

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/232/2021**

**In the matter between:**

**NOBENDI GUGUSHE**

**APPLICANT**

**AND**

**PRINCIPAL SECRETARY-MINISTRY OF MINING 1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF MINING 2<sup>ND</sup> RESPONDENT**

**CHAIRPERSON OF THE DISCIPLINARY  
INQUIRY (MINING SECTION) 3<sup>RD</sup> RESPONDENT**

**THE MINING ENGINEER  
(MS BOITHATELO MOTHOLO) 4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

**Coram : Hon. Mr. Justice T.E Monapathi**

**Date of Hearing : 14<sup>th</sup> February 2022**

**Date of judgement : 31<sup>st</sup> August 2022**

Neutral Citation: Nobendi Gugushe vs Principal Secretary Ministry of Mining and 3 Others (2022) LSHC 206 CIV(31<sup>st</sup> August, 2022)

## **SUMMARY**

*Review – Applicant having been subjected to disciplinary hearing post letter of her resignation- resignation letter rejected for non-compliance with section 39(1) of Public Service Regulations-disciplinary proceedings interdicted in the interim. Whether Applicant properly resigned and whether the 2<sup>nd</sup> Respondent has a right to refuse applicant's resignation-Held- letter of resignation constitutes final act of termination of employment contract-application succeeds with costs.*

### **Annotations:**

### **CITED CASES:**

**SALSTAFF Obo Bezuidenhout v Metrorail [2001] 9 BALR 926**

**Kragga Kamma Estate CC and Another v Flanagan 1995 (2) SA 367**

**Selloane Mahamo v NedBank Lesotho Limited LAC/CIV/04/2011(4<sup>th</sup> July 2011).**

**Muzengi v Standard Chartered Bank & Another 2000(2) ZLR 137.**

**Mudakureva v Grain Marketing Board 1998(1) ZLR 145 SC.**

**Pekeche v Thabane and Others CIV/APN/259/1998.**

**Morongoe Nketsi v Principal Secretary -Ministry of Finance and Others CIV/APN/70/2019(18<sup>th</sup> March 2020).**

### **STATUTES:**

**Public Service Regulations, 2008**

**The Constitution of Lesotho 1993**

**[1]** This is an application for a review of the disciplinary proceedings which were intended to proceed against the Applicant after she had resigned.

[2] The Applicant approached this Honourable Court on an urgent basis for an order in the following terms:

1. Dispensing with the rules of this Honourable Court pertaining to modes and periods 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 rules as to notice and form of service shall not be dispensed with on account of urgency herein.

(b) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall not be restrained and interdicted from conducting any disciplinary hearing/inquiry staged against the Applicant set to commence on the 8<sup>th</sup> July 2021 at 10:00am pending the finalization hereof.

(c) The 4<sup>th</sup> Respondents shall not be restrained and interdicted from proceeding with any disciplinary hearing /inquiry staged against the Applicant set to commence on the 8<sup>th</sup> July 2021 at 10:00am pending finalization hereof.

(d) The 1<sup>st</sup> Respondent shall not be ordered to dispatch the record of proceedings (if any) that led to the 2<sup>nd</sup> Respondent's decision to hold disciplinary hearing against the Applicant herein and its rejection of her resignation from Public Service to the Registrar of this Honourable Court within fourteen (14) days hereof;

(e) The 2<sup>nd</sup> Respondent's decision to hold disciplinary hearing against the Applicant herein on the 8<sup>th</sup> July 2021 shall not be reviewed, corrected, and set aside.

(f) The 2<sup>nd</sup> Respondent's decision to refuse and or reject the Applicant's resignation from the Public Service shall not be declared unlawful and of no legal force and effect.

(g) The Respondents shall not be ordered to pay costs on Attorney and Client's scale.

(h) The Applicant shall not be granted further and or alternative relief.

2. Prayers 1(a), (b), (c) and (d) shall not operate with immediate effect as an Interim Court pending finalization hereof.

[3] The late Justice Nomqongo granted the interim reliefs on the 6<sup>th</sup> July 2021. The matter is opposed.

[4] The facts of this case are straight forward. The Applicant herein was a Public Service officer employed in the Ministry of Mining since 2009. He was employed on permanent and pensionable terms. On the 11<sup>th</sup> May 2021, the Applicant was served with a "show cause" letter for absenteeism from work since March 2021. Her absenteeism was said to be in contravention of section 3 (2) (b) of the **Codes of Good Practice 2005**. Applicant was expected to furnish her response not later than the 14<sup>th</sup> May 2021.

[5] Applicant reacted to the said letter on the 17<sup>th</sup> May 2021 whereby she requested what can be termed as "further particulars" to enable her to respond accordingly to the said letter. A day following her response, she received another letter titled "stoppage of salary". The letter indicated that Applicant's salary was going to be stopped with effect from the 24<sup>th</sup> June 2021, which was ultimately stopped. Following receipt of the letter stopping her salary, the Applicant tendered her resignation letter with immediate effect from the 21<sup>st</sup> May 2021 and the said was served to the 2<sup>nd</sup> Respondent. In her letter of resignation, the Applicant had

indicated that she tendered her one (1) month salary *in lieu of notice*.

- [6] On the 1<sup>st</sup> June 2021, 1<sup>st</sup> Respondent wrote another letter to the Applicant informing her that her letter of resignation was being refused on the grounds that the letter failed to comply with the proper requirements for valid resignation in terms of section 39(1) and (6) of Public Service Regulations 2008. Section 39(1) reads:

*“An officer serving on pensionable terms may resign his or her appointment by giving 1 calendar months’ notice or paying an amount in cash in lieu of notice, which shall be equivalent to his or her gross salary.”* Sub-Rule (6) reads: *“where an officer who has been charged with a breach of discipline resigns from the public service before the charge has been dealt with to finality in accordance with the provision of the Disciplinary Code, the disciplinary proceedings on the charge of discipline shall continue against him or her notwithstanding the officer’s resignation.*

- [7] Following 2<sup>nd</sup> Respondent’s response of Applicant’s letter of resignation, the latter’s Counsel wrote to Ministry advising it that it was improper to refuse the Applicant’s resignation because the latter had not been charged with any breach of discipline at the time of her resignation. On the 25<sup>th</sup> June 2021, the Applicant was served with a letter inviting her to a disciplinary hearing scheduled to take place on the 8<sup>th</sup> July 2021 at Ministry of Mining Board room at 10:00am.

- [8] Following the letter of invitation to the disciplinary hearing, the Applicant approached this Court on urgent basis on the 6<sup>th</sup> July 2021 seeking reliefs of prayers as reflected at paragraph 1 of this judgement. The intended disciplinary hearing was interdicted by the late Mr. Justice Nomqongo, pending review of this hearing.

- [9] Applicant's case is that 1<sup>st</sup> Respondent's conduct to stage disciplinary hearing against her while she had resigned is unlawful and has no legal force. Advocate Setlojoane submitted that, it is wrong for the Respondents to say that Applicant had failed to follow proper requirements of resignation as stipulated under section 39(1) and (6) of **PUBLIC SERVICE REGULATIONS 2008**. According to him, Applicant's resignation is proper and valid since she had indicated that since she resigned with immediate effect, she tendered her 1 month's salary *in lieu of notice*. He referred the Court to the case of **Mahamo v Neddbank**. In reacting to the Respondents' argument that Applicant should have paid cash as she had intended. Advocate Setlojoane submitted that it is wrong because the Legislature's intention could not have meant actual cash but by paying of a one month's salary of failure to serve an adequate notice. Applicant submitted further that she had not gone beyond what is prescribed by subsection (6) because when she resigned, she had not yet been charged with any breach of discipline; therefore, her resignation is in all intends and purposes proper and valid.
- [10] Respondents' case is that they are entitled and justified to refuse the Applicant's letter of resignation. Their contention is that the latter 's misconduct was being investigated and therefore she could not be allowed to resign to avoid disciplinary hearing. Another reason advanced by the respondents was that the Applicant failed to meet the requirements of a valid resignation as prescribed by section 39(1) and (6). He referred to a case of Constitutional Court of South Africa in **Karin Steenkamp and Others v Edcon Limited**<sup>1</sup> which I find it to be inapplicable in the present case because in **STEENKAMP** case the issues were about dismissal for operational requirements, which is not the issue in the present case. Advocate Moshoeshoe submitted that since Applicant had resigned with immediate effect, she ought to have paid cash in liquid in lieu of notice. As a result of non-compliance with section 39(1) of the Regulations, Applicant's resignation became unlawful and of no legal force.

---

<sup>1</sup> CCT/46/15 and CCT/47/15

- [11] The issues for determination are whether in the circumstances the 2<sup>nd</sup> Respondent has the right to refuse the Applicant's letter of resignation which she had tendered on the 21<sup>st</sup> June 2021. The other issue is whether the 2<sup>nd</sup> Respondent 's conduct to hold the disciplinary hearing after the Applicant had resigned is lawful and of legal force.
- [12] Resignation is well defined in the case of **SALSTAFF Obo Bezuidenhout v Metrorail**<sup>2</sup> as a unilateral act by which an employee signifies that the contract end at his election after the notice stipulated in the contract or by law. The Court held that the mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do does not alter the legal consequences of the resignation. A notice of intention to resign to be legally effective and therefore to terminate the contract must be clear and unequivocal. **See: Kragga Kamma Estate CC and Another v Flanagan**<sup>3</sup>.
- [13] In the case of **Selloane Mahamo v NedBank Lesotho Limited**<sup>4</sup> Mosito AJ as he then was stated at page 13 of his judgement that notice of termination of employment given by an employee is a final act and is a right which once given cannot be withdrawn without the employee's consent. In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer entitled to refuse to accept a resignation or decline to act on it. The Court held that refusal to accept a tendered resignation, to require an employee to remain in employment is against his or her will, and that will reduce the employment relationship to a form of indentured labour. **Section 9 (2) of the Constitution of Lesotho** expressly provides that no person shall be required to perform forced labour.

---

<sup>2</sup> [2001] 9 BALR 926

<sup>3</sup> 1995(2) SA 367 (A) at 375 (C)

<sup>4</sup> LAC /CIV/04/2011

[14] The Court held further that it is constitutional right of an employee to tender his resignation at any time and leave the employer with the remedy of damages as the case maybe. The Court concurred with approval the decision in **Muzengi v Standard Chartered Bank & Another**<sup>5</sup> where it was held that a letter of resignation constitutes a final act of termination by an employee. This means once the employee tenders a letter of resignation to his employer, the contract of employment is terminated as the employer cannot refuse to accept his resignation but can only agree to the employee's withdrawal if he is inclined to doing so. The employer can however institute a claim of damages he may suffer as a result of the employee's resignation without giving him adequate notice. **See: Mudakureva v Grain Marketing Board**<sup>6</sup>. In **Peckeche v Thabane and Others**<sup>7</sup>, the Court stated that resignation is a unilateral act and that no person may be forced to remain in employment against his will.

[15] In the case of **Morongoe Nketsi v Principal Secretary of Ministry of Finance and Others**<sup>8</sup> the Applicant tendered her letter of signation on the 31<sup>st</sup> July 2015 which was the date of hearing prior to commencement of the proceedings. The Chairman of the Tribunal had ruled on the same that since the Respondent had resigned, there was no longer a need to continue with the hearing. Human Resources Office rejected the letter of resignation as being improperly written and no letter was submitted. The hearing proceeded in the Applicant's absence resulting in a verdict of guilty and was dismissed. On review, Sakoane J (as he then was) held that rejecting letter of resignation was improper and wrong. He held further that Applicant's unequivocal intention was to terminate employment relationship and no disciplinary process must have continued on and beyond 31<sup>st</sup> July 2015. The Court found the resignation of the Applicant to be proper and valid.

---

<sup>5</sup> 200(2) ZLR 137

<sup>6</sup> 1998(1) ZLR 145 (SC)

<sup>7</sup> CIV/APN/259/98

<sup>8</sup> CIV/APN/70/2016



**[16]** In *casu*, the Applicant had tendered her letter of resignation on the 21<sup>st</sup> May 2021 with immediate effect. It is undisputed that at the time she resigned she was not charged with any breach of discipline until the 25<sup>th</sup> June 2021 when she was served with a letter inviting her for disciplinary hearing. It was more than 30 days from the time she resigned when she was invited for disciplinary hearing. The central question is whether at that time when Applicant was invited to the disciplinary hearing was still the employee of the 2<sup>nd</sup> Respondent and subjected to disciplinary hearing. The answer is in the negative. She had resigned, and no more an employee of the 2<sup>nd</sup> Respondent.

**[17]** I understand the Respondents' argument in refusing Applicant's letter of resignation to be non-compliance of section 39(1) and (6). At the time when the Applicant was served with the letter of invitation to the disciplinary hearing, she had already resigned. There was no legal obligation for the Applicant to attend any purported process thereafter. I find it to be improper and wrong. The letter of resignation was clear and unequivocal. It is clear the Applicant's intention was to terminate her employment relationship with 2<sup>nd</sup> Respondent, and the latter cannot refuse her resignation because doing so will be tantamount to a forced labour which section 9(1) of our Constitution prohibit.

**[18]** In my respectful view, 2<sup>nd</sup> Respondent was unfair in refusing the Applicant's letter of resignation when it was clear that she was no longer interested in working for the 2<sup>nd</sup> Respondent. I disagree Mr. Moshoeshoe's contention that Applicant ought to have paid cash in liquid in lieu of notice. The intention of the Legislation in speaking of cash in lieu of notice could not be interpreted to mean "hard cash", but the employee must pay 1 months' notice since she has resigned without giving of an adequate notice.

**[19]** When the Applicant tendered her letter of resignation on the 21<sup>st</sup> May 2021 with immediate effect, the contract of employment had

terminated from the moment she tendered her resignation letter, and the 2<sup>nd</sup> Respondent cannot refuse to accept her resignation. If the employer feels that he had suffered a loss as result of Applicant's resignation without adequate notice, the employer can institute a claim for damages.

**[20]** I have come to the conclusion that post the 21<sup>st</sup> May 2021, the Applicant was no longer the employee of the 2<sup>nd</sup> Respondent, and therefore she could not be subjected to disciplinary hearing. At the time of her resignation, she had not been charged with any breach of discipline. I agree that the purported disciplinary hearing must be reviewed and set aside. The resignation of the Applicant is found to be proper and valid. There is no need to hold disciplinary hearing for the Applicant since she is no longer in the employ of Ministry of Finance. She accordingly resigned on the 21<sup>st</sup> May 2021.

**[21]** In the result, the following order is made:

- a) The disciplinary proceedings against the Applicant are reviewed and set aside.
- b) The 2<sup>nd</sup> Respondent's refusal of Applicant's resignation from Public Service is declared unlawful and of no legal force.
- c) The Respondents are ordered to pay costs of suit.

**T.E. MONAPATHI**

---

**JUDGE**

**For Applicant : Adv.R. Setlojoane**

**For Respondents : Adv. M. Moshoeshoe**