CIV/APN/96/92

IN THE HIGH COURT OF LESOTHO

In the Application of

CHIEF MARAKABEI THEKO	Applicant
vs	
ATTORNEY GENERAL	1st Respondent
MINISTER OF INTERIOR & CHIEFTAINSHIP AFFAIRS	2nd Respondent

JUDGMENT

Delivered by the Honourable Mr Justice T. Monapathi Acting Judge of the High Court on the 22nd day of February, 1994

The Applicant filed a notice of motion on the 16th March 1992, for an order int he following terms

"(a) Declaring that Applicant herein is entitled to be paid the same stipend in respect of his office of chief as chiefs of his equivalent status.

(b) Directing REspondents to pay the costs hereof.

(c) Granting Applicant such further and/or alternative relief as this Honourable Court may deem fit."

Respondents were duly served and duly filed their answering affidavit of one LESOLE PUTSOA, the Director of Chieftainship Affairs in the Ministry of the 2nd Respondent. The Applicant duly filed his replying affidavit. Counsel duly presented their arguments before me on the 14th December 1993.

It is common cause that the Applicant is a gazetted chief of Ha Ramakabatane under the Chief of Boithatelo, Thaba Bosiu in the District of Maseru. Applicant is Subordinate to the Principal Chief of Thaba Bosiu and Ha Ratau, Chief Khoabane Theko.

By way of introduction I need to say that Chieftainship is a hereditary right. There are certain benefits which flow to chiefs such as stipends, be they monthly or yearly. What is important is that these stipends differ in amounts and frequency depending on certain considerations, the most obvious being firstly the chiefs class or status the number of male households a tax payer and whether a chief is gazetted or not. This has been the accepted classification or categorization of chiefs namely principal chiefs, ward chiefs, chiefs and headmen. It was submitted by Mr. Nathane for the Applicant that any further classification would be unrealistic and fictitious It would be unreasonable to seek to extend the accepted order of t he chief's classes. It was submitted further that the right to a stipend is almost unalienable to the holder of offices of chiefs. This means that once a chief falls into a category of chiefs entitled

to a stipend it became unlawful discrimination not to give such a chief a stipend on the same terms and conditions as befit that class of chiefs. The answer to this will also depend on t he status of the circular issued by the Ministry of Interior or Cabinet Circular which publish the state of stipends, that is their terms and conditions of their payments. Cabinet Circular Notice No.12 of 1985 (the circular) annexed as MMT3 to the Applicants replying Affidavit is one such a circular. It is central to these proceedings.

The Applicant's case is a simple one. He says he is a gazetted chief and he has more than 250 tax payers under his chiefly supervision and jurisdiction and he is therefore entitled to a monthly stipend of a chief. He wants this Court to make such a declaration.

The history of this dispute begins with a letter (the letter) annexed as MMT2 to the Applicants founding Affidavit. The letter was written on the 18th February, 1985 by the Applicant's superior chief, the Principal Chief, Chief Khoabane Theko. This was proper in the circumstances, in that Chief Khoabane w as enjoined by custom to introduce the Applicant or rather to promote the claim of his junior chief. It is eminently useful t o quote from the letter as follows "By this letter I introduce Chief Marakabei M. Theko to be paid monthly stipend as his tax-paying subjects are

now more than 250, which is a minimum number of subjects that gives a chief a right to monthly stipend. He has 263 tax paying subjects." This letter teaches us that there was in the understanding of some chiefs a convention or practice firmly established on the basis of which chefs are entitled to a monthly stipend or the opposite depending on the number of ones tax payers under their jurisdiction. I prefer to call this tax payers *male households*.

This Court was informed that this letter MMT3, which was a demand, was ignored by the office of the 2nd Respondent. I voiced my concern as to the fact that this demand was ignored and not responded to. I warned that Government departments and officials ought to set an example in attending promptly and properly to ordinary people's complaints Had this been done, in this instance, this dispute could have been avoided or settled amicably. Close on the heels of the letter, and on the 26th February, 1985 followed the circular. The contents of the circular can conveniently be extracted as follows to enable ease of reference.

> "The following are rates of pay for the Chiefs and Headmen as at 1st January, 1985 -
>
> | Category | Payment |
> |---|---|
> | Principal and Ward Chiefs | M9600 p.a. |

Area Chiefs	M4800 p.a.
Chiefs	M3000 p.a.
Headmen	M1200 p.a.

2. The remaining Chiefs and Headmen who were drawing gratuities based on the previous system of basic tax should be paid an allowance at t he rate of M360 p.a. as at 1st January, 1985."

It has been submitted that the previous category of chief under paragraph 2 were so classified only provided that such chiefs had male households of not more than 250. The significance of Chief Khoabane's letter, now, rears its head. It means therefore the Applicant belonged to the upper class of chiefs entitled to an annual stipend of M3000.00. If this is refused (as the Respondents have done), the Applicant submits that he is being discriminated against vis-a-vis chiefs of similar standing as himself. This is the crux of the Applicant's claim.

Respondents have submitted in response that these stipends depended on the number of people under each chief's jurisdiction, thus giving such a chief certain responsibilities and thus entitling him to a stipend on a comparative basis. To this I agree. But this does not answer the question as to why a chief whose circumstances have improved, such as that of t he Applicant

should be kept under category 2. As I have said argument has been made that this Circular was discriminatory and unfair in itself or in its application and effect, on Applicant and Chiefs of similar circumstances.

Indeed a circular is not subordinate legislation strictly speaking. I have however been persuaded that a Circular is a binding administrative arrangement as between a class of people to whom it has to be publicised, who in turn expect to be regulated by it and who expect certain benefits flowing therefrom. As a corollary the concerned people must also accept certain onerous obligations, duties and minor disadvantages as imposed by the arrangement of this nature. In the manner outlined above circular such as this become binding on the Respondents. It is binding.

The amount of an annual stipend that the Applicant stands to benefit in having his claim realized is a sum of M3,000.00 per annum, as he did indicate in Court. This is a substantial amount of money by any accounts. Judged on this aspect of the amount one cannot but be of the opinion that Applicant's claim is not frivolous. He stands to gain considerably if he succeeds, although at this stage, he is merely asking for a declaration. Applicant is entitled to apply for a declaration in terms of section 2 (b) of the High Court Act No.5 of 1978 for this

relief.

This Court has been asked for a declaration under the mentioned section which provides that, in addition to any powers or jurisdiction which may be vested in it by law, the High Court shall have power in its discretion, at the instance of any interested party, to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequent upon its determination I am satisfied that the Applicant is an interested person as envisaged by the section 2 (b) of the s aid High Court Act. I am also satisfied that this is a proper case in which I may exercise my discretion. For reason stated herein before the Applicant's claim seems very real and cannot be termed academic This is my firm view, after considering all the facts which are indicative of suitable circumstances for the exercise of this Court's discretion.

Discrimination is a species of unreasonableness. Discrimination is an actionable wrong. This means that one has a justiciable right not to be discriminated against The constitution of Lesotho provides as follows in chapterII of Section (4) (1), that

" Whereas every person in Lesotho is entitled, whatever his

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following -

(a) .....

(b) .....

(c) ....

(d) .....

(e) ....

(f) ....

(g) .....

(h) ....

(i) ....

(j) .....

(k) . .. .

(l) .....

(m) .....

(n) Freedom from discrimination,

(o) ....

(p) .....

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are

contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

2. For the avoidance of doubt and without prejudice to any other provision of this Constitution it is hereby declared t hat the provisions of this Chapter shall, except where the context otherwise requires, apply as well in relation to things done or omitted t o be done by persons acting in a private capacity (whether by virtue of any written law or otherwise) as in relation to things done or omitted to be done by or on behalf of the Government of Lesotho or by any person acting in the performance of the functions of any public office or any public authority."

Sub Section (2) shows quite clearly that public officers are equally liable as ordinary or private persons of the duty to act without discrimination whether by Covert or Overt acts To discriminate is defined by the Concise Oxford Dictionary as "1. To make or see a distinction 2. Differentiate 3. Make a distinction especially unjustly on the basis of race or colour or sex 4. Select for unfavourable treatment." There are other additional definitions. It is the latter (underlined) definition of

discrimination which Applicant finds apposite and applicable. This is correct as far as it goes.

We now have to look at this aspect of the effect of administrative acts as against the decisions themselves. The learned author Lawrence Baxter in his useful work ADMINISTRATIVE LAW. 1st Edition at page 522, sums up this admirably well thus " We judge the unreasonableness of decisions not only by the manner in which they are reached but also in terms of their effects. The Courts have recognized that even when they are unable to interfere with the manner in which the decisions have been reached they might still interfere if their effects are unreasonable. This is particularly true in the case of subordinate legislation. Schreiner J.A remarked in SINOVICH vs HERCULES MUNICIPAL COUNCIL (1946 AD 783 "The law does not protect the subjects against merely foolish exercise of a discretion by an Official, however much the subject suffers thereby. But the law does protect the subject against stupid bye laws, however well intended if their effect is sufficiently outrageous." To this I agree.

I would consider that again had the Ministry of Interior replied in the negative - for Chief Khoabane's letter, it would amount to failure to take into account a relevant consideration of the improved circumstances of the Applicant. But no reply was made to the letter. One cannot even surmise what the reason for the

reply would have been. But this makes no improvement to this situation. The right to receive reasons for decisions is paramount in the Rule of Law and natural justice.

A Court is entitled to review a discretionary act if the official vested with the discretion fails to apply his mind to the matter, and in applying his mind the official is obliged to have regard to all relevant information. For a broad statement of the principles of review of discretionary acts See APPLICANT vs ADMINISTRATOR 1993 (4) SA 733, W). The fact that the Ministry did not reply to the letter of demand serves only to fortify my view that there were no good reasons for the decision in the circular. In all circumstances of this case, I am satisfied that the official concerned did not apply his mind to the matter.

It is clear from the foregoing that I would declare that the Applicant is entitled to be paid the same stipend in respect of his office of chief or chiefs of equivalent status. This Order I make with a further order that the Respondents shall pay the costs of this Application to the Applicant.

T. MONAPATHI

Acting Judge

For the Applicant Mr. Nathane

For the Respondents Law Office