IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 17/2020**

(LAC /REV /15/2019)

In the matter between:

MATSOSO NTSIHLELE & 127 OTHERS **APPELLANT**

AND

DIRECTOR OF ELETIONS **1ST RESPONDENT**

INDEPENDENT ELECTORAL COMMISSION **2ND RESPONDENT**

MINISTRY OF PUBLIC SERVICE **3RD RESPONDENT**

MINISTRY OF FINANCE **4TH RESPONDENT**

CLERK OF NATIONAL ASSEMBLY **5TH RESPONDENT**

COMMISSIONER OF POLICE **6TH RESPONDENT**

ATTORNEY GENERAL **7TH RESPONDENT**

CORAM: K. E. MOSITO, P
M. H. CHINHENGO, AJA
N.T MTSHIYA AJA

HEARD: 21 OCTOBER 2020

DELIVERED: 30 OCTOBER 2020

Summary

Review application dismissed by Labour Appeal Court- appellants appealing to this court- this court confirming decision of court below.

JUDGMENT

MTSHIYA AJA

INTRODUCTION

[1] This is an appeal against the decision of the Labour Appeal Court delivered on 20 May 2020.The court dismissed the appellants' review application with no order as to costs.

[2] On 9 December 2019 appellants filed a notice of motion on an urgent basis in the Labour Appeal Court seeking the following relief:

> *"1. A rule nisi be issued and made returnable on the time and date to be determined by the court calling upon the respondents to show cause if any, why the orders sought herein shall not be granted.*
>
> *2. The rules relating to the modes of service and time limits provided for in the rules are dispensed with due to urgency of this matter.*
>
> *2.1 The first respondent be interdicted, prohibited and restrained from*
>
> *2.1.2 Proceeding with the implementation of the new organizational structure formulated by the management task team of 1st respondent*

and or appointing any person to the created positions envisaged in the new structure pending finalization hereof.

2.1.3 Taking any steps in relation to the performance of any activity pursuant to the new organizational structure pending finalization of the matter.

2.1.4 An order directing the 1st respondent to dispatch the original copy of the organizational structure executed by Dr Zabala,documents incidental and connected with the Dr Zabala organizational structure to this court seven days after the service of this order.

2.1.5 An order directing 1st respondent to dispatch the transcribed record of proceedings in respect of the deliberations which proceeded before the appointed Task Team established in September 2019 to this Court seven days after the service of this order.

2.1.6 An order directing that the tribunal be appointed to investigate the fitness of the 1st respondent to hold office in view of perjured evidence she related to Parliament (Public Accounts Committee) and before the constitutional court in the matter between the same parties.

3. It be declared that the positions contemplated in the "new Structure" be declared null and void and of no legal force to the extent of discriminating against the Applicants contrary to section 18, 19 and 26 of the Constitution.

4. An order reviewing and setting aside the decision of the 1st respondent staling the implementation of the structure executed by Dr Griffith Zabala to the extent of taking away the benefits of applicants contrary to section 17(1) of the Constitution.

5. *An order declaring the invalidity of the decision of the 1st Respondent stalling the implementation of the structure executed by Dr. Griffth Zabala to the extent of taking away the benefits of applicants contay to section17(1) of the constitution.*

6. *A declaratory order that Applicants are entitled to the benefits and salaries commensurate to their appointments to positions authorized in the structure of Dr Zabala.*

7. *That prayer 2-4 operate as interim orders with immediate effect and will remain in full force and effect until the final determination of this application and if the rule nisi should be confirmed also thereafter.*

8. *Granting further or alternative relief."*

[3] As already stated in the first paragraph herein, on 20 May 2020, the court a quo dismissed the review application with no order as to costs. The appellants now appeal against that decision and their grounds of appeal are listed as follows:-

"1. The court a quo ignored or mischaracterized all the relevant evidence and materials referred to in the annexures which provide the normative substratum for interpreting sections 149 of the National Assembly Electoral Act 14 of 2011 and section 15 of the Interpretation Act 19 of 1977.

2. The court a quo erred in affording the 1st Respondent an advantage of acting unlawfully in implementing an impugned structure when the employment of Appellant by the predecessor of 1st Respondent remains a lawful administrative act capable of producing legally valid consequences for so long as the decision to do so employ them pursuant to the structure of Dr. Zabala is not set aside in proceedings for judicial review. There are inherent contradictions on the acceptance and otherwise of offers of employment to newly graded positions to which the court a quo failed to address itself with regard to the case of Mr. Maphasa Mokhochane who benefited from the structure of Dr. Zabala.

3. The learned Judge in the court a quo misconceived the fact that appellants consented to transfer of their contracts from the public service in favor of an upward mobility of employment to serve in the positions and

job specifications created in the structure of Dr. Zabala which positions appear in the offer of employments attached to the founding affidavit as well as supporting affidavits.

4. The learned judge in the court a quo erred and totally misconceived the factual matrix providing the context in which the ministries of Finance and Public Service approved the structure of Dr. Zabala and which the present Director of Elections is challenging on the basis of hearsay evidence.

5. The learned judge erred and misdirected herself by making credibility findings to the effect that the impugned decision of the present Director of Elections seeks to continue with the exercise of achieving the transition of staff in terms of the NAEA.

6. The learned judge in the court a quo erred and misdirected herself in holding that the decision of the Director of Elections dated 16th April 2018 of introducing another structure running parallel with the structure of Dr. Zabala is reasonably necessary to carry out the intentions of the parties in terms of the NAEA five years after the predecessor of the 1st Respondent had approved the structure of Dr . Zabala.

7. The court a quo erred in holding that Appellants have no rights accruing under the Zabala structure contrary to overwhelming evidence on the approval of the structure of Dr. Zabala from both the Ministries of Finance and Public Service.

8. The court a quo erred in downplaying the fact that IEC itself had resolved that all staff appointments based on new grades and their concomitant salary levels started being effective from the 1st April 2013 and had been carefully considered before the Ministry of Finance of Public Service sought

concurrence of the Ministry of Finance in order to finalize the necessary approvals in line with the financial year and budget that would be submitted to the Ministry of Finance.

9. The court a quo erred in holding that the appointment letters were simply intended to express intention of the management to retain Appellants so that they could make election to either remain with the Public Service or to opt for migration to the Independent Electoral Commission. The judge had no basis and gave no reasons for the rejection of the Appellants' version that they migrated to IEC by operation of the law or for preferring the 1st Respondent's version who was not working for IEC at the time.

10. The court a quo erred in not undertaking the necessary evaluation of the rival allegations made by the parties on the approval of otherwise of the structure by Dr. Zabala on the basis of the documentary material presented in evidence. This she did notwithstanding the fact that IEC is withholding some of the documents including the original copy of the Zabala structure and the acceptance letters.

11. The court a quo erred in holding that the impugned organizational structure does not take away the rights and opportunities presents to Appellants by the structure of Dr. Zabala.

12. The court a quo erred in failing to give full faith to documentary evidence emanating from the predecessors of 1st Respondent, records from the Ministry of Finance and Public Service, record and proceedings of Mr. Motlohi Sekoala in the mediation process. The extent to which she deviated from presented evidence is so fundamental, irreparable and manifestly untenable.

13. The learned judge in the court a quo erred and misdirected herself in conflating and confusing different matters; when dealing with consultation, she justifies the impugned structure on the basis of the consultations of Dr. Zabala which preceded the structure of 1st Respondent's management tasks team of 2018.The evidence and admissions are overwhelming that there were no consultations conducted in respect of the impugned structure.

14. The court a quo erred in misunderstanding the law of evidence regarding the evidence of 1st Respondent who testified to events which occurred prior to her employment in the IEC.

15. The Appellants reserve their right to the additional grounds of appeal."

Brief Background Facts

[4]In its introduction, the Court a quo correctly captures the common cause background facts of this case. l cannot do any better than repeat the said background facts herein as presented. The court a quo gives the background fact as follows:

" After the passing of the National Assembly Electoral Act of 2011 (NAEA), the IEC commissioned a consultant, Dr Zabala to design a new organizational structure for the IEC whose aim was to attain the institutional and functional independence of the commission in compliance with the Act. After completion of the excise, the commission then submitted the proposed new structure and the concomitant salaries structure to the Ministry of Public service which in turn approved the structure with certain adjustments. This structure was however never implemented. In 2018, the new management through the incumbent Director of Elections then reviewed the initial proposed structure. Aggrieved by this decision, the

applicants launched a constitutional case. The Court declined to exercise its constitutional Jurisdiction in terms of section 22 (2) (b).

[4] The applicants appealed this decision in ***Matsoso Ntsihlele and 125 others v IEC and others C of A (CIV) No 57/2019.****The Court of Appeal directed that the applicants should ventilate their claim before the relevant Labour tribunals or Courts. This background is common cause"*

Appellant's Case

(5) It is important to note that in this judgment the original Zabala structure is referred to as appendix 1 and the reviewed management structure as appendix 3.

(6) At the hearing of the appeal, the appellants' Counsel indicated that, notwithstanding the 14 grounds of appeal listed in the notice of appeal, and reproduced in paragraph 3 of this judgment, the matter was being argued mainly on the basis of the following two grounds:

a) The 1st respondent acted irrationally and unreasonably in substituting the Zabala structure (appendix 1) with a new Management Structure (appendix 3); and

b) The action of the 1st respondent was illegal in that the appellants were not heard in violation of the *audi alteram partem* rule

[7] The appellant's case, in the main, is contained in the founding affidavit of Matsoso Ntsihlele who describes himself as a Constituency Electoral Officer. The affidavit was sworn to on 3 November 2019. He attached supporting affidavits from 121 of his fellow appellants.

The appellants correctly state that the 2nd respondent engaged Dr Griffth Zabala to design and recommend a new organizational structure for it. They then allege that a new organizational structure, the original Zabala structure, was then approved and that they were offered employment under that new structure. The dispute then arose when the management of the 2nd respondent introduced a new structure without consulting them.

[8] The appellants aver:

> "5.3 For the information of this Honourable Court, we performed well in the interviews. We were accordingly appointed to new positions on terms and conditions relating to employment under the structure executed by Dr. Zabala. According to our letters of appointment, we assumed new positions effectively from 1st April 2013.In view of the appointments to the newly upgraded positions, we continued to serve the organization .The structure of Dr. Zabala was approved and we in law acquired property rights from it. Mr . Mphasa Mokhochane was essentially paid a salary commensurate to the new structure and we expected the same treatment.
>
> 5.4 The present Director of Elections, instead of implementing the approved structure of Dr. Zabala, promoting it and remunerating us according to it, she actually formulated her own structure in 2018, created positions envisaged therein with different benefits which have the effect of diminishing our entitlements as foreshadowed in the structure of D. Zabala . She did this without giving us a hearing and or consulting with us, yet her decision had

financial implications on our monthly salaries, gratuity and pensions regard being had to the option we exercised in terms of Section 149 (1) of the National Assembly Electoral Act 14 of 2011 to remain with Independent Electoral Commission."

The above, in my view, summarises the appellants' concerns. They therefore prayed for the setting aside of the new management structure and the implementation of the original Zabala organizational structure, which they claimed had already been approved.

The respondents' case

[9] For their part, the respondents admit that Dr Griffth Zabala was indeed engaged to draw up a new organizational structure for the 2nd respondent. In her answering affidavit, the 1st respondent, in part, averred:

"6. Post the transitional period, need arose for the creation of additional positions within the IEC so that it may best carry out its mandate. The IEC, in its wisdom and in exercise of its power to employ its staff, commissioned the re-formulation of some of its existing staff positions and creation of new positions where necessary. I wish to categorically state that the process is not going to prejudice any of the existing staff of the IEC including the applicants; no one is going to lose their jobs or be demoted. All that is going to happen is to create new positions where necessary and make changes in the nomenclature of the existing positions. The adjustments were

necessitated by the changing environment on international election management. The IEC had to adopt the best international practices."

A structure was indeed drawn up and recommended to the 2nd respondent. However, the recommended structure, namely appendix 1, was never approved. The 2nd respondent had to consult the Ministries of the Public Service and Finance before approving the structure as presented. To that end the 1st respondent avers:

"6.6The consultations with these key government ministries revealed that appendix 1, as proposed by the Consultant (Dr Zabala), was too expensive to run and could not be implemented as it is; reviews were accordingly proposed. The structure was reviewed in 2013 to address the question of the size of the organogram; the resultant product was again termed 'High Level Organizational Structure' a copy of which is attached and marked appendix 2."

6.7 The consultations between the IEC and the Ministry of Public Service again necessitated the revision of appendix 2; during consultations it appeared that the nomenclature for the proposed new positions was not in sync with the Public Service nomenclature and had to be reviewed. That gave birth to the current new High Level Organizational Structure that has been approved by the IEC and key stake holders; it is pending implementation. A copy of that final product is attached and marked appendix 3."

[10]The 1st respondent states that the 2nd respondent, as an independent statutory entity, has the responsibility to approve its own organizational structure and to employ staff on terms and conditions determined by it after consultations with the Ministries of the Public Service and Finance.

[11] She said with respect to those employees who had elected to take employment under the 2nd respondent, the cut-off date was 15 March 2013.From that date all former Public Service employees who had elected to take up employment with the 2nd respondent were now under its direct employment. This included the appellants.

[12] On whether or not some of the appellants were offered employment under appendix 1, the 1st respondent answered:

> *"10.2 Applicants have never been appointed into any of the created positions in the two non-approved structures and appendix 3 which is the final product awaiting implementation. l challenge them to produce their appointment letters to prove their contention. What had happened is that during the migration face of the IEC staff from the public service into the IEC's direct employment, offers of new positions were inadvertently made to some members of staff as appears from the identical letters annexed to the supporting affidavits of the deponent's co-applicants, but those offers were never accepted; all those concerned knew that the offers were prematurely made as the process of consulting with the concerned government ministries were not yet done hence no acceptance letters were communicated and no letters of appointment were ever issued. I reiterate*

the contents of paragraph 6 above. l refer this Honourable Court to the savingrams dated 13 November, 18 November 2013 and 19 June 2014 and annexed to the Deponent's Founding Affidavit as annexure IEC collectively, to prove that as at December, 2012 no decision had been made approving any structure for implementation by the IEC."

[13] The 1st respondent maintained the position that it is the 2nd respondent who has to approve the organizational structure. The Ministries of the Public Service and Finance were merely consulted. The new structure was yet to be implemented and to that end the appellants cannot claim to have derived any rights from it.

Issues

[14]In my view, the issues for determination are:

a) Whether or not the court a quo erred in finding that appendix 1 was never approved and implemented.

b) Whether or not the court a quo was correct in finding that the decision and process of the 2nd respondent in reviewing appendix 1 was not irrational, unreasonable and illegal.

Arguments

[15] In his submissions, Advocate Lephuthing, for the appellants, indicated that the arguments of the appellants were anchored on that the 1st and 2nd respondents acted irrationally, unreasonably and arbitrarily in introducing a

new structure without consulting the staff. To that end he argued that the *audi alteram parten* rule was violated. He referred the court to the case of Matebesi V. Director of immigration and others LAC {1995- 96] 616, where indeed the importance of the *audi* rule was emphasized. I must admit there are a plethora of authorities on the common law derived rule. It is trite that a person whose rights or interests are affected by an administrative decision ought to be heard before such a decision is taken or made. There is no argument about the place of this rule in law. However its application, on the basis of what constitutes being heard, will vary from case to case depending on circumstances. The rule seeks fairness in decision making.

[16] It was his view that the respondents had conceded that the staff was denied the opportunity to be heard or consulted. He maintained that correspondence with the Ministries of the Public Service and Finance proved that appendix 1 was approved and some members of the appellants had been appointed to positions under it. He said the change of structure had adversely affected their rights in that they were then denied salaries and benefits under the new structure.

He submitted:

> *"[30] The structure of 1st Respondent and her management task team takes away the benefits of Appellants as it is apparent from the summary of evidence tendered. They therefore complain that the said decision to so deprive them of salary and appurtenances of their promoted positions is unreasonable and irrational……"*

I must point out from the outset that Advocate Lephuthing actually conceded that there was no question of irrationality and unreasonableness in the manner in which the 2nd respondent reached its decision. He, however, insisted that the appellants were not heard.

[17] Advocate K. Letuka, for the respondents, submitted that appendix 1 was indeed reviewed ending up with appendix 3. He said the original structure, appendix 1, was never substituted or rejected but was reviewed following consultations with the Ministries of Public Service and Finance.

[18] Advocate Letuka further submitted that appellants were never appointed under appendix 1 as they alleged. They became members of the staff of 2nd respondent upon electing to do so in terms of enabling legislation and not because of appendix 1. It was the 2nd respondent's responsibility to approve the structure and to appoint staff under it.

[19] Addressing the court's discretion to interfere with administrative decisions where necessary on review, he said:

> *"7.1 It is not for the review court to second guess administrative authority charged with making a decision. Courts will always defer to administrative authorities and as far as possible respect their decisions unless such decisions can be shown to been grossly irregular or illegal.*
>
> *7.2 The function of judicial review is to scrutinize the legality of administrative action not secure a decision by the Court in place of an administrator. As a general principle, the Courts will not seek to substitute*

their own decision for that of the public authority. The Court will accordingly only interfere with a decision of an administrator if there has been a breach of disregard of the principles of natural justice or it can be shown that the decision was grossly unreasonable or it was ultra vires."

The respondents agreed with the findings of the court below.

Analysis

[20] In examining the issues in this matter, my view is that a resolution to the dispute lies in the proper articulation of the true facts of the case. If the true facts of the case are not laid out properly and appreciated, wrong decisions and conclusions of law are bound to be made. I shall here below briefly attempt to lay out the facts of the case as I understand them.

[21] Section 66 of the Constitution of Lesotho establishes the 2nd respondent and gives it certain powers, duties and functions. The relevant sections of the Constitution for this case are the following:

"66 (1) There shall continue be an Independent Electoral Commission consisting of a chairman and two members, who shall be appointed by the King acting in accordance with the advice the Council of State.

66 A (1) The Electoral Commission shall have the following functions-

a. *to ensure that elections to the national Assembly and local authorities are held regularly and that every election or referendum held is free and fair:*

b. *To organize, conduct and supervise, in an impartial and independent manner, elections to the National Assembly and referenda under the provisions of this constitution and any other law.*

c. *To delimit the boundaries of constituencies in accordance with the provisions of this Constitution and any other law;*

d. *To supervise and control the registration of electors;*

e. *To compile a general register of electors and constituency registers of electors for the several constituencies and to maintain such register or registers up to date;*

f. *To promote knowledge of sound democratic electoral processes;*

g. *To register political parties;*

h. *To ascertain, publish and declare the results of elections and referenda;*

i. *To adjudicate complaints of alleged irregularities in any aspect of the electoral or referendum process any stage other than in an election petition; and*

j. *To perform such other functions as may be prescribed by or under any law enacted by parliament.*

(2) In order to discharge the duties and functions referred to in subsection (1), the Electoral Commission may-

a) Employ staff on terms and conditions of employment determined by it after consultation with the Public Service Commission.

b) Take into employment public officers seconded to it in terms of subsection(3)

(3) The Minister responsible for the Public Service shall, when requested by the Electoral Commission, make available to the Commission any public officer of any authority of the Government for the purpose of the discharge of its functions, and the appointment, exercise of disciplinary control or removal of any public officer in relation to the performance of his electoral functions shall be vested in the Commission.

66 The Electoral Commission shall not, in the performance of its functions, be subject to the direction or control of any person or authority.

66 D (1) Parliament shall provide funds to enable the Commission to perform its functions effectively.

(2) The funds required to meet the expenses of the Commission in the performance of its functions, including the salaries, allowances and terminal benefits payable to or in respect of the members of the Commission, shall be a charge on the Consolidated Fund."

[22] It is under sections 66 A (3) and 66D, quoted above, that, for its operations, it becomes necessary for the 2nd respondent to consult the Ministries of the Public Service and Finance. Given the import of those provisions the reasons are obvious.

[23] In order to enhance the independence of the 2nd respondent, in 2011 the Government of Lesotho enacted legislation in the form of the National Assembly Electoral Act of 2011.

Section 149 of that Act provides, in part, as follows:

> *" 149.(1) Subject to subsection (2), a person who, immediately before the coming into operation of this Act, was employed in the Public Service and serving under the Commission, shall be regarded as an employee of the commission with all the benefits already acquired or accumulated.*
>
> *(2) A person who intends to remain with the Public Service shall notify the Commission within a period of 6 months of the coming into operation of this Act for redeployment into the Public Service, in consultation with the Ministry of Public service."*

With respect to the Bill, the "Statement of Objects and Reasons of The National Assembly Electoral Act, 2011" provided as follows under paragraph 8:

> *" It provides additional powers, duties and functions on the independent Electoral Commission, procedures for registration of electors and political parties, the conduct of elections, procedures for determination of objectives and offences and their penalties."*

The above re-emphasizes the government's desire to re-equip and re-strengthen the 2nd respondent.

[24] As can be seen from section 66 A (3) of the Constitution, prior to 2011, the 2nd respondent relied on staff seconded to it by the Public Service. That position changed when section 149 of the National Assembly Electoral Act 2011 came into force. Section 149 of that Act was then applied. The application and implementation of the provisions of the law in terms of that section is what led to the dispute before the courts. Prior to that law being put into effect, the 2nd respondent already had staff seconded to it in terms Section 66 A (3) of the Constitution. It is those members of staff who were then given the option to elect whether or not to remain in the Public Service or to move to the 2nd respondent, which already had an existing structure but was, for staff purposes, dependent on the Public Service. It is under the then existing structure of the 2nd respondent that appellants were employed. In fact, pending implementation of appendix 3, the appellants remain employed under the then existing structure of the 2nd respondent. I am here referring to the structure that was in place before transition and that structure remains in force until appendix 3 is implemented.

[25] It cannot therefore be correct to argue that when the opportunity to exercise the option to elect to remain in the Public Service or to move to the 2nd respondent, appendix 1 was already in place. That cannot be. The appellants were not enticed by appendix 1 which had not yet come into existence. The appellants cannot deny that fact because they were allowed to participate in its

formulation. They participated when they were already employed under the current operating structure.

[26] Under the paragraph 5.1 of the founding affidavit applicants confirm participation in the crafting of appendix 1 by stating;

> *"The report and recommendations came after consultations with all stakeholders, that is us the staff, management, political parties and virtually all government Ministries which quite clearly had an interest in the matter"*

Clearly appellants were already on the staff establishment of the 2nd respondent when they participated in the formulation of appendix 1. They could not therefore have been enticed by a structure that was not in existence.

[27] Some of the points raised under paragraphs 26 above address the issue of whether or not the appellants were consulted when appendix 1 was reviewed and finally approved by the 2nd respondent as appendix 3. The review process led to three versions of the original Zabala structure namely appendix 1, which the appellants rely on, appendix 2 and appendix 3 which was finally approved by the 2nd respondent in April 2018. Given the fact that the Zabala structure appendix 1 was never rejected but reviewed by the 2nd respondent, one can safely say the review process produced Zabala structure 2 and Zabala structure 3 which is now pending implementation. This reasoning rejects the notion that a totally new management structure was introduced.

The last version of the review process namely, appendix 3 is the one referred to in the 2nd respondent's memorandum of 16 April 2018 addressed to the Principal Secretary- Finance. The memorandum reads:

> "**New Organisational structure for independent electoral commission"**
>
> The above subject matter bears reference.
>
> In May 2014, The Ministry of Public Service approved Organisational Structure for Independent Electoral Commission; however there were concerns with regard the naming of the positions and nomenclature. The Ministry of Finance had also concurred to the budget of the new structure. It was during this period that IEC never had time to address some of the operational issues due to busy schedule of preparing for snap elections thus far. We have since submitted corrected version of the structure to the Ministry of Public Service and the corrected version has superseded the previously approved structure. It is upon this communication that IEC kindly request for a meeting with your good office to discuss the budget of this new version.
>
> Hope for your prompt response."

[28] I believe my narration and observations in the preceding paragraphs, namely paragraphs 20-27, set out the correct position relating to the factual background in this matter. There was never any approval of appendix 1 until appendix 3 which was then submitted to the Principal Secretary- Finance on 16

April 2018. The role of the Ministry of Finance in the operations of the 2nd respondent is spelt out under section 66D of the Constitution.

[29] Accordingly, if the correct position is that up until 16 April 2018, the 2nd respondent had not yet approved appendix 1, there is no way the appellants could have been employed under it. They cannot therefore claim rights under a structure which the 2nd respondent had not yet approved and implemented. The court a quo was therefore correct in rejecting their claim to contracts of employment under a non-existent structure.

[30] The respondents were honest enough to admit that in anticipation of the finalisation of the new structure, they had prematurely issued offer letters of employment to some members of the appellants. It is worth noting that in the prematurely made offers, salaries were not specifically spelt out. That was so because the 2nd respondent was still consulting with the Ministries of the Public Service and Finance on the structure. The Task Team confirmed that: "Appointment letters were issued prior to approval of the structure"

[31] It was not denied that the reviews of the original Zabala structure were mainly centered on the size of the staff, naming of positions (nomenclature) and funding. Clearly these aspects were being reviewed as they appeared on the Zabala original structure as presented. It was never substituted or rejected but was subjected to review. According to the respondents, the adoption of and implementation of appendix 3 would result in the creation of more positions without any demotions or redundancies. That means no members of staff, including appellants, would be prejudiced.

[32] I therefore agree with the court a quo that the Zabala structure (appendix 1) was never approved. It was reviewed and finally approved by the 2nd respondent in 2018. By that time the period of transition had long expired. Appellants were already employed on the basis of the staff structure that existed before transition took place. I fail to appreciate how in the circumstances the issue of prejudice could arise.

[33] The delay in approving a new structure was fully explained. The delay was attributed to the need to consult relevant Ministries already referred to herein and preparations for the snap election of 2014. As for the implementation of appendix 3, the delay has been caused by endless court actions mounted by the appellants. For my part, I am satisfied that indeed reasonable explanations for the delay in approving and implementing appendix 1 were proffered.

[34] Furthermore I do not think the participation of the appellants in the final stages relating to approval and execution of the finally approved product still required their input. Surely if that were allowed administration would become cumbersome. They do not deny the fact that they were kept informed as to what was happening with regards to approval processes. That is why they are able to rely on correspondents between government and the respondents. To the extent that it was the same Zabala structure (appendix 1) that was being reviewed by the 2nd respondent and the Ministries of Public Service and Finance, I do not think it is correct to argue that the appellants were not heard. They had their say in the proposed structure, which structure was reviewed until it was approved by the 2nd respondent in the form of appendix 3.

Employment benefits from the structure could only flow upon its approval and implementation.

In paragraph 15 of this judgment, I briefly made remarks on the need to observe the *audi alteram partem* rule. I think for the better appreciation of it application In casu, understanding of that rule I must further refer to other relevant case authorities.

In **Koro Koro Constituency Committee v Executive Working Committee-All Basotho Convention (C of A(CIV) 10/2019) [2019] LSCA 3 (01 February 2019),** the Court, with respect to the application of the *audi alteram rul*e noted as follows:

> "[6] In President of the Court of Appeal v the Prime Minister and others,[41] this court pointed out that:
>
> As explained by Gauntlett JA in his earlier quoted dictum from Matebesi, the requirements of fair procedure, which includes the *Audi principle*, have 'more recently mutated to an acceptance of a more supple and encompassing duty to act fairly'. The same sentiments appear from the statement by Hoexter undr the rubic 'audi alteram partem' (at 363):
>
> 'From the late 1980s … our courts have steadily retreated from the old formalistic and narrow approach to "natural Justice" and towards a broad and flexible duty to act fairly in all cases.'
>
> And in the same vein (at 362):
>
> '…[P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for

the all-or-nothing approach to fairness that characterized our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'

[62] However, this Court in President of The Court of Appeal v The Prime Minister and others proceeded that, the principle that procedural fairness is a highly variable concept which must be decided in the context and circumstances of each case and that the one size-fits-all approach is inappropriate, has been explicitly recognized by the highest courts in England. This means, as I see it, that the strict rules of the *audi principle* are not immutable. Where they are not strictly complied with, as in this case, the question as to whether in all the circumstances of the case the procedure that preceded the impugned decision was unfair, remains.'

In the circumstances of this case and taking into account the principles of law explained in the above passages, I am of the view that fairness was achieved when the appellants participated in the original exercise which led to appendix 1. They confirm that participation. As already said appendix 3 is a reviewed format of appendix 1.

[35] In view of foregoing, I come to the following final conclusions:

a) The original Zabala structure (appendix1) was never approved by the 2nd respondent until April 2018 when it was approved as appendix 3.

b) The staff, including appellants, was heard on the original Zabala structure (appendix1) which through review was finally approved

as appendix 3. Appellants were involved in its formulation as already stated under paragraph 34. There therefore no violation of the *audi alteram partem* rules.

c) None of the appellants were ever employed on the basis of the Zabala structure (appendix1) and accordingly no rights ever accrued to the appellants under a non-existent structure.

d) Appellants have not proved illegality or irrationality in the manner the respondents handled this matter. Appellants are challenging respondent's decision on the basis of wrong facts. Respondents have advanced reasonable explanations for the delays in approving and implementing the Zabala structure (appendix1).

e) The court quo's findings were based on an analysis of the correct facts attaching to this case and cannot therefore be faulted.

[36] All in all, on the basis of the correct facts of the case the appellants have not proved that the respondents acted irregularly or illegally so as to warrant the setting aside of their approval and proposed implementation of appendix 3. The appeal has no merit and should be dismissed

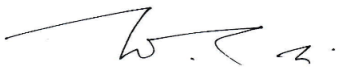
Costs

[37] Generally the practice is that costs need not be awarded against workers so as not to intimidate them from approaching the Courts with their grievances.

This is the route taken by the court below. I do not see any justification for departing from that practice.

[38] **Disposal:** I therefore order as follows:-

1. The appeal is dismissed.
2. There is no order as to costs.



_____

N.T MTSHIYA

ACTING JUSTICE OF APPEAL

I agree

_____

K.E. MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree

_____

M.H. CHINHENGO

ACTING JUSTICE OF APPEAL

For Appellants: Advocate C J Lephuthing

For Respondents: Advocate L Letuka