

IN THE COURT OF APPEAL FOR LESOTHO

C O A (CIV) 63/2019

CIV/ APN/96/2016

HELD AT MASERU

In the matter between:-

**LESOTHO PUBLIC SERVICE
STAFF ASSOCIATION**

1ST APPELLANT

MONONO TEBA-MOLOMO

2ND APPELLANT

and

**THE CHIEF MAGISTRATE –
NORTHERN REGION**

1ST RESPONDENT

**THE ACTING REGISTRAR
OF THE HIGH COURT**

2ND RESPONDENT

**THE RESIDENT MAGISTRATE –
LERIBE**

3RD RESPONDENT

**THE MINISTER OF JUSTICE &
AND CORRECTIONAL SERVICE**

4TH RESPONDENT

**THE HUMAN RESOURCE OFFICE-
MAGISTRACY**

5TH RESPONDENT

THE ATTORNEY-GENERAL

6TH RESPONDENT

THE JUDICIAL SERVICE COMMISSION

7TH RESPONDENT

CORAM : DR. K.E. MOSITO, P
P.T. DAMASEB, AJA
M. CHINHENGO, AJA

DATE ENROLLED : 15 MAY 2020 (For determination by way of written submissions in terms of the CA President's COVID 19 PD 2020).

DATE DELIVERED : 29 MAY 2020

Summary:

The second appellant is a local court president and as such a member of Lesotho's judicial branch in terms of s 133 of the Constitution. Aggrieved by her transfer by the first respondent who is her supervisor from her current duty station to another, she objected to her transfer and the objection was overruled. Not only was her objection overruled but her remuneration was also suspended on account of her failure to report for work.

The second appellant, instituted review proceedings to have reviewed and set aside her transfer and suspension of her remuneration. She was joined in the proceedings by the first appellant which is a trade union representing the interests of public servants falling within the purview of the Public Service Act 1 of 2005. The second appellant alleged that her transfer was contrary to law without pleading the law she claimed was breached. The High Court upheld the respondents' in limine objection that the first appellant lacked standing and that the applicants did not disclose any cause of action. The High Court held that as a judicial officer second appellant could not be represented by first appellant whose mandate was confined to public servants and not judicial officers who fell under the jurisdiction of the Judicial Service Commission.

On appeal to the Court of Appeal, the High Court's conclusions on points in limine upheld. Held further held that the applicant's failure to plead the law and irregularities was fatal and that on that basis alone, the appeal fell to be

dismissed. Further held that the High Court's finding that the suspension of the second appellant's remuneration was lawful, was correct and that in the absence of proof of irregularity or unlawfulness in the transfer, the transfer was not invalid. Accordingly, appeal dismissed, with costs

JUDGMENT

PT Damaseb AJA:

Introduction

[1] The proceedings which have led to the present appeal are motion proceedings. It is trite that motion proceedings are intended for the resolution of common cause facts.¹ Where there are disputes of fact and those have not been referred to oral evidence, the facts deposed to by the applicant which have not been denied are considered as admitted. The version of the respondent is to be accepted unless it is found to be untenable or so far-fetched that it can be rejected on the papers.²

[2] The issues that have arisen in the appeal, as I will demonstrate presently, can be resolved by reference to the common cause facts which are revealed in the several letters exchanged between the protagonists during the evolution of the dispute. In the few situations where there are disputes of fact, the

¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para [26].

² *MNM Construction Co. (Pty) Ltd v Southern Lesotho Construction Co. (Pty) Ltd and Others* LAC (2005-2006) 112, 116 E-F; *Monnanyane v SOS Children's Village and Others* LAC (2005-2006) 416 para [7].

version of the respondents will prevail as those disputed facts were not referred to oral evidence.

Common cause facts

[3] The second appellant (Teba-Molomo) is a judicial officer holding the position of Local Court President (LCP) at Sefikeng. On 6 August 2014, she received a letter of transfer under the signature of the Human Resource Manager for the Subordinate Courts (copied to the chief magistrate, senior resident magistrate and resident magistrate) in the following terms:

I am directed to inform you that it has been decided that you be transferred from Sefikeng local court to Setleketseng Local court following expiry of contract of CP Fanie Masoabi.

...

Your transfer will be effective from 1st October, 2014.

[4] Teba-Molomo was dissatisfied with her transfer and by letter dated 20 August 2014, she requested not to be transferred because (a) at Setleketseng a previous LCP was attacked at gunpoint and a watch man was killed, (b) she preferred to be transferred to either Matala local court or Maseru local court to enable her further her studies and to complete the construction of her house which was already under way. By letter dated 19 September 2014 her request was denied because:

'it is not possible to transfer you to the courts you have mentioned as there are Court Presidents who have recently been placed, transfers are made to fill vacancies where they exist.'

[5] It is not in dispute that Teba-Molomo failed to transfer to the new duty station at Setleketseng. It appears that her refusal to transfer created a new reality because, on 13 February 2015, the Chief Magistrate for the Northern Region directed a letter to her in the following terms:

This is a follow-up letter regarding your previous transfer letter to Setleketseng Local Court dated on the 19th September 2014. However reconsideration was made that you rather be transfer to Rampai Local court due to not reporting to your new station which was Setleketseng local Court. This reconsideration is made by the Chief Magistrate Office –North Region. This letter serves to inform you of your transfer from Sefikeng Local Court to Rampai Local Court with effect from the 2nd of march 2015. If your preference is still at Setleketseng Local Court, please do so on the mentioned date and also be aware that replacement on your behalf will be found to Rampai Local Court. Not reporting to your duty station on the above mentioned date or rather not finding a replacement in time would be considered as absconding from your duties on your part.

[6] Based on correspondence exchanged between her and representatives of the judiciary, it becomes apparent that a meeting took place between Teba-Molomo and members of the magistracy because on 26 November 2015, the resident magistrate responsible for Rampai local court wrote to Teba-Molomo recording a meeting that took place on 20 November 2015 between Teba-Molomo, the Chief Magistrate- North, the human resource officer and the resident magistrate. The letter records that Teba-Molomo was given the opportunity to explain why she had to date not transferred to Rampai. It further records that Teba-Molomo stated

in reply that she 'will not report myself at Rampai and work there'. The letter then directs her to vacate the government house as she was considered to be absent from work without good cause.

[7] Because of her refusal to comply with the transfer instruction, Teba-Molomo's salary was suspended. That becomes apparent from a letter directed to the magistracy by Lesotho Public Service Staff Association (LESPSSA) which, purporting to act on behalf of Teba-Molomo, on 11 February March 2016, recorded that the 'client's monthly salary had once again been stopped in relation to her transfer from Pitseng Local Court to Rampai Local Court.' The letter goes on to record:

With due respect, we wish to mention that everything that has happened to our client, being the transfer, the salary stoppages and eviction is unlawful regard being had to all laws regulating the entire public service.

[8] After further exchange of correspondence between Teba-Molomo and representatives of the judiciary, on 15 March 2016, the acting registrar of the High Court directed a letter to her in the following terms:

Having carefully considered your representations against your transfer to Rampai by the learned Chief Magistrate North, I direct that you should transfer to the destination reflected on your letter of transfer by the learned Chief magistrate on or before the 1st April, 2016.

[9] On or about 25 April 2018, Teba-Molomo approached the High Court on an urgent basis seeking the following relief (excluding the customary formal prayers related to urgency and interim relief):

That the [Human Resource office of the magistracy be] ordered to reinstate [Teba-Molomo] monthly salary for the months of March and April 2015 respectively and salaries from January 2016 to date.

That [the Chief Magistrate for the Northern Region's] decision to transfer [Teba-Molomo] from Pitseng Local Court to Rampai Local Court [should] be reviewed, corrected and set aside as null and void.

That the [chief magistrate, resident magistrate for Leribe and the Human Resource office of the magistracy] be directed to accept [Teba-Molomo] at work without loss of benefits, remuneration resulting from employment.

The parties

[10] Teba-Molomo instituted the proceedings jointly with LESPSSA which was cited as the first applicant in the review proceedings. In correspondence that preceded the launching of the legal proceedings, LESPSSA is referred to as a 'civil servants association duly registered in terms of the laws of the Kingdom of Lesotho pursuant to section 22 of the Public Service Act 2005... read with the Societies Act No. 20 of 1966 and is legally organizing within the entire public service...'

[11] In her founding affidavit, Teba-Molomo:

- (a) Referenced only her interest in the proceedings and neither described the juristic character of LESPSSA or its legal interest in the outcome of the review proceedings;
- (b) Justified the relief she sought on the basis that the transfer:

fails to comply with the laws governing the transfers of public employees which have comprehensively outlined a procedure to be followed when conducting a transfer of public employees, that is, they precisely stated who has the powers of transfer over another public officer and how to do it. It is my believe that work place procedures are set to and meant to be adhered to in order to avoid a situation where either party may find itself suffering a great deal of prejudice either due to abuse of power or ill-discipline.

[12] As far as the legal basis for the relief is concerned, the quoted passage represents the totality of the cause of action pleaded by Teba-Molomo in support of her grievance arising from her transfer.

[13] The opposing affidavit on behalf of the respondents is deposed to by Makampong Gugu Mohoro in her capacity as the chief magistrate for the northern region. In the founding affidavit, the respondents oppose the application on procedural grounds and on the merits. As for the former, they maintain that:

- (a) Teba-Molomo failed in the founding affidavit to describe LESPSSA, the nature of its relationship to either Teba-Molomo or the respondents and how it stood to be affected by the outcome of the proceedings;
- (b) There was non-joinder of the Judicial Service Commission (JSC) which has jurisdiction over Teba-Molomo and will therefore be affected by the outcome of the proceedings;
- (c) In the manner it is framed, the application does not disclose a cause of action. In that regard, the respondents maintain that, apart from the bald allegation of non-compliance with transfer procedures, the application does not disclose any cause of action in that it fails to state in what way and which provisions of the law were breached, thus making it impossible for them to know the case they had to answer.

[14] On the merits, the respondents plead that the manner of the impugned transfer did not constitute any irregularity or any conduct bad in law and that the application fails to establish how they failed to comply with any law. That as a judicial officer Teba-Molomo falls under the jurisdiction of the JSC and that she was transferred by the office of the chief magistrate as head of the region and that the transfer decision was only communicated by the human resources department of the magistracy. It is stated further that Teba-Molomo was lawfully transferred to the new duty

station where her services were needed but that she refused to comply with a lawful order and that she absconded from work since 1 October 2014 as a result of which her salary was suspended.

[15] Prior to the hearing of the application, the applicants brought an application for the joinder of the JSC and that was granted.

The High Court's approach

[16] Sakoane J upheld the objection to the joinder of LESPSSA. The learned judge observed that LESPSSA did not file any affidavit to explain its interest in the proceedings. The judge quite appropriately observed that the applicants were required to establish LESPSSA's standing in the founding affidavit, which they failed to do and that it was not open to them to introduce evidence in reply to sustain its standing. The judge *a quo* went on to consider whether, in law, it was competent for LESPSSA to represent the interests of a judicial officer in the review proceedings. The learned judge concluded that in terms of s 3 of the Public Service Act 2005, Teba-Molomo being a judicial officer, she fell outside the reach of the laws governing the public service. According to the learned judge:

She is obliged to accept the decisions to be deployed to any court where there is need for a judicial officer of her rank. The only issue that could be up for debate is whether the principle of audi alteram partem applies,

and if so, whether it was observed in the decision-making process to transfer her...

[17] Sakoane J concluded that the review application failed to disclose in what way the judiciary breached the transfer procedures; that the chief magistrate was competent depending on the needs of the judiciary to transfer local court presidents; that Teba-Molomo's refusal to report at the new duty station was without any basis and that the suspension of her salary was justified in view of her unlawful absence from duty.

The appeal

[18] The appellants complain on appeal that the High Court misdirected itself in concluding that LESPPSSA has no *locus standi*; that even if LESPPSSA is found to lack standing, Teba-Molomo remained an applicant and had made out the case for the relief sought; that the High Court was wrong in finding that as a judicial officer Teba-Molomo was not entitled to the protection of the PSA 2005, and that the High Court's findings in favour of the respondents was against the weight of the evidence.

Analysis

[19] In the view I take on the failure by the second appellant to disclose a cause of action, I need not decide all the appeal grounds

canvassed by the appellants. But before I discuss the issue of the cause of action, I wish to dispose of the twin issues of the *locus* of LESPSSA and the suspension of Teba-Molomo's salary.

[20] Nowhere in the founding affidavit is the legal interest of LESPSSA in the review proceedings disclosed. Sakoane J was correct in holding that the *locus* of LESPSSA ought to have been alleged and established in the founding affidavit. That was not done. It is not an answer to suggest, as the applicants did in reply and in argument, that LESPSSA's interest was sufficiently disclosed in the correspondence attached to the pleadings. The applicable principle is that it is not permissible in motion proceedings to merely attach to an affidavit documentation and expect the court to draw inferences therefrom. The deponent to the affidavit is required to identify portions in the annexures on which reliance is placed and to make out the case which is sought to be inferred on the strength of those portions.³ That the applicants failed to do.

[21] More importantly, it is inconceivable that a judicial officer who is not a civil servant could be represented in legal proceedings by LESPSSA a trade union whose mandate arises under the Public Service Act 1 of 2005 (PSA 2005). The public service of Lesotho is created by Chapter XIII of the Constitution whereas subordinate courts are created by Chapter XI of the Constitution. Section 118 of the Constitution creates the judicial branch which consists of a Court of Appeal, a High Court, subordinate courts and courts

³ *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) at 324G.

martial and such tribunals exercising a judicial function as may be established by Parliament. In terms of s 133(1) read with ss (3) of the Constitution, the JSC alone has jurisdiction over the appointment and discipline of judicial officers including a member of any subordinate court.

[22] In terms of s 137 of the Constitution, public servants are subject to the jurisdiction of the Public Service Commission which has the power to appoint, to exercise disciplinary control and the power to remove them. That power is expressly excluded by s 137(3)(e) in respect of ‘any office to which section 133 of this Constitution (which relates to the offices within the jurisdiction of the Judicial Service Commission) applies’. Section 3 of the PSA 2005 states in stentorian tone:

This Act does not apply to the offices specified in section 137(3) of the Constitution to the extent therein specified.

[23] LESPSSA’s interest in the proceedings was predicated on Teba-Molomo being subject to the reach of the PSA 2005. That obviously is unsustainable in law.

[24] All told, the High Court correctly concluded that LESPSSA has no direct and substantial interest in the proceedings. Its participation in the proceedings was ill-conceived and the ground of appeal directed thereat has no merit.

[25] In making findings of fact, Sakoane J applied the test laid down in *Plascon-Evans*⁴ and on the issue of Teba-Molomo's stay-away from work made the following finding:

It is common cause that [Teba-Molomo] remained obdurate and did not comply with the decision to be transferred. This was even after the Registrar had heard her in the matter and endorsed the decision of the Chief Magistrate. She did not render any judicial services from 4 October 2014 to February 2015 and after her transfer took effect on 13 October 2015 to date. She was sufficiently warned about her absenteeism and threatened to have payment of her salary stopped and hauled before a disciplinary body. She was not bothered.

[26] It is trite that an employer is entitled to withhold remuneration from an employee who refuses to work: 'No work, no pay': **Teaching Service Commission v Moeketshi Makhobalo** C of A (CIV) 2/2015; **Commissioner of Police & another v Ntlotsoeu** LAC (2005-2006) 156 para [13]; **Makhetha & another v Commissioner of Police** C of A (CIV) 2 of 2008 [2009] LCSA at para 14.

Since Teba-Molomo refused to work and the respondents' version is accepted that she had no good reason not to work in the interest of the employer, she was lawfully denied remuneration.

No cause of action disclosed

[27] Teba-Molomo approached court alleging that her transfer was in violation of the law. As has been previously demonstrated, the reliance placed on the PSA 2005 (whose provisions were not

⁴ See paras [1] and [2] above.

identified in any event) is ill-conceived. Nowhere in the founding affidavit does Teba-Molomo specify the manner in which the transfer was irregular viewed against the backdrop of Chapter XI of the Constitution. That failure is fatal and is dispositive of the appeal, without more.

[28] An applicant seeking review bears the onus to allege and prove the review grounds and to satisfy the court that good grounds exist to review the conduct complained of.⁵ It is not for the court or the decision-maker to speculate what irregularity an applicant relies on for impugning an administrative decision. A respondent is entitled to know the review grounds and irregularities relied upon by an applicant for review so as meaningfully and intelligibly to counter them. As Hoexter correctly observes:

*If the applicant is able to make out at least a prima facie case of illegality, the respondent authority will then bear the onus of refuting it, also known as the burden of rebuttal.*⁶

[29] Judicial review has two aspects: First, it is concerned with ensuring that the duties imposed on decision-makers by law are carried out. Secondly, judicial review is concerned with ensuring that an administrative decision is lawful, i e that powers are exercised only within their true limits. The court's review power does not involve determining the correctness or otherwise of the decision under review. The court only intervenes to correct an

⁵ *Davies v Chairman, Committee of the JSE* 1991(4) SA 43 at 47H.

⁶ Hoexter, Cora. 2007. *Administrative Law in South Africa*. Juta; Cape Town, p 483.

irregularity or unlawfulness and in its absence considerations of equity do not provide any ground of review: *Davies* (supra) at 47G.

[30] It is trite that a party that relies on the breach a statutory provision or law for its cause of action must formulate the pleading in clear terms with reference to the provisions of the specified law. In other words, the statutory duty should be defined and the breach specified.⁷ The particular provision relied upon may not be specified if the case is pleaded clearly enough to make it obvious to the respondent what case to meet.⁸

[31] Teba-Molomo's application does not disclose any review ground and the respondents were justified in pleading that they were embarrassed by the lack of particularity so as to enable them meet her case. On that ground alone the application stood to be dismissed. Be that as it may, the learned judge *a quo* correctly held that on the papers there was a clear need for a local court president at the station to which Teba-Molomo was transferred and that the transfer was done in accordance with established procedure and practice.

[32] For all of the above reasons, the appeal falls to be dismissed, with costs.

⁷ Compare, *Dorland v Smith* 2002 (5) SA 374 (C).

⁸ *Ketteringham v City of Cape Town* 1934 AD 80 at 90; *Botha v Guardian Assurance Co Ltd* 1949 (2) SA 223 (G) 227.



P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



DR K.E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



M. CHINHENGO
ACTING JUSTICE OF APPEAL

For Appellants: Adv B M Masiphole

For Respondents: Adv L P Moshoeshe