IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) NO 40 A/2014
CIV/APN/458/2013
CIV/APN/439/2013
CIV/APN/171/2014

In the matter between

COMMISSIONER OF POLICE	**1ST APPELLANT**
ATTORNEY GENERAL	**2ND APPELLANT**

and

LINEO MANAMOLELA	**1ST RESPONDENT**
LERATO MOTSEKI	**2ND RESPONDENT**
MOSHE KOATJA	**3RD RESPONDENT**
MONESE RAMOTHOANA	**4TH RESPONDENT**

CORAM : FARLAM, JA
LOUW, AJA
CLEAVER, AJA

HEARD: 10 October 2014
DELIVERD: 24 October 2014

SUMMARY

Transfer of Police Officers – whether entitled to a pretransfer hearing – demotion – whether justified where failure to perform duties due to stay by Court of transfer – If demotion by

Commissioner of Police indirect contempt of stay order – on facts, whether wilful and mala fide non-compliance.

JUDGMENT

LOUW, AJA

[1] This is an appeal by the Commissioner of Police (the commissioner) against the judgment of and orders made by Hlajoane, J in the High Court on 30 May 2014 in three related applications that were heard together. The judge *a quo* reviewed and set aside the decisions of the commissioner to transfer, and thereafter to demote the respondents who are members of the Lesotho Mounted Police and held the commissioner to be in contempt of court.

[2] The background to the matters on appeal can be stated as follows.

[3] During August and September 2013 the respondents successfully completed promotion courses. The first respondent was as a result promoted from the rank of inspector to that of senior inspector and she was thereupon transferred from her posting at Police Head Quarters in Maseru to Leribe District (traffic). The second to fourth respondents were promoted from the rank of police

constable to that of inspector. The second and third respondents were transferred from Maseru to Mokhotlong and the fourth respondent, from Maseru to Qacha's Nek.

[4] The respondents wrote to the commissioner pursuant to the announcement of their transfers. They did not dispute that as police officers they could be transferred, but requested that their transfers to the places in question be reconsidered in the light of their representations. The first respondent raised the ill health of her daughter and the crucial stage in her school career as reasons for her request to remain in Maseru. The second respondent requested that she be allowed to remain in Maseru and to exchange her transfer to Mokhotlong with another police officer who had been transferred from Mokhotlong to Maseru. The third respondent requested that he be posted to a place near his family where he could take care of his younger brothers and also keep an eye on their home which had been broken into when he was posted elsewhere. The fourth respondent requested a transfer to Leribe or Butha-Buthe for family

reasons. The respondents' requests were refused and they were told that they should proceed to the places to which they had been transferred and that they should communicate further through the correct channels there.

[5] The first respondent applied (under case NO CIV/APN/439/2013) to the High Court on notice of motion for the review and setting aside of her transfer on the basis that she had not been given a hearing before the decision to transfer her was made. On 3 October 2013 she was granted an interim order staying her transfer pending the outcome of her application.

[6] The second, third and fourth respondents brought a joint application (under case NO CIV/APN/458/2013) on the same basis for similar relief. They were granted interim relief on 21 October 2013, staying their transfers pending the outcome of their application.

[7] In the first application, the answering affidavit was made by Inspector Halahala. Deputy

Commissioner Tšooana made the answering affidavit in the application brought by second to fourth respondents. The response in both applications was the same, namely that, as police officers, the respondents were liable to be transferred and that they had been told before or during their attendance at the promotion courses that, once promoted, they would be transferred to stations where there were vacant managerial positions. The respondents did not object to the prospect of being transferred and did not withdraw from the promotion courses which were held to remedy the shortage of management officers in the police across the country. In any event, they could raise any objections to their transfer through the proper authorities of the areas to which they had been transferred. In the case of the first respondent, Halahala stated further that the police had no prior information regarding any prejudice she might suffer if transferred from Maseru, that her daughter's health was only raised once she had been transferred and that her subsequent request that her transfer be reconsidered had been turned down because she

had failed to give "convincing reasons" that the transfer would be prejudicial to her.

[8] After their transfers were stayed, the respondents found themselves in limbo. Despite the written request made through their attorneys that they be allowed to continue carrying out their duties in the interim, the respondents were not given any duties to perform in Maseru. The commissioner's stance, set out in the answering papers, was that they had been replaced in their erstwhile positions by junior officers who had been promoted and that there were no positions for them to fill in Maseru. In the result they were required to continue reporting for duty without being assigned any duties to perform pending the outcome of the applications to set aside their transfers.

[9] On 29 October 2013 the respondents received letters in identical terms from Senior Inspector Ralethoko, a human resource officer of the police. The respondents were referred to various sections of the Public Service Regulations, 2008 relating to the payment of salaries to officers promoted to vacant

positions and other matters relating to payment of salaries. They were further informed that their reaction to their promotion and transfer

> *"leaves COMPOL with no other options but to reasonably believe that you are declining the promotion and transfer."*

The letters further called upon them to "show reasonable cause, if any" why they should not be demoted in terms of Regulations 7(5) of the Lesotho Mounted Police (Administration) Regulations, 2003, (the Regulations) to the ranks previously held by them and why the principle of no work, no pay should not be applied to them for failure to take up their duties at the posts to which they had been transferred.

[10] The respondents' attorneys replied by letter on 30 October 2013, stating that not paying the respondents or demoting them would be illegal and

in contempt of the interim court orders staying their transfers.

[11] Nothing further happened for about 5 months before the respondents each received a "Notice of Demotion" dated 14 April 2014, informing them that after the commissioner had "gone through the response from your legal representative [the letters of 30 October 2013] and the circumstances causing your inability to perform duties [at the posts to which they had been transferred] as stated by you, he has decided that you are not suitable to hold the position you were promoted to.'

. . .

'Since you were promoted into a vacant position and now you are unable to fill the position, there is no reason for you to hold the position."

The respondents were further informed that they had in terms of the provisions of Regulation 7 (3) and (5) been downgraded to the rank previously held by them; that the emoluments due to them in the rank they had previously been promoted to would,

be stopped and withdrawn and that they should report for duty on a date stated in the notice.

[12] The respondents responded by launching the third application (the contempt application) seeking orders

1 holding the commissioner in contempt of the interim court orders staying their transfers;

2 declaring their demotion to be null and void; and

3 for the payment of attorney and client costs by the commissioner.

[13] The three applications were consolidated and came before Hlajoane, J on 7 May 2014 who delivered judgment on 30 May 2014, holding:

1. that the respondents ought to have been afforded a hearing before their transfers were decided upon and consequently, set aside the decisions to transfer them;

2. the demotion to be irregular and not in accordance with the Regulations; and
3. the act of demoting the respondents to be in contempt of the orders staying their transfers.

[14] The commissioner's case on appeal is that the respondents were in effect afforded procedurally fair treatment in regard to the decision to transfer them and in the context and circumstances of the case a prior hearing was not required. I have set out the facts relied upon by the commissioner in para 13 above. I do not repeat them here. I do not agree that the procedure adopted was procedurally fair.

[15] The legal principles underlying the approach in matters of this kind appear from the statement in this court by **Gauntlett JA** in Matebesi v Director of Immigration and Other, LAC (1995-1999) 616 at 621 J-622 G, the case of the dismissal of a public servant who had not been granted a prior hearing. Although the appellant was unsuccessful on the facts, it was held that the *audi* rule applied in principle to the dismissal of a public servant. The

dictum has often been referred to with approval in this court and was recently again referred to in the following terms in this court by Brand AJA in the President of the Court of Appeal v The Prime Minister and Others C of A (CIV) 62/2013, paras [19] and [20]:

"[19] As explained by **Gautlett JA** in his earlier quoted dictum from *Matebesi,* the requirements of fair procedure, which includes the *audi* principle, have 'more recently mutated to an acceptance of a more supple and encompassing duty to act fairly'. The same sentiments appear from the statement by Hoexter under the rubric '*audi alteram partem'* (at 363):

'From the late 1980s … our courts have steadily retreated from the old formalistic and narrow approach to "natural justice" and towards a broad and flexible duty to act fairly in all cases'

And in the same vein (at 362):

'…[P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'

[20] The principle that procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and that the one-size-fits-all approach is inappropriate, has been explicitly recognised by the highest courts in England (see eg *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) 106d-h) and South Africa (see eg *Du Preez & Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 231-3; *Minister of Health & Another*

> *NO v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign & Another NO v as Amici Curiae*) 2006 (2) SA 311 (CC) para 152). This means, as I see it, that the strict rules of the *audi* principle are not immutable. Where they are not strictly complied with, as in this case, the question as to whether in all the circumstances of the case the procedure that preceded the impugned decision was unfair, remains."

[16] As appears from the contents of the letters written by the respondents pursuant the announcement of their transfers, the commissioner's decisions to transfer the respondents to the particular stations were all, at least potentially, prejudicial to the respondents. (see Selikane and Others v Lesotho Telecommunications and Others LAC (1995-1999) 739 at 744D and 748 H-I).

[17] The fact that the respondents were offered a hearing of sorts at the stations to which they had been transferred after the decisions were made, did not on the facts of this case constitute a fair

procedure. In *Administrator, Transvaal and Others v Traub and Others*. 1989 (4) SA 731 (A), Corbett, CJ said

> "Generally speaking, in my view, the *audi* principle requires the hearing to be given before the decision is taken by the official or body concerned that is while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken … Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken … this may be so, for instance, in cases where the party making the decision is necessary required to act with expectation or where for some other reason it is not feasible to give a hearing before the decision is taken."

[18] It was not suggested on behalf of the commissioner that this is a case where he needed to act with expedition or where it was for some other reason not feasible to give a prior hearing. The

impression is very strong that the respondents were not given a prior hearing because the commissioner was of the view that as members of the police they were not entitled to be heard at all before a decision to transfer them to specific stations was taken.

[19] The fact that the respondents were told that they would on the successful completion of the courses be promoted and transferred does not constitute a proper prior hearing as they were not told beforehand where they would be transferred to. They were entitled to a prior hearing in regard to where they would be posted to. In my view the absence of a prior hearing in this case rendered the procedure unfair and the decision of the court *a quo* setting aside the respondents' transfers must be upheld.

[20] The commissioner decided to demote the respondents for the reasons set out in his letters of 14 April 2014. In doing so, the commissioner purported to act in terms of Regulation 7(3) and (5).

[21] The relevant part of Regulation 7 reads:

"7(3) On promotion to the ranks of Sergeant, Inspector and Senior Inspector, a member of the Police Service shall be on probation for a period of one year.

(5) If, at any time during the period of probation, the Commissioner is of the opinion that an officer is not suited to perform the duties of the higher rank the officer shall revert to the rank held by him or her immediately prior to the promotion. Otherwise, at the conclusion of the period of probation or extended probation, the officer will be confirmed in the higher rank."

[22] It is clear from the letters of demotion that the respondent's performance in their "new" posts had not been evaluated and that the principal reason for the respondents' demotion was their "inability to perform duties at [the station to which they had been transferred]." The reason given presupposes that the respondents' transfers were valid and

effective. At the time the decision to demote was taken, the transfers were not only subject to review in the applications pending before the High Court but had by orders of that court been stayed pending the outcome of the applications. The respondents' "inability to perform duties" at the stations to which the respondents had in terms of the impugned decisions been transferred, cannot form a legitimate basis for the decision to demote the respondents.

[23] The commissioner's decision to demote the respondents must consequently be set aside.

[24] The court *a quo* held that by demoting the respondents, the commissioner had acted in contempt of the interim orders staying the respondents' transfers.

[25] By demoting the respondents by reason of their "inability" to perform their duties at the places to which they had been transferred, the commissioner in effect purported to give effect to the transfers that had been stayed and thereby indirectly disobeyed

the interim orders. It is not necessary to decide whether such conduct constituted formal disobedience of the order. In my view it has on all the evidence, including, the evidence of how the commissioner (mistakenly) came to the decision to demote the respondents, not been shown beyond reasonable doubt that the commissioner's indirect refusal to obey the orders was both wilful and *mala fide*. In Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 333 Cameron, JA put this requirement as follows:

> *"A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (although unreasonableness could evidence lack of good faith)."*

(Referred to with approval in this court in Lerotholi Politechnic and Anor v Lisene, LAC (2009 - 2010) 397 at 403 E – J.)

[26] The interim orders and notice of the orders by the commissioner are common cause. Assuming that the demotion of the respondents amounted to non-compliance, the commissioner bore an evidential burden in relation to wilfullness and *mala fides* and to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide* (Fakie. at 344 I – 345 A). In my view the commissioner has placed such evidence before the court.

[27] It follows that the court *a quo* should not have held the commissioner in contempt of the interim orders. The commissioner's appeal must consequently succeed to that extent.

[28] In view of the fact that both the commissioner and the respondents should have been partially successful in the contempt application in the court *a*

quo (case CIV/APN/171/2014) no order as to costs should in my view, have been made in that application.

[29] The three applications were ultimately heard as one appeal. The respondents have been substantially successful in the appeal as a whole. In my view they are entitled to the costs of the appeal.

[30] In the result, the following order is made.

1. The appeal against the order in the court *a quo* in case CIV/APN/171/2014 holding the Commissioner of Police in contempt, succeeds and such order is set aside.

2. The order in the court *a quo* in case CIV/APN/171/2013 is deleted and the following order is made in its stead:

(a) The demotion of the respondents by the Commissioner of Police as per the letters dated 14th April 2014 (INSP 4 to 6) is reviewed and set aside;

(b) There shall be no order as to costs in case CIV/APN/171/2013;

3. Save as set out in paragraphs 1 and 2 above, the appeal against the orders made in case numbers CIV/APN/458/2013 and CIV/APN/439/2013 is dismissed.

4. The first appellant (the Commissioner of Police) is ordered to pay the costs of the appeal in appeal case C of A CIV) NO40/2014.

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W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree

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I.G. FARLAM
JUSTICE OF APPEAL

I agree

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R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For the Appellants : Ms P. Mohapi

For the Respondents : Mr L. Molati