

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO 1 OF 2001
HIGH COURT MISCELLANEOUS CIVIL APPLICATION NO 379 OF 2000

In the matter between:

PAMELA NASHA

Appellant

vs

ATTORNEY GENERAL
THE PERMANENT SECRETARY TO THE PRESIDENT

1st Respondent
2nd Respondent

Mr. S. Taimu for the Appellant
Mrs. O. Sekgoma for the Respondents

J U D G M E N T

CORAM: AGUDA Ag. J. P.
KORSAH J. A.
MOSOJANE J.

AGUDA Ag. J.P

On September 21, 2000, the appellant brought an application before the High Court in Lobatse for a rule nisi principally for an order that: -

"The second respondent should release and ensure that the appellant proceed forthwith to Luton University, United Kingdom for her studies, and particularly to pay her air fares, tuition and all other necessary expenses for the studies."

The application was accompanied by a certificate of urgency. The application for the order nisi was refused on the same day as it was filed but it was ordered that

notice of the application be given to the defendants for hearing at a later date. After due hearing upon affidavits filed by the parties, the learned trial Judge, Lisimba, J, dismissed the application with costs to the respondents on December 1 2000. It is against that judgment that the appellant filed a notice of appeal containing grounds of appeal on December 12, 2000.

Counsel for the appellant filed heads of arguments, on January 24, 2001. In those heads, counsel set down the issues for determination as these:

1. Did appellant have a legitimate expectation to proceed with her studies at Luton University, United Kingdom?
2. Was appellant heard before the decision refusing her entry to Luton University, United Kingdom was taken by the Permanent Secretary?
3. Can failure of natural justice at the hearing in a lower body be cured by sufficiency of hearing in the appellate body?

The facts of this case are very simple indeed and are mainly common cause. The appellant is a Chief Executive Officer in the Ministry of Local Government. In November 1999 the Departments of the Government responsible for such matters decided to send the appellant for further training leading to a Bachelor of Science degree at the University of Luton, United Kingdom. It would appear that thereafter application was made to the University for admission. On May 15, 2000 the University wrote to offer her admission, setting out what she had to do. She then proceeded to do all those things required of her personally, for example,

undergoing a medical test and attending an orientation course. Then in a letter addressed to the appellant by the Director of Public Service Management (DPSM), the DPSM informed the appellant that she was no longer to undergo her training at Luton but somewhere in the Southern African region. This was later followed by another letter addressed to the appellant by the Permanent Secretary in the Ministry of Local Government saying among other things: -

“I have therefore on further consultations with DPSM decided that you should enroll at the Midrand University. This is also of course in line with the existing policy of Government that preference be given to placing students in regional institutions and that they be placed outside the region if the course to be followed or studied is not available. Please go ahead and register at the Midrand University.”

It was this letter that precipitated the commencement of these proceedings. It is clear from this letter that the person who made the decision was the Permanent Secretary, but that he took the decision after he had had consultation with the DPSM, and that the decision was taken in line with the then existing Government policy.

The appellant deposed to an affidavit of 24 paragraphs which contain mainly facts leading to the change in the attitude of the second respondent concerning where she should undergo her training as well as arguments in support of her case that the change is to her disadvantage, and also that the decision to change was erroneous, unreasonable, improper, unlawful and unjust.

It seems clear that in considering this appeal, the starting point should be to give an answer to the first issue raised by the appellant. It is only if the answer to that question is positive, namely, that the appellant has a legitimate expectation to proceed with her studies at Luton University that the necessity to examine the other issues will arise. If the answer to that question is in the negative then in my view there will be no necessity to proceed to an examination of the other two issues. And it was clear to me that the answer to the first question can be usefully discussed only by considering the further question, on whether or not on the facts of this case she has a legal right which is enforceable in the courts.

In his heads of argument, counsel for the appellant says that his prayer is "for an order in terms of the Notice of Grounds of Appeal," but in the Notice and Grounds of Appeal the reliefs sought are "Orders originally sought in the Notice of Motion; (2) the setting aside of the judgment of Justice Lisimba ..." and (3) costs. This throws us back to the Notice of Motion which originated the whole proceedings. This, to say the least is a lazy way of stating what exact relief the appellant is seeking from this court. For example two of the reliefs claimed in the original Notice of Motion have become useless, namely, "(4) respondents are granted leave to anticipate return date ... (6) Orders 3 and 4 shall operate as interim orders pending the return date," and cannot now be granted by this court. It would have been helpful had counsel set down precisely what reliefs he expected from this court. That is what the Rules of Court prescribe. Civil Form 1 of the Second Schedule prescribes specifically the "relief sought from the Court of

Appeal.” The procedure of incorporation as was done in this case may sometimes confuse the issues for determination by this court. That is why I have set down at the commencement of this judgment what appears to me to be the main relief being claimed in this appeal, the subsidiary being a claim for costs. Of course it appears that there is a claim for a declaration that the decision refusing appellant to further her studies in Luton University is improper and unlawful. Counsel must in the future be very careful in framing their claims before this court, so that such claims will be in proper form and of utmost clarity.

This of course leads me to the conclusion that what the appellant wanted was in effect the quashing of the decision of the second respondent to ask her not to proceed to Luton University for her study but to Midrand University for which in effect she is seeking an order in the nature of certiorari and at the same time an order in the nature of mandamus to compel the respondents to send her to Luton University for her study.

In my view, whatever may be the nature of the claims of the appellant, she had to convince the court that she has a legal right enforceable against the respondents. The law is that where an injunction is sought upon the ground that the applicant has been denied an opportunity of fair hearing (as has been seriously canvassed in this case) the court will refuse relief unless it is satisfied that the procedural duty allegedly breached was actually owed. See de Smith **Judicial Review of Administrative Action** (4th ed. by J.M. Evans) page 392. In this case the

appellant says that at the meeting of the senior members of staff of the Departments of Government dealing with training within the public service of Botswana, she was entitled to be heard before a decision in the case could be taken or in any meeting at which a decision previously taken could be altered. A more specious argument can hardly be imagined. If the argument is accepted that she had a legal right to be heard, then a large number of the members of the Public Service will all claim the right to make an input even when Government in its generosity is willing to offer civil servants an opportunity for an advancement in the service through in-service training. After all it is in all such meetings that decisions are taken whether to send particular members of the Public Service overseas for further training or not, and to which foreign country. Such a decision in my view is one solely for the employer, at his own discretion in respect of which the courts have no jurisdiction. It would be otherwise if a breach of the law, statutory or procedural whereby an individual or a group of individuals are adversely affected has been called in question. A decision of the type in question here is purely administrative in respect of which the courts cannot issue an order of certiorari. If the law were otherwise persons affected by each decision of the Government would then feel free to ask the court to quash those decisions of that body which affect them because they were not summoned to the meeting of the relevant Government Department.

The letter informing the appellant of the change of University is very clear as to how the decision was arrived at. It certainly had nothing whatsoever to do with the appellant. It was not due to any fault in her but was due entirely to a change in

policy direction in so far as training in the public service is concerned over which the courts have no jurisdiction. The letter reads in part as follows:

- "1. that in a meeting held on August 23, 2000 at DPSM between DPSM and representatives of Ministry of Local Government (Ministries of Education and Agriculture were invited but did not attend) the issue of relevance of the South African HRM programmes to the needs of the Public Service was discussed extensively and contents of the programmes compared to those of the UK and USA programmes. Analysis of contents of the programmes compared indicates that the South African programmes are more relevant to the needs of Botswana Public Service than those in UK and USA. It was therefore agreed in that meeting that the South African programmes should take precedence over USA and UK programmes considering the fact that the difference in terms of contents and therefore relevance are marginal.
2. Other factors such as cost effectiveness were also taken into consideration which together with that of relevance were decisive on programme venue. It was therefore unanimously agreed in the meeting on the basis of the facts before the parties attending that meeting, that all Human Resources Management first degree candidates must as a matter of Training and Development Policy, be placed in the SADC region as programmes in this field have been found as good in terms of contents as comparable programmes overseas."

I am of the first view that this change in direction in the training policy of public officers affects the whole service and the appellant had no legal right to be invited in shaping that policy. No court in this country can make an order of certiorari quashing the decision thus arrived at in the interest of the service as seen by senior officers of Government charged with the responsibility of taking decisions in such matters.

Furthermore, as I have said earlier what in effect the appellant is asking the court to do is to make an order in the nature of mandamus compelling the second respondent to send her for training at Luton out of government expense. Partly for the reasons which are quite clear from what I have said above, and for other reasons, the court cannot do this. It is trite to say that mandamus will issue only to enforce the performance of a public duty, and that it will not lie to compel the performance of a duty that is not recognised by law. In this case the respondents do not owe it as a public duty to the appellant to send her for training at Luton University or at any other place whatsoever. And the appellant has not shown that she has a right recognised by the law to be trained in Luton University. I must repeat that mandamus will issue only where it has been imposed on the respondent a duty by law which is enforceable at the instance of an applicant.

In support of the submissions made by counsel for the appellant in this case that the respondents were in error by not affording the appellant an opportunity to be heard before the change was effected reliance has been put on the judgment of the High Court in **Tebogo Silas Rapitsenyane v. The Attorney General and Others** Misa 173/2000 dated June 21, 2000. In coming to his decision in that case, Horn, Ag. J., relied on the decision of this court in **Student Representative Council and Others v. Attorney General**, Civ. App. No. 10/95 judgment dated July 12, 1995 where according to the learned trial judge this court quoted with approval some statement made by Lord Diplock in the case of **Council of Civil Service Unions and Others v. Minister of the Civil Service** [1984] 3

ALL ER 935, at page 949. I do not consider it necessary to set down that quotation nor the facts of the **Students Representatives Council** case. It is sufficient for me to say that the facts in that case are totally different from the facts of this case. In that case the Minister of Education had by virtue of powers vested in her by delegation from the Chancellor of the University, the President of this country, under section 5(3) of the University Act ordered the immediate closure of the University under section 11 of the Act as amended in 1989. Many of the students of the University had rioted and caused enormous damage to property outside the University. The Judge President in delivering the judgment of the Court said:-

“That the drastic action as the closure of the University was taken by the Minister cannot itself be in all the circumstances of this case, unreasonable. It might have been unreasonable were it shown that some condition which should have been observed before she took the action had remained unfulfilled.”

The learned President then went on to consider the well-known rule of **audi alteram partem**. In dismissing all the arguments directed against the non-observance of that rule, the learned President recalled what we had said in **Sarah Mothusi v. Attorney General, Civ. App. No. 15/93**, judgment dated July 7, 1993, that:-

“A right to be heard must be meaningful, in that its exercise should involve the possibility of a change in a contemplated decision.”

As we can see the case was based upon an allegation of a failure to give the students a hearing before the Minister took an action in the performance of what amounts to a public duty as entrusted to her under an Act of Parliament which is not the case

here. Secondly the action was precipitated by the poor behaviour of some of the students. In the present case what the appellant is complaining of is the change of policy which has nothing to do with any alleged misdeeds on her part.

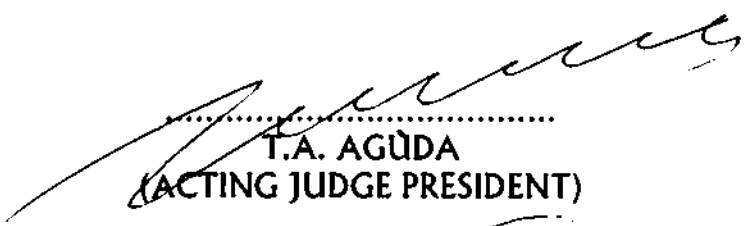
In this regard, the Attorney General's Chambers have not been particularly helpful apparently because they believed that the judgment of Horn, Ag, J., in **Tebogo Silas Rapitsenyane v. The Attorney General, Supra**, was correct, and that they were bound by it. Apart from everything else, even if we were to apply the aspect of the dictum of **Lord Diplock** in **Council of Service Unions** case, **supra**, namely:-

"To qualify as a subject for judicial review the decision must ... affect such other person ... (b) by depriving him of some benefit or advantage which ... (ii) he has received assurance from the decision maker will not be withdrawn without giving him just an opportunity of advancing reasons for contending that they should not be withdrawn, that would not carry the case of the appellant far."

There is no evidence that any assurance had ever been given to the appellant in this case, nor in the **Tebogo Silas Rapitsenyane** case by the Department of Government concerned that they would not withdraw the benefit given or offered without giving the appellant in each case an opportunity of advancing reasons for contending that the benefit would not be withdrawn. Of course such an assurance could be inferred if in this case the appellant had actually commenced her study at Luton, and a decision to withdraw her award was due to some alleged misconduct on her part.

For the reasons herein given the answer to the first issue raised by the appellant must be in the negative. The appellant had no legitimate expectation to proceed with her studies at Luton University. The answer to the second issue admitted of only one answer, and that is common cause, namely, that the appellant was not heard before the decision was undertaken that she was no longer to pursue her education at Luton University. The third issue is nothing but merely theoretical as it is not an issue in this case. It is clear therefore that this appeal must fail, and it is hereby dismissed. As regards the question of costs of this appeal, I think that each party should bear his or her own costs. This is because the ground upon which the dismissal of this appeal is based was not raised by the respondent. But **ex abutendi cautela**, the order as to costs made at the court a quo must stay. The appeal is dismissed. Each party to bear his or her own costs.

Delivered in open court at Lobatse this 2nd day of February 2001.


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T.A. AGUDA
(ACTING JUDGE PRESIDENT)

I AGREE


.....
K. R. A. KORSAH
(JUSTICE OF APPEAL)

I AGREE


.....
J. Z. MOSOJANE
(JUSTICE OF APPEAL)