IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO: 11/2020

CONST CASE: 12/2018

In the matter between:

THE PRINCIPAL SECRETARY,
MINISTRY OF PUBLIC SERVICE **1ST APPELLANT**

ACCOUNTANT GENERAL **2NDAPPELLANT**

ATTORNEY GENERAL **3RD APPELLANT**

AND

MAKHAHLISO TSUPANE AND 15 OTHERS **RESPONDENT**

CORAM: DR.K.E. MOSITO P,
P.T. DAMASEB AJA,
DR. P. MUSONDA AJA,
DR. VAN DER WESTHUIZEN AJA,
T N MTSHIYA AJA

HEARD: 19TH OCTOBER 2020

DELIVERED: 30TH OCTOBER 2020

JUDGEMENT

Dr. P. Musonda AJA:

Summary

Constitutional Law- Discrimination- whether the two categories of Secretaries had the same status- Executive Secretaries being permanent and pensionable staff- Ministerial secretaries being contract staff whose contracts are terminable by the termination of a Minister's position or regime change- whether differential treatment comes to this Court with a sense of Constitutional invalidity- the test is identification of objectively determinable characteristics of the difference in conditions of service.

Introduction

[1] We refer to the parties as they were in the court a quo. The Applicants are employed by the Government of Lesotho as Executive Secretaries .They are attached to the offices of the Attorney General, the Judges of the High Court and Court of Appeal. Alongside the position of Executive Secretary there exists what are called Ministerial Secretaries. These cadres shared the same grading in terms of emoluments.

Factual Matrix

[2] On the 11th April 2007, the Ministry of Public Service (the 1st Appellant issued a circular titled: RE; **OFFICES OF THE MINISTERS AND ASSITANT MINISTERS PREVILEGES OF PERSONAL STAFF**. The final result of the circular was to upgrade the position of Ministerial Secretaries from grade F to G. The Executive Secretaries were not included in that up-grading.

[3] Aggrieved by such exclusion, the Applicants mounted a constitutional challenge in the court a quo claiming that their exclusion violated the provisions of section 18 and 19 of the Constitution of Lesotho. They sought a declaration to that effect .The Applicants prayed that the court order the Respondent to forthwith upgrade their position equal to that of Ministerial Secretaries with effect from 2nd March 2007,being the date when the Ministerial Secretaries upgrading came into effect and the payment of arrears from that date. They alleged that they were being discriminated against because the functions of Ministerial Secretaries are the same as those of Executive Secretaries of the Attorney General and the

Judges, so are the entry qualifications. The Respondents in the court a quo opposed the application.

Applicants' Case in the Court a quo

[4] The founding affidavit was deposed by Makhaiso Julia Tšupane, which affidavit was supported by the other Applicants. She averred that generally the duties of an Executive Secretary entail production and distribution of documents, mail processing and records management, office Management, organization of office meetings, conference and official trips and visits, office security, improvement of Secretaries' services and dissemination of information in order to provide effective administrative support.

[5] The functions and duties of a Ministerial Secretary are the same as those of an Executive secretary. The entry requirements are also similar. Before the issuance of the circular, both positions of Executive Secretary and Ministerial Secretary were graded at F.

[6] The upgrading of Ministerial Secretaries from Grade F to G, effectively promoted Ministerial Secretaries to a Grade higher than Executive Secretaries.

[7] To date the Applicants remain in Grade F and that was the nub of their constitutional challenge.

The Respondents' Case in the Court a quo

[8] Tšeliso Lesenya, the Principal Secretary in the Ministry of Public Service, which issued the circular which is subject of the constitutional challenge, swore the answering affidavit.

[9] He averred that there was a functional difference between Ministries Secretaries and Executive Secretaries. The main differences were :

(a) The Ministerial Secretaries, instruct messengers to collect cabinet papers for Ministers for information and preparation of cabinet meetings,
(b) They have a duty to observe media remarks /criticism directed to the Ministry and constituency and they notify honorable Ministers for appropriate action or information
(c) They check parliament papers and forward them to the personal aide for the Minister's response ,and
(d) They operate a reminder system for the Honorable Ministers to enable relevant action to be taken.

[10] According to the Principal Secretary Lesenya, it became therefore clear that in executing their duties, the Ministerial Secretaries deal with non-office related duties. The deponent cited the dealing with cabinet material, observance of the behavioural pattern in the media directed to particular Ministries and constituencies. The Ministerial Secretaries' report to the Ministers and Heads of departments. They

instruct messengers and deal directly with personal aides. In his view that was the justification that their duties were wide-arranging, broad and they deal with multiple people. Key amongst the duties of the Ministerial Secretary is to use his/her utmost exertions to promote the interest of the Minister and the Public service.

[11] He denigrated Executive Secretaries as only dealing and responsible to Judges and their scope is limited. The Executive Secretaries cannot be compared as they are employed under permanent and pensionable terms. They have valuable contracts as they would retire at the age of sixty. They have permanently been in the service since 2007, while Ministerial Secretaries have changed once there is regime change .They cannot therefore claim discrimination only on the issue of the grading while silent about consequential benefits attached to their terms of engagement. There was nothing wrong if they remained in Grade 'F' as it is in accordance with their terms of engagement.

[12] The entry qualifications of Executive Secretaries are that they must have a diploma in secretarial studies plus ten (10) years work experience, while Ministerial Secretaries may show typing production and knowledge of secretarial duties. They must be nominated by the Ministers concerned. So the entry qualifications are drastically different from the position of Executive Secretary and cannot be said to be the same.

The Court a quo

[13] The learned judge in the Court a quo referred to the Constitution of Lesotho Section 18(3) couched in these terms:

> *"Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status whereby persons of another such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description".*

The learned Judge went on that section 18(2) proscribes discrimination by any person acting by virtue of any written law or in the performance of the functions of any public office or any authority.

[14] It was the view of the court *a quo* that the words "other status" were expansive as they covered other descriptions beyond colour, sex etc. The case of ***Tseou v Minister of labour and Employment,***[1]where it was held that:

[1] 2007 LSHC 141

> *"The definition itself contains the phrase other status which in my opinion, was meant to cover other criteria not listed therein or which might not have been foreseeable at the time the definition was given."*

[15] Status is defined in the concise oxford Dictionary, as meaning relative standing or professional standing. The applicants and Ministerial Secretaries share the same status i.e. they are secretaries though attached to different offices. They perform the same functions not to mention that Executive Secretaries have additional responsibility of supervising subordinate staff, conducting induction courses for them, identifying their training as well as appraising their performance as shown in their Job description annexed to the affidavit of Mr Tšeliso Lesenya. Ministerial Secretaries have nevertheless been accorded the privilege and advantage of a higher grade than Executive Secretaries. This is prima facie discrimination and therefore breach of **section 18(2) and (3) of the Constitution** which proscribe discrimination, so the learned Judge reasoned.

[16] For differentiation to be constitutionally valid must pass the test laid down in ***Prinslo v Van der Linden***,[2]

> "*In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate and arbitrary manner or manifest naked preferences that serve no legitimate Governmental purpose, for that would be inconsistent with the rule of law and the foundational premises of the state".*

[2] 91997) (3) SA 1012

[17] The learned Judge heavily relied on the decision of this Court which he perceived to be at all fours with the present application in ***The Ministry of the Public Service and Another v Molefi Kome and Others***[3].The learned judge held the circular to be discriminatory.

Appellant's case

[18] Aggrieved by the decision the Respondents noted an appeal to this Court. They filed the following grounds, the Court a quo erred in law and misdirected itself by:

(i) Declaring that duties are similar, disregarding the material differences by declaring that the Executive Secretaries and Ministerial Secretaries are similarly circumstanced and therefore ought to be treated equally ,while they are materially different;
(ii) Declaring that the Public circular No 4 of 2007 is unconstitutional despite the fact that it seeks to promote fairness between permanent and pensionable employees and employers under contracts that are tied to the contract of the Minister;
(iii) Ordering that the Executive and Ministerial Secretaries be of the same grade despite the differences in the duration and security of tenure, and ;

Declaring that the two contracts are similar thus opening flood gates of suits against the Government, as this means Ministerial Secretary can therefore claim permanent and pensionable contract as well as independence from the Minister's contract.

[3] C of A (CIV) NO 44/2013 (2014) LCSA 5 (17TH April 2014)

[19] The Respondents' case for differentiation is anchored on the fact that Ministers Secretaries are on contract and perform at the Minister pleasure who is their master, they are paid 25 per cent gratuity at the end of their tour of service. They argue that the Applicant's case is based on the Aristotelian concept equal treatment (formal equality) which is usually summed up as: likes should be treated alike. The converse would be: unequals should be treated unequally .In ***Andrews v Law Society of British Columbia***.[4]The supreme Court of Canada restated "the Aristotelian Concept of equal treatment (formal equality) as things (people) that are alike should be treated alike, while things (people) that are unalike should be treated unalike in proportion to their unalikeness".It should be noted that Lesotho's Constitution embraces sustentative equality and not formal equality, so it was argued and in support the decision of ***Tsepe v IEC***,[5] was cited.

[20] It was submitted that, that was a dispute of fact as to the existence of material differences between the Ministerial Secretaries and Executive Secretaries. The applicants do not address them. These being motion proceedings, the version of the Respondent should be accepted as correct, ***Lesotho National Olympic Committee v Morolong***,[6]was cited as authority for that proposition .

[4] (1989) 1 SCR 143
[5] C of A (civ) No 11/05 at para 22
[6] (2000-2004) LAC 449 at 452

[21] The Respondents argue that the circular did not violate section 18 of the Constitution that is why the applicants optionally relied on "other status". This Court could only rule in their favour if there was a finding that, they were afforded differential treatment. The phrase "or other status" in Section 18(3) was interpreted in ***Timothy Shabane and Others v Specified Offices Defined Contribution Pension Fund,***[7]

> *"Status is itself is not a prohibited ground of discrimination and that in the context ,"or other status" means an attribute related to status that is equivalent or analogous to, but not the same as the specified grounds mentioned .These might for example ,be material status or sexual Orientation".*

[22] In ***Prinsloo v Van der Linde***, supra, the South African Constitutional Court acknowledged that:

> *"It must be accepted that, in order to govern a modern country efficiently and to harmonize the interests of all its people for their common good, it is essential to regulate the affair[s] of its inhabitants extensively. It is impossible to do so without differentiation and without classification which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation".*

[7] COFA (Civ) No.4 /2016 Delivered on the 12th day of may 2017 at para 22.

Prinsloo V van der Linde,supra was cited with approval by this court in the ***Road Transport Board V Northern Venture Association,[8].***

[23] In a much simple language, the ***Labour Court in Ntai V SA Breweries***, [9]held that were differentiation only becomes discrimination when it is based or linked to an unacceptable ground such as race.

[24] Circular No 4 of 2007 could not be said to violate section 19 of the Constitution, which deals with equality before the law and to the equal protection of the law. The words, "the law" in section 19 denotes a situation whereby a person is complaining or alleging that a statute creates inequality. The words refer to legislation (Acts of Parliament) subsidiary legislation (regulations and or legal notices, Customary law and any other unwritten law (Common law).The circular is not law, so it was argued. Regard must be had to the nature, scope and object of the impugned legislation apart from other relevant factors, the case of ***LNIG V Nkuebe***[10]was cited in support.

[25] It was valiantly argued that there existed a reasonably connected legitimate purpose to the differentiation. It was the core argument that there was a distinction between the functions, duties and entry requirements between the Executive Secretaries and Ministerial

[8] (2001) 22 11J 214 (CC)
[9] C of A (CIV) No 10/ 2005 para. 4
[10] 2000-2004 LAC 877 at para 17-18.

Secretaries. The latter were upgraded from F to G in light of the extra duties and responsibilities that they perform.

[26] In a nutshell the Respondents prayed that we make a finding that employment contracts of Executive and Ministerial Secretaries are materially different. Their differentiation was therefore constitutionally valid.

[27] Advocate Nthontho in his supplementation of the Appellants Heads reiterated, the distinction between the two and was of the view that the matter should have been brought in the High Court sitting as such, not as a constitutional Court.

The Respondents' Case

[28] The applicants' case as stated in their founding affidavit in the court a quo was that the Respondents' circular No 4 of 2007 had violated their constitutional rights provided in sections 18 and 19 of the Constitution, which forbid unequal treatment and discrimination.

[29] It was the Respondent's case that circular No 4 of 2007 was struck down as being unconstitutional for violating the provisions of section 18, 19 and 26 by this Court in the case of ***The Ministry of Public Service and Another V Molefi Kome and others***[11].This was a case where chauffeurs of the Honourable Ministers were upgraded from Grade D to E and later to Grade F, until the Judges chauffeurs remained on Grade D. It was and is the applicant's case that their

[11] C of A (Civ) No 44/2013

case is similar to that of the Molefi and others as it relates to them, circular No 4 of 2007 should suffer the same fate.

[30] The court a quo found that the case of ***Kome and Others V Ministry of Public Service Supra and Others Supra*** was a binding precedent in the present case. The argument by the Respondents that the court was dealing with a mere differentiation as explained in the matter of ***Prinsloo V Van Der linde,*** *supra,* was rejected by the court a quo.

[31] The Respondents attack the first ground of appeal, whose assumption is that there was a declaratory order sought in the court *a quo* that Ministerial Secretaries and Executive Secretaries were similarly circumstanced. This was the finding of the court a quo, so the Respondents argue. The functions of Executive and Ministerial Secretaries are the same and that this is underscored by the fact that all along they received equal treatment by the Ministry of Public Service until the advent of circular No 4 of 2007, which regulate in an arbitrary manner or manifestly 'make preference' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to relate to a defensible vision of the public good as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation ,the new constitutional order constitutes 'a bridge away from a culture of authority…..to a culture of justification.

Accordingly, before it can be said that mere differentiation infringes section 8, it must be established that there is no rational relationship between differentiation in question and the government propose, which is proffered to validate it. In absence of such rational relationship the differentiation would infringe section 18, it is not a necessary condition for the differentiation.

[32] The wording of section (18)3 of the Constitution on discrimination does not make mention of people being similarly circumstanced as the Respondents complain in their final ground of appeal it would be difficult for the Respondents to deny that Ministerial and Executive Secretaries perform similar duties, though for different authorities, Judges on one hand and ministers on the other.

[33] The Court was asked by the Applicants to analyse the Constitutional Court of South Africa's in ***Prinsloo***, supra, in order to determine whether the justification proffered in the present case by the Respondents passes the constitutional muster. The Court in that matter said:

> *"It is convenient for the purposes to refer to the differentiation presently under discussion as mere differentiation. In regard to mere differentiation the constitutional state is expected to act in a rational manner .It should not still constitute unfair discrimination of that further element ,referred to above ,is present (emphasis added)".*

[34] The Applicants questioned what legitimate government purpose is served by paying Ministerial Secretaries more than Executive

Secretaries while they perform substantially similar functions. The primary consideration in deciding to extend preferential treatment to the Ministerial Secretaries to the exclusion of the applicants is because the former serve a "Minister" who is a politician so the applicants submitted.

[35] It cannot be said that Ministerial Secretaries serve a shorter period in a country like Lesotho where it is not unusual that someone can be a Minister for a period of 15 to 20 years. Therefore the length of service cannot be a justification.

[36] We were urged to follow our decision in ***Ministry of Public Service and Another V Molefi Kome*** and others *supra*, and dismiss the appeal. When dealing with costs we were asked to follow the ***Biowatch Trust V Registrar Genetic Resources and Others*** [12]which we have followed on several occasions.

[37] The issues this appeal raises:

(i) Can this court depart from its own decision in ***The Ministry of Public Service and Another V Molefi Kome and others***, *supra*, which decision declared circular No 4 of 2007 as unconstitutional.

(ii) Was there a rational basis for the differentiation for it to pass the constitutional muster?

[12] The Supreme court overruling constitutional precedent September 24 2018 RU5319 Every GRS Report .com

Consideration of the appeal

[38] The Lesotho Court of Appeal as the apex Court occupies analogous position like Supreme Courts in the Region. When considering whether to depart from its previous decision or decisions, this Court is beholden to universal consideration by similar courts.

[39] The Court's treatment of precedent implicates longstanding questions about how the Court can maintain stability in the law by adhering to precedent under the doctrine of stare decisis. While correcting unworkable standards, abandon legal doctrines or outdated factual assumptions.

[40] The United States Supreme Court has shown less reluctance to overrule its decisions on constitutional questions than its decisions on statutory questions. The court nevertheless stated that:

> "*There must be special justification or at least strong grounds that goes beyond disagreeing with a prior decision's reasoning to overrule constitutional precedent. The court has considered several "prudential and pragmatic factors "that seek to foster the rule of law while balancing the costs and benefits to society of reaffirming or overruling a prior holding."*

[41] The decision in The ***Ministry of Public Service and Another v Molefi Kome and others*** is a constitutional decision by this court. The rationale of the apex courts not being averse to revisiting their decisions in constitutional litigation was predicatively made by former Supreme Court of Justice Khanna, when he said:

> *"There is no generation, which has a monopoly of wisdom to irreversibly bind other generations. If a constitution cannot bend it will break."*[13]

His colleague Justice Vassiliades, speaking in 1960 about constitution making in Cryprus said:

> "*It is a sin to ignore time and human circumstance in Constitutional making."*[14]

[42] The point being made is that contemporary constitutional values should inform constitutional making, constitutional litigation and the making of laws and regulations thereunder?

[40] However I come back in a moment after a discussion whether the differentiation was constitutionally valid.

[43] The Constitution of Lesotho guarantees equality and forbids discrimination on a number of grounds like race, gender, religion etc. it is an undeniable fact that a list of other prohibited grounds, which were not captured by constitutional designers may emerge. The contemporary debate is which new grounds should be recognized as prohibited grounds in order to accommodate the contemporary realities. This is a seminal question. Could it be said that treating differently circumstanced employees is discrimination within the context of section 18.

[44] The Applicants' case as pleaded is that of constitutional invalidity Circular No 4 of 2007 because secretaries of the same

[13] Hans Raj Khanna-Wikipedia
[14] Goodreads.com

status are discriminated, the High Court stated that the two categories were of the same status. It is that finding which led to the conclusion that the Executive Secretaries were discriminated. It is the correctness of that finding which has to be interrogated, given the conditions of service of the Ministerial Secretaries and Executive Secretaries.

[45] In ***Harksen v Lane No and others***,[15] the Constitutional Court of South Africa held that:

> *"the enquiry as to whether differentiation amounts to unfair discrimination is a two-stage one. Firstly does the differentiation amount to discrimination? If it is not a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner*
> *(b) if the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to be on a specified ground, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the Complainant. The test of unfairness focuses primarily on the impact of the discrimination on the Complainant and others in his her situation.*

[46] The passage in ***Harksen***, *supra*, appear to be a distillation of ***Prinsloo v Van der Linde and Another supra, President of the Republic of South Africa and Another v Hugo,[16] Larbi-adam and Another v Members of the Executive Council for Education And***

[15] (1998) SA 300 CC.
[16] 1997 12 BCIR 1655 (CC).

Another (North-West Province).[17] In the ***City Council of Pretoria v J Walker***[18]**,** what Langa D P, was saying, is that it is easy if the discrimination is based on prohibited grounds to so hold, because unfairness is presumed. But when the ground is not specified the Applicant has a hill to climb as he/she must demonstrate that it impairs human dignity or is pejorative, Goldstone J says:

> *"The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparable serious manner… in the final analysis it is the impact of discrimination on the Complainant that is the determining factor regarding the unfairness of the discrimination."*[19]***The City Council of Pretoria v Walker supra.***

[47] The differentiation was based on the identification of objectively determinable characteristics of different conditions of service and not on status. The Minister's Secretaries have no security of tenure, they are paid gratuity, no life pension; they come and go with the regime. It may be argued that their selection is not merit-based or in accordance with the existing Public Service Act and the Regulations made thereunder, which may be a matter for administrative law. Their case stands and falls with their pleadings, which sought the constitutional invalidity of the upgrading of Ministerial Secretaries. The Ministerial Secretaries are disadvantaged. Can it therefore plausibly be argued that the preferred rationale is unintelligible and

[17] Case CCT 8/97
[18] Para 38
[19] Ibid

unconnected to a legitimate governmental objective. This Court thinks not.

[48] I am far from being persuaded that the issue was one of discrimination at all. I agree with the Appellants the Ministerial Secretaries upgrade was based on the identification of objectively determined characteristics of different conditions of service. This case is distinguishable from ***The Ministry of Public Service and Another v Molefi***, supra**.**

Costs

[49] In Constitutional litigation, the ***Biowatch Trust v Registrar Genetic Resources and Others***[20] has become part of our costs jurisprudence in the Kingdom. I therefore follow the ***Biowatch*** principle, and make no order as to costs.

Order

[50] The appeal is allowed and the Order of the Court a quo is set aside.

DR P MUSONDA

ACTING JUSTICE OF APPEAL

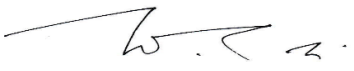
[20] (2009) (6) SA 232 (CC)

I agree

P T DAMASEB

ACTING JUSTICE OF APPEAL

I agree



N MTSHIYA

ACTING JUSTICE OF APPEAL

Van der Westhuizen AJA:

Introduction

[51] Life is hard. And, it is not becoming any easier for ordinary hard-working people to put milk and bread on the table and to carve out a decent living. The unhappiness of the executive secretaries, upon

being informed that only the ministerial secretaries were going to be upgraded, is understandable.

[52] I agree with the conclusion of my esteemed brother, Dr Philip Musonda AJA, that the appeal must be upheld and that no costs should be ordered.

[53] Furthermore, I agree with the judgment of Musonda AJA that the differentiation between the two categories of secretaries did not amount to discrimination as forbidden in the Constitution of Lesotho.

[54] However, in my respectful view, if a few steps are taken backwards, one does not have to reach the question as to whether the differential treatment was based on objectively determined factors and whether it was rational. Thus I present a few thoughts concerning this case, within the context of the law regarding equality and discrimination in Lesotho and elsewhere in jurisdictions with comparable legal systems and constitutions.

[55] As stated above, one has some sympathy with the plight of the executive salaries. The instinctive response might well be that they were discriminated against - perhaps even because of a desire to afford advantages to the executive (for whom the ministerial secretaries work) over the judiciary and attorney general (for whom many of the executive secretaries work), or for whatever other reasons one's suspicions may be based on.

[56] However, the right to equality and the prohibition of discrimination should not be invoked as a sledgehammer to settle

every dispute based on perceived unfairness or injustice Equality is protected in several international human rights instruments and in the constitutions of many countries. This protection follows from centuries of slavery; Nazism; colonialism; apartheid; male chauvinism and patriarchy; the marginalization of people with disabilities; dangerous prejudices; the exploitation of differences in order to gain material wealth at the cost of others; and oppression. Prohibited discrimination cannot be the judicial niche for disputes that have little to do with the reasons for the protection of equality.

Administrative law

[57] The decision of the executive recorded in the circular might of course have implications for administrative law and other areas of law. For example, if the executive secretaries were not given an opportunity to state their case, *audi alteram partem* might not have been adhered to. The decision-maker must have applied its mind and acted rationally and in good faith. If it did not, for example by not doing a proper job evaluation, it might not have done so. And, of course, the decision-maker had to have the legal authority to make the decision. Otherwise it would have acted *ultra vires*.

[58] The executive secretaries could have taken the decision to upgrade the ministerial secretaries and not them on review. Whether they would have been successful, this Court cannot reach a conclusion on. But they did not choose that route. They approached the High Court under the banner of equality and unconstitutional discrimination.

Discrimination

[59] As indicated above, discrimination is not an overarching catch-all for dissatisfaction and all forms of illegality. Our decisions and other actions differentiate between people all the time. Not all differentiation is constitutionally forbidden discrimination. The South African Constitutional Court clearly stated this in ***Prinsloo v Van der Linde***, followed by this Court in ***Road Transport Board v Northern Venture Association***, quoted and referred to in the judgment of Musonda AJA.

Which ground?

[60] The first question in any discrimination matter has to be: Why did the differentiation happen? What was it based on? On what ground was differentiated? In order to contain forbidden discrimination within the purpose of the protection of equality and international human rights instruments, constitutions have traditionally "listed" a number of "forbidden grounds". Race, colour, sex, gender, disability and religion are well-known examples. For all these there are clear and strong historical reasons.

[61] However, life is not static. From time to time new patterns of harmful discrimination emerge. Therefore, in most especially modern constitutions the list of forbidden grounds is not a "closed" one. Space for the recognition of further grounds is created by different formulations. For example, section 9(3) of the Constitution of South Africa, Lesotho's neighbour, states that discrimination may not take

place *"on one or more grounds, including race, gender, …".* The *one or more* is aimed at the fact that grounds can overlap and that a litigant often finds it difficult to show whether she was discriminated because of, for example, her gender or her race. The term *including* serves to keep the list open. Section 15(1) of the Canadian Charter of Rights and Freedoms uses the words "*in particular"* for the same purpose.

[62] In several jurisdictions courts have been confronted with the question as to which grounds could be recognized in addition to the ones already included. In doing so, it has been argued that the recognized grounds all relate to "immutable characteristics", in other words characteristics that one cannot change, like your race. Thus any additional ground must be "analogous" to the already recognized ones. This test is not unproblematic, inter alia because it is questionable whether one can change your religion and people indeed change their sex. So, the more contemporary test is whether you are being discriminated against based on a characteristic that you cannot change, or ought not to be forced to change, because of your human dignity.

[63] The first hurdle in the way of the executive secretaries is to show which forbidden ground in the Lesotho Constitution applies to the treatment they received. Section 18(3) mentions race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. Clearly the first nine grounds do not apply. It was argued that they were discriminated against because of their *status.*

Status?

[64] The High Court stated that the two categories of secretaries had the same status, and then proceeded to find that the executive secretaries had been discriminated against because of their status. This statement either resulted from a grammatical or typographical error, or from a fundamental misdirection. In order for discrimination to enter the picture, their status had to be different. Black people cannot be discriminated against in favour of other black people based on race; women cannot be discriminated against in favour of other women based on sex; and Christians cannot be discriminated against in favour of other Christians based on religion. Discrimination based on race can happen between black and white people; on sex between women and men; and on religion between Christians and Muslims, for example.

[65] What was the status of the secretaries? How did the status of the executive secretaries differ from those of the ministerial secretaries? Neither the respondents nor the High Court made that clear. Normally the concept of *status* applies to, for example, marital status. In the workplace married women are often discriminated against because of the fear that they will get pregnant. In class-based societies social status, such as to which cast one belongs, may be relevant. Whether one was born inside wedlock, or outside - and thus "an illegitimate child" - is another example. Section 18(3) specifically uses the words *"birth or other status …".* It links *status* to *birth* and continues: *"… whereby persons of another such description are*

subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description".

[66] Even if the two categories of secretaries belonged to different status groups, contrary to the expressed view of the High Court, I am unable to detect any status that would fall within the meaning of section 18(3). The fact that their contracts differed did afford them two different constitutionally recognized kinds of status on which discrimination is forbidden. Status based on the kind of one's employment contract is very far from "analogous" to the grounds recognized in section 18(3).

[67] Thus the executive secretaries failed to clear the first hurdle in their way. They did not bring themselves into the ambit of the equality clause of the Constitution. On this ground alone, the appeal must succeed.

Differentiation or discrimination?

[68] In my respectful view, it is unnecessary to proceed to the question whether the differential treatment of the two categories of secretaries amounted to constitutionally prohibited discrimination, or was based on rational distinctions. As stated, the ground of the alleged discrimination was not established. However, should one get there, I agree with the conclusion reached by Musonda AJA, largely for the reasons advanced in his judgment. The upgrade of one of the two groups of secretaries was based on the identification of

objectively determined conditions of employment in terms of their contracts. The most relevant might well be the fact that the ministerial secretaries do not enjoy the same degree of job security that the executive secretaries do.

Conclusion

[69] Therefore I agree that the appeal must be upheld, with no costs order – as stated above.

DR J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

DR KE MOSITO

[70] I agree with the order proposed by my brother Musonda AJA. The reasons for my agreement are those ably reflected in paragraphs 66 and 67 of the judgment of my brother van der Westhuizen AJA. In addition, the pleadings themselves fell short of establishing discrimination against Executive Secretaries.

DR KE MOSITO

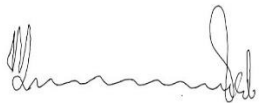
PRESIDENT OF THE COURT OF APPEAL

I agree

P DAMASEB

ACTING JUSTICE OF APPEAL

I agree



DR P MUSONDA

ACTING JUSTICE OF APPEAL

I agree

N MTSHIYA

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: MR K. NTHONTHO

FOR THE RESPONDENTS: MR M RASEKOAI