IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/0193/2022**

In the matter between

BAKUBUNG SEUTLOALI **APPLICANT**

AND

COMMISSIONER LESOTHO CORRECTIONAL SERVICE **1st RESPONDENT**

CHAIRMAN OF DISCIPLINARY COMMITTEE **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

Neutral Citation: Bakubung Seutloali v Commissioner of Lesotho Correctional Services and 2 others [2022] LSHC 250 Civ (03 OCTOBER 2022)

CORAM **:** **HLAELE J.**

HEARD **:** 21 SEPTEMBER 2021

DELIVERED **:** 03 OCTOBER 2022

SUMMARY: *Review Proceedings-The meaning of balance of probabilities.*

ANNOTATIONS:

CITED CASES:

1. Pather v Financial Services Board866/2016) [2017] ZASCA 125 (28 September 2017)
2. Rorisang English Medium School v Nazareth Furniture and Hardware (C of A (CIV) 48/17) [2019] LSCA 48 (01 February 2019
3. Joubert Drankwinkels (Pty) Ltd, F V B.E. Koma Civ/T/553/86l
4. Gates v. Gates, 197 Ga. 11 (28 S.E.2d 108), (02 December 1943)
5. National Employers v Jagers Eksteen AJP (sitting with Zietsman J and Van Rensburg CASE NO: 64558/17 (04 AUGUST 2020)

JUDGMENT

HLAELE J

[1] INTRODUCTION

1.1 This is a matter for review of the decision of the 1st respondent (Commissioner of Lesotho Correctional Services [LCS]) to dismiss the Applicant from employment.

1.2 A good starting place is the facts which are common cause so as to root out facts are disputed and therefore form the bases for the determination of the court.

[2] FACTS THAT ARE COMMON CAUSE

2.1 Before counsel could make their respective submissions, they agreed with the court that these facts are common cause. These are;

i. That the applicant was, until his dismissal an employee of LCS.
ii. That on the 21st November 2021 he was absent from duty

iii. That due to his absenteeism from work he received communication from his employers calling him for a disciplinary hearing.[1]

iv. That the disciplinary matter was heard on the 7th February 2022, having been postponed on the 27th January 2022.

v. That the disciplinary panel made a recommendation to the 1st Respondent that the Applicant should be dismissed.

vi. That the applicant noted an appeal after the recommendation was made.

vii. That the respondent only requested the record of the proceedings after the 14-day period which the rules allow for the filing of the appeal.

viii. That the 1st Respondent, as is the procedure that governs the institutions, wrote the applicant a letter requesting him to show cause why he (the 1st Respondent) could not confirm the recommendation of the disciplinary panel.[2]

ix. That upon the request above, the Applicant did make such representations in the form of a letter.[3]

x. That after receiving the representations by the Applicant, the 1st Respondent rejected his representations and dismissed the Applicant in terms of the recommendations made by the disciplinary body.[4]

The record of proceedings

xi. I highlight this part for the following reasons. The Applicant does not per se dispute the contents of the record. He contends that the record has omitted an important aspect of the proceedings. Minus the omission, he accepts the record as is.

[3] DISPUTED FACTS

[1] Page 19 of the record annexure BS1

[2] This letter appears at page 66 of the record. It is labelled annexure **"MN2''**

[3] The letter appears and page 44 of the record and is labelled annexure" **BS6"**

[4] The letter of dismissal appears on page 67 of the record and marked annexure **"MN3'.**

3.1 Below are the facts that were disputed by the parties and fall within the determination of the court: These also constitute the grounds of review.

(a) Was the applicant intimidated before the commencement of the disciplinary proceedings, as a result of which his case was not well prosecuted[5].
(b) Did the 1st Respondent address his mind to all the evidence before him before making a determination to dismiss the Applicant[6].

[4] ISSUES FOR DETERMINATION

4.1 Arising from the disputed facts, coupled with the prayers sought in the notice of motion, the issues for determination for this court are:

a. Was the Applicant intimidated at the hearing? As a result of this intimidation, was he unable to make proper representations before the disciplinary body. Did this failure to make proper representations result in him not properly putting his defense before the panel?
b. Does the decision of the 1st respondent stand to be reviewed, corrected and set aside because it (the decision) was founded on a report that did not adhere to principles of fair hearing in that the applicant was not given an opportunity to present his case. The allegation being that he was intimidated.

[5] APPLICANT'S SUBMISSIONS (on intimidation)

5.1 The applicant was represented by Advocate Mohanoe. Below are the submissions that he made on behalf of the Applicant.

[5] Paragraph 12.1 at the founding affidavit at page 15 of the record.
[6] Paragraph 12.3 of the founding affidavit page 15 of the record

5.2 The case of the applicant stands and falls on the fact that he was intimidated into accepting a plea of guilt. As a result of this plea, which was a result of intimidation, the Applicant did not make proper representations in his defence during the hearing. Hence the recommendation by the disciplinary chair that he be dismissed.

5.3 For this proposition he referred the court to paragraph 12.1 of the founding affidavit. For convenience this court will quote the short paragraph in toto. It reads;

> 12.1 I was intimidated by the presiding officer to plead in the manner I did due to the comment he made before the hearing started.

5.4 Adv. Mohanoe did concede that this intimidation does not appear on the face of the record of proceedings. Be that as it may be, he charged the court should consider other facts alleged in the pleadings to show that the issue of the occurrence of the intimidation was probable. To this end, he referred the court to the charge sheet at page 19 of the record. The argument he advanced to show is that it was probable that the Applicant was intimidated and his initial reaction when he received the charge sheet on the 2nd February 2022. His initial reaction was that he denied the charges. Annexure "**BS1"** does indeed reflect that on the 2nd of February the applicant denied the charge. Meaning he is not pleading guilty to the charge. The record further reflects that during the hearing his charge changed to guilty. The explanation for this change of plea, according to Advocate Mohanoe, is that before the hearing, he was intimidated to change his plea.

[6] RESPONDENT'S SUBMISSIONS

6.1 Advocate Mafisa argued on behalf of the Respondents that as the records reflects, there is nothing that suggests that the applicant was intimidated, before, during or after the hearing. Confronted with the change in his plea at the hearing as

opposed to the charge sheet, her simple submission was that there is nothing untoward when a person changes his plea.

[7] THE LAW

7.1 The court's duty in this regard is to determine what is probable in the circumstances. The scale being on the balance of probabilities.

In ***Pather v Financial Services Board***[7] the court said;

> *As long ago as 1939, Watermeyer JA in **Gates v Gates**, 59 put the position thus: 'Now in a civil case the party, on whom the burden of proof (in the sense of what Wigmore calls the risk of non-persuasion) lies, is required to satisfy the court that the balance of probabilities is in his favour, but the law does not attempt to lay down a standard by which to measure the degree of certainty of conviction which must exist in the court's mind in order to be satisfied. In criminal cases, doubtless, satisfaction beyond reasonable doubt is required, but attempts to define with precision what is meant by that usually lead to confusion. Nor does the law, save in exceptional cases such as perjury, require a minimum volume of testimony. All that it requires is testimony such as carries conviction to the reasonable mind. It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the "clearest" evidence or "clear and satisfactory" evidence or "clear and convincing" evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.*

[7] (866/2016) [2017] ZASCA 125 (28 September 2017)

7.2 ***(Pty) Ltd, F V B.E. Koma***[8] agreeing that the fact of probability must appear ex facie the papers said,

> *Suffice it then to say in the words of Cotran C.J. in Lesotho Foto Laboratories & Lighting Distributor so important is the need for defendant to raise substantial balance of probabilities that "mere conjuncture or slight probability will not suffice and further that the question of probability must be based on facts raised in the affidavit itself."* "

7.3 On the same concept, the court in ***Rorisang English Medium School v Nazareth Furniture and Hardware***[9] reinforcing that the Applicant should place before court adequate evidence so as to assist the court to gage the probability, the court said;

> *The plaintiff bore the burden of proof to establish its claim on a balance of probabilities. That* onus *included the duty to adduce sufficient admissible evidence to support the claim. A defendant who denies delivery is entitled to proof by the plaintiff of actual delivery of the items it is being held liable for. That would be the case even where it had assumed the risk that the material could be delivered to a third party without its knowledge.*

7.4 Also, in **National Employers v Jagers Eksteen AJP (sitting with Zietsman J and Van Rensburg** J) formulated this approach at 440D - G as follows:

> *'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the*

[8] *Joubert Drankwinkels (Pty) Ltd, F V B.E. Koma* Civ/T/553/86l

[9] *Rorisang English Medium School v Nazareth Furniture and Hardware* (C of A (CIV) 48/17) [2019] LSCA 48 (01 February 2019)

probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

7.5 In essence what the courts require is for the alleger of a fact to adduce credible evidence the effect of which would be to tilt the scale in favour of his version.

[8] APPLYING THE LAW TO THE FACTS

8.1 The court has to engage in an exercise whose question is, from the papers before it, is it probable that the Applicant was intimidated into changing his plea from that of 'not guilty' to that of 'guilty'? There being no evidence on the disciplinary record, is there other evidence which would prove, on a balance of probabilities, that the intimidation occurred.

8.2 The alleged intimidation of the Applicant appears at paragraphs 5 and 12.1 of the founding affidavit. In short, his allegation is that the presiding officer said that the Applicant should;

> "…only deny the facts if I am going to bring evidence that I was at work on the alleged date"

On the other hand, the record of proceedings[10] reflect that at the commencement of the case the rights of the Applicant, (who is called accused in the record) were read to him. The accused was informed of his right to call witnesses. The reading of this other rights that the Applicant was given during the hearing do not reflect any intimidation. This is compounded by the fact that the Applicant was given an opportunity to

[10] Page 31-46 of the record

mitigate his sentence. It was at this stage that he gave facts that show why he was not at work on the given day. This is in contrast to the allegation that the intimidating words threatened that he should not give contrary information or evidence. Coupled with the fact that he was given the right to bring witnesses, I am not persuaded those words were uttered.

8.3 On a balance of probabilities, the onus being on the applicant to adduce evidence to prove what is probable, I am not persuaded that the Applicant has discharged this duty.

[9] APPLICANT'S FAILURE TO LODGE AN APPEAL

9.1 The 2nd ground for review is that the 2nd Respondent made it impossible for the Applicant to appeal his decision timeously. This, he alleges, the 2nd Respondent did by not giving him the record within the 14 days stipulated in their rules to lodge an appeal.

[10] THE LAW

10.1 Not even the Code of Good Conduct provides that it is the responsibility of the employer to furnish an employee with the record of disciplinary hearing. What is the responsibility of the employer rather is that once the request has been made, the employer should furnish the employee with the record within a reasonable time. What reasonable time means depends on the facts of each case. In the present case it would mean within the 14 days in which the employee is expected to lodge an appeal against the decision of the disciplinary body.

10.2 This being the case, the facts of this case merely show that the applicant merely noted the appeal. It is his case that by the mere act of noting an appeal, it then immediately became the

responsibility of the 1st Respondent to furnish him with the record. That cannot be so in law and in fact.

10.3 It is common cause that the Applicant only began earnestly seeking the disciplinary record after the 14-day appeal lodging period that is envisaged in their rules. Meaning that, by his own actions he had denied himself the opportunity to appeal. His failure to act within the 14 days is detrimental to his own cause. He cannot therefore be heard to be saying that he was denied the right to appeal due to failure to access or be furnished with the record of proceedings. This ground of review stands to fail as well.

[11] CONCLUSION

11.1 I have concluded that the applicant has failed to make out a case for review. The two grounds of review he relied on to set aside the decision of the 1st Respondent are found wanting in fact and in law.

[12] ORDER

The court makes this order:

1. The application is dismissed with costs.

M. G. HLAELE
JUDGE

Applicant: **Adv S.S Mohanoe**

Respondents: **Adv M. Mafisa**