IN THE LABOUR COURT OF LESOTHO LC/PS/A/02/2012

HELD AT MASERU

In the matter between:

THABO MAKHALANE APPLICANT

And

THE MINISTRY OF LAW AND CONSTITUTIONAL AFFAIRS 1st RESPONDENT
PUBLIC SERVICE TRIBUNAL 2nd RESPONDENT
THE ATTORNEY GENERAL 3rd RESPONDENT

JUDGMENT

Hearing Date: 4th June 2013
Appeal against the finding of the 2nd Respondent. Court mero muto raising a preliminary point of non-joinder of the attorney General in the proceedings as an interested party. Parties agreeing that the Attorney General be joined as a 3rd Respondent and Court granting the application. Applicant raising four grounds of appeal and withdrawing one. Court finding merit in only one ground and dismissing the rest. Court graining appeal and remitting the matter to the 2nd Respondent to make a determination of the compensation amount. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an appeal against the finding of the 2nd Respondent. It heard on this day and judgment was reserved for a later date. Applicant was represented by Adv. Da Silva Manyokole, while the Respondents were represented by Adv. Moshoeshoe.

2. The background of the matter is that the appellant was employed by the 1st Respondent as a Stores Assistant. He was charged and tried for misconduct on the 22nd October 2011, found guilty and thereafter dismissed. Following his dismissal, Applicant lodged an appeal with the Principal Secretary in the

1st Respondent. The appeal was also dismissed leading to the initiation of an appeal with the 2nd Respondent.

3. The grounds of appeal before the 2nd Respondent were as follows,
   1. That the disciplinary panned had not afforded him the opportunity to plead;
   2. That he was not afforded an opportunity to state his reasons;
   3. That his dismissal was based on unclear reasons and insufficient evidence.
   The 2nd Respondent dismissed his appeal on the ground that all the procedural safe guards had been complied with and that there was clear and sufficient reasons for the dismissal of Appellant.

4. Subsequent thereto, Appellant lodged the current appeal with this Court on the following grounds,
   "1. The judgment of public service tribunal is bad in Law it is not based on piece of evidence but it was driven by sentiments, emotions and corruption.
   2. The judgment is unjust, unfair and very bad since it is contradictory and it is not based on any merit since even the tribunal has acceded to the fact that there was no record but only a summary which is not verbatim.
   3. The main point, the tribunal was concerned about was to make sure that justice was not done but seemingly they carry their personal interests.
   4. This judgement violates any known reasoning or points of law. it should therefore be set aside as it has seriously violated the rights of the appellant as an employee and the citizen of this country.

5. On the premise of the above grounds, it was prayed that this Court substitute the finding of guilty with that of not guilty and award the reinstatement of Appellant. The matter was opposed by the Respondents and both parties were given the opportunity to make representation on the all the issues. At the commencement of the proceedings, the Appellant expunged the extract that "*but it was driven by sentiments, emotions and corruption*" from its first appeal ground and the whole of the

third appeal ground. Our judgment is therefore in the following.

SUBMISSIONS AND FINDINGS

6. It was submitted that Appellant had been charged with the contravention of sections 15(6) of the Public Service Act 1 of 2005 read with section 3(2)(n) of the Codes of Good Practice of 2005 in that,
"On the 30th May 2011, the charged officer committed a criminal offence involving dishonesty by unlawfully forging the signature of the Principal Secretary of the Ministry of Law and Constitutional Affairs on a Purchase Order No. LPO 002780 issued to a supplier registered as Gallo Group."

7. It was argued that at all material times, Appellant denied the charges. This notwithstanding, the quoted Purchase Order was never presented as evidence, at any stage, to prove that he had committed the offence accused of. On this basis, he argued that there was no evidence of misconduct to support the finding made.

8. In answer, it was submitted on behalf of the Respondents that there was evidence of fraud. The Court was referred to pages 8, 24 to 25 and 29 to 31 of the record to demonstrate this. At page 8 of the record, the Court was referred to the Appellant's second ground of referral in the following,
"Moreover, we have been talking about the photocopying purchase order which was not defrauding the ministry, supplier have been not paid and I have not benefitted. So the document did not harm anybody."

9. At pages 24 to 25 specific reference was made to paragraph 3 where the following is recorded,
"Apart from that, there was no purchase order document during the disciplinary proceedings so it was not clear whether we are talking about that photocopying purchase order LPO 002780 or the original."

10. At pages 29 to 31 reference was made to the first paragraph where the following is record,
"First of all, let me clarify that only the courts have the legal power to find me guilty or not guilty, by forging of PS law

signature as you already said so, not anybody from the panel who have no legal capacity to find me guilty, that is why I should not accept dismissal from public service because so far the courts did not find me guilty and I am no more criminal, even the law is clear that the person is not guilty until courts find him so."

11. It was argued that from the three above quoted paragraphs, Appellant is admitting that he forged the purchase order but that it was on the copy and not the original. It was argued that whether payment was actually made from the forged document or not, that is immaterial as the crime of forgery relates only to the signature. It was said that all this evidence was presented before the tribunal and on its basis, Appellant was found guilty. It was concluded that all these facts show that there was a breach of rule 3(2)(n), which Appellant had been initially charged with.

12. We have perused the record as referenced by both parties. As Appellant has rightly put, there is nothing on record to suggest that a copy of the forged purchase order was ever presented as evidence either at the initial disciplinary hearing or before the 2nd Respondent. This is also not denied by the Respondent. It is therefore without doubt that this is the case, as same does not form part of the record before Us.

13. That notwithstanding, the evidence on record seems to suggest that Appellant was in effect admitting that he had forged the purchase order, except that he only forged the copy and not the original. This is clear on the extracts from pages 8, 24 to 25 and 29 to 31 of the record. There is also no doubt that there was a purchase order, whether an original or a copy, and that the signature of the Principal Secretary was forged on it by Appellant. We are in agreement with Respondents that it is immaterial where the forgery was committed but that what matters is the fact that same was done and it affects the relationship of trust between parties. Regarding the breach alleged to have been established by the conduct of Appellant, We wish to reserve Our comment for now.

14. Consequently, it is Our view that there was sufficient evidence to show that Appellant committed an act of

misconduct. The absence or the presence of the purchase order cannot on its own determine the fate of the charges that had been laid against Appellant. By this We mean whether the purchase order had been presented or not, if there was sufficient evidence to establish misconduct on the part of Appellant, then both the initial trier and the 2nd Respondent were correct in returning a verdict of guilt. Consequently, this ground of appeal fails.

15. On the second appeal ground, it was submitted that there is not verbatim record of proceedings both in the initial proceedings and in the proceedings before the 2nd Respondent. It was added that the fact that there is no verbatim record of proceedings demonstrates that no hearing was held for the Appellant prior to his dismissal and before the 2nd Respondent. It was argued that the fact that no hearing was held, shows that the judgment made was unjust, unfair and very bad. The Court was referred to the case of *Rakhoboso v Rakhoboso LAC (1995-1999)* 331 at 336 where the Court relied on a quotation from *De Smith Woolf Jowell, Judicial Review of Administrative Action (5 ed, 1995)* 378 – 379 in the following,
"… no man is to be judged unheard …."
Further reference was made to the cases of *Attorney-General Eastern Cape v Blom 1988 (4) SA 645 (A)* at 660G; *Matebesi v Director of Immigration & others LAC (1995-1999) 616* at 623B-E; and *Cheall v Association of Professional Executive, Clerical and Computer Staff (1983) QB 126 (CA)* at 144B, in support.

16. It was added that the judgment of the 2nd Respondent is contradictory in that it relied upon a different section of the law, from the one used to charge and dismiss Appellant, to come to its conclusion of guilt. It was submitted that Appellant had been dismissed for contravention of section 3(2)(n) whereas the 2nd Respondent found him guilty of section 3(2)(g). it was argued that the 2nd Respondent correctly made a finding that it had no jurisdiction to find Appellant guilty of a criminal offence and concluded that it was irregular for Appellant to have been found guilty of section 3(2)(n). Having made this conclusion, the 2nd Respondent erred by proceeding to find Appellant guilty of an offence that he had not been charged for.

17. In answer, it was submitted that the absence of the verbatim record of proceedings cannot stand as an indicator that the respondents did not deal with the Appellant fairly, and cannot therefore vitiate the proceedings. Reference was made to the case of *Mondi Kraft (Pty) Ltd v PPWAWU & others (1999) 10 BLLR 1057 (LC).* In this case, it was held that the Court was not precluded from reviewing the award on account of unavailability of the verbatim record provided that there were sufficient facts placed before it to enable it to conduct the review. The court had gone further to state that sufficient facts include admissions as to facts and obvious defects in the award subject of review. It was argued that the totality of evidence that has been lead should lead this Court to conclude that the dismissal of Appellant was fair both procedurally and substantively.

18. Regarding the alleged contradictions, it was said that there is no contradiction as the finding is consistent with the initial charges. It was however prayed that in the event that the Court found contradictions, that the Court order the 2nd Respondent to make a finding on the proper section, that is section 3(2)(n) and not 3(2)(g). it was argued that all the facts establish an offence in terms of that section.

19. While We agree with the Appellant and acknowledge the authorities that he referenced regarding the principle of *audi alteram partem*, We differ by opinion. It is Our view that the absence of a verbatim record is no more than an indicator that a hearing may have not been held and as such it is not conclusive proof of failure to hold a hearing. In order for to stand as proof, it must be supported by evidence which when taken together with the absence of the record, will lead us to conclude on the balance of probabilities that no hearing was held at all for Appellant prior to his dismissal. This is more so where it is denied that no hearing was held as is the case *in casu*.

20. However, what remains is that there is no verbatim record of proceedings both before the initial hearings and before the 2nd Respondent. We are in agreement with Respondents, and further accept the authority in *Mondi Kraft (Pty) Ltd v PPWAWU & others (supra)*, that they relied upon in their argument that

that the absence of the record cannot on its own vitiate the entire proceedings. It would only do so in the event that there were no sufficient facts to enable us to fairly and equitably determine this matter. We wish to reiterate Our stance on paragraph 14 of this judgment, that sufficient facts have been placed before us to enable Us to make a fair and equitable determination of the matter.

21. Regarding the alleged contradiction, We have perused the judgement of the 2nd Respondent, and in particular at page 43 of the record, where the alleged finding by Appellant was made in the following,
"We now look at the charge itself, section 3(2)(n) …. Our interpretation of this section is that the prosecution is enjoined to prove to this tribunal that a criminal offence has been committed it is also our humble view that this tribunal has no criminal jurisdiction in our considered opinion the prove of a criminal offence before this tribunal can only be done by way of presenting judgment of a criminal court that a criminal offence was indeed committed."

22. It is clear from the above extract that the 2nd Respondent declined jurisdiction to determine this matter on account to the fact that it had no jurisdiction to make a finding in terms of section 3(2)(n). In spite of its finding, it went ahead and found Appellant guilty of contravention of section 3(2)(g), a section that is totally different from the one that Appellant that been initially charged with (see the initial charge at paragraph 6 of this judgment). This in Our view amounts to a contradiction in that at some point the 2nd Respondent is recorded to have declined jurisdiction but later on usurps it and finds Appellant guilty.

23. It is Our opinion that having declined jurisdiction, the 2nd Respondent ought to have retuned a finding of not guilty. As the 2nd Respondent has correctly recorded in its judgment, it had no jurisdiction to make a criminal finding. It would only, on the basis of the verdict of guilt from a court of competent jurisdiction, make a finding that Appellant had committed an act of misconduct as envisaged by section 3(2)(n). Consequently, this Court cannot direct that the 2nd

Respondent make another finding on the same issue as if no finding was made before.

24. We say this because the moment that 2nd Respondent declined jurisdiction, it became *functus officio* until its finding is set aside. Our finding finds support in the case of *Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) SA 298 (A)* at 306 F–G, where the following finding was made,
"once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject - matter has ceased"-

25. Not only was the 2nd Respondent wrong in usurping jurisdiction in the matter where it had none, it was wrong to have substituted the charge initially levelled against Appellant with its own. Doing so was a clear violation of the rights of Appellant flowing from the procedural requirements of a fair dismissal for misconduct. The conduct of the 2nd Respondent was tantamount to the initiation of a fresh charge on appeal, in violation of all the procedural safeguards and the return of an unfair and unjust finding of guilt. In effect, the 2nd Respondent stood in as a substitute of the initial trier, a practice that is highly shunned upon by the courts of law (see *Mondi Craft v PPWAWU & others (supra).*

26. On the last ground of appeal, it was submitted that in the initial hearing, the appellant was denied his rights flowing from the procedural requirements of dismissal for misconduct. Specific reference was made to the rights to plead, mitigate and cross examine witnesses. It was argued that while the record may suggest that such were granted, they were in fact not afforded to Appellant.

27. In answer, it was submitted that Appellant was afforded the opportunity to defence himself. Reference was made page 28 of the record where Appellant was afforded the opportunity to state the reason why he may not be dismissed. Specific reference was made to an unnumbered paragraph number four where the following is recorded,

"on the basis of the finding of guilty against you and the recommendation for your dismissal, you are invited to show cause, within a period of seven (7) days of receipt of this letter, why you may not be dismissed from the Public Service."

28. Further reference was made to page 21 of the record, where Appellant was informed of his rights in the hearing. This is recorded as follows,
"You are notified of the following rights that you may exercise:
1. You are allowed to bring a representative who must be your colleague within your Ministry or Department. Please note that the right to representation does not include representation by a legal practitioner;
2. You may bring a witness/witnesses;
3. You or your representative, have a right to cross examine evidence or witnesses.
It was argued that the fact that Appellant did not exercise the above rights does not mean that they were denied to him.

29. We are satisfied from the quoted extracts that Appellant was afforded his rights to mitigate and cross examine the witnesses of Respondent at the initial disciplinary hearing. We say this because in as much as Appellant disputes them, he had not tendered any evidence to support his argument. He has basically made a bare denial of the extension of the said rights. Our law is clear that bare denials are unconvincing and unsatisfactory *(see Mokone v Attorney General & others CIV/APN/232/2008*.) That notwithstanding, there is no record that Appellant ever pleaded to the charges that he faced, except that he lead evidence disproving the charges against him.

30. We acknowledge that in that light of this, the 2nd Respondent ought to have found that there was a breach of procedure in the initial hearing. However, even if 2nd Respondent had made this finding, it would not have vitiated the entire proceedings. We say this because appellant did not suffer any substantial prejudice from the said breach. According to the summary of the proceedings, Appellant led evidence in contradiction of the charges against him. Therefore, the breach does not sustain the granting of an appeal.

31. In the light of Our finding on ground two, this appeal ought to succeed. However, it is Our view that an award of

reinstatement, south by Appellant, would not be appropriate under the circumstances. We have confirmed and made a finding that Appellant committed an act of misconduct involving the forging of the signature of the Principal Secretary. It is Our view that an appropriate remedy would be that of compensation.

32. Appellant prayed for order of costs of suit but did not make any submissions to support the prayer. The assumption is that the prayer is sought on the premise that costs follow suit. We have stated before that as a Court of equity and fairness, We are not bound by the principles of the ordinary civil courts regarding costs (*see Mokone v G4S Cash Solutions (Pty) Ltd LC/31/2012).* Costs normally follows suit in these court but not in this Court. We make an award of costs where a party or both have been frivolous or vexatious. Neither of these grounds have been alleged as the basis for the prayer for costs. Therefore, we decline to make such an award.

AWARD

We therefore make an award in the following terms:

a) That the appeal is upheld;
b) That the matter be remitted to the 2nd Respondent for a determination of the compensation amount;
c) No order as to costs is made; and
d) This order be complied with within 30 days of receipt herewith.

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF DECEMBER 2013.

T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO

Mr. S. KAO **I CONCUR**
MEMBER

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. DA SILVA MANYOKOLE**
FOR RESPONDENTS: **ADV. MOSHOESHOE**