IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO 06/2019

In the matter between:

MAKERESEME SEBOPHE **1ST APPELLANT**
MABASOTHO PUTSOANE **2ND APPELLANT**

and

COMMISSIONER OF POLICE **1ST RESPONDENT**

ATTORNEY GENERAL **2ND RESPONDENT**

CORAM : MOSITO P
DAMASEB AJA
MUSONDA AJA

HEARD : 20 MAY 2019

DELIVERED: 31 MAY 2019

SUMMARY

Administrative Law – The Rules of natural justice – the right of police officers to be heard before being transferred – Police Act No 7 of 1998 saying nothing – section 4 decreeing the deployment of Lesotho by the Commissioner of Police Mounted Police Officers throughout the Kingdom of Lesotho – Appellants were previously heard before being transferred – Legitimate expectation induced by the decision – maker. Appellants making representations after the decision, whether that suffices as a hearing – existence of special circumstances may override the audi principle – onus is on the respondent to prove their existence – court to strictly interpret the existence of exceptional circumstances.

JUDGMENT

DR P MUSONDA AJA

BACKGROUND

[1] This is an appeal against the order of (Mahase ACJ), dismissing an application for review by the appellants with costs.

[2] The appellants had approached the High Court on the 20th December 2018 seeking the following Orders:

(i) That the rules of court pertaining to normal modes and periods of the service be dispensed with on account of the urgency of the matter.

(ii) A rule *nisi* be issued returnable on the date and time to be determined by the court calling upon the respondents to

show cause (if any) why an order on these terms shall not be made absolute:

(a) That the transfer of the applicants be stayed pending finalization of the application;

(b) That the first respondent's decision to transfer the applicants be reviewed, corrected and set aside

(c) That the applicants be granted costs of the suit;

(d) That the applicants be granted further and alternative relief;

(e) That prayers 1 and 2 (a), should operate with immediate effect as interim relief;

FACTS:

[3] The first appellant who is Senior Inspector was by letter dated 5th November 2018 transferred from Butha-Buthe district to Mohale's Hoek district (Mpharane Police Station).

[4] The second appellant was a Senior Inspector transferred on 5th November 2018. The second appellant also made representations after the facts without any success. In the case of the second, during her 17 year career in the Lesotho Mounted Police Service, she was transferred on eight occasions on each occasion she was afforded a hearing. She approached the High Court and she was granted a Court Order. This was a third transfer within a year.

[5] On 10th December 2018 and 4th December 2018, Superintendent Shale the Staff Officer in the Commissioners' office

wrote to the appellants that the Commissioner had reflected on their representations and still felt that due to the exigency of duty their transfers stood save and except that in respect of the second appellant he found the representation's reasonable, but the reasons were overridden by the exigency of duty.

[6] The appellant filed an urgent application on 20th December 2018. The court below rejected the review relief sought by the appellants without giving reasons. The appeal lies against that decision of the High Court.

THE APPELLANTS CASE:

[7] For the appellants rely on several grounds of appeal. The first ground is that the court *a quo* dismissed the application without giving reasons for the judgement. Secondly that the court *a quo* erred and misdirected itself in dismissing the application in the face of salient facts, evidence and a clear position of the law, which were in favour of granting the application. Thirdly that the court *a quo* ought not to have dismissed the application as the transfer decision to transfer was void *ab initio* and the transfer cannot be validated by a subsequent hearing as alleged by the respondents in the court *a quo.*

[8] The sharp focus of the appellants' case is that the decision to transfer them was made without a hearing and was therefore *void ab initio*. According to the appellants, the manner of their transfer did not fall within the exception to the observation and adherence to the rules of natural justice.

[9] It was alleged that the respondents admitted that they made the decision to transfer appellants without giving them a hearing prior to the making of the said decision. Paragraph 7.1 of the answering affidavit supports that allegation, it states:

> *"That contents herein are noted safe to clarify that, applicants' transfers were made pursuant to the Police Service Act 1998. The Act, unequivocally states that members of the Lesotho Mounted Police Service shall be deployed in and throughout Lesotho. The Act, does not place an obligation on the Commissioner of police to make pre-deployment hearing.*

[10] In support of ground one of appeal, the appellants relied on the following cases. In *Judicial Service Commission V Cape Bar Council (Centre for Constitutional Rights as Amicus Curiae,*[1]*was cited* where it was held that:

> *"It is difficult to think of a way to account for one's decisions other than to give reasons (see Mphahlele V First National Bank of SA Ltd 1999. (2) SA 667 (CC) para 12).*
> *As to rationality, I think it is rather cynical to say to an affected individual: you have a constitution right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence by the decision – maker. "Trust me, I have good reason, but I am not prepared to provide them? Exemption from giving reasons will therefore almost invariably result in immunity from an irrationality challenge. I believe the same sentiment to have been expressed by Mokgoro and Sachs JJ when*

[1] 818/11 [2012] ASCA 115 (14TH September 2012)

they said in Bell Portion School Convening Body V Premier, Western Cape [2002] (3) SA 265 (CC) para 159:

"The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law"

[11] The decision of this court in *Lesotho Teachers Trade Union V Director of the Teaching Service Department and Others,*[2] was also relied, on wherein this court said:

"The failure by both courts to give reasons is reprehensible. Qhobela and Another LAC (2000 – 2004) 28. See also S V Immelman 1978 (3) SA 726 (A) at p 729 C-D, where Corbett JA, said the following:

"The absence of such reasons may operate unfairly, as against both the accused person and the state. One of the various problem's which may be occasioned in the Court of Appeal by absence of reason's is that a case where there has been a plea of guilty but evidence has been led, there may be no indication as to how issues of fact thrown up by the evidence or on what factual basis the court approached the question of sentence"

The court further went on to state at p 803 that:

"It has come to our attention in the Court of Appeal that there are judges in the High Court who fail, sometimes even often fail, to produce reasons for their judgement. In such cases appeals in the court of Appeal are heard without the benefit of reasons. Quite

[2] Ubid at (44)

> *obviously such a practice must be strongly deprecated, as it is not only unethical but it also leads to a perception that judges give arbitrary decision which are not supported by any reasons. It need hardly be stated that arbitrariness is itself a form of dictatorship which is in turn a foreign concept to the rule of law that we seek to uphold as judges. If allowed to continue, such practice will no doubt bring the whole justice system into disrepute. It undoubtedly leads the loss of public confidence in the ability of courts to resolve disputes.*

[12] There being no reasons to justify the order in the court *a quo* an inference should be drawn that no good reasons existed. On that ground alone this court should allow the appeal.

[13] The second and the third grounds were argued together. Reliance was placed on the following dictum by *Guni J*, when setting aside a decision to transfer an employee which was not preceded by a prior hearing in *Hokinyane V Principal Secretary, Ministry of Local Government and Chieftainship and others,*[3]:

> *"There is no legal requirement for hearing prior to transfer. The legal principle that appears to have been established over the years in this jurisdiction is that an employee has a right to a hearing in relation to a potentially prejudicial decision"*

[14] Guni J, heavily relied on the decision of this court in *Mamonyane Matebesi V Director of Immigration and others,*[4] and *Selikane and 33 others V LTC and Others,*[5] this court said:

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[3] C of A (CIV) 2/96
[4] C of A (CIV) 2/96
[5] C of A (CIV) No 7/99

> *"There are no specific rules and/or regulations that require a hearing before a transfer of an employee could be made. It is demanded by the principles of natural justice together with fundamental principles of fairness, that prior to the making of the final and potentially prejudicial decision the person whose rights are likely to be adversely affected by such decision should be given an opportunity to be heard before it is made"*

[15] There is authority from the High Court to similar effect. The case of *Ngubane V Minister of Education and cultural Ulundi and Another,*[6] was cited with approval by Hlajoane J in *Phaila V Director General National Security Services and 2 others,*[7] where the court in expressing disapproval of the transfer of a teacher made without prior hearing said:

> *"There can be no doubt that in deciding whether to transfer the applicant the official concerned would have to enquire into and consider various facts and circumstances which affected the applicant's rights"*

[16] In *Lineo Manamolela and Others V Commissioner of Police and Another,*[8] Hlajoane J said:

> *"(24) There are instances where, as pointed out by respondents, Counsel, pre-transfer hearing may be rendered impracticable so that giving an ex post facto hearing would not be rendered unlawful. There are 'exceptional circumstance".*

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[6] 1985 (3) SA 160
[7] CIV /APN/79/13
[8] CIV/APN/458/2013

[17] It was argued that the appellants ought to have been heard before the decisions to transfer them were made. The case of *Administrator, Transvaal and others V Traub and others,*[9] was cited in aid of that proposition. In that case 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 necessarily required to act with expedition or where for some other reason it is not feasible to give a hearing before the decision is taken"*

[18] In summary it was submitted that an administrative decision such as transferring a police officer should be made only after the affected individual has been given a hearing and that it is procedurally improper that representations be entertained only after the decision to transfer has already been made.

[9] (1989) 4 SA 731 (A)

THE RESPONDENTS CASE:

[19] It was the respondents' case that the appellants made a representation to the Commissioner of Police per their letters dated 20th November 2018 before the Commissioner made a final decision to transfer the appellants. That post *facto* hearing was sufficient to satisfy the requirement of *audi alteram parterm*. The respondents allege that in the exceptional circumstances of the case it was not feasible or practicable to give appellants a pre-transfer hearing.

[20] In response to the ground that the court's failure to give reasons vitiate the order *a quo*, the respondents argue that such failure does not vitiate and that there is ample authority to that effect.

[21] In *Rathulo V Magistrate Court Mohale and Another,*[10] Chaka-Makhooane J, dismissing a review application due to absence of reasons relied on Majara J's judgement in *Ramabele V The Learned Magistrate and Others,*[11] where Majara J held that:

> *"....while Superior Courts frown upon failure by trial courts to furnish reasons for judgment and/or sentence, nowhere in the*

[10] CRI/APN/628/09 (2010) LSHC 38
[11] CRI/APN/364/08

decided cases have they unequivocally stated that such failure per se is enough to vitiate the entire proceedings."

[22] This was not a matter that was judicially reviewable, so the respondents argued, as the common law grounds for review of inferior courts are gross irregularity, *mala fides*, *prejudice or bias*, which were absent in this case.

[23] The respondents went on to draw a distinction between review proceedings and appeal, by citing a passage from *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition of p 932,* where the authors say:

"The reason for bringing proceedings under review or appeal is usually the same, it is to have the judgement set aside. Where the reason for wanting this is that the Court came to a wrong decision or conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the grievance is against the methods of the trial, it is proper to bring the case on review. The first distinction depends, therefore on whether it is the result only or rather the method of trial which is to be attacked."

[24] Respondents strenuously argued that the letters of representation written by the appellants to the first respondent on 20th November 2018 giving him reasons to reconsider their transfers satisfied the *audi* principle. On this

approach, the final letters of transfer of the first appellant date 10th December 2018 and that of the second appellant dated 4th December 2018, were written after due consideration of their representations.

[25] The *audi* principle may be attenuated or ousted in certain circumstances, so the respondents argued. In support of that argument they cited the case of *Doody V Secretary of State for Home Affairs and Others,*[12] in which case Lord Mustill said:

> *"The standard of fairness is not immutable. They may change with the passage of time both in the general and in their application to decision of a particular type… the principles of fairness are not applied by role identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken in all aspects.*

[26] To buttress their case that the circumstances of the case excluded compliance with before the decision to transfer the appellants the respondents cited *Hoexter* under the rubric *audi alteram partem* at 362 when he says:

> *"The principle that procedural fairness is highly variable concept which must be decided in the context and the circumstances of each*

[12] (1993) 3 AII ER 92 HL
13 Baxter Lawrence, Cora Hoexter
Administrative Law, Juta Limited 1984

case and that the one-size-fits-all approach is inappropriate, has been explicitly reignited by the highest courts in England (see eg Doody V Secretary of State for Home Affairs and other. Others (1993) 3 All ER 92 (HC) 106 DU Preez and Another V Truth and Reconciliation Commission (1977) (3) SA 204 (A) 231-3 Minister of Health V Another No V New Clicks SA (Pty) Ltd and Another as Amicus 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, the questions as to whether in all circumstances of the case the procedure that preceded the impugned decision was unfair remains"

[27] The respondents also refer to the case of *Selikane and 33 others V LTC,*[13] where this court said:

"(13) It seem, therefore, that dependency on the particular facts of the case a failure to give a pre-decision hearing may be cured by affording the person affected an opportunity to make representation or to be herd post facto. Obviously it is preferable that if practicable, the hearing take place before the decision is arrived at because after the event the person affected has the burden of persuading the person concerned that the was wrong"

[28] The respondents also rely on *Baxter Administrative Law (1984) at p587,* where he says:

"Since natural justice seeks to promote objective and informed decision, it is important that it be observed prior to the decision. Once

[13] C in eof A (CIV) No 7/99

> *a decision has been reached in violation of natural justice, and even if it has not yet been put in effect, a subsequent hearing will be no real substitute; one has to do more than merely present one's case and refute opposing case. One has to convince the decision-maker that he was wrong. In a sense the decision maker is already prejudiced. As a general rule, therefore, a failure to observe natural justice before the decision is taken will lead to invalidity.*

[29] In winding up their submissions the respondents disagreed with Baxter and said the courts have in exceptional circumstances' validated post-decision representations. It was their case that the Commissioner of Police simultaneously processed transfers of the Senior Officers during the time which the Commissioner was engaged and working tirelessly on issue of National Reforms. And that it was these 'exceptional circumstances', which justified a post *de facto* hearing.

[30] During oral argument, the respondents conceded that given the common cause fact that the appellants were not afforded a hearing prior to their transfer, they respondents' case stands or falls on whether they made out that there were exceptional circumstances to justify a post facto hearing.

It is unquestionably clear that the respondents do not dispute that the appellants were entitled to be heard before the decision to transfer them was made. And that that is what should be done ordinarily as said earlier they graciously cited authorities that espouse that proposition of the law. In any

event the second appellant in her founding affidavit said that in the past she was afforded a hearing before transfer.

[31] The following issues fall for decision in the appeal:

(i) What has been the practice before a decision to transfer Police Officer is made?

(ii) Whether there were 'exceptional circumstances to override the *audi* principle?

(iii) If the right to a hearing was violated what is the effect of the transfer

[32] In *Ridge V Baldwin*,[14] the House of Lords made clear that it, "was imperative to give an individual the right to be heard before an adverse decision is made against that individual". I find it useful to have regard to the Police Service Act 1998 in discerning whether the conduct of the respondents was justified in the present case. For example, before the Prime Minister advises the King that the Commissioner of Police retire in the interest of efficiency or effectiveness under Section 5 (3) and (4), before rendering such advice the Prime Minister has to give an opportunity to the Commissioner of Police to make representations. Section 12 on the other hand, allows the Commissioner to delegate the power conferred on him by the Act, contrary to Adv N.C. Sehloho's" oral argument, that the power to redeploy is non-delegatable. Under Section 16 (1), before the beginning of each financial year the Police Authority

[14] (1964)AC 103

shall issue a plan setting out the proposed arrangements for the policing of Lesotho during that year. Under Section 23 (1), The Commissioner shall make arrangements for obtaining the views of the public about matters concerning the policing of Lesotho and their co-operation with the police in the prevention of crime. A reading of the Police Act shows that it places emphasis on consultation. Though the legislation as admitted by the appellants does not place an obligations on the Commissioner of Police to have a pre-deployment hearing such an obligation flows from common law and practice.

[33] The law in this jurisdiction and South Africa support the conclusion that there must be a pre-transfer hearing: *Commissioner of Police and Another V Manamolela and Others, Selekane and Others V Lesotho Telecommunications and Others, and Administrator Transvaal and Others V Traub and Others (Supra).* The rationale is that a decision has to be made when the decision-maker has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken. As *Baxter* observes[15].

> *"When he says as a general rule, therefore, a failure to observe natural justice before the decision is taken will lead to invalidity"*

[15] Baxter Lawrence, Cora Hoexter Administrative Law Juta Limited 1984

[34] The courts of the United Kingdom have recognised both procedural and substantive legitimate expectation. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. This expectation must be induced by the behaviour of the public authority, (per Lord Fraser in *Council of Civil Servants Unions V Minister for Civil Service.*[16])

In Australia the doctrine has given rise to procedural protection rather than substantive rights in terms whereof - where a decision – maker proposes to make a decision inconsistent with a legitimate procedural fairness requires, the person affected should be given notice and an adequate notice to respond. Audi is also presumed where has there has been a regular practice which the claimant can reasonably expect to continue, *Minister for Immigration and Ethnic Affairs V Teolo.*[17]

The doctrine of legitimate expectation was first developed in English law as a ground for judicial review in administrative law to protect a procedural or substantive right.

The appellants made out a case for a legitimate expectation to be heard before a transfer. In respect of the second appellant there was even a Court Order to that effect in prior proceedings.

[16] (1985) AC 374 Hl **UCC** at p 401
[17] (1995) 183 CIR 273

[35] The onus rested on the respondents to demonstrate exceptional circumstances to justify only and after the fact hearing. In *David Samuel Anvit V West Bank and West Bank Aviation Finance,*[18] Mpati P had this to say:

> *"The term 'exceptional circumstances' is one that has been used in various different statutory provisions in varying contexts over many years. It was first considered in South Africa in Norwich Union Life Insurance Society V Dobbs 1912 AD 1912 AD 395, where Innes ACJ said the question once arise, where are exceptional circumstance? Now it is undesirable to attempt to lay down any general rule each must be considered upon its own fact. But the language of the clause show that exceptional circumstance must arise out of, or be incidental to the particular action."*

[36] Mpati P, went on, later cases have likewise declined any invitation to define exceptional circumstances for the sound reason that the enquiry is a factual one see *S V Joubert, S V Schie lella 1999 (14) SA 623 (CC) paras 75-77.* A helpful summary of the approach to the question in any given case was provided by Thring J in *MV Ais Mamas, Seatrans Maritime V Owners, MV Ais Mamas and Another 2002 (6) 150 (C)* where he said:

1. *"… what is ordinarily contemplated by the words 'exceptional circumstances is something out of the ordinary and of an usual*

[18] 2023/14 [2014] ZASCA 132 (23 September 2014)

nature, something which is excepted in the sense that the general rule does not apply to it, something uncommon, rare or different;

2. *To be exceptional the circumstances concerned must arise out, or be incidental to, the particular case;*
3. *Whether or not 'exceptional circumstances,' exist is not a decision which depends upon the exercise of judicial discretion, their existence or otherwise is a matter of fact; which the court must decide accordingly;*
4. *Depending on the context in which it is used, the words 'exceptional' has two shades of meaning: the primary meaning is unusual or different unusual or specifically different"*

The appeal stands and falls on whether the respondents established exceptional circumstances.

[37] In my considered view the absence of reasons for an administrative decision affects an individual litigant who is entitled to know the rationale for the decision. It is the reasons, which will motivate or demotivate the litigant to appeal, as the litigant will be able to get proper advice from counsel. The lower court's reasons will also assist this court to the correct conclusion. However, time has not come for us to vitiate the proceedings in the court *a quo* for absence of reasons, though we strongly deprecate this unethical conduct.

[38] The answering affidavit of the first respondent states that the Act does not place an obligation on the Commissioner of Police to make pre-deployment hearing a constructive

admission that the first respondent was dealing with an annual routine situation.

[39] At the time of making the decision the Commissioner's mind was coloured with the fact that he had no obligation to avail the appellants the *audi* principle and that they so legitimately expected to be given that opportunity relying on the jurisprudence in this country and beyond, which he appears to have been oblivious of, which his counsel was alive to when arguing the appeal.

[40] It is this court's view, that there existed no exceptional circumstances' to deny the appellants *audi* and the post-decision hearing after his mind is coloured, cannot amount to a hearing, and it cannot be so credibly argued. All what would have been done is that the decisional letter should have been characterised as the letter of intent to transfer, and that would have been compliant with the *audi* principle.

[41] There could exist 'exceptional circumstances' where Commissioner of Police had to deploy officers to go and supress an instantaneous breakdown of law and order or he had to react instantaneously in any part of the Kingdom dithering on the brink of disorder. The concept of 'exceptional circumstances' will be validated by the courts as if there are legitimate reasons for overriding the *audi* before the decision

is made. This court is mindful not to make decision that will ill-serve effective policing of this country.

CONCLUSION:

[42] The respondents having failed to establish exceptional circumstances to justify a failure to grant the appellants *audi* before transfer, the appeal should be upheld and prayers 2 (b) and 2 (d) in the notice of motion be granted. The order of the court *a quo* is set aside and substituted with a different order.

ORDER

[43] In the result, the following order is made:

(I) Appeal is allowed;

(II) The first respondents decision to transfer the appellants should be corrected and set aside;

(III) The appellants are granted costs in this court and the court *a quo.*

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DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

_____
DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____

P T DAMASEB
ACTING JUSTICE OF APPEAL

For Appellants **:** Adv Chabana
For Respondents **:** Adv Sehloho