

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.09/2021

CIV/APN/272/21

In the matter between: -

MOTHABATHE HLALELE

1ST APPELLANT

AND

**THE HONOURABLE PRIME MINISTER
OF LESOTHO DR MOEKETSI MAJORO
RETSÉLISITSOE MOHALE
RESPONDENT**

1ST RESPONDENT

2ND

**THE GOVERNMENT SECRETARY
PUBLIC SERVICE COMMISSION
MINISRE OF PUBLIC WORKS
RESPONDENT**

3RD RESPONDENT

4TH RESPONDENT

5TH

**PRINCIPAL SECRETARY, MINISTRY
OF FINANCE**

6TH RESPONDENT

**THE DIRECTOR, HUMAN RESOURCE,
MINISTRY OF PUBLIC WORKS
RESPONDENT**

7TH

**PRINCIPAL SECRETARY, MINISTRY
OF PUBLIC WORKS
RESPONDENT**

8TH

PUBLIC OFFICERS DEFINED

CONTRIBUTION FUND

9TH RESPONDENT

**PUBLIC OFFICER, PUBLIC OFFICERS
DEFINED CONTRIBUTION FUND
RESPONDENT**

10TH

HON. MATHIBELI MOKHOTHU MP

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

HEARD: 16 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

Constitutional law - appointment of a principal secretary contrary to section 139(1) of the Constitution - whether such appointment valid. Whether appellant was appointed by the new Prime Minister.

Held: there was no valid appointment and appeal dismissed with costs.

JUDGMENT

K.E. MOSITO P

Introduction

[1] On 24 August 2020, the appellant filed an urgent application in the High Court seeking a number of interim and substantive interdictory reliefs. The application was opposed by the respondents. In addition, the respondents filed a counter-application. In the counter-application, the respondents were seeking a declarator that the purported renewal of the

appellant's contract be reviewed, corrected and set aside on the ground of it being non-compliant with section 139(1) of the Constitution of Lesotho. They also asked the court to declare that the Government Secretary had no legal or constitutional authority to renew contracts of principal secretaries under the constitution. On 1 December 2020, the High Court dismissed the main application and granted the counter-application. Dissatisfied with the order granted by the High Court, the appellant came on appeal to this Court.

Parties

[2] The appellant is Mr Mothabathe Hlalele. He is a male Mosotho adult of Mafeteng and was employed as a principal secretary in the Ministry of Public Works of the Kingdom of Lesotho. As this Court pointed out in *School Board of Mapoteng High School v Teaching Service Commission*¹ practice has become embedded in our civil practice whereby ministries and departments of government are joined as parties to proceedings in the courts without clear legal bases. Government ministries and departments are nowadays being made parties to proceedings without a clear legal bases. Section 98(2)(c) of the Constitution provides that one of the functions of the Attorney-General is to take necessary legal measures for the protection and upholding of the Constitution and other laws of Lesotho. Section 3 of the Government Proceedings and Contract Act⁷ stipulates that:

“In any action or other proceedings which are instituted by virtue of the provisions of section 2 of Act,

¹ School Board of Mapoteng High School v Teaching Service Commission C of A (CIV) 07/2020 at paras 6-7.

the Plaintiff, the Applicant or the Petitioner (as the case may be) may make the Principal Legal Adviser the nominal defendant or respondent.”

[3] It is worth repeating that, legally speaking, it cannot be doubted that in proceedings against the Government of Lesotho, it is peremptory to cite the Attorney-General as a nominal defendant. The use of the word “may” in the section, is not intended to give a litigant a choice of whether to cite Government ministries and departments or not. It is therefore, undesirable to cite Government ministries and departments as well as officials without showing the legal bases for their joinder and whether they have a direct and substantial interest in the outcome of the proceedings. With this prelude, I now turn to the pleadings.

Factual matrix

[4] The facts giving rise to this appeal are not complicated. They are that, on 11 July 2017, the appellant signed a form of agreement for officers employed on local contract terms. This was a contract of employment of appellant as a Principal Secretary in the public service of Lesotho. The agreement was subject to the conditions set forth in a schedule attached to the agreement. The engagement of the appellant was to be for a period of thirty-six (36) months.

[5] There was a provision that, “the contract may be extended or renewed as provided for in in clause 12 of the schedule.” That clause 12 provided for future employment. It provided that “[f]ive months prior to the completion of his or her term of engagement, the person engaged shall give notice in writing to

the Government whether or not he/she desires to be offered further employment.” It further provided that the renewal shall be based on satisfactory performance by the person engaged which shall be determined by the employer. The contract was to be interpreted in accordance with the laws of Lesotho.

[6] On 6 February 2020, the appellant signified his intention to have his contract extended for a further period of three years. On 21 April 2020, the Government Secretary wrote to appellant informing him that his request for renewal of contract had been approved. On 21 August 2020, the appellant received a letter from an acting Government Secretary instructing him to vacate office and hand over all government property in his possession to the Deputy Principal Secretary.

[7] In his answering affidavit, the Prime Minister (Dr Moeketsi Majoro) referred to a previous decision of the High Court where the Court dismissed a challenge by applicants who were similarly circumstanced as the appellant. He urged the High Court to follow its previous decision in *‘Mabotle Damane and Another v The Prime Minister and 2 Others CIV/APN/211/2020*.

Issues for determination

[8] The crux of this appeal, which falls for determination, is whether, after the expiration of his first contract, the appellant was legally appointed to hold office as from 12 July 2020. If the answer is in the affirmative, then the appeal must succeed. If the answer is in the negative, then, that is the end of the appeal and other claims fall off.

The Law

[9] The Government Secretary is a creature of the Constitution and his or her office is an office in the public service.² He or she has charge of the Cabinet Office and is responsible, in accordance with such instructions as may be given to him by the Prime Minister, for arranging the business for, and keeping the minutes of, the Cabinet. He is responsible for conveying the decisions of the Cabinet to the appropriate person or authority and has such other functions as the Prime Minister may from time to time direct or as may be conferred on him by any other law.³ Whether the Prime Minister has directed or conferred on the Government Secretary a power to do or not to do is a question to be factually determined.

[10] The power to appoint a person to hold or act in the office of principal secretary is vested in the Prime Minister, acting after consultation with the Public Service Commission.⁴ In addition to the functions vested in the Government Secretary under section 97 of the Constitution, the Government Secretary has a statutory function to – (a) co-ordinate the activities of the Principal Secretaries and transmit communication from the Principal Secretaries to Cabinet; (b) be responsible for conveying the policies and discussions of Government to the appropriate person or authority and for ensuring that those policies and discussions are properly carried out by that person or authority; (c) enter into performance agreements with the Principal Secretaries, supervise and monitor their performance; and have overall responsibility over all public officers.⁵

² Section 97 (1) of the Constitution of Lesotho 1993.

³ Section 97 (2) of the Constitution of Lesotho 1993.

⁴ Section 11(1) of the Public Service Act, 2005.

⁵ Section 12 of the Public Service Act, 2005.

Consolidation of the two appeals

[11] There are two grounds upon which the appellant bases his appeal. The first ground was that the court *a quo* erred in delivering a judgment at a place other than in having delivered the judgment at a place and time unknown to appellant. The complaint seems to be that the court did not deliver its judgment in open court. Although this complaint appeared as a ground of appeal, it was neither supported by any material on record nor was the issue persisted in either in the written heads of argument or in argument before this Court. It can safely be assumed that it was abandoned. There is therefore no need to determine it.

[12] The second ground was that, the court *a quo* erred in dismissing the main application and upholding the counter application. The basis of the complaint was said to be that, regard being had to the appellant's factual allegations and those of the respondents, the court ought to have granted the main application. The short answer to this complaint is that, cases are resolved not just on allegations of fact, but also on admissible evidence and applicable legal principles. Furthermore, on the facts as pleaded, there was never a consultation between Prime Minister Thabane and the Public Service Commission regarding the appointment or renewal of the appellant's contract until it ended in July 2020.

[13] On the facts as pleaded, there is a dispute of fact whether the appellant was ever appointed after the expiration of his contract. Prime Minister Majoro avers in his answering affidavit

that he never appointed the appellant again after the expiration of the appellant's contract. In principle, this dispute of fact must be resolved in favour of the respondent. There is a thread of reasoning that runs through the appellant's case that, before his contract ended, Prime Minister Thabane renewed it and extended it by a further period of three years. However, the Chairman of the Public Service Commission avers in his affidavit that there was no consultation between Prime Minister Thabane and the Public Service Commission regarding the appointment of the appellant.

[14] On the issue of consultation, there is a suggestion in the written heads of argument that, it is legally impermissible for the court to enquire into whether consultations ever took place between Prime Minister Thabane and the Public Service Commission regarding the appointment of the appellant. One has a feeling that this argument has its basis in the provisions of section 155 of the Constitution, which provide that:

8. Where, under any provision of this Constitution, any person or authority is authorised or required to exercise any function after consultation with some other person or authority, the person or authority first referred to shall not be required to act in accordance with the advice of the other person or authority and the question whether such consultation was made shall not be enquired into in any court.

[15] Applied to the case before us, this section would mean that, although, under section 319(1) of the Constitution, Prime Minister Thabane was authorised or required to appoint the appellant as principal secretary, after consultation with the Public Service Commission, he (Prime Minister Thabane) was not required to act in accordance with the advice of the Public

Service Commission and the question whether such consultation was made shall not be enquired into in any court. In my opinion, it is unnecessary to interpret this section in the particular circumstances of this case for two reasons. First, it is on the facts, common cause that there was no consultation between Prime Minister Thabane and the Public Service Commission. There is therefore, no need to enquire into whether such consultation was made or not. Second, the appellant's case was that it was the Government Secretary (on behalf of) who consulted the Public Service Commission. Since this is not the kind of consultation contemplated in section 155 of the Constitution, then the courts are not precluded from enquiring into whether such consultation was made.

[16] When a Prime Minister appoints a principal secretary, he or she is exercising a public power. The public power at stake derives from section 139(1) of the Constitution and the operative legislation, being the Public Service Act. The South African Constitutional Court once held that:

“The exercise of public power must ... comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.⁶

⁶ *Affordable Medicines Trust and Others v Minister of Health and Others* 2005 (6) BCLR 529 (CC) at paras 49, 75 and 77.

[17] I respectfully agree with the foregoing remarks. The Constitution did not give Prime Minister Thabane authority to delegate to the Government Secretary to consult with the Public Service Commission regarding appointments of principal secretaries. The Public Service Act does not do so either. The Prime Minister and the Government Secretary are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. I hold therefore that, the purported appointment or approval of the request to extend, without prior consultations between the Prime Minister Thabane and the Public Service Commission was illegal and could not give rise to any legitimate expectation to the appellant.

Disposal

[18] In its bare bones, the relief asked for by Mr Hlalele was to be either reinstated or to be compensated. Regard being had to the discussion above, this appeal cannot succeed. This was a frivolous appeal and there is no reason why the appellant should not be ordered to pay costs of this appeal.

Order

[19] In the result, the appeal is dismissed with costs.



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

I agree:



**P. T. DAMASED AJA
ACTING JUSTICE OF APPEAL**

I agree:



**M. H. CHINHENGO
ACTING JUSTICE OF APPEAL**

FOR THE APPELLANT: MR. K.J. NTHONTHO
FOR THE RESPONDENTS: MR. M. RASEKOAI with
ADV C J LEPHUTHING