

LESOTHO / JUDGMENT

Teboho Liau V Director General NSS & 4 Others (CIV/APN/0251/2022) [2022] LSHC 285 (7 November 2022) [2022] LSHC 285

COURT
High Court

CASE / FILE NUMBER
CIV/APN/0251/2022

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IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/0251/2022

In the matter between

TEBOHO LIAU

AND

DIRECTOR GENERAL OF

1ST APPLICANT

NATIONAL SECURITY SERVICE

1ST RESPONDENT

MINISTER OF DEFENCE AND

NATIONAL SECURITY SERVICE

NATIONAL SECURITY SERVICE

BOARD OF INQUIRY

THE ATTORNEY GENERAL OF THE

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

KINGDOM OF LESOTHO

5TH RESPONDENT

Neutral Citation: Teboho Liau and Director General of National
Security Services and 4 others [2022] LSHC 285 Civ (07 NOVEMBER
2022)

CORAM

HEARD

DELIVERED

:

:

:

HLAELE J.

14 SEPTEMBER 2022

07 NOVEMBER 2022

SUMMARY:

Review: Grounds
for review restated. Reasonableness and
impartiality as grounds for review. The test for what a ‘reasonable
arbitrator’ means. How to determine whether the trier of fact
addressed his mind to the issues before the tribunal.

ANNOTATIONS:

CITED CASES:

1. Mosoeunyane v Likotsi (CIV/APN/89/2014) [2016] LSHC 2 (18 August 2016)
2. Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A)
3. Head of the Department of Education v Mofokeng & others [2015] 1 BLLR 50 (LAC)
4. Gold Fields Mining SA (Pty) Ltd v CCMA [2007] ZALC 66; [2014] 1 BLLR 20 (LAC)
5. Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC)
6. Roma Taxi Association v Officer Commanding Roma Police (C of A (CIV) 20 of 2015) [2016] LSCA 6 (29 April 2016)
7. SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others 2009 (1) SA 565 (CC)
8. Lehlohonolo Alotsi v Commander of the Defence Force and 4 Others [2022] LSHC, 221 Civ (31 August, 2022)

BOOKS

1. Iain Currie, Cora Hoexter The New Constitutional & Administrative law. Vol.2 Juta 2001.

ARTICLES

1. K. GODFREY “Irregularity in the High Court: Appeal or Review” The Rhodesian Law Journal. October, 1972. 1972 R. L. J. Vol. 12, Part 2.p 240-246

JUDGMENT

HLAELE J.

[1] INTRODUCTION This is a review application in terms of Rule 50 of the High Court Rules wherein the Applicant, who is dissatisfied with the decision of the tribunal which tried his disciplinary case, has come before this court to have the decision of the tribunal reviewed and set aside. The Notice of Motion is couched as thus: -

1. Dispensing with ordinary and normal modes of service and time frames provided for by the rules of this Honourable Court due to the urgency of this matter.

2. A Rule Nisi be and is hereby issued and made returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause, in any, why the following Orders shall not be made absolute: INTERIM RELIEF
 - a) The 4th Respondent be directed to dispatch the original record of proceedings of disciplinary enquiry against Applicant before the Registrar of this Honourable Court to facilitate review thereof within fourteen days of receipt hereof.
 - b) The discharge of Applicant from the service of 3rd Respondent be stayed pending final determination of this Application.
 - c) That Respondent's be interdicted from placing any other person in the position of Applicant pending finalization hereof.
 - d) That 1st Respondent should advise the Human Resource Officer of the 3rd Respondent or any other person tasked with payments of salaries to disburse salary of Applicant for the month of August 2022 henceforth and or any other due benefits as if he was never dismissed pending finalization hereof. FINAL RELIEFS
 - e) That the judgement delivered by 4th Respondent and dismissal of Applicant be review, corrected and set aside as irregular and contrary to the law.
 - f) That Applicant be reinstated to his position as an Assistant Director without loss of remuneration and status within the service.
 - g) That Applicant be allowed to resume his duties as an Assistant Director of 3rd Respondent.
3. Prayers 1 and 2 (a), (b), (c) and (d) be granted to operate with immediate effect as interim relief.
4. Costs of suit at Own Attorney and Client Scale only in the event of opposition hereof.
5. Granting the Applicant such further and alternative relief as the court may find it fit and proper. The only interim orders that were granted were the dispensation of rules and the dispatch of the record. Mahase J, correctly stated that the orders sought in the interim reliefs prayed for, had a final effect as therefore could not be granted as interim reliefs. She however ordered the expeditious filing of pleadings and put the parties to terms of filling of heads and arguments.
- [2] THE PARTIES The Applicant describes himself at paragraph 9 of the founding affidavit as a former employee of the 3rd Respondent. In this institution he is identified as number 11638. At the time of this dismissal his rank in the institution was Assistant Director, having been promoted from Senior Intelligence Officer. The Respondents are mainly the personnel of the National Security Services institution (NSS), they are, the Director General of the institution, the Minister of government responsible for National Intelligence and of course the Attorney General who is cited as the legal representative of government.

- [3] FACTUAL MATRIX 3.1 I will commence with the facts that are common cause. It is common cause that; 3.1.1 A show cause letter was written to the Applicant on the 4th December 2017. He was required to make representations to show cause why he could not be suspended with pay from his duties as an Assistant Director at NSS. The reason for the suspension was that he failed to adhere to the NSS Recruitment Policy during the recruitment process of 2016. I will quote verbatim the relevant part of the letter. It read; Show cause why[sic] you cannot be suspended from National Security Services (NSS) duties with immediate effect for abuse of power while you were Human Resource Manager. That, you failed to fully adhere to NSS Recruitment Policy during the recruitment processes of the new NSS Entrants in 2016 and 2017 respectively. You are expected to respond to this letter within seven (7) days from the day you receive it. 3.1.2 He responded to this letter on the 5th December 2017, wherein he sought clarity to the letter of the 4th. The issues he needed clarity on were posed in question form. I quote the contents of his letter revealing his queries. It read as follows: -
1. which dates of recruitment are you referring to?
 2. Where was I on the dates you are referring to? 3. which recruits are you referring to?
 4. what Policy are you referring to and which year?
 5. who were the members of the recruitment and selection panel you are referring to. [sic] 2
- 3.1.3 Instead of filing the requested particularity or clarity, the 1st Respondent wrote another letter to the Applicant dated 26 January
2018. In the said letter, the Director of NSS basically wrote another show cause letter. I will quote the relevant portion of the letter. It read: - The Director General -NSS is intending to suspend you from NSS duties pending investigations surrounding the under-listed allegation against you: -Failure to advise the Director Tau MAKHALEMELE, your then Director Human Resource to adhere to the NSS Recruitment Policy of the 9th May 2012, which clearly stipulates the requirements for employing the 2016 new entrants as you were by then the Human Resource Manager and you knew or ought to have known this policy well. As a result of this the recruitment of NSS new entrants was rendered flawed and caused the Department great financial loss. The letter was signed by the Director General NSS one P. J Ralenkoane, the 1st Respondent herein. 3.4 To this letter the Applicant responded by bemoaning the injustice meted out against him by the office of the Director General in that the policy referred to in his suspension letter is non-existent or is known only to the Director- General. He 1 Annexure "TL1" to the founding affidavit at page 27 of the record. 2 Annexure "TL2" to the founding affidavit at page 28 of the Record. requested a copy of the said policy. This letter was written on the 30th January 2018. 3.4.1 Responding to the Applicant's letter, the Director General wrote another letter dated 7th February 2018. This letter effectively suspended the Applicant from duty. It added further information that he is being investigated by the Directorate of Corruption and Serious Economic Offences (DCEO) relating to the same incident of recruitment of new entrants. 3.5 On the 18th May 2020 about 2 years later, the Applicant received a letter from the 1st Respondent requesting

him to make representations and show cause why disciplinary action cannot be taken against him. 3.6 In return and responding directly to the letter of 18th May 2020, the Applicant instructed his counsel of record to seek certain documents on his behalf. He alleged that these documents were instrumental for the preparation of his defence. 3.7 On the 30th June he was formally charged. To which he responded by requesting information relating to the recruitment process under which he was charged. The information and documents he sought included radio messages, the advertisement for positions and other related inviting recruits to apply information. 3.8 On the 13th July 2020, he attended the disciplinary hearing. He raised various preliminary objections thereat. These related to the constitution of the panel, the unavailability of some potential witnesses, and the possible impartiality of the Panel. The objection on the constitution of the Panel was upheld whereas the other objections were dismissed. A new disciplinary panel (board) was appointed which the Applicant had no objections to. The matter was set to commence on the 29th April 2022. 3.9 The disciplinary proceedings were interrupted by the Applicant's filing of court proceedings under CIV/APN/0135/2022. In this court application he sought a permanent stay of the disciplinary proceedings. This application was dismissed by the 3 Annexure "TL4" to the founding affidavit at page 30 of the record. 4 Annexure "TL5" to the founding affidavit at page 31 of the record. court per Makhetha J. He then noted an appeal but then withdrew the said application before this matter came before me for hearing. It should be stated that in their response to the Applicant's founding papers, the Respondents had raised a legal point of *lis pendens* in that the appeal was pending and the review before me can therefore not proceed. I do not know whether the withdrawal was fostered by this state of affairs.

3. 10 The Disciplinary hearing commenced on the 18th July 2022. 5 More of the record will be said later in the judgement. Suffice to state that it reflects that the Applicant was present and he was represented by legal representatives being advocates Monese and Malabulabu. The prosecutor was Director Chabana, supposedly of the NSS. The Applicant pleaded not guilty to the charges. 3.11 After the proceedings, the panel found the Applicant guilty of the charges preferred against him and recommended to the Director General that he be demoted to a lesser rank. 3.12 The Director General accepted the outcome of guilt but rejected the panel's recommendation of a demotion. Instead, he substituted it with discharge from duty which effectively translates to a dismissal. 3.13 The Applicant noted an appeal against the Directors sentencing to the Minister of Defence and National Security. After making representations to the Minister, the Minister confirmed the discharge. It is this decision that has birthed the present application. The conclusion of the letter, which deals specifically with the findings and decision of the Minister reads: - Based on the foregoing findings, I confirm the verdict of the Board of Enquiry that the member is guilty on all charges. Having considered the recommendations of the board and those of the Director General and those made by the member, I hereby discharge the member from [sic] the service with effect from the 10th August, 2022 in terms [sic] Section 21(9)(e) of the National Security Act No 11 of 1998. 5 The handwritten record appears at pages 93-109 of the record.

- [4] APPLICANT'S GROUNDS FOR REVIEW. 4.1 The grounds of review appear at paragraph 25 of the founding affidavit. In summary, the gist of the grounds of review are that: - 4.1.1 The panel failed to apply its mind to the relevant issues and facts in accordance with the behests of the statute and tenets of Natural Justice. Elaborating on this ground, the deponent states that his defence was not negated, there was not evidence that proved his charge as he was not part of the recruitment process, he was denied access of records. 4.1.2 He alleges that the panel was impartial in that some witnesses had passed on(died). The absence of these witnesses at the trial was based on prejudice. 4.1.3 He was not given an opportunity to make verbal representations during his appeal. This constituted denial of the right to make proper representations.
- [5] ISSUES FOR DETERMINATION. This court has to consider the following issues for determination. 5.1 Are the grounds put before this court grounds for review or appeal? 5.2 What are the grounds for review? 5.3 Has the Applicant complied with these grounds for review. 5.4 Was the Applicant denied a fair hearing 5.5 Did the disciplinary board address its mind to issues at hand before it made a recommendation to the Director 5.6 Did the Minister act outside the tenant's Natural Justice when he preferred written representations against oral representations. [5.1.1] HAS THE APPLICANT FILED GROUNDS FOR REVIEW OR GROUNDS OF APPEAL. The somewhat thin line between grounds of review or appeal although familiar to legal practitioners, tends to sometimes be elusive at the worst of times. It has been observed as far as 1972, when Zimbabwe was still called Rhodesia that; The difference between appeal and review is familiar to Southern African lawyers: appeal challenges the correctness of the decision and is based on what appears in the record; review challenges the regularity of the proceedings...6 Khabo J in the case of *Lehlohonolo Alotsi v Commander of the Lesotho Defence Force*⁷ confirms that Judicial review is in essence concerned, not with the decision but with the decision-making process. Upon review, the court is in general terms concerned with the legality of the decision, not the merits. Thus, a review is mostly concerned with the correctness of the legal matters of a decision whereas an appeal is mostly concerned with the correctness of the decision itself. An appeal is a request to change or modify the decision or verdict. A review is concerned with the irregularities a decision maker engaged in when making the decision. These include the impartiality of otherwise of the decision, the adherence to procedural requirements. 5.1.1(a) I will now proceed to address the grounds of review cited by the Applicant in his founding papers and put these under a micro- scope, I will determine, using the test above, whether they are grounds of appeal or review. 5.2 The first ground of review reads: - 6 K Godfrey "Irregularity in the High Court: Appeal and Review? The Rhodesian Law Journal" October LG72 RJL Vol 12 Part 2 pp 240-246 7 *Lehlohonolo Alotsi v Commander of the Defence Force and 4 Others* [2022] LSHC, 221 Civ (31 August, 2022)

- a) In analysing the disciplinary proceedings, it is clear that the disciplinary tribunal failed to apply its mind to the relevant issues and facts in accordance with the behests of the statute and tenets of natural justice. Applying the test to this ground of review, it is concerned with the irregularities a decision maker engaged in when making the decision. It does not ask this court to modify the decision or verdict. 5.3 The second ground of review reads: -
- b) Ex facie the record of proceedings, the board refused to subpoena one of my witnesses being former Director General Lekhooa which ultimately prejudiced my case. This ground of review also passes the master test because it talks to issues of prejudice. In the case of *Mosoeunyane v Likotsi*,⁸ Moahloli J held and confirmed that prejudice is a ground for review. 5.4 The third ground for review reads: - C) The 2nd Respondent refused to grant me a chance to make verbal representation for my appeal yet there is no law that prescribes those representations to be only written. This is not a ground for review but an appeal because the Applicant is challenging the correctness of the decision based on law. As such this court will not entertain it. Ground decision e) suffers the same fate as it talks to the correctness of the decision. Ground f) was premised on the existence of an application for stay execution in CIV/APN/0135/2020 which has since been withdrawn. As such it is overtaken by events. They stand to be dismissed, therefore. 5.5 Having established that some grounds of review that have been submitted by the Applicant are indeed grounds of review and can therefore be entertained by this court, the next task for this court is to perustrate these grounds against the provisions of the law. *88Mosoeunyane v Likotsi* (CIV/APN/89/2014) [2016] LSHC 2 (18 August 2016)
- [6] THE DUTY OF THE REVIEWING COURT- THE LAW 6.1 A reviewing court can only interfere with the decision-makers pronouncement on the case where such a decision is so unreasonable that no reasonable decision maker can reach such a decision. This is one of the grounds of review raised by the Applicant. Our courts have cited with authority the case of *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another*⁹. This authority has been cited with approval by Our courts with specific reference to page at 152 A-E, where the following is recorded, “Broadly, in order to establish review grounds, it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice. Such failure may be shown by proof, inter alia that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the interference that he had failed to apply his mind to the manner aforestated.” into account 6.2 This therefore means that, a review court will ordinarily be reluctant to interfere with the exercise of discretion, provided that the discretion was not exercised capriciously or arbitrarily. The case of *Head of the Department of Education v Mofokeng & others*¹⁰ is instructive in guiding the court in determining what constitutes unreasonableness. In giving guidance, Murphy AJA said the following: The determination of whether a decision is unreasonable in its result

is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on 9 Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another⁹ 1988 (3) SA 132 (A) 10 Head of the Department of Education v Mofokeng & others¹⁰ [2015] 1 BLLR 50 (LAC) grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed at common law,... such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. The Court must nonetheless still consider that apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence.

6.3 The court undertaking a review process, while engaging in the exercise of examining interrelated questions of rationality, lawfulness, and proportionality pertaining to the purpose and basis for reasoning and effect of the decision will not do so in a piecemeal fashion. It will not dissect and scrutinize each and every facet of the decision in isolation or individually.

6.4 In the case of Gold Fields Mining SA (Pty) Ltd v CCMA¹¹, the court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. Thus, this court may intervene if and only if the arbitrator commits a reviewable irregularity that has the consequence that the award under review is so unreasonable that no reasonable decision-maker could reach the decision to which the arbitrator came on the basis of the available evidence¹².

6.5 In Gold Fields Mining SA (Pty) Ltd (above) the Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The court cautioned¹¹ Gold Fields Mining SA (Pty) Ltd v CCMA [2007] ZALC 66; [2014] 1 BLLR 20 (LAC)¹² Amalgamated Engineering Solutions and another v Malisema Makhele and 5 others (LC/REV/APN/26/2022)²⁰²¹.⁷² against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence.

6.6 The Goldfields Mining case provided that the questions a review court asks are whether the decision maker gave the parties a full opportunity to have their say in respect of the dispute, whether he identified the issue in dispute he was required to arbitrate. The court of review should investigate whether the decision-maker understood the nature of the dispute, whether he or she dealt with substantial merits of the dispute and whether the decision is one that another decision maker could reasonably have arrived at based on the evidence. All in all, when a decision-maker fails to have regard to the material facts it is likely that he will arrive at a decision that is unreasonable. Similarly, where he fails to follow proper and due process he will arrive at an unreasonable outcome. Then the reviewing court will intervene.

6.7 The case of Sidumo & Another v Rustenburg

Platinum Mines Ltd & Others¹³ (2007) 28 ILJ 2405 (CC), the Constitutional Court simplified the test for the review as follows: “Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach? If so, it is reviewable. If not, it is not.”^{6.8} In *Roma Taxi Association v Officer Commanding Roma Police*¹⁴ (C of A (CIV) 20 of 2015) the court added: four grounds exist, namely, Unless the illegality, procedural impropriety, unreasonableness and disproportionality any “Curial Intervention” will be impermissible. Constant judicial intervention may grind the wheels of government to a halt. Judges are not all-round experts, especially in matters which require specialised knowledge. In any event law is not a subject of mathematical precision. Individuals or governmental agencies having the same power and dealing with the same circumstances may not deal with the matters in exactly the same way. ^{6.9} From the afore cited authorities, it is clear that the task of this court is limited to the grounds of review and cannot go beyond them in making a determination whether the decision of the 2nd Respondent & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC) 14 *Roma Taxi Association v Officer Commanding Roma Police* (C of A (CIV) 20 of 2015) [2016] LSCA 6 (29 April 2016) Respondent is reviewable. His findings are premised on the report of the proceedings undertaken by the 4th Respondent. The 4th Respondent never made any decision regarding the fate of the Applicant. It merely made findings and recommendations. The final arbiter was the 2nd Respondent on behalf of the 3rd Respondent.

- [7] THE LAW AND THE FACTS Having established the law, the next task for this court is to infuse the law to the facts of the case. This will be done in line with the submissions made by the parties’ legal representatives during oral addresses, and also the heads of argument. I should state from the on set that only the Applicant filed their heads of argument. The Respondents failed to file the heads in terms of the rules of court and the directives of this court in relation to trial readiness of matters worst of all, an order of this court by Mahase J as far back as the 19th August 2022. More of this will be dealt with later in this

judgement.

7.1 APPLICANT’S SUBMISSIONS 7.1.1 The essence of Applicant’s case is stated in his heads of argument in this fashion: The core issue therefore which this honourable court is invited to make a decision on is whether the 2nd and the 4th Respondent committed any irregularities which would warrant setting aside of the Applicant’s discharge and whether Applicant can be reinstated without loss of remuneration. The latter is dependent on the findings of the former.¹⁵ The Applicant relies on the Rule 50 of the High Court Rules for the proposition that the law permits the filing of a review in the circumstances outlined. As stated earlier the provisions of common law come into play. 7.1.2 The irregularities he mentions are that the decision-maker failed to apply his mind to the facts of the case and evidence before he could make a decision. For this he relies on the authority *Cora* 15 Paragraph 22 of the Heads of argument. Hoexter in the book *The New Constitutional & Administrative law*¹⁶. He states that there is no evidence that negates his defence that he knew of the vetting process, he signed the radio messages (he conceded during addresses that contrary to this submission, there was evidence that he did), that he did not

ensure compliance with the recruitment advertisement. 7.1.3 The findings of the board form part of the record.¹⁷ In the summary of the evidence and the conclusions reached, the chair of the board states; The prosecutor showed that the accused confirmed that the signature to the radio messages mentioned above is his. He further did not indicate on the messages that he was signing on behalf of the Director Operations who is the rightful signatory of such messages. By so doing the accused subverted good order and discipline laid out in count “A” In similar fashion, the chair of the board analyses his findings on charges B, C and D. All the while citing the evidence presented to him, how the evidence proved the charge and how he arrived at his decision. His analysis are good in fact and in law. 7.1.4 The reasoning by the trier of fact indicates that he addressed his mind to the dispute at hand. He was alive to the charge and the requirements thereof. The evidence adduced before him proved the charge. It is not for this court to reevaluate the evidence and come to a different finding. The issue is, as has been said in the authorities cited above, to test whether a reasonable arbitrator or trier of fact could have reasonably come to such a decision. I conclude that from the reasoning articulated in his findings the arbitrator and the 2nd Respondents decision stands and cannot be reviewed or set aside. 7.1.5 My conclusion is based on the fact that I do not find anything on record that manifests unlawfulness. The recording is proportional the issue at hand. It talks of issues of National Security which require a high level of sensitivity. He has said so in 16 Cora Hoexter The New Constitution & Administrative law Vol.2 Juta 2001. He quotes page 16 17Pages 110-119 so many words. All relevant considerations were considered and articulated, and this is evident.

[8] CONCLUSION I find that the recommendations made by 4th Respondent, and accepted as the basis for the decision of the 2nd Respondent are not reviewable on the grounds laid out by the Applicants. This is on the strength of the authorities that outline the grounds of review and the duties of the reviewing court above. I can only interfere with the decision of the 4th Respondent if the record of proceedings revealed irregularities. There are none. Asking myself the key question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? I find that there exists such a rational and objective connection between the material available to the decision maker and the conclusion he finally arrived at. Therefore, the decision of the 2nd Respondent is not reviewable in law.

[9] UNETHICAL AND UNPROFESSIONAL CONDUCT OF COUNSEL 9.1 Earlier on in this judgement, I intimated that I will return to the issue of the unethical conduct of counsel herein. I must be quick to exonerate Advocate Monesa who appeared on behalf of the Applicant herein. He prepared a well presented, carefully bound record of proceedings. The record was perfectly paginated and as the domis litis he complied with all the Directives and Rules of this court. He articulated his case well in his heads of Argument. 9.2 On the contrary, the same cannot be said about his colleague Advocate Thakalekoala. The history of this case reveals that the file was allocated to me on the 1st September 2022. On the 5th of September the matter was set down for the first appearance by virtue of a postponement before Mahase J. Advocate Thakalekoala made no appearance and no excuse was offered for

his non- appearance. The matter was subsequently set down for hearing on the 17th October 2022. The court issued an order that the file should comply with the Directives of the court on trial readiness. As has been said, Advocate Monese did a sterling job in this regard. I should mention that as at the 19th August 2022 Mahase J had ordered that Advocate Thakalekoala should file Respondent's Heads of Argument on the 2nd of September 2022. 9.3 On the 17th October the matter proceeded in open court. When the matter was called, there was no representation on behalf of the Respondents. I was informed that Advocate Thakalekoala was representing them. We had a brief adjournment to facilitate his attendance. 9.4 Upon the reconvening of the court, he was present. He informed the court that he was earlier appearing before the Court of Appeal. Quizzed why he had not informed the court about this; he had no satisfactory answer. Neither did he explain why he had not also extended his colleague to same courtesy. 9.5 It should also be mentioned that he had not filed Heads of argument in terms of the rules and Mahase J's order. 9.6 The court then ordered that he should file 2 sets of heads of argument. The first, which were due on the 19th October 2022 were to deal with why the court should not order costs *de bonis propriis* for displaying unbecoming, unethical and against him unprofessional conduct towards the court in (a) making the court wait for him and not informing the court timeously that he was engaged in another court, and (b) not filing heads of argument in the main. 9.7 The second set of Heads of Argument were due on the 21st October 2022, which were the main Heads of Argument. 9.8 To date, Advocate Thakalekoala has not filed these two sets of Heads of Argument. 9.9 This conduct displayed by advocate Thakalekoala shows the utmost disrespect for the courts and their authority. If left unattended, this behaviour might spill over and become a tendency. The courts must show their displeasure against such unprofessional conduct by mulcting a practitioner with cost *de bonis propriis*. Indeed, the duty and courtesy a legal practitioner owes a court is that they must be punctual and prepared for all court appearances and if delayed, they have to notify the court and opposing counsel. His primary duty is to respect the court and adhere to the Rules of court that govern procedures in court. These include the filing of Heads of argument, more so when a court has not only ordered them but has also been lenient in giving a practitioner time to file them out of time. 9.10 It is for the aforementioned reasons that I find it appropriate to order costs *de bonis propriis* against Advocate Thakalekoala. In the case of the Constitutional Court in *SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others*¹⁸ it was held that: 'An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.

[10] ORDER I therefore make the following order:

1. The application is dismissed with costs.
2. An order of costs *de bonis Propriis* against Advocate Thakalekoala on an attorney and client scale.

M. G. HLAELE JUDGE Applicant: Adv L. C Monesa Respondent: Adv Thakalekoala 18SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others 2009 (1) SA 565 (CC) 19

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