IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru **C of A (CIV) NO. 44/2013**

In the matter between:

THE MINISTRY OF PUBLIC SERVICE	**FIRST APPELLANT**
THE ATTORNEY – GENERAL	**SECOND APPELLANT**

and:

MOLEFI KOME	**FIRST RESPONDENT**
RETIMELETSOE MARAI	**SECOND RESPONDENT**
JAKOBO MOTHEBETSOANE	**THIRD RESPONDENT**
TEBOHO MARTINS	**FOURTH RESPONDENT**
REALEBOHA RAMOHOLI	**FIFTH RESPONDENT**
MABUSETSA MAKHARILELE	**SIXTH RESPONDENT**
TAELO LEHANA	**SEVENTH RESPONDENT**
TS'ELISO TS'ENOLI	**EIGHTH RESPONDENT**
THOLENG MOFOKENG	**NINTH RESPONDENT**
MOTLATSI MOHAPELOA	**TENTH RESPODENT**

CORAM : SCOTT, A.P.
THRING, J.A.
CLEAVER, A.J.A.

HEARD : 10TH APRIL, 2014

DELIVERED : 17 APRIL, 2014

SUMMARY

Group of civil servants unfairly discriminated against by employer in violation of their constitutional rights – Decisions of employer to exclude them from being upgraded along with other similar civil servants reviewed and set aside – Order by Court a quo that employer pay arrear salaries as if they had been upgraded with retrospective effect together with other civil servants – Order justified in circumstances.

JUDGMENT

THRING, J.A.

[1] At all material times the respondents have been employed by the first appellant as drivers or chauffeurs. The first six respondents have been and still are employed in the Ministry of Justice as drivers or chauffeurs for Judges of the High Court. The seventh to the tenth respondents inclusive have been and still are employed as drivers or chauffeurs for the Director of Public Prosecutions, the Ombudsman, the Auditor-General and the Government Secretary, respectively. For the sake of brevity I shall refer to all the respondents collectively as "Judges' drivers" or "Judges' chauffeurs as the context may require. Other persons were and are also employed by the first appellant as chauffeurs for cabinet ministers and assistant cabinet ministers. I shall refer to these collectively as "ministers' chauffeurs."

[2] Until 30 September, 2002 the Judges' drivers were called "drivers" and were on grade C in the first appellant's hierarchy of civil servants. On that date, however, the first appellant issued a minute in terms of which they were upgraded and re-designated "chauffeurs" on grade D. Their salaries were commensurately increased and they were paid the amounts of arrear salary owing to them.

[3] On 6 January, 2006 the first appellant issued a notice in terms of which the ministers' chauffeurs were upgraded to senior chauffeurs on grade E with effect from 1 April, 2006. However, the position of the Judges' chauffeurs remained unchanged.

[4] On 11 April, 2007 the first appellant issued another notice, in terms of which senior chauffeurs (the ministers' chauffeurs) were regraded to grade F with effect from 2 March, 2007. Again, the position of the Judges' chauffeurs remained unchanged.

[5] The exclusion of the Judges' chauffeurs from the two upgradings of chauffeurs which took place on 6 January, 2006 and 11 April, 2007 caused them to be dissatisfied. In April 2010 they launched an application on motion in the Court *a quo* in which they sought the following relief against the appellants:

> "1. The decision or action by first respondent [now first appellant] of unfairly discriminatory

[against?] applicants [now respondents] from

honourable ministers and honourable assistant ministers' chauffeurs to be declared invalid and of no force and effect, null and void *ab initio* to the extent that it offends and violates section 18 of the Constitution.

2. The decision or action by first respondent of unfairly discriminating [against?] applicants from honourable ministers' and assistant ministers' chauffeurs to be declared invalid and of no force and effect, null and void *ab initio* to the extent that it offends and violates section 19 and 26 of the Constitution.

3. Declaring that applicants should be treated equally and be afforded equal treatment, protection, rights, seniority and status from grade D to F similar to that afforded to honourable ministers' and honourable assistant ministers' chauffeurs.

4. Directing respondents to pay salaries to applicants from the date a decision was taken

to improve and enhance the status of honourable ministers' and honourable assistant ministers' chauffeurs from grade D to F.

5. Review and set aside first respondent's decision of unfairly discriminating [against?] applicants from honourable ministers' and honourable assistant ministers' chauffeurs.

6. Costs of suit.

7. Granting applicants such further and / or alternative relief."

[6] The matter came before the Court *a quo* **(Monaphathi, A.C.J.)** in May, 2013, and he gave judgment on 6 September, 2013. He granted the application "in terms of allprayers in the notice of motion", with costs. The appellants now appeal to this Court, but in terms of their notice of appeal"(t)he appeal is only directed against the part directing appellants to pay respondents arrear salary in line with prayer 4 in the notice of motion." It is consequently now no longer in dispute that-

(a) The first appellants' decisions of 6 January, 2006 and 11 April, 2007 to exclude Judges' chauffeurs from the upgrading of ministers' chauffeurs discriminated unfairly

against the former and offended against secs. 18, 19 and 26 of the Constitution (prayers 1 and 2 of the notice of motion);

(b) Those decisions have according properly been declared by the Court *a quo*on review to be invalid and of no force or effect,

and have been properly set aside (prayer 5 of the notice of motion);

(c) It has been properly declared by the Court *a quo*that the respondents should "be afforded equal treatment, protection, rights, seniority and status … similar to that afforded to" ministers' chauffeurs (prayer 3 of the notice of motion).

Indeed, before the Court *a quo* it would seem that the appellants opposed the granting only of prayer 4 of the notice of motion, the rest of the relief claimed being granted by consent.

[7] The case advanced by the appellants in the Court *a quo* was summarised by the learned Acting Chief Justice as follows in his judgment:

> "The nub [of] respondents' [now appellants'] contention is that before the applicants [now respondents] can talk of arrear salary they should first be upgraded to the grades in question

> retrospectively. Further that only after that can the applicants claim arrears retrospectively.
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> [10] The respondents claim that the applicants in their papers did not pray to be upgraded retrospectively, particularly in prayer three (3), and cannot therefore even talk of arrear salary. It is the
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> respondents' view that the applicants cannot be granted what they have not claimed. The respondents could barely advance an authority for the proposition that the applicants should not be paid retrospectively."

This argument was in essence repeated before us by counsel for the appellants.

[8] I have difficulty understanding the logic of the appellant's argument, when considered against the background of the relief which was granted by the Court by consent in the rest of its order. In granting prayer 5 of the notice of motion the Court *a quo* unquestionably reviewed and set aside the first appellant's decisions to exclude Judges' chauffeurs from the upgrades of their rankings to grades E and, subsequently, to grade F. which had been effected to ministers' chauffeurs. It also consequentially declared that the respondents "should be treated equally and be afforded equal treatment, protection, rights, seniority and status from grade D to F similar to that afforded to" ministers'

chauffeurs (prayer 3 of the notice of motion). The appellants, it seems, have no quarrel with these orders. Then comes prayer 4, which is a directive to the appellants "to pay salary arrears to applicants from the date a decision was taken to improve and enhance the status of ministers' and honourable assistant ministers' chauffeurs from grade D to F". The notice of motion is not very elegantly framed, but it seems to me that when the relief sought in it is read as a whole, prayer 4 is consequent upon what is claimed in prayers 3

and 5, and is intended as a directive so as to give practical effect to what is claimed in prayers 3 and 5.

[9] On the uncontested findings of the Court *a quo*, then, the respondents had been done an injustice by the first appellant : they had been unfairly discriminated against in breach of their constitutional rights not to be discriminated against and to be treated equally before the law. The first appellant's decisions to treat them in this way were accordingly declared by the Court *a quo* to be invalid and of no force or effect, and were set aside. In addition, the Court *a quo* declared that the respondents should receive redress and ordered that they should (now) be treated in the same way as the ministers' chauffeurs had been. This means that they should now, insofar as may be possible, be placed in the same position as that occupied by the ministers' chauffeurs. Inasmuch as the latter were upgraded to grade E in 2006 and to Grade F in 2007, the way to place the respondents in the same position as them would be to upgrade the respondents in the

same way, with retrospective effect. Indeed, to my mind this is exactly what the respondents asked for, albeit somewhat obscurely and inelegantly, in prayer 3 of their notice of motion when they sought "equal treatment, protection, rights, seniority and status from grade D to F similar to that afforded to" ministers' chauffeurs. The meaning becomes even clearer when prayer 3 is read together with prayer 4, where the salary arrears are sought "from the date a decision was taken to improve and enhance the status of" ministers' chauffeurs "from grade D to F". See, in this regard, the

> decision of this Court in **Attorney-General and Others v Bolepo andOthers**, LAC (2000-2004) 522 at para [15] (page 527 A-B), where, in a comparable case, an order was confirmed in terms of which arrear salaries were to be paid with retrospective effect. No good reason has been advanced by the appellants why this cannot be done. The arguments put forward on their behalf in this connection, it seems to me, really amount to little more than bureaucratic sophistry.

[10] In any event, I fail to understand why, as the appellants contend, it should be necessary for the ranking of the respondents to be upgraded with retrospective effect before they can be paid the arrears of salary which are owing to them. To satisfy prayer 4, all that the first appellant has to do is to calculate the arrears due to each respondent and pay them over to him.

[11] The appellants' further argument that the arrear salaries were in the nature of damages which could not be recovered in motion proceedings, which was put forward in the Court *a quo*, was not advanced in this Court, and nothing more need be said about it.

[12] In my view there is no merit in this appeal. It is dismissed, with costs.

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W.G. THRING
Justice of Appeal

I agree:

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D.G. SCOTT
Acting President

I agree:

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R.B. CLEAVER
Acting Justice of Appeal

For appellant : R.Motsieloa

For first respondents: L.T. Makholela