

IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU **C of A (CIV) NO. 85/2019**

CIV/APN/197/2019

In the Matter between:-

**THE GOVERNMENT OF THE
KINGDOM OF LESOTHO**

1ST APPELLANT

P.S MINISTRY OF TOURISM

2ND APPELLANT

MINISTRY OF TOURISM

3RD APPELLANT

ENVIRONMENT

P.S MINISTRY OF PUBLIC SERVICE

4TH APPELLANT

PUBLIC SERVICE COMMISSION

5TH APPELLANT

MINISTRY OF PUBLIC SERVICE

6TH APPELLANT

ATTORNEY GENERAL

7TH APPELLANT

AND

MOOROSI MATELA AND 12 OTHERS

RESPONDENTS

CORAM: DR K.E. MOSITO P
 DR P. MUSONDA AJA
 M CHINHENGO AJA

HEARD: 20 OCTOBER 2020

DELIVERED: 30 OCTOBER 2020

SUMMARY

Administrative Law – Substantive legitimate expectation – Effect of new policy on existing rights and legitimate expectations – are such rights and legitimate expectations extinguished thereby.

Appeal against decision of high Court enforcing employees legitimate expectations- Appeal dismissed with costs.

DR. K.E. MOSITO P

BACKGROUND

[1] In this matter, the present appellants were respondents in the court a quo, while the present respondents were the applicants. For avoidance of doubt, I shall refer to the parties as they were in the court a quo. I shall refer to the present respondents as the applicants and the present appellants as the respondents.

[2] The applicants challenged the decision of the High Court (Mokhesi J) handed down on 14 November 2019. The applicants approached the court *a quo* for a *rule nisi* returnable on a date and time to be determined by the court, calling upon the respondents to show cause, if any why: the first to sixth respondents should not be restrained and interdicted from advertising and/or filling the Applicant's posts/positions within the Ministry of Tourism,

Environment and Culture by employing any other persons thereto, pending the determination of the application.

[3] Regarding the final relief, the applicants sought an order reviewing and setting aside the decision of the Principal Secretary (second appellant) to terminate Applicants' employment statuses in the third appellant Ministry as irregular, procedurally unfair and unlawful. In the alternative, the applicants sought an order reviewing and setting aside the failure or refusal by the first respondent to renew applicants' employment contracts with the third respondent ministry as irregular. They also sought an order Correcting the decision to terminate Applicants' employment status, Alternatively, they sought a decision reviewing and setting aside the failure or refusal by the 1st Respondent to renew applicants' employment contracts with the respondent ministry as irregular.

[4] They asked the court to order their reinstatement into their respective positions in the Ministry; order the respondents to facilitate their engagement, appointment and employment as permanent and pensionable public officers under the ministry. In the further alternative, the applicants sought an order declaring that the applicants legitimately expected to be engaged, appointed and employed as permanent and pensionable public officers under the ministry. They further asked the court to direct and order the second and third respondents to pay the applicants compensation equivalent to the applicants' monthly salaries for 3 years contract period. They also sought further or alternative relief as well as costs of the

application.

THE PARTIES

[5} As pleaded, Applicants are former employees of Lesotho Highlands Water Authority engaged in various positions in Nature Reserves in the north of the country known as Northern Parks– Upon the Lesotho Highlands Development Authority(LHDA) winding down some of its operations in 2005, the Lesotho Northern Parks were transferred to the Government of Lesotho to fall under the aegis of the Ministry of Tourism, Environment and Culture (MTEC) in terms of the Memorandum of Understanding signed between the Government of Lesotho and the LHDA, in the year 2005.

[6} The respondents were effectively, the Government of Lesotho as properly represented by the Attorney General.

FACTUAL MATRIX

[7} The applicants are former employees of the Lesotho Highlands Development Authority (LHDA) engaged on contractual basis and occupying various positions within what are known as the Lesotho Northern Parks (LNP). LNP is made up of Liphofung Nature Reserve, Tšehlanyane Nature Reserve and Bokong Nature Reserve. Per the agreement between the Government of Lesotho and the LHDA, the Lesotho Northern Parks were transferred to fall under the aegis of the Ministry of Tourism, Environment and Culture (MTEC). The decision was made in the year 2005. A total of fifty-two (52) employees were to be transferred together with the Lesotho Northern Parks (LNP) infrastructure to be under the MTEC. The said transfer took place in

the same year, and since 2008 the MTEC had engaged the said employees on a three-year contract which were renewed continually until later on when MTEC through Principal Secretary 'Mamasiane (2nd respondent) decided not to renew the same.

[8] Since the 2008 the said contracts contained a clause which stipulated that the contracts carried no expectation of renewal, but, despite existence of this 9 clause, the applicants were given new three-year contracts when the old ones lapsed. The decision not to renew the contracts was communicated to the applicants on the 18th February 2019, a month and two weeks before the contracts could expire. Clearly aggrieved by this decision not to give them new three-year contracts as has always been the practice for the past ten years, the applicants sought the intervention of the Ombudsman. While this intervention was being undertaken, the 2nd appellant went ahead with the process of giving three-year contracts to some of the applicants' colleagues and other new recruits, to the exclusion of the applicants. It is common cause that before the decision was taken not to give the applicants new three-year contracts, they were not afforded any hearing.

ISSUES FOR DETERMINATION

[9] The issue for determination are:

(a) first, whether regard being had to the pleadings the issue of substantive legitimate expectation was properly determined.

(b) Second, whether the affidavit of the Principal Secretary for the Ministry of the Tourism that consultations did take place was ignored.

(c) Third, whether the government's promise contained in the agreement was the kind of promise that would typically receive protection under the doctrine of substantive legitimate expectation.

(d) Forth, whether a new policy could properly which take away the rights that had already been conferred by the previous policy. Lastly, the court a quo erred in not appreciating that the notice of termination of the contracts of employment doubled up as both notice of termination and an opportunity to be heard.

THE LAW

[10] The learned judge in the court a quo has admirably reviewed the principles and judicial authorities on legitimate expectation. I respectfully associate myself with the erudite exposition of the legal principles discussed therein. I respectfully adopt the discussions on the legal principles herein.

[11] I can only add that there could be no legitimate expectation that a public body would act otherwise than in accordance with the lawful scope of its authority. If it be true that the promises to appoint the applicants carried out, it is at least arguable that applicant's expectation, legitimately entertained, was unfairly defeated. What gives rise to the right to be heard is the negative impact of the decision on the rights or legitimate expectations of the person

claiming to have been entitled to a hearing before the decision was taken.¹ In *Masetlha Ngcobo J* said:

“The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* (the *audi* principle). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness. Indeed, consultation prior to taking a decision ensures that the decision-maker has all the facts prior to making a decision. This is essential to rationality, the sworn enemy of arbitrariness. This principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual.”²

[12] The doctrine of legitimate expectation is definitely part of our law. Legitimate expectations are capable of including expectations which go beyond enforceable legal rights provided they have some reasonable basis.³ As Lord Fraser said in *Council of Civil Service Unions and Others vs. Minister for the Civil Service*⁴:

"But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law..... Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular

¹ *Walele v City of Cape Town and Others* 2008 (11) BCLR 1067 (CC) at para 27.

² *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (*Masetlha*) at para 183.

³ *Attorney-General of Hong Kong vs. Ng Yuen Shiu* (1983) 2 All ER 346 (PC) at 350C.

⁴ *Council of Civil Service Unions and Others vs. Minister for the Civil Service* (1984) 3 All ER 935 (HL) at 943 -944.

practice which the claimant can reasonably expect to continue..."

[13] The doctrine of legitimate expectation arises in cases where a person whose claim to a hearing before an administrative decision is taken falls short of a legal right, may nevertheless be entitled to some form of hearing if the interest of that person gives rise to a legitimate expectation. The doctrine also has its origins in natural justice and is also established on the duty to act fairly. If the aggrieved person had a legitimate expectation to be heard, the principle applied. In terms of the doctrine, the *audi* principle applies to cases where the aggrieved person's legitimate expectation was affected by the decision reached, even if such person had no antecedent rights affected thereby.⁵ With those legal principles in mind, I now turn to considering the appeal before us.

CONSIDERATION IF THE APPEAL

[14] There are four grounds of appeal for consideration before us. The first ground is that, the court a quo erred in finding for applicants on substantive legitimate expectation. There is no merit in this complaint. The reason for this is that, in developing the doctrine of substantive legitimate expectation the English courts have held that:

"... the law will hold a public authority to its promise or practice unless there is good reason not to do so ... as "a requirement of good administration, by which public authorities ought to deal straightforwardly and consistently with the public"⁶

⁵*Ibid at para 27.*

⁶ *Hoexter Administrative Law* 429.

[15] The pleadings disclosed substantive legitimate expectation in that there was a promise made to the applicants. The government's promise contained in the agreement was the kind of promise that would typically receive protection under the doctrine of substantive legitimate expectation.⁷ Indeed, the express promise and an established practice of making payment, would also typically secure at least procedural protection under the doctrine of legitimate expectation. The issue was therefore canvassed in the papers. The explanation by the Principal Secretary for the Ministry of the Public Service is tantamount to a plea of impecuniosity when confronted with a claim for payment.

[16] The second ground is that, the court a quo erred in holding that that the court a quo erred in ignoring the evidence contained in the affidavit of the Principal Secretary for the Ministry of the Tourism that consultations did take place. It is not correct that the learned judge ignored the affidavit. The true position is that, he considered the affidavit and rejected the validity of the contentions.

[17] The third ground is that, the court a quo erred in ignoring the evidence contained in the fact that there was a new policy which took away the rights that had already been conferred by

⁷ *In R v North and East Devon Health Authority, ex parte Coughlan* 2000 3 All ER 850 (CA) discussed in Hoexter *Administrative Law* 429, the court held the authority to its assurance (its promise) that it would keep a facility for disabled people open, the applicant, a disabled person, having relied upon that promise, and "there being no overriding public interest to justify the disappointment of the applicant".

the previous policy. There is no substance in this contention. Once the employees had rights and legitimate expectations that had already been created by a previous policy, those could not just ne be taken away by a new policy without the consent of the beneficiaries of the previous policy who are negatively affected by the new policy. There is nothing amiss in government contending that the new policy did not take away existing rights and legitimate expectations, but providing that, if they are wrong, it will be forced to live up to its promises as required by the law.

[18] The last ground is that, the court a quo erred in not appreciating that the notice of termination of the contracts of employment doubled up as both notice of termination and an opportunity to be heard. There is no merit in this contention.

DISPOSITION

[19] It is clear from the foregoing reasons that this appeal cannot succeed. I am therefore of the view that it should be dismissed with costs.

COSTS

[20] I now turn briefly to deal with the argument relating to costs. The appellants have lost the appeal and they must bear the costs of this appeal.

ORDER

[21] The following order is made:

(a) The appeal is dismissed with costs.

(b) The decision of the court a quo is confirmed.



DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I Agree:



P. MUSONDA

JUSTICE OF APPEAL

I Agree:



M CHINHENGO

ACTING JUDGE OF APPEAL

FOR APPELLANTS: ADV. L.P. MOSHOESHOE

FOR RESPONDENTS: ADV. T. MAQAKACHANE