

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A NO.12/2014
CIV/APN 374/13

DIRECTOR OF TRADE

1ST APPELLANT

**PRINCIPAL SECRETARY –
 MINISTRY OF TRADE AND
 INDUSTRY, COOPERATIVES
 AND MARKETING**

2ND APPELLANT

**MINISTRY OF TRADE AND
 INDUSTRY, COOPERATIVES
 AND MARKETING**

3RD APPELLANT

ATTORNEY GENERAL

4TH APPELLANT

and

PINKI MOSOOANE

RESPONDENT

CORAM: FARLAM JA
 LOUW AJA
 CLEAVER AJA

HEARD: 10 OCTOBER 2014

DELIVERED: 24 OCTOBER 2014

SUMMARY

Public servant's right to a hearing before being transferred – applicable principles discussed and applied.

JUDGMENT

CLEAVER AJA

- [1] This is an appeal against a judgment of the High Court, which, in confirming a *rule nisi* previously issued by it, declared the transfer of the Respondent, an employee of the Ministry of Trade and Industry, Cooperatives and Marketing, (The Ministry) from Mohale's Hoek to Maseru to be null and void.
- [2] The facts giving rise to the application by the Respondent for the relief which she ultimately obtained, can be stated briefly. The Respondent has been in the employ of the Ministry since November 2001. As the judge *a quo* correctly remarked, the relationship between the Respondent and her superiors was troubled. In June and August 2013 the Chief Commercial Officer in the Ministry addressed letters to the Respondent warning her about her conduct. In the first

letter she was advised that the Ministry had received complaints about the poor service and habitual absenteeism which prevailed at the Mohales' Hoek office of the Ministry which was under her supervision and control.

The letter, which bore the heading "*re WARNING FOR CONTINUED SUBORDINATION*", and in which the Chief Accounting Officer expressed his displeasure at vulgar language used by the Respondent when addressing him on 6 June 2013, concluded with a warning that her conduct constituted insubordination and that such conduct would not be tolerated. In the letter of 12 August 2013 various incidents of alleged misbehaviour or misconduct by the Respondent were tabulated and it concluded in the following terms - "*Finally, consider this the first written warning against yourself and the continued unbecoming behaviour incidences that may be brought to my attention, will lead to disciplinary action against you.*"

- [3] Matters came to a head on 21 August 2013. The Respondent says that on that day the Minister (the 3rd Appellant) stormed into her office and said to her

"Le teng letaoa lena leo u reng le ke ke la u etsa letho"
loosely translated to mean "*that drunkard you said cannot do anything to you is here*".

Later that day she received a letter dated 21 August 2013 addressed to her by the Principal Secretary in the Ministry reading as follows:

“re: YOUR TRANSFER TO MASERU

Kindly take note that Management has decided to transfer you in terms of section 32(3) of Public Service Regulations 2008, from Mohale’s Hoek to Maseru district, with effect from 22nd August 2013. You are expected to report yourself to the Commercial Officer – Maseru on your arrival. Your terms of service will remain the same in other respects. I would like to take this opportunity to wish well in your new assignment.”

- [4] On 2 September 2014 the Respondent was granted an order in the High Court staying her transfer pending a final decision as to its validity.
- [5] In her founding affidavit the Respondent contended that the transfer was irregular and unfair because:
 - (a) She was not given a hearing before being transferred.
 - (b) The notification to her of her transfer by the Principal Secretary (the 2nd Appellant) was invalid and should have been given by the Director in the Ministry (the 1st Appellant).
 - (c) Since Mohale’s Hoek is more than 40 kilometres from Maseru, she should have been afforded government transport and a settlement allowance.
 - (d) She was not given 3 months’ notice as provided for in the Public Service Regulations 2008.

- (e) Having regard to the allegations in the two letters written to her, which she denied, the transfer was not *bona fide*.
- (f) Her services were not required in Maseru since there was no vacancy there for one of her seniority.

[6] In their answer the Appellants drew attention to the complaints against the Respondent and contended that in consequence the Respondent was transferred to ensure “*that there is efficiency and continuance of service delivers to the public while investigations are ongoing.*”

[7] The court *a quo* found against the Respondent in respect of her claim to have been entitled to a hearing before being transferred, but made the following findings in her favour:

- (a) The notice of transfer was addressed to the Respondent by the Principal Secretary instead of by the Head of Department as the law requires, and
- (b) The decision to transfer the Respondent was unfair in that it was vitiated by the events preceding the transfer;
and in result the court confirmed the rule which had been issued, with costs.

[8] The appeal before us is against the two findings set out in the previous paragraph, there being no appearance before

us on behalf of the Respondent, the successful party in the court below.

- [9] In concluding that only the Head of Department could transfer the Respondent the court *a quo* relied on Regulation 32(3) of the Public Service Regulations 2008 (“The Regulations”) which provides
“A Head of Department may transfer a public officer within the relevant Ministry.”

It would appear, that, relying on a passage in *Commissioner for Inland Revenue v I.H.B King; Commissioner for Inland Revenue v AH King* 1947(2) SA 196 (A) at 209, the judge *a quo* concluded that only the Head of Department could transfer the Respondent. That case concerned the application of a provision in the Income Tax Act, and although the court held that the use of the word “may” in the statute confers a power which in some cases will be of the nature that the person to whom that power is given is under the duty to use it (which is what I perceive the court *a quo* to have had in mind) the court went further and explained whether that is so, must be ascertained from a number of factors. In my view the passage from the case does not assist in the present matter for Regulation 32(3) simply gives the Head of Department authority or power to transfer a public officer within the Ministry.

[10] In deciding whether the Principal Secretary had the requisite authority to transfer the Respondent, regard must be had not only to the Regulations but also the Public Service Act 2006 (the Act) and the Constitution of Lesotho (the Constitution).

[11] Section 96 of the Constitution, under the heading Principal Secretaries; provides

“Where any Minister has been charged with responsibility for any department of government, he shall exercise general direction and control over that department and, subject to such direction and control, every department of government shall be under the supervision of the Principal Secretary whose office shall be an office in the public service:....”

[12] In section 4 of the Act ‘Head of Department’ is defined as

“a public officer who is in charge of a department or an agency under his or her supervision or any other public officer designated as such by the Minister”

Section 13 of the Act contains the following provisions:

- “(1) *In addition to the functions vested in the Principal Secretary under section 96 of the Constitution, the Principal Secretary is the chief accounting and overall supervising officer of a Ministry under his or her supervision.*
- (2) *Without limiting the generality of sub-section (1), the Principal Secretary is responsible for –*
 - (a)
 - (e) *transferring and rotating public officers from one department to another within, and reorganising the ministry under the Principal Secretary’s supervision.”*

Section 32(3) (e) clearly provides the requisite authority for the Principal Secretary to transfer the Respondent and the court *a quo* was therefore not correct in relying on the provisions of Regulation 32(3). In the Regulations “*Principal Secretary*” is defined as “*the Principal Secretary responsible for the Ministry of Public Service*”, who in terms of Regulation 32(1) is authorised to transfer a public officer to anywhere within the public service. As made clear by section 13(2) (e) of the Act, a Principal Officer of a department has authority to transfer a public officer to another department within the ministry (my emphasis).

[13] In the circumstance the finding of the court *a quo* that the Principal Secretary did not have the authority to transfer the Respondent cannot stand.

[14] While it is so that the letter advising the Respondent of her transfer was addressed on the same day that she says that the Minister stormed into her office and uttered the words recorded in para 3 above, I do not consider that that fact alone justifies the conclusion reached by the court *a quo* that the reason for the transfer was to punish the Respondent. The Respondent’s case was brought on motion and must be assessed according to the principles applicable to such proceedings, namely that where there are disputes of fact, the Respondent’s version is to be preferred when deciding whether an applicant has discharged its onus. The

case for the Appellants (Respondent in the court below) was that there had been a number of complaints about the Respondent and the manner in which she had been running the Mohale's Hoek office, and that she needed to be transferred away from that office so that the complaints could be further investigated and the office could function properly. The Respondent's behaviour towards her superiors had also been of concern. It would have been preferable to have had the Minister's reply to the Respondent's allegations, but I do not consider that the absence of such reply established *mala fides* as the reason for the transfer. In the result the court's finding that the transfer was unfair cannot stand.

[15] The Court below found that since the Respondent resided in Maseru she did not qualify for government transport or a settlement allowance and did not require three months' notice. In the light of the view which I take in respect of the failure to afford her a hearing before being transferred it is not necessary to deal with these contentions.

[16] As mentioned in paragraph 7 the court *a quo* did not uphold the Respondent's main challenge to the transfer, namely that she had not been afforded a hearing prior to the transfer. The court concluded that since the Respondent retained her salary and status the transfer did not prejudice her, and accepted the version of the Appellants that the Respondent resided in Maseru, notwithstanding her

assertion that she resided in Mohale's Hoek. This the judge did because he considered himself obliged to accept the version of the respondents in the motion proceedings before him.

- [17] Having found that the court ought not to have found for the Respondent on the two grounds which underpinned the judgment, consideration must now be given to the rejection by the court of the Respondent's challenge to the transfer on the ground that she had not been given a hearing before she was transferred. Since the Respondent had succeeded in the court *a quo* it was not open to her to appeal against that decision for an appeal cannot be noted against the reasons for judgment but against the substantive order made by a court. See *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (AD) at 355.

There was no appearance for the Respondent before us but that does not preclude us from deciding whether her challenge was wrongly disallowed.

- [18] A leading judgment dealing with the right to a hearing is *Matebesi v Director of Immigration and Others* LAC (1995-1999) 616. In that judgment Gauntlett JA set out and explained the reasons which underpin the general principle in Lesotho, as in South Africa, that a public servant is entitled to be heard before being dismissed.

In *Selikane and Others v Lesotho Telecommunications and Others* LAC (1995-1999) 739 the court was concerned with the right of an employee to a hearing before being transferred. In the course of his judgment Browde JA expressed himself as follows (at 744 D-E):

“The rule is rather that the right to a hearing in relation to a potentially prejudicial decision applies unless excluded either expressly or by necessary implication (see Mathebesi’s case ...).”

The rule is not a hard and fast one for as recognised in *Mathebesi’s case* at 626 B-C it may be ousted or attenuated by a particular set of facts, where it cannot practicably be implemented, at all or to its fullest extent, respectively.

As to the situation where a hearing is afforded after the prejudicial decision has been taken it is important to remember that this should occur only in exceptional cases see *Administrator, Transvaal and Others v Traub and Others* 1989(4) SA 731 (AD) at 750 C-E.

- [19] In her application the Respondent submitted that the transfer was highly prejudicial to her because she had been given an “*extremely short notice and/or none at all*”. The judge *a quo* considered that in the circumstances of the case the issue of notice to her was irrelevant, and that since she retained her status and salary she was not entitled to a hearing as the transfer did not prejudicially affect her. I

regret that I do not share this view. The mere fact that the Respondent, who was in charge of the office at Mohale's Hoek, was to be moved to Maseru office on less than twenty four hours' notice without any indication as to what her position at the Maseru office would be cried out for her to be heard before being moved. No indication was given as to the reason for the transfer. If there was reason to act with such expedition, she was not apprised of it.

Although the court *a quo* found that she was not entitled to a hearing, the case for Appellants was that she was to be afforded one after the transfer. That was certainty not conveyed to her.

I accordingly conclude that the Respondent was entitled to a hearing before being transferred and the finding of the court *a quo* that she was not entitled to a hearing is overturned.

[20] The result of my finding is that the appeal is dismissed and the order of the High Court is confirmed. Since there was no appearance for the Respondent there will be no order in respect of the costs of appeal.

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree

I.G. FARLAM
JUSTICE OF APPEAL

I agree

W.J. LOUW
ACTING JUSTICE OF APPEAL

For Appellants: L. Tau