

CIV/APN/98/2018

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

MOHALENYANA MASASA

APPLICANT

And

MINISTRY OF DEVELOPMENT PLANNING

1ST RESPONDENT

CHARPERSON DISCIPLINARY INQUIRY

2ND RESPONDENT

PRINCIPAL SECRETARY

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

Neutral Citation: Mohalenyane Masasa vs Ministry of Development Planning
& 3 Others [200] LSHC 139 CIV (21st September 2022)

JUDGEMENT

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

Hearing : 25th February, 2022

Date of Delivery : 21st September, 20022

SUMMARY

The court found no prejudice occurred here by use of both Sesotho and English which was permitted in the constitution. Nor can an instrument or proceedings be in-validated for that a reason. This is so when on the facts the Court so found that there would have been no fault or prejudice and found against the Applicant.

Annotations

STATUTES

Public Service Act 2005

Good Practice 2008

REPORTED CASES

Raphhuthing vs Chairman of the Disciplinary Hearing and Others (C of A CIV/45/2014) [2015] LSCA 2 (7th August 2015)

Davis vs Chairman Committee of Johannesburg Stock Exchange 1991 (4) SA 43 at 44 (A)

Hira and Another vs Booysen and Another, 1992 (4) SA 69 A AT 93

Mdamane and Another vs Ministre of Local Government and Land Tenure and Another 1995 (3) 235 (TK) AT 238 C-D.

R vs Mophethekasi and Other CRI/T/213/2002 [2004] LSHC 147 (22ND November 2004)

Sechaba Maphike vs Lesotho Oil and Other CIV/APN/414/1994

Davis vs Chairman Committee of Johannesburg Stock Exchange

[1] This is an application in which the Applicant seeks an order in the following:

1. Granting Applicant rule nisi returnable on a date and time to be fixed by the Respondents to show cause (if any) why the following orders should not be made final and absolute.
 - (a) Reviewing and setting aside the proceedings of disciplinary inquiry of NMDS or being improperly conducted, and the proceedings of the appeal hearing.
 - (b) Ordering 2nd and 3rd Respondents to furnish the handwriting record of Sesotho version and audio tapes for the pending finalisation of this matter.
 - (c) Granting Applicant costs of this application in the event of opposition.
 - (d) Such further and/or alternative relief.
2. That prayer 1 (b) should operate with immediate effect as an interim relief.

[2] Matter was opposed, and no interim relief was granted. At the time of hearing of this application, the parties had filed their heads of arguments.

[3] The background of this matter is that the Applicant was a public servant employed in the Ministry of Social Development Planning and he was deployed at National Manpower Development Secretariat (NMDS)

working as a training officer. It is common cause that the Applicant was disciplinarily charged for contraction of clause 3 (2) (g) and (n) of the codes of GOOD PRACTICE 2008 read with Section 15 (l) (a) (i) of **Public Service Act 2005**.

The charge reads;

*“It is alleged that on or about the 16th December 2016, it was discovered that you tempered with bank account and bursaries for students that are sponsored by National Manpower Development Secretariat while performing your duties.as such you have violated Clause 3 (2) (g) and (n) of the codes of **GOOD PRACTICE 2008** read with Section 15 (1) (a) (i) of the Public Service Act 2005 which states, “that the Public Officer should not commit a criminal offence involving dishonesty, misappropriation of Public funds or cause damage to public property or bring Public Service into disrepute and that the Public Officer shall not knowingly make any false, misleading or inaccurate statement either orally or in any official document or book or sign any such document, or destroy any document or book whether electronically stored or otherwise, or alter or erase entry with intent to deceive,” respectively.*

- [4] It is common cause that the said disciplinary hearing was held on the 13th April 2017 at NMDS Boardroom as per disciplinary inquiry as shown on page 23 of the record. Following the disciplinary hearing, the Applicant was subsequently dismissed. See page 17 of the record. He then appealed against his dismissal to Principal Secretary confirmed the decision of his dismissal. See page 18 of the record. It is against this background that the Applicant filed this application before this Court.

- [5] The issue that is for determination is whether in the circumstances the disciplinary committee had committed any irregularities that warrant review.
- [6] Applicant`s case is that the said disciplinary proceedings were conducted in Sesotho language and there was no interpreter. He avers that the said proceedings were also recorded in an electronic audio device. He submitted that after the hearing he was served with the typed record that was written in English language when he said was not used during the proceedings and in the absence of an interpreter. According to the Applicant, the record did not reflect his testimony in the manner that made concessions which he said he never made during the hearing and the result of which he was found guilty.
- [7] Applicant`s version is that he had been owed by one Tseliso Seekane some funds in the amount of M400.00 and the said Seekane promised to pay him and that he told him that Seekane was expecting some money from someone in South Africa. According to the Applicant, Seekane told him that he would tell that person to deposit the money into his (Applicant) bank account. When the money was deposited into his account, an SMS reflected without showing the source from which the money was deposited. He said he pleaded that during the disciplinary hearing but that was not considered by the chairman.
- [8] Respondents` case is that the Applicant cannot challenge the procedure in which he initiated and signed every page of the record which effectively signified that he had read through everything. According to Advocate L. Moshoeshoe counsel for the Respondents the Applicant cannot deny what

had been recorded because even the Sesotho version tally well with the English version. Respondents submitted that even though the Applicant disputed that the record did not reflect what he had specifically said during the hearing, he did not pick out or point out what he had said and what he had not said. He failed to show discrepancies. His version was not supported nor demonstrated.

- [9]** According to Respondents, evidence showed that the Applicant received money on two occasions from NMDS account and he admitted that except to say he thought it was from the person whom one Seekane said he was expecting money from. Advocate L. Moshoeshoe further submitted that having discovered that Applicants` account had been used illegally he was approached and warned by one Felile Ramaisa, and that was after the second transaction was deposited, that was when Applicant said he became aware of the illegal transactions.
- [10]** Advocate Moshoeshoe submitted that Applicant became aware of the said illegal transactions after having been warned by one Refiloe, however he continued to use the money. He admitted having used M8, 000.00 after giving one Tseliso M2, 000.00. He also was asked whether Tseliso finally paid him M4, 00.00 which he said he was been owed, but said he did not because they had spent a lot of it.
- [11]** Advocate Moshoeshoe submitted further that even on appeal, the Applicant did not bring forth the issue that he had signed and initiated on every page of the record to show proof of receipt not admission of the contents. He concluded his submissions by contending that the Applicant had failed to prove his case against the Respondent and asked that it be dismissed.

[12] In **RAPHUTHING V CHAIRMAN OF THE DISCIPLINARY HEARING AND OTHERS**¹ **Chinchengo AJA** at paragraph 13 stated that, “*except in exceptional circumstances, review proceedings are not concerned with the merits of the case but with correcting erroneous decision – making. If a public body exceeds its powers, then the Court will exercise retracting influence. The Court went further to state that, if the Court acts mala fide or with unreasonableness so gross as to be inexplicable except on assumption of mala fide, or ulterior motive, the Court is entitled to intervene. But if the decision has been honestly and fairly arrived at a point lying in desertion of body or person who decided it, the Court has no function whatsoever decision is one which it itself would not have made.*”

[13] In **Davis v Chairman Committee of Johannesburg Stock Exchange 1991 (4) SA 43 at 44 (A)**, the Court stated that a court had a limited jurisdiction in review proceedings and supervised administrative action in appropriate cases based on “gross irregularity.” In the absence of irregularity as unlawfulness, considerations of equity did not provide any ground for review. The Court held further that, there was no onus on the body whose conduct was the subject – matter of review to justify its conduct; on the contrary, the *onus* rested on upon the Applicant for review to satisfy the Court that good grounds existed to review the conduct complained of.

[14] In **HIRA AND ANOTHER V BOOYSEN AND ANOTHER, 1992 (4) SA 69 A AT 93**, the court stated that; “*generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons*

¹ (C of A CIV/45/2014) [2015]LSCH 2(7th August 2015)

injured or aggrieved thereby to approach the Court for relief by way of common-law review. Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it “the tribunal”) has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision limited.”

See: **NDAMASE AND ANOTHER V MINISTER OF LOCAL GOVERNMENT AND LAND TENURE AND ANOTHER 1995 (3) 235 (TK) AT 238 C-D.**

[15] Maqutu J as he then was in **R V MOPHETHEKASI AND OTHERS**², stated that the language issue for Lesotho is not a problem. The country Lesotho which means the land of the Basotho. The English colonial’s name of the country is Basutoland which in no uncertain terms costs this country the land of the Basotho. The court quoted Section 3 (1) of the constitution which provides; “The official language of Lesotho shall be Sesotho and English; accordingly, no instrument shall be invalid by reason only that it is expressed or conducted in one of those languages.” The court went further to say that it remains a fact that ninety percent of the people are not fluent in English, although have learned the language at the differing levels at school. English is not their first language or mother tongue. Nevertheless, English remains the sole medium of instruction at Secondary and University level.

[16] In the case of **SECHABA MAPHIKE V LESOTHO OIL AND OTHERS**³, Maqutu J as the then was stated at page 5 that “*this court`s*

²CRI/T/213/2002[2004] LSHC 147(22nd November 2004)

³CIV/APN/414/1994

review jurisdiction is not meant to take away the powers of those quasi – judicial persons to deal with the merits and the discretion that goes with the exercise of those powers. The court`s general duty is to see to it that no failure of justice or unfairness of a serious nature has occurred. Costs are not expected to set aside proceedings, on review by reason of what they perceive as irregularities as defects in the record of proceedings or conduct of proceedings, unless these are grave and must have caused serious prejudice to one of the parties. The irregularity must be a gross one.”

[17] It is clear from the foregoing authorities that this Court has powers to correct the decisions of the quasi – judicial persons, not take away the powers they have. In *casu*, the Applicant`s is asking this Court to review and set aside the proceedings of disciplinary inquiry of NMDS as being improperly conducted and the proceedings of the appeal hearing. He also asks this Court to order 2nd and 3rd Respondents to furnish the handwritten record of Sesotho version and audio tapes.

[18] I must indicate that at the hearing of this case, the handwritten record of Sesotho vision hand them furnished except the alleged audio tapes which the Applicant said was available during the proceedings. Advocate L. Moshoeshoe vehemently denied such audio tape device ever being in existence. I understand the Applicant`s case to be that the proceedings were conducted in Sesotho language and there were no interpreters. In his founding affidavit at page 4 of the record, he does not state reasons why he needed an interpreter because by his own accord, he admitted that the proceedings were in Sesotho, the language of his Land (his mother tongue

language). He does not state prejudice he suffered as a result of the proceedings conducted in Sesotho, and I found no fault in that nor any irregularity made. **Maqutu J in R v Maphethekasi** (supra) stated that the language issue in Lesotho should not be a problem. **Section 3 (1) of the Constitution** expressly provides that Sesotho and English shall be the official languages of Lesotho and that no instrument shall be invalid by reason only that it is expressed or conducted in one of these languages. It therefore means that the Applicant cannot complain that because the proceedings were conducted in Sesotho and there was no one interpreter, that led to the proceedings being irregular. I reject his assertion. Unless he demonstrates prejudice, he suffered, this point should be rejected.

- [19] Coming to the prayer for reviewing and setting aside proceedings chaired by 1st and 2nd Respondents respectively, the Applicant says that after the hearing he was served with a typed record which he said was written in English language, the language which he argued was used in the absence of an interpreter. Throughout the proceedings, nowhere did the Applicant demonstrate discrepancies between the two records; the Sesotho handwritten one and the English, typed one. All that the Applicant submitted was that the English typed record did not reflect what he actually said during the proceedings. In my respective view, he has failed to make his case for review. In the absence of gross irregularity, it becomes difficult for this court to consider that ground for review. As stated in **DAVIS V CHAIRMAN COMMITTEE OF JOHANNESBURG STOCK EXCHANGE** (supra), there was no onus on the body whose conduct was subject matter of review to justify its conduct, but it is the onus vested on upon the Applicant to satisfy the Court that good grounds existed to review the conduct complained of. In

my respective view, the Applicant has failed in *casu* to demonstrate or prove this onus.

[20] From the facts, the Applicant did not deny that his bank accountant was deposited with money on two occasions. At page 12 of the record, the Applicant admitted that the sum of M10, 706.00 was deposited into his bank account and he withdrew M4, 000.00 and later on the following day he withdrew another M4, 000.00. He admitted having spent M8, 000.00 and M2, 000.00 remained into his bank account. When asked about the second transaction being deposited into his bank account, he admitted that he was approached by one Felile Ramaisa who warned him immediately after the second transaction was made. When asked about the whereabouts and how much money was, he said it was still in his bank account, all of it. He did not dispute that he spent M8, 000.00 of the second transaction despite having been warned by Felile that that money was illegally transferred into his bank account.

[21] This court finds no gross irregularities in the disciplinary proceedings which calls for review. Applicant dismally failed to show any discrepancies between the two visions, Sesotho handwritten vision and the typed English one. They looked closely and carefully compared the two visions, and it found that they tallied very well.

[22] In the result, the Court makes the following order:

(a) This application is dismissed.

- (b) The decision of disciplinary inquiry of NMDS is hereby confirmed.
- (c) No order as to costs.

T.E. MONAPATHI

JUDGE

For Applicant : **Adv. Letompa**

For Respondents : **Adv. Makhoali**