

IN THE HIGH COURT OF LESOTHO

In the matter between

***Mamahali Mpho Molapo**

Applicant

and

**Maseru City Council
Town Clerk - MCC**

**1st Respondent
2nd Respondent**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On the 2nd day of October 1998

In this matter the Applicant seeks a declaratory order to the effect that her purported dismissal as the employee of the 1st Respondent is null and void and of no force and effect. As ancillary prayers she accordingly seeks reinstatement to her position as personnel manager of the 1st Respondent, payment of monthly salary from September 1997 to date of judgment as well as costs of suit. I should mention at the outset that during the course of argument before me the parties were in agreement that in the event of this Court granting reinstatement the Applicant could only be reinstated to her new position of Social and Economic Planner as she had already been transferred thereto at the time of her purported dismissal. Now for the story of the litigation:

The parties are indeed on common ground that the Applicant was appointed to the post of Manpower Manager in the service of the 1st Respondent on the 22nd April 1992. The letter of appointment to that effect is Annexure "A" to the Applicant's founding papers. This letter has been signed by the then Town Clerk S.M. Phamotse. It is Applicant's case however that the latter was merely informing her of the appointment which according to her had been made by the Minister of the Interior and Chieftainship Affairs in terms of Section 4 (1) of the Urban Government (Amendment) Order 1990 (repealing and replacing Section 29 of the principal Act namely the Urban Government Act 1983).

The Respondents, on the other hand, contend that the appointment in question was made by the Town Clerk S.M. Phamotse himself and that therefore the 2nd Respondent was entitled to dismiss the Applicant without the approval of the Minister as he admittedly did on the 10th September 1997 in terms of Annexure "C".

While it may appear, at first blush, as if there might be a dispute of fact as to who actually appointed the Applicant a closer examination of the matter shows that such dispute is not real, genuine or *bona fide* but artificial. This is mainly so because appointment of officers of the 1st Respondent is the exclusive domain of the Minister of the Interior and Chieftainship Affairs in terms of Section 4 (1) of the Urban Government (Amendment) Order 1992. That section provides as follows:-

“29. (1) The Minister may, on such terms and conditions as he thinks fit, appoint,

- (a) a Town Clerk;
- (b) a Deputy Clerk;
- (c) A Treasurer; and
- (d) such other officers as may be deemed necessary for the proper performance of the functions of the Council.”

As I read this section it clearly empowers the Minister of the Interior and Chieftainship Affairs and no body else to appoint officers of the 1st Respondent.

Adv Mosisili for the Respondents has tried to overcome this patently insurmountable hurdle by suggesting that the Minister had delegated the power of appointment to the Town Clerk. I cannot accept this argument principally for two reasons:

Firstly the Minister has not been given express or implied power to delegate as suggested anywhere in the Urban Government Act 1983 as far as appointment of officers to 1st Respondent is concerned. In this regard I accept **Lawrence Baxter's** statement in his invaluable book **Administrative Law** at **page 432** that the power to delegate does not automatically exist: it must be provided for, either expressly or impliedly.

In any event I observe that even if the Minister had in fact delegated the

power of appointment to the Town Clerk notice of such delegation would have had to be published in the Gazette in terms of Section 36 (1) (d) of the Interpretation Act 1977 which is to the following effect:

“36 (1) Where a Minister has delegated powers and duties under section 35(2), or where an Act confers power upon any person to delegate the exercise on his behalf of any of the powers or the performance of any of the duties conferred or imposed upon him under any Act -

- (a).....
- (b).....
- (c).....

(d) notice of such delegation shall be published in the Gazette.”

It is common cause that no such notice has ever been published in the Gazette.

Secondly the very author of the letter of appointment Annexure “A” S.M. Phamotse has deposed an affidavit to the effect that the Applicant’s appointment was in fact done by the Minister himself. All that the deponent did was merely to inform the Applicant. Significantly, as shown above, the deponent was the Town Clerk at the time he signed this letter. I think the choice of words employed by the deponent in this letter is decisive in showing that the appointment was not made by him as the Town Clerk. The letter opens with the following words:

“I am to inform you that you have been appointed to the post of Manpower Manager in the service of Maseru City Council.....” (Emphasis added). Quite clearly the author does not pretend to have made the appointment himself. On the contrary an impression is created that the appointment was made by someone else.

Nor do I think that S.M. Phamotse’s averment as shown above can, on probabilities, reasonably be controverted on the papers as they stand. This is mainly so because neither the present Town Clerk namely the 2nd Respondent nor Paul Qobo who has filed a supporting affidavit on behalf of the Respondents was the town clerk at the time of Applicant’s appointment in April 1992. Moreover, as earlier stated, S.M. Phamotse had no statutory power as the Town Clerk to appoint the Applicant as an officer of 1st Respondent.

I attach due weight to the fact that the Respondents have not availed themselves of their right to apply for cross examination of the deponent S.M. Phamotse. For my part I am satisfied as to the inherent credibility of the factual averments of the Applicant and S.M. Phamotse and hereby proceed on the basis of the correctness thereof. I do so on the authority of **Plascon - Evans Paints v van Riebeeck Paints 1984 (3) S.A. 623 A.D. at 635.**

Accordingly I find that the Applicant was in fact appointed by the Minister of Interior and Chieftainship Affairs and not by the Town Clerk as alleged by the Respondents. That being the case I find that the 2nd Respondent acted *ultra vires* his powers in purportedly dismissing the

Applicant without the approval of the Minister as he did on the 10th September 1997. It is indeed a well known canon of interpretation of statutes that power to appoint includes power to dismiss. In this regard it is necessary to refer to Section 34 of the Interpretation Act 1977 which provides as follows:-

“34 (1) Where an Act confers a power or imposes a duty upon a person to make an appointment or to constitute or establish a board, tribunal, commission, committee, council or similar body the person having such power or duty shall also have the power

(a) to remove, suspend, dismiss or revoke the appointment of, and to re-appoint or reinstate, any person appointed in exercise of such power or duty;

(b) to revoke the appointment; constitution or establishment of, or to dissolve, any board, tribunal commission, committee, council or similar body appointed, constituted or established, in exercise of such power or duty, and to re-appoint, re-constitute or re-establish the same; and

(c). To specify the period for which any person appointed in exercise of such power or duty shall hold such appointment.

(2) Where the power or duty conferred under sub-section (1) is only exercisable upon the recommendation, or subject to the approval or consent of some other person, then such recommendation, approval or consent is also required for the exercise of the additional power referred to in paragraphs (a),

(b) and (c) of the subsection (1).”

See also **Lesotho Telecommunications Corporation v Thamahane Rasekila C of A (CIV) No. 24 of 1991** (unreported).

Regarding Applicant’s salary there is no suggestion that the Applicant has earned alternative salary elsewhere. Indeed there is no evidence that she worked anywhere during the period of her unlawful “dismissal”. Accordingly I consider that this is a fit case where monthly salary should be ordered in favour of the Applicant.

In the result therefore the application is granted as prayed. For the avoidance of doubt I make the following order:

- (1) The purported dismissal of Applicant as the employee of 1st Respondent dated 10th September 1997 is hereby declared null and void and of no force and effect.
- (2) The Applicant is hereby reinstated to her position as Social and Economic Planner of Maseru City Council.
- (3) The Respondents are ordered to pay the Applicant her monthly salary with effect from September 1997 to date.
- (4) The Respondents shall pay the costs of suit.



M.M. Ramodibedi

JUDGE

2nd October 1998

For Applicant : Adv Rakuoane
For Respondents : Adv Mosisili