

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.50/2019

**COMMISSINER OF POLICE
MINISTRY OF POLICE
ATTORNEY GENERAL**

**1ST APPELLANT
2ND APPELLANT
3RD APPELLANT**

AND

**NTABA RAMPHIELO
TUMELO KONTANTE
PUSETSO MOTABA
MAKAMOHELO BERENG-NKONGOANE
RALIKHOMO MOKOALELI
KHOSI KALAILA
RETHABILE MAKATENG
LEFA MATSOELE
MASECHABA TEMEKI
KHAUTA RAPONE
MAKHELE JANE
NKHETHUOA MOSHABE
MABATHO CHONELANGA
SEFALI SEFALI
MAREABETSOE MOFOKA
MATHOLANG SEHAU
SEQABA MOHLOBOLI
RORISANG MAFETHE
THATO CHABALALA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT
11TH RESPONDENT
12TH RESPONDENT
13TH RESPONDENT
14TH RESPONDENT
15TH RESPONDENT
16TH RESPONDENT
17TH RESPONDENT
18TH RESPONDENT
19TH RESPONDENT**

KELETSO KALI	20TH RESPONDENT
THABANG MOLELEKOA	21ST RESPONDENT
MOLOMO MOHALE	22ND RESPONDENT
REFILOE NTOI	23RD RESPONDENT
NTOLO MOHALE	24TH RESPONDENT
TSOLO SEKHOTLA	25TH RESPONDENT
LERATO TOLOFI	26TH RESPONDENT
KHETSI MATOOANE	27TH RESPONDENT
MOKHOEBI LEHLOENYA	28TH RESPONDENT
LILLO SEHLOHO	29TH RESPONDENT
KHAUHELO PHATELA	30TH RESPONDENT
MOLEFI SENYANE	31ST RESPONDENT
THEBE HLAO	32ND RESPONDENT
THABANG SETENANE	33RD RESPONDENT
MOSHOESHOE TSITA	34TH RESPONDENT
THABISO SEFALANE	35TH RESPONDENT
ALEXIS TLATLANE	36TH RESPONDENT
TŠEPO MBOBO	37TH RESPONDENT

CORAM : P T DAMASEB AJA
M H CHINHENGO AJA
DR J VAN DER WESTHUIZEN AJA

HEARD : 17 OCTOBER 2019
DELIVERED : 01 NOVEMBER 2019

SUMMARY

The Commissioner of Police failed to follow the requirements of natural justice or the procedures prescribed in the Police Act 7 of 1998 when deciding to cancel the lawful promotion by his predecessor of police officers and to withhold their salaries. Thus the decision is unlawful. The appeal against the order to this effect by the High Court is dismissed.

FIRST DRAFT JUDGMENT (27.10.2019)

VAN DER WESTHUIZEN AJA

Introduction

[1] In this appeal against a judgment of the High Court the Commissioner of Police (Commissioner) is the first, the Ministry of Police the second and the Attorney General of Lesotho the third appellants. The High Court ruled in favour of 35 police officers (the applicants in that Court and respondents in this Court) by confirming a rule nisi and interdicting the Commissioner from demoting them and withholding their salaries, because the Commissioner's decision to hold their earlier promotion in abeyance had been unlawful and irregular.

[2] On appeal the appellants argue that the order of the High Court is impossible to comply with. Other officers have been appointed in those positions. The order would result in each of the positions being filled by two people and double salaries being paid. This

would amount to an untenable administrative and financial duplication.

Background

[3] On 9 June 2017 the Commissioner of Police promoted 36 police officers to the ranks of Lance Sergeant, Sergeant, Sub-Inspector and Inspector. They were officially informed of this by a “*Wireless Message Form*” from “*COMPOL HRO*” of the Lesotho Mounted Police Signals Branch. They received the insignia and performed their duties according to the ranks to which they had been elevated.

[4] In a “*Memo*” dated 6 July 2017, under the heading “*RE: LMPS NEWLY PROMOTED OFFICERS’ SALARY ABEYANCE*”, Inspector Machela referred to Police Memos of 4 and 6 June 2017. He informed the officers that the Commissioner of Police had on 30 June 2017 decided “*to hold in abeyance salaries of all Police Officers who have been promoted as per the above cited Memos*”. The letter noted that “*this Memo does not per se cancel the said promotions*”. It further stated that “*some of the promotees lodged a civil claim CIV/APN/216B/2017 which was moved before the High Court of Lesotho on the 4th July 2017*” and added that “*the said case will be heard on the 7th August, 2017 together with the case that was lodged by LEPOSA per CIV/APN/216B/2017...*”. The memorandum of 6 July stated that “*the final decision for those cases will determine the validity of the promotions and the benefits thereto*”.

[5] The Lesotho Police Staff Association (LEPOSA), a registered union, instituted litigation against the previous Commissioner of Police and 46 others under case number 216/17. According to the High Court judgment in this matter, the present Commissioner, Commissioner Molibeli, withdrew the opposition and answering affidavits filed by his predecessor in the LEPOSA matter, when he assumed office, effectively supporting LEPOSA. The civil claim referred to was case 216B of Lebohang Setsomi and 35 others versus the Acting Commissioner of Police. This case dealt with promotions to senior ranks, according to the High Court.

[6] In his answering affidavit Commissioner Molibeli admitted that the 36 officers who approached the High Court in this matter were not parties to cases 216 and 216B of 2017. He stated that *“in those or above applications, the challenge on the promotions was based on the fact that, there were neither vacancies nor funds budgeted for, those new positions which the officers in the above mentioned applications were promoted to ... Whereas that was never the case with the applicants herein. What makes the present applicants herein to be ‘victims’ is the fact that they were promoted to the vacant positions as a result of the promotions of officers in ... 216 ... and ... 216B ...”*.

[7] In another “Memo”, this time dated 13 July 2017, Inspector Machela referred to two previous memos and stated that he had been “directed by the Commissioner of Police to herewith inform

you, as I hereby do that with effect from today the 13th July 2017, all Police Officers who were promoted as per the above cited Memos cease to hold the **NEW** ranks pending the final decision of the court of law in (cases) ... 216/2017, and 216B/2017 respectively”. This memo of 13 July added: *“This Memo supersedes the Memo dated 06th July, 2017”*

[8] The difference between the memoranda of 6 and 13 July seems to be that on 6 July the salaries were held in abeyance and it was explicitly stated that the promotions were not *“per se”* cancelled; whereas on 13 July the officers were told that with immediate effect they ceased to hold the ranks to which they had been promoted. Both memoranda seem to make the finalisation dependent on the outcome of cases 216 and 216B of 2017.

[9] It is common cause that the 36 officers were not given an opportunity to be heard before the decision about their promotion and salaries was taken.

[10] On 11 December 2017 a *“Memo”* invited applications for several vacant senior positions.

[11] The respondents wrote to the Commissioner on 5 February 2018 and pleaded with his office to remedy the situation within seven working days. The Commissioner did not answer the letter, but called the first respondent to his office. In a personal

conversation the Commissioner stated that because the promotions had not been budgeted for, he would not be able to honour them and pay salaries. According to the first respondent, he asked where the money had come from to promote other officers into the very same positions that the respondents had been promoted to. The Commissioner stated that he would try to promote the respondents into the vacancies that existed, one by one. In his answering affidavit the Commissioner did not deny this version in the founding affidavit.

[12] According to the respondents, funds were available. Since 9 June 2017, when they were promoted, other officers have been promoted. The Commissioner responded by stating that the senior positions referred to by the respondents and advertised in the memorandum of 11 December 2017 had been in existence. One, of Deputy Commissioner, became vacant when he was appointed as Commissioner. According to the respondents, 19 promotions took place to the ranks of Lance Sergeant, Sub-Inspector and Inspector. In short, the respondents allege that other officers were promoted into the positions they occupied after their promotion and that the advertisement and filling of posts were calculated to prejudice them.

The High Court

[13] On the basis of urgency the 36 officers approached the High Court for a rule nisi, calling on the Commissioner and the other

respondents to show cause why their prayers should not be confirmed. They asked the court to –

“interdict the Commissioner from promoting officers to the ranks into which they had been promoted, pending the determination of their application;

order the Commissioner to pay the applicants’ salaries;

interdict the Commissioner from continuing to withhold their salaries;

declare the decision of the Commissioner to refuse to pay the salaries null and void; and

award costs to the applicants.”

[14] On 26 March 2018 the interim relief was granted by **Makara J**. The rule nisi was returnable on 24 April 2018.

[15] The matter was heard on 22 May 2018. It would appear that on 8 November 2018 a “*ruling*” was made. We were informed by counsel that the eventual reasoned judgment was issued on 15 May 2019.

[16] **Makara J** opined that the natural justice requirement of *audi alteram partem* had originated “*from the judicial teachings of the Holy Bible*”. He found the Commissioner’s omission to afford the affected officers an opportunity to be heard to be fatal. The Commissioner should have realised the implications of this failure before considering the demotion.

[17] To **Makara J** it furthermore appeared that *“it also fatally escaped his wisdom that demotion is specifically circumscribed under Section 46 of the Police Act 7 of 1998”*. This provision requires certain procedures to be followed regarding disciplinary proceedings and punishment. No disciplinary proceedings took place in this case.

[18] According to the High Court, the fact that the Commissioner *“continued to promote other officers to the same ranks ... compromise(d) his bona fides in this matter”*.

[19] The High Court thus confirmed the rule nisi and-

“ordered that the Commissioner “is interdicted from demoting the applicants in terms of their status, remuneration and privileges”;

ordered the Commissioner to pay the salaries to the ranks to which the applicants had been promoted;

interdicted the Commissioner from continuing to withhold the salaries;

declared the Commissioner’s decision to withhold the salaries null and void; and

awarded costs to the applicants.”

The appeal

[20] The Commissioner and the other appellants appealed to this Court. Counsel for the appellants agreed that the decision to

cancel the respondent's promotion and to hold their salaries in abeyance was irregular, because the officers had not been given an opportunity to be heard before the decision was taken. The appellants' main argument on appeal is that the High Court misjudged the consequences of the remedy it ordered. It would result in duplication, in that two persons would be appointed and have to be remunerated in one and the same position. This was impossible to implement in terms of existing institutional structures and financial policies.

[21] The High Court considered this aspect. It stated its appreciation for the potential of the order sought *"to introduce a nightmare in the organisational structure of the police, the budget allocated for salaries and allowances"*. Thus the Court *"found it prudent to postpone writing of the final order to enable (the parties) to negotiate towards agreeing on some form of practical compromise"*. According to the court, *"(b)oth counsel had correspondingly seen wisdom in the proposed avenue"*. Counsel *"were accordingly ordered to appraise the Court about progress made on a specific date"*. (This Court was informed by counsel that this period had followed the ruling of the High Court on 8 November 2018, until the reasoned judgment was delivered on 15 May 2019.) Counsel for the officers presented a document with a proposed basis for discussions towards a settlement. Counsel for the Commissioner, however, advised that her instructions were not to consider any settlement whatsoever. The High Court stated that the decision of the Commissioner *"authored the stalemate"*. No one

should benefit from its own unlawful conduct, so stated **Makara J.**

[22] Counsel for the Commissioner argued in this Court that because of the failure to afford the 36 officers an opportunity to be heard, the decision should indeed have been set aside. However, the High Court should have stopped there and left it to the officers to sue the Commissioner for damages. This possibility was not presented to the High Court though.

[23] The respondents submitted that the promotion of the 36 police officers had not been cancelled, challenged, or set aside by a court. The High Court and this Court cannot effectively cancel the promotions.

[24] Counsel for the respondents submitted in this Court that the appeal must be dismissed on one ground, namely the dishonesty of the Commissioner. He pointed out that the memoranda of 6 and 13 July 2017 made the finalisation of the issue of the promotion and demotion of the 36 officers dependent on the outcome of cases 216 and 216B of 2017; and that the Commissioner had told the first respondent that he would try to promote them one by one. Yet, the Commissioner proceeded to appoint “*hand-picked*” others in those positions.

Analysis

[25] The 36 officers were neither given the opportunity to be heard before the memoranda of 6 and 13 July 2017, nor were the procedures prescribed for disciplinary proceedings in the Police Act followed. This would render any decision to demote them and withhold their salaries unlawful and thus null and void. As stated above, counsel for the appellants wisely conceded this.

[26] The argument on appeal that the “*duplicity*” of two people in one position would result in administrative and financial chaos, impossible to solve within the limits of relevant law, is not persuasive. Without speculating about the motive behind the memoranda of 6 and 13 July 2017, it can be safely stated that the Commissioner should have known that procedures prescribed in the Police Act and the requirements of natural justice had to be followed. He should furthermore have known that these had indeed not been followed before the two memoranda were issued. He told the first respondent that he could not honour the promotion because it had not been budgeted for; he indicated that he would attempt to assist the 36 officers individually; but he appointed others to the positions.

[27] When the High Court stated its appreciation for the practical difficulties presented by the situation and encouraged negotiations to find a solution, the Commissioner instructed his lawyers not to participate in any such attempt. And in this Court he argues that the High Court erred by ordering the very duplication which he

caused. To uphold the appellants' submission would endorse a clumsy apparent strategy to hold the court ransom.

[28] But was the promotion of the 36 respondents indeed cancelled? Were they demoted? If not, they are still on the ranks to which they were lawfully promoted. An order to reinstate their promotion would make little sense. The fact that their salaries have been withheld would be what they need relief on.

[29] The memorandum of 6 July 2017 stated that a decision had been taken to "hold in abeyance salaries of all Police Officers who have been promoted". It explicitly said that the memorandum did "not per se cancel" the promotions. The final outcome of cases 216 and 216B of 2017 would determine the validity of the promotions. Thus this memorandum did not convey a decision to cancel the promotion or demote the respondents, but rather to withhold their salaries.

[30] The memorandum of 13 July 2017 superseded the one of 6 July and stated that the officers, with immediate effect, "*cease(d) to hold the NEW ranks*", but "*pending the final decision of the court*" in cases 216 and 216B. From the wording of this memorandum it would seem that the demotion was still not final, because the outcome of the other cases was awaited. In the High Court judgment **Makara J** referred to these cases as "*of paramount significance*" in this matter. However, neither the judgment nor the

papers before this Court contain any reference to the outcome of the cases. There is also no indication of any further decision on the promotion by the Commissioner. The 13 July memorandum must be assumed to contain the final or at least most recent decision.

[31] The High Court acknowledged the “*circumspective terms*” of the memorandum in that it refrained from “*pronouncedly stating that the addresses were demoted*”. The High Court adopted “a contextual interpretation” though. The officers were “effectively demoted”. The promotion of other officers to the relevant ranks and the fact that the status quo still pertained supported this interpretation, according to the High Court.

[32] This approach seems reasonable and practical under the circumstances. The fact is that the officers have still neither received any retraction of the memorandum, nor their salaries. In this Court it was indeed argued on behalf of the appellants that the officers could not be accommodated administratively and financially on the ranks to which they were promoted. Their predicament has to be addressed. The exact status of the demotion decided on by the Commissioner would only effect the precise formulation of the relief granted, not the core of this Court’s decision.

Condonation

[33] The appellants filed this appeal approximately 16 days late, calculated from the delivery of the judgment on 15 May 2019. They applied for condonation. The application was opposed. The condonation application was argued together with the merits of the appeal, as the potential merits had to be considered together with the explanation of the lateness. The period of lateness was not long. From the above it is clear that the appeal could not be said to have no reasonable prospects of success. Thus condonation has to be granted.

Conclusion

[34] The Commissioner unlawfully decided to cancel the lawful promotion of the 36 officers and to withhold the salaries they were entitled to, according to the ranks to which they had been promoted. The appeal against the order of the High Court on the basis pleaded and argued must fail. It is tempting to amend the wording of the order to suit more accurately the prevailing circumstances. For example, if the respondents have indeed been demoted, it would make little sense to interdict the appellants from demoting them. The paragraphs concerning the salaries are repetitive. However, the thrust of the order is clear and the temptation is resisted.

Costs

[35] There is no reason why the costs of this appeal should not follow the result.

Order

[36] The following order is made:

- (1) Condonation of the late filing of the appeal is granted.
- (2) The appeal is dismissed, with costs.

DR J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I Agree

P T DAMASEB
ACTING JUSTICE OF APPEAL

I Agree

M H CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellants: Adv T Lebakeng

For the Respondents: Adv L A Molati