

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.35/2012

In the matter between

**THE PRINCIPAL SECRETARY-MINISTRY
OF TOURISM, ENVIRONMENT AND CULTURE**

1ST APPELLANT

**HUMAN RESOURCE OFFICER MINISTRY
OF TOURISM, ENVIRONMENT AND CULTURE**

2ND APPELLANT

**PRINCIPAL SECRETARY MINISTRY
OF PUBLIC SERVICE**

3RD APPELLANT

ATTORNEY GENERAL

4TH APPELLANT

And

SELLOANE MAKHA

1ST RESPONDENT

PALESA KOTELO

2ND RESPONDENT

NTAOTE NTAOTE

3RD RESPONDENT

CORAM: RAMODIBEDI P
HOWIE JA
THRING JA

HEARD: 12 APRIL 2013

DELIVERED: 19 APRIL 2013

SUMMARY

Public Service – Public Officers – Ministry Circular Notice 8 of 2000 stating, inter alia, that serving degree graduate officers at Grade E or below would be regraded F – Whether officers on Grades below F who graduate subsequently are automatically entitled to be remunerated at the F level once they have graduated – no legitimate expectation of such entitlement created by paragraph 3 (e) of the Circular.

JUDGMENT

HOWIE JA

[1] The three respondents are public officers holding positions in the Ministry of Tourism, Environment and Culture. The designation of their respective positions, according to Public Service

grading, entails that the first two respondents are currently at grade D and the third respondent at grade B. Those were their respective grades when they commenced public service employment.

[2] On entry into the service none of them held a university degree but in 2010 a Bachelor degree was conferred on each of them by the National University of Lesotho.

[3] On the strength of their having attained graduate status, the respondents applied to the High Court for an order directing that they be remunerated at the level appropriate to grade F, (that being the grade said to be applicable to their enhanced qualifications) with effect from their submission to the Ministry of their degree qualifications. The Court (Monapathi J) granted the order, hence this appeal.

[4] The three cited officials in the court below were the Principal Secretary and Human Resource Officer of the Ministry and the Principal Secretary in the Ministry of the Public Service. They are now the appellants.

[5] The first respondent, who deposed to the founding affidavit on her own behalf and on behalf of her fellow respondents, alleged that

they had all three applied, hitherto unsuccessfully, for promotion to posts commensurate with their qualifications. The respondents' case was that notwithstanding that they had not been appointed to posts at grade F they were nevertheless entitled, by reason of their qualifications alone, to be remunerated at the level of grade F with effect from their becoming graduate officers.

[6] No factual or legal basis for the respondents' alleged entitlement to grade F remuneration purely on the strength of their graduate status was alleged in their founding papers.

[7] In the appellants' opposing affidavit, the first appellant stated that the mere possession of a degree qualification does not qualify an officer to be remunerated according to grade F. He or she has to be appointed to a position at that grade to be remunerated at that level. Nor are vacancies at grade F advertised. They are submitted to the Public Service for placement and all applications for a particular vacancy wait in a queue.

[8] In reply, the first respondent disputed the process according to which applications for a grade F post were dealt with. She also challenged what the first appellant said regarding the grade level of the post of accountant. (This related to something she had said about the third respondent in the founding affidavit.) Then, in

support of her assertion regarding the grade level of an accountant she annexed a copy of Ministry of the Public Service Circular, Notice 8 of 2000 dated 31 March 2000 and referred to page 5 which contains details of the designations, and redesignations to grade F, of certain posts, including that of accountant. She concluded by denying the first appellant's assertion that officers do not qualify for grade F merely by having degree qualifications and that they have to be appointed to positions in grade F. Significantly, she did not seek to reinforce her denial with reference to the Circular but merely said

“I reiterate that the present practice dictates that we should by now have been placed in accordance with our qualifications.”

[9] It should immediately be observed that that was the first, and only, reference in the record to a practice. The existence of a relevant practice should have been raised in the founding papers so that its alleged existence could be dealt with by the appellants. Its existence cannot be found on this record.

[10] By the time the matter was argued in the court below, the Circular had assumed central importance, not by reason of the reference made to it by the respondents but by reason of paragraph 3 (e) containing the following words:-

“Serving degree graduate officers who are at Grade E or below, will be regraded F...”

[11] On the strength of that statement it was contended for the respondents that they were entitled to the relief granted them by the court below.

[12] That court considered, on the basis of the doctrine of legitimate expectation, that the appellants should have been placed in grade F positions or appropriately remunerated. The court drew in this regard, as did the respondents’ counsel, on a remark in **Letlaka Banyane v Commissioner of Correctional Services and Another** CIV/APN/80/2008, and the facts and order in **Moeketsi D Mahetlane and Others v Commissioner of Police and Another** CIV/APN/637/2010.

[13] In both those matters the Circular was referred to. In **Banyane’s** case a prisons officer, consequent upon a disciplinary inquiry, was demoted and his remuneration was reduced. The issue was whether the reduction was lawful. The court held that no statutory or regulatory provision applied which empowered or required a reduction and that reduction was thus unlawful. It was in that context that the court said that the Circular embodied a rule of practice that carried with it a legitimate expectation. By this it

was no doubt meant that, absent a provision enabling a salary reduction, the officer had a legitimate expectation that his remuneration would continue on its existing scale. But that is of no assistance to the respondents.

[14] In **Mahetlane's** case the applicants were police officers who had acquired university degrees but whose salaries had not been adjusted to conform to grade F which they said was appropriate to their qualifications. They applied for an order that the adjustment they sought be made. In this regard they relied on paragraph 3 (e) of the Circular. The court referred to the comment in **Banyane's** case about legitimate expectation and went on to find that paragraph 3 (e) in referring to "*serving degree graduate officers*" applied to the applicants. Although the court held that they had no right (as they claimed) to be promoted to the exclusion of others and had to apply for the positions for which they qualified, it nonetheless ordered that they be paid their "*salary underpayments from (the) dates of submission of their university degree qualifications or equivalent*" computed "*in terms of the usual monetary scales applicable to the police.*"

[15] It is not clear quite what the order in that case meant. The Commissioner was not ordered to regrade the applicants and the order made no reference to grade F, merely "*the usual monetary*

scales". Also, the court made no findings as to the meaning of paragraph 3 (e) or why, if it was indeed held to apply to the applicants, that was so.

[16] In this Court counsel for the respondents accepted that he had difficulty in endeavouring to contend that there was any relevant practice on which a legitimate expectation on the part of the respondents could have been founded other than the terms of paragraph 3 (e).

[17] It cannot be overemphasised that to be legitimate, an expectation must be reasonable. And if it is said to be based on a document, the terms of that document have to be properly interpreted and interpreted in context.

[18] The Circular is headed "*GRADING OF GRADUATE ENTRY LEVEL POSITIONS*" and concerns a new policy. The relevant paragraphs read as follows –

- "1. It is notified for general information and appropriate action that degree graduate entry positions which have hitherto been on Grade E are regraded F effective from 1st April, 2000.*

2. *In most cases jobs at Grade E and below will have to be merged and redesignated accordingly. Non-degree holders who are at Grade E will retain the current grade and designations until ministries have reviewed their structures.*

3. *Regrading of posts will be effected in the following manner:-*
 - (a) *New entrants into Grade F should enter at the minimum point (Point 55).*
 - (b) *Degree graduate officers who have just joined the Civil Service and are engaged at Grade E, will accordingly be regraded F.*
 - (c) *Degree graduate holders who were held against senior posts for salary purposes, such as G, H etc. Ministries are advised to consult Director of Human Resources in the Ministry of the Public Service.*
 - (d) *Graduate entry positions at Grade E will be regraded F. Posts which were on multiple grading in the old grading structure e.g. 8/9-10, 9-10/11, 9-10, 8/10 etc will be regarded F.*

- (e) *Serving degree graduate officers who are at Grade E or below, will be regraded F, while other officers who are already at F will retain their respective notches in Grade F.*
- (f) *Where appropriate senior posts at Grade F exist, Grade E posts will be regraded to F level and assume the appropriate designations and responsibilities e.g. Forester at Grade 7-8 will be regraded District Forestry Officer Grade F etc.”*

[19] Several aspects of the Circular are significant. First, it is about the regrading of posts, not about increasing remuneration irrespective of one's post. Second, the main focus is on raising the grade at which new officers who have degrees enter the service. Obviously they will only be able to enter if grade F posts are available and they are appointed to them. Third, the only future officers who are referred to are officers with degrees who join the service on or after 1 April 2000. All other officers mentioned are people already in the service as of 31 March 2000. In particular, serving degree graduate officers are those with degrees who are already in the service on that date. Fourth, non-degree holders are specifically mentioned. The first and third respondents were in that category on 31 March 2000. The Circular does not provide for the regrade of their posts. Still less does it provide that then non-degree holders who later acquire degrees will be entitled either to a

regraded grade F post or to increased remuneration on the grade F level.

[20] In the light of these considerations paragraph 3 (e) means that degree graduate officers in the service on 31 March 2000 will have their posts regraded to grade F. It does not govern the situation of officers who were non-degree holders on 31 March 2000 and who subsequently acquired degrees. There is nothing in the language of the Circular or in its purpose to justify a decision favourable to the respondents.

[21] And applying the provisions of the Circular to the facts, take the situation where two individuals, A and B, graduate at the same time. A applies for entry into the service, B is already a public officer on grade D. No vacancy exists at the grade F level. A cannot gain entry. As for B, how can it seriously be suggested that she is nevertheless entitled to have her post regraded or at least to be paid, while she is on grade D, at the grade F level? I see no basis for an answer in favour of B based on the Circular.

[22] Accordingly the Circular cannot give rise to the legitimate expectation contended for.

[23] It remains to point out that in so far as the court below held that the respondents were to be placed on grade F, that was a finding made without any evidence that grade F posts were available and without any statutory provision or any public service rule or regulation having been shown to exist which enables such placement to be made.

[24] The appeal is allowed, with costs. The order of the court below is altered to read:

“The application is dismissed, with costs.”

C.T. HOWIE
JUSTICE OF APPEAL

I agree

**M.M. RAMODIBEDI
PRESIDENT OF THE
COURT OF APPEAL**

I agree

**W.G.G. THRING
JUSTICE OF APPEAL**

For the Appellants : Adv. L. Mokhehle

For the Respondents : Adv. M. Rafoneke