CIV/APN/407/2000

IN THE HIGH COURT OF LESOTHO
In the matter between:

'M'AMONTŠO 'MOLOTSI	Applicant
and	
ACCOUNTANT GENERAL	1st Respondent
PRINCIPAL SECRETARY - MINISTRY OF PUBLIC SERVICE	2nd Respondent
MINISTER RESPONSIBLE FOR THE PUBLIC SERVICE	3rd Respondent
ATTORNEY GENERAL	4th Respondent

For the Applicant: Mr Nteso
For the Respondents: Mr Mapetla

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 10th day of December 2001

The Applicant herein has applied ex parte on urgent basis for an order interdicting Respondents from transferring her from one Ministry to another namely the Ministry of Local Government to the Ministry of Finance both located within Maseru City within one kilometre of each other. She has further applied for an order declaring the said transfer null and void and costs of the application. This application was opposed by

Respondents.

The grounds upon which Applicant relied have been outlined in paragraph 13 of Founding Affidavit. They are as follows:

Firstly, that the First Respondent had no power to transfer Applicant from Ministry of Local Government to the Ministry of Finance - Treasury Department or any Ministry wheresoever (see Annexure "A" page 14 of the record). Annexure "A" is a letter dated 15th October 2000, to the Applicant from the Principal Secretary (Mr. Sekatle) of Ministry of Public Service.

Secondly, in the same token that Mr. Sekatle had acted unlawfully when he purported to confirm what had been done which the Applicant called a "stark violation of the law." In regard to what Mr. Sekatle has confirmed, this Court was referred to Annexure "A" at page 14 of the record, which was a letter dated 6th September 2000 from the Accountant General addressed to this Applicant. The letter says:

> "It has been decided that you be transferred from the Ministry of Local Government to the Ministry of Finance/Treasury Department with immediate effect. Your other terms and conditions of service will remain the same."

This letter was also addressed "under flying seal" (u.f.s.) to the Principal Secretary Local Government. Lastly on the aspect of the letter it showed that it was copied to the Ministry of Public Service, Ministry of Local Government and the office of the Auditor General.

One of the complaints by the Applicant is that since Annexure "A" bears no acknowledging signature from the Principal Secretary, the latter may not have been aware

of it; he may not have consented to the transfer or he may have been side-stepped in the arrangement; or it was otherwise procedurally flawed. But otherwise it has not suggested that the Accountant General was not the appropriate officer to have communicated the intended transfer to the Applicant. At this stage it is even helpful to indicate that the Applicant was suggesting that the transfer was faulty in that the letter had not indicated that the letter was that of Public Service Commission or the Minister or emanated therefrom, through proper channels or decision.

Thirdly, it was that the Third and the Second Respondents acted wrongfully in transferring Applicant into a vacuum. The suggestion being that it was where there was no desk or work allocated to her and where she was placed in a limbo. As she puts it in para 8.2 of her Replying Affidavit, she said,

> "The prejudice that I suffer is that I know there was no vacant position at the Treasury Department, hence why I have been rejected from Treasury by the present Accountant General. As of now I am shuttling between the Ministry of Local Government and Ministry of Finance. There is not even office space for me in the Treasury Department. The reason why the present Accountant General rejected me was because he was shocked as to the manner of my purported transfer."

Indeed this is a pathetic story.

The above brings me to the history of this application. It was filed on the 30th October 2000, on which day an interim order was issued returnable on the 20th November that year. On the 20th November the rule was extended to the 4th December and to the 11th December of that year, when on the latter date the Applicant asked for time to file a Replying Affidavit thence the Respondents asked that the Applicant be put to terms that she be compelled to file her reply by 14th December.

The minute in the file shows that on the 18th December Mr Nteso for Applicant and Mr. Nthloki were before Court. Then it is recorded that the Applicant has still failed to file her Replying Affidavit and then the prayer 2,6 which was an interim order operating with an immediate effect was discharged. The prayer had been that the transfer was stayed pending the determination of the application. A point was made therefore that the alleged prejudice could not have been in the terms suggested at least after the interim order..

Fourthly, that the notice (five working days) which had been given in Annexure "B" had been insufficient. I instantly noted that the Applicant had not stated her personal circumstances which caused prejudice either in the transfer itself or in the number of days granted. That is

why the response by the Respondents' deponent, Mr. Sekatle was that having called the Applicant or the Applicant having attended to Mr. Sekatle's whatever was the case the Applicant was given "full counselling" and there could not have been any prejudice that she suffered as a result of such transfer.

Fifthly, that none of the Respondents had power under any law to transfer Applicant without first giving her prior hearing and the grounds therein. I did not read this to suggest that the 3rd Respondent had no such power. I may just note however what Mr. Sekatle said in response. I quote from paragraph 8 of Answering Affidavit:

> "Equally without merit is the argument that she is being transferred without being given sufficient notice or hearing. The part of the matter is Applicant was given 5 days within which to move to her new office appear I had called her to my office for full counselling on this matter. It is therefore incorrect to suggest that she was not given a fair hearing, besides there is no basis in law that she was entitled to such hearing particularly when there is no prejudice that she suffered as a result of such transfer."

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Before coming back to the last issue I found it hard to ignore or not to mention as a background this what Mr. Sekatle calls mere gossip. At the same time I acknowledge that this contained as Mr. Sekatle observed more reason of a why the Applicant should have been removed from where she was (by way of transfer) because her relations with the Principal Secretary could not conduce to proper functioning of the Ministry. And the misunderstanding constituted a good ground for the Applicant to accept to part ways with the head of the Ministry for the good of the running of the Ministry. These allegations which were contained in paragraphs 8,9,10 and 11 contained things which could have been declared scandalous and vexatious but there was no such attack. As a background and as a matter of public policy I would not avoid stating them for what they are but not for their truthfulness. If they are true one can only hope that they will be dealt with according to law.

Firstly, the complaint that Mr. Sekatle and the Applicant's boss (Commissioner of Lands) were close friends.

Secondly this Applicant had quarrelled with the Commissioner of Lands and complained about incidents of contravention of regulations which led to unfair benefits and enrichment from public funds, and this the Applicant resisted. This resulted in hate against the Applicant and the undertaking by the Commissioner of Lands that she will get rid of the Applicant.

Thirdly, a certain cheque was allegedly paid to a certain Rainbow Construction for a job that was allegedly not done. The Applicant said she complained to the Principal Secretary. This attracted more hatred

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Fourthly a company called Bahale Construction was allegedly paid in full for work not completed.

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And lastly a certain employee by the name of Lebohang Mpheuletsane was allegedly paid a salary of Grade 12 even though according to her employment contract she was supposed to be paid a salary of Grade 8. A complaint by Applicant in this connection attracted an accusation that she was being insubordinate.

Apparently this Applicant is someone who takes umbrage at acts of corruption because as she said those were just but a few examples. I go back to the feeling of Mr. Sekatle who said that if this was true it was more reason why there should have been removal of this Applicant by way of transfer. They may be correct. If it was not the Court would have no way of judging it. This is because essentially what concerns the Court as and when reviewer of conduct of public servants can be said to be procedural impropriety, not substantive reasons and such like, for transfer of public servants.

Indeed where a letter which the Accountant General has written did not disclose whose decision it was to transfer the Applicant it can only be awkward in the observation of the Court, but without evidence as to how letter indicating transfer are normally drawn, Mr. Nteso's attack, in the absence of evidence or authority merely amounts to speculation. The Court was bound to accept that this is the normal way of writing such letters. It is safer not to prescribe unnecessarily in the circumstances. Indeed this Applicant's complaint before Mr. Sekatle has been with regard to the absence of signature of Principal Secretary as indicated above. Secondly that Public Service has by circular embargoed transfer of Accounting cadre. And lastly that the Applicant did not follow right channels. It did not appear that Applicant's case was that the transfer had not emanated from none other than the right authority but that the maker of the decision was not shown in the letter.

In other instances of transfers or dismissals the operative words are that "I am directed" (see Mamonyane Matebesi v The Director of Immigration 1997-1998 LLR 455 at 488. To me the distinction is more apparent than real. In those instances

(Matebesi case) the writer does not disclose who has made the decision. I find no reason to disbelieve Mr. Sekatle that the Minister has made the decision. This I say having been given the background of the tension between the Applicant and the Commissioner of Lands. I found it quite untenable that the Applicant said that she felt the Principal Secretary for Local Government should have been the one to be transferred. It did not matter how altruistic the Applicant may have been in her attitude towards things that were not going right at the Ministry at which she was posted. As I said before the concern of the Court as at present is procedural impropriety of the transfer of Applicant from one Ministry to the other.

The Court agreed that the matter did not qualify for urgency inasmuch as the Applicant had failed to allege and prove grounds upon which urgency was based in this application. See Attorney General v Tšeliso Matela 1999-2000 LLR and LLB and Franken v Ministry of Works 1981(2) LLR 327 at 332. This I say quite unrelated to the following incidents in the history of this application. Firstly after receipt of the letter annexure "A" the Applicant did not proceed to Court but contacted Mr. Sekatle to complain which meeting the Applicant called a confrontation. Secondly the Applicant must have as a fact taken occupation of a post in the next Ministry that is why she observed that there was no work allocated. In any event whether or not she had removed it is not clear why the matter was urgent according to the

Applicant's say so. Thirdly, the order was allowed to lapse by the Applicant. Perhaps that was explainable but it militated against the matter being regarded as an urgent one.

Inasmuch as the Applicant is seeking an interdict whose grounds she should have proved she would not have been able to prove any irreparable ham. Furthermore it did not help where the Applicant would not have been able to prove a right on her part as required in Setlogelo v Setlogelo 1914 AD 221. See Attorney General v Tšeliso Matela (supra) for which the application ought to be dismissed.

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Much as it was shown that the Applicant had demonstrated no prejudice if she was transferred and much as I concluded that the counselling by Mr. Sekatle constituted a hearing in the circumstances of the case I did not agree with Mr. Mapetla that the case of Mamonyane Matebesi v Director of Immigration (supra) decided that there was no need to grant a public servant a hearing before transfer. Displacement of a hearing has resulted from practical consideration e.g. absence from work. That is why this displacement is qualified by the learned judge of the Court of Appeal Gauntlett JA in Matebesi case at page 465 where he says:

> "In my view there can be no doubt that the terms of section 6(3) of Public Service Order 1970 permit the displacement of audi in appropriate circumstances. They do not however themselves oust its operation ex lege and in all cases.....". (My underlining)

In any event I have decided that there was a hearing afforded to the Applicant. It may after all have been after the letter from the Accountant-General and to that extent if after the decision to transfer see OK Bazaars (1929) Pry Ltd v Suzan Makara C of A (CIV) No.8/92, January 1993. In that case Mahomed P emphasized what was required as:

Firstly, notice of intended action..... Secondly, a proper opportunity for him to present his case." (Page 10) At the top of the page before quoting from a case by Colman J learned Judge President had said: "What will be fair in a particular case, will depend on the circumstances of that case....." Meaning that the hearing could still be afforded after the decision was reached. Then is the question of whether there was prejudice.
Prejudice which makes a hearing before transfer imperative may come in two ways to a civil servant who is to be transferred. Firstly where personal circumstances are such that such a servant is to be granted a reasonable time. And secondly where the notice is itself too short. Again this depends on the circumstances of each individual cases. See 'Matsepo Mohale and Another v Principal Secretary for Health and

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Another 1991-1996(1) 634 at page 640. That is whether a hearing would or would not have been required before the actual transfer depends on prejudice to the public servant. According to Mamonyane Matebesi's case (supra) the denial of a hearing should be an exception. I disagreed therefore that the case is authority for the proposition that a hearing is not cecessary.

I found that the Applicant was given sufficient notice to move to her new duty station, regard being had to the fact that there was really no prejudice that she stood to suffer by being moved from one Ministry to another within one (1) kilometre of each other.
The application ought to fail.

The application was dismissed with costs.

T Monapathi
Judge

10th December, 2001