power, the applicant had to positively establish that the 1st respondent was acting *mala fides* when he requested representations from him regarding his criminal record. This is done to ensure that separation of powers is not breached by the court order sought: This principle was stated in **Gool v Minister of Justice and Another 1955 (2) SA 682 (C.P.D) at 688 E – G:**

> *…., I respectfully agree that the approach outlined in Webster v Mitchell, supra, is the correct approach for ordinary interdict applications. The present*

is however, not an ordinary application for an interdict, in the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of mala fides, the court does not readily grant such an interdict: that, I think is clear from the judgments in Molteno Bros. & Others v South African Railways and Harbours, 1936 A.D. 321….

In **National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC)** at paras 65 – 66 the court said:

When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so in the clearest of cases.

66. A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus, courts are obliged to recognise and assess impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.

[11] On the basis of the approach to interim interdicts *pendente lite*, espoused in **Webster v Mitchell 1948 (1) SA 1186 (w) 1189 (**referred to in **Tony**

Rahme Marketing Agencies SA (Pty) Ltd and Another case (supra))**,** I find that the applicant failed to establish a *prima facie* right to an interim interdict: As already seen, the applicant, in his replying papers, does not deny the allegation that one Motlatsi Mofokeng of Mabothile, Botha Bothe, assaulted Mrs Tsubane's son and was found guilty and sentenced in 1999. Even though his middle name is not mentioned by Mrs Tsubane and does not appear from the police investigation report, the applicant does not dispute the fact of this person being convicted of assault as Mrs Tsubane confirms.

[12] Referring to a *prima facie* right, in paras 13 – 14 of his founding affidavit, the applicant says:

> *"-12-*
>
> *I aver that I have a prima facie case against the Respondents that warrant the granting of interim relief. I cannot be able to reply without the 1st Respondent furnishing me such particulars as I requested. As a result, until such particulars are furnished the intention to dismiss me should be stayed.*
>
> *-14-*
>
> *I aver that I have a well grounded apprehension of irreparable harm if the interim order is not granted. I might be dismissed from employment on allegations which are not proven by the 1st Respondent."*

[13] It is apposite to recall that there is duty cast upon the 1st respondent to invoke s. 31 (1) (b) where an officer did not honestly fill in the application for a job as a police officer. It will also be observed that at the beginning of s. 31 (1) (b) process, the applicant requested particulars of the offence and was furnished with the police investigation report which depicts Motlatsi Mofokeng as having been convicted of assault in 1999. This

information – inclusive of confirmation by the victim's mother of the incident- underlie the 1st respondent's invocation of the impugned process. Surely, on the conspectus of all these considerations, can it seriously be said that the 1st respondent was acting *mala fide when* he dealt with applicant in the manner provided under s. 31 (1) (b) of the Act? In my judgment the answer should be in the negative. This process is provided by the law and it is invoked when there is evidence of misrepresentation. It cannot, further, be said that the applicant has a right not to be subjected to s. 31 (1) (b) process, in circumstances where there is evidence of criminal conviction. The applicant has failed to establish that the 1st respondent was acting *mala fide* when invoked s.31 process.

[14] This being an interdict pending review, as already said, the applicant must establish a *prima facie* right though open to some doubt, by persuading the court about his prospects of success in the review proceedings**.** The applicant is seeking this court's intervention to stop dead the 1st respondent from pursuing to finality, a process which is legally justified on the facts discussed above. The applicant does not have the prospects of success on the merits as will be seen in the discussion to follow in due course, for attempting to review unterminated disciplinary proceedings where exceptionality is non-existent, and for this reason, the applicant has failed to establish a *prima facie* right, and further, there being no evidence of *mala fides* on the part of the 1st respondent when he invoked s. 31 (1) (b) process, the balance of convenience did not favour interdicting the latter from exercising his statutory powers.

[15] As regards, irreparable harm, it is without doubt that if it comes to the point where the applicant will have to be dismissed that will not constitute an irreparable harm because if he is to be dismissed that decision will

always be reviewable on the established grounds of review (if grounds for review exist). In the circumstances, judicial review represents a satisfactory remedy to which the applicant will have resort to if he feels his dismissal would be amenable to be reviewed. The present is not a clearest case which warranted an interdictory relief in the manner sought by the applicant. In the result the rule must be discharged.

REVIEW IN MEDIAS RES

[16] The instant matter is quintessentially a review in *medias res* because the 1st respondent has already triggered the disciplinary process provided under S. 31 (1) (b) of the Act by requesting the applicant to show cause why he should not be dismissed for dishonestly answering a question about his criminal conviction when he applied for a job as a police officer. This court has power to review proceedings of inferior courts and tribunals in terms of Rule 50 of the High Court Rules 1980. However, that power is not readily exercisable when review is directed at unterminated proceedings. The rarity of exercising that power to unterminated proceedings rests of considerations of "grave injustice [which] might otherwise result or when justice might not by other means be attained" (**Walhaus & Others v Additional Magistrate, Johannesburg & Another 1959 (3) SA 113 (AD) at 119 G – 120 B)**. In **Walhaus** (ibid) at 119 G the Court said:

> *" 'It is true that by virtue of its inherent power to restrain illegalities in inferior court, the Supreme court may, in proper case, grant relief by way of review .... This however, is a power which is to be sparingly exercised ....The learned authors of Gardiner and Lansdown (6th ed. vol.1 p.150) state:*

> *'While a Superior Court having jurisdiction in review or appeal will be slower to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in court below, it certainly has power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained… In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'*
>
> *In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the Magistrates' courts…..[T]he prejudice inherent in an accused's being obliged to proceed to trial, and possible conviction, in a Magistrates' court before he is accorded an opportunity of testing in the Supreme court the correctness of the Magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme court in granting relief before conviction…."*

[17] The above policy which eschews piecemeal appeals and review of inferior courts and tribunals has been accepted into this jurisdiction in **Mda and Another v Director of Public Prosecutions LAC (2000 – 2004) 950 at 957** and has been applied religiously (**Koetle v Lesotho National Olympic Committee CIV/APN/42/18 [2018] LSHC 33 (18 May 2018) paras 6 – 7).** It is undesirable to attempt to exhaustively define circumstances in terms of which injustice might be thought possible to arise as each case has its own unique features which must be assessed to determine whether they call for review or deviation from the policy against piecemeal review of decision of inferior courts or tribunals.

[18] It is common cause that the applicant lodged this review application at the show-cause stage. Adv. Maqakachane, for the respondent, referred this court to the Indian Supreme Court decision in **Union of India v VICCO Laboratories Appeal (Civil) 5401 of 2007 (11) TMI 21 (Supreme Court).** In that case the court said the following about a litigant who approaches the court at the show-cause stage:

> *Normally, the writ court [review court] should not interfere at the stage of issuance of show cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the concerned authorities and to satisfy the concerned authorities about the absence of case for proceeding against the person whom the show cause notices have been issued. Abstinence from interference at the stage of issuance of show cause notice in order to relegate the parties to the proceedings before the concerned authorities is a normal rule. However, the said rule is not without exceptions. Where a show cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show cause notice stage should be rare and not in a routine manner. Mere assertion by writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out.*

[19] I do not understand this case to be espousing anything novel. I embrace what this case says in so far as it says the court can interfere at show-cause stage where the notice was issued without jurisdiction or where there is evidence of abuse of process, however, I do not see any wisdom in providing (if that is what the judgment was doing) an exhaustive enumeration of circumstances in terms of which the court can interfere at the show-cause stage. The show-cause stage is part and parcel of the

disciplinary proceedings *albeit* the initial stage of the process. The same principles of non-interference are applicable, however, exceptionally, where it is established as a fact that the injustice might result this court has power to intervene by way of review. I am in full agreement with the court that the incidences mentioned, are exceptionalities which may cause injustice if the process is allowed to run its full course before the decision is challenged by way of review. This is because, for example, jurisdiction is a threshold issue. Where the show-cause letter is issued without jurisdiction, the proceedings should not be allowed to be concluded before a review application is brought challenging jurisdiction to issue such a letter. The reason for this view is not difficult to fathom; proceedings which are conducted without jurisdiction are a nullity. In fact in a different context, in this jurisdiction, the ruling in favour of the jurisdiction of this Court was appealed against in *medias res* in the matter of **Masinga and Others v Director of Public Prosecutions (C of A (CRI) No. 11/2011 [2012] LSCA 28 (27 /April 2012); LAC (2011 – 2012) 283.**

[20] In that matter the appellants who had been extradited from South Africa to face various charges, including murder, had raised a special plea that the High Court did not have jurisdiction on account of what they alleged not to have been afforded fair hearing before the decision was taken to extradite them to Lesotho. The Director of Public Prosecutions raised an argument before the Court of Appeal, that the appeal should be struck from the roll as the appellants were challenging unterminated criminal trial. At para.2 of the judgment, the court (ibid) said:

> *….The absence of a court's jurisdiction to hear a matter will vitiate the proceedings. A dismissal of a plea that the court has no jurisdiction is therefore appealable. See Moch v Nedtravel (Pty) Ltd t/a American*

Express Travel Services 1996 (3) SA 1 (A) at 10 B – J. In the present case the appellants face the prospects of a lengthy trial. If their plea against the jurisdiction of the court were to be upheld, there would be a considerable saving of both time and expense. In these circumstances it seems to me that it would be fair to both parties to have the issue resolved at this stage.

[21] In the instant matter, therefore, the fact that the applicant faces the prospects of dismissal does not attract this court's intervention. Dismissal is part and parcel of any work related-disciplinary process, and therefore, is nothing exceptional about the prospects of it eventualising. The disciplinary process must be finalised before any challenge can be brought against it to this court. This conclusion covers the alternative relief as well.

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

a) The rule is discharged; and

b) The application is dismissed with costs

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MOKHESI J

For the Applicant:	**ADV. V. 'MONE** **Instructed by T. Maieane & Co. Attorneys**
For the Respondent:	**ADV. T. MAQAKACHANE** **Instructed by Attorney General**