

IN THE APPEAL COURT OF LESOTHO

**HELD AT MASERU
47/2021**

C of A (CIV) No.:

C of A CIV/APN/146/2021

C of A CIV/APN/149/2021

In the matter between:

**PRINCIPAL SECRETARY MINISTRY OF
PUBLIC SERVICE**

1ST

APPELLANT

ATTORNEY-GENERAL

2ND

APPELLANT

AND

KOTSO MABASO

1ST

RESPONDENT

DAVID NTHEOLA

2ND

RESPONDENT

THAKANE THENE

3RD

RESPONDENT

THATO 'MAPULENG MOKITIMI

4TH RESPONDENT

'NYANE MOETI

5TH RESPONDENT

LEBOGANG TLHORISO

6TH

RESPONDENT

NGAKA RAMOKOKE

7TH RESPONDENT

**MATHAPELO KANONO
RESPONDENT**

8TH

AND

**PRINCIPAL SECRETARY-MINISTRY OF
FOREIGN AFFAIRS AND INTERNATIONAL
RELATIONS AND 6 OTHER
APPELLANTS**

AND

**'MATHAPELO KANONO
RESPONDENT**

CORAM: P.T. DAMASEB
N T MTSHIYA
J v d WESTHUIZEN

HEARD: 21 APRIL 2022

DELIVERED: 13 MAY 2022

Summary

The Government of Lesotho's (GoL) failure, amongst others, to comply with Reg.32(1) of the Public Service Regulations 2008 requiring the principal secretary of the Public Service to consult receiving ministries when a transfer of a public officer is contemplated was held by the High Court to be unlawful and therefore reviewed and set aside. On appeal the GoL argued that the regulation was not mandatory in every case and that the High Court erred in so concluding.

Held on appeal that the High Court did not err, and the appeal dismissed with costs.

JUDGMENT

PT Damaseb, AJA:

Introduction

[1] On appeal are two cases arising from two civil applications heard by Sakoane CJ under CIV/APN/146/2021 (*Mabaso matter*) involving 6 applicants, and CIV/APN/149/2021 (*Kanono matter*). The two matters were heard together because they raised similar factual and legal issues and the learned Chief Justice disposed them of in a single judgment for that reason.

[2] In both matters the respondents (applicants *a quo*) are public servants in the employ of the Ministry of Foreign Affairs and International Relations (MFAIR) of which the first appellant is the Principal Secretary (PS of the MFAIR). The actions of the Principal Secretary for Public Service (PS of the PS) and his counterpart, the PS of the MFAIR, gave rise to the litigation instituted on urgent basis in the High Court by the affected public servants in the two matters.

[3] At the hearing of the appeal, learned counsel for the GoL, Mr Letompa Letlatsa, conceded that the appeal in the *Kanono matter* must succeed. For that reason, I find it unnecessary to traverse the pleadings relating to the *Kanono matter*. I will make further brief comments about the *Kanono matter* at the end of this judgment from which it will be clear that the GoL's concession *vis a vis* Ms Kanono was properly made.

The Mabaso matter

[4] The applicants in the *Mabaso matter* were employees of the MFAIR and consider themselves as career diplomats with extensive training and experience in the work of that Ministry. Their grievance stems from their transfer, with immediate effect, by the PS of the PS from the MFAIR to other ministries of the GoL (the receiving ministries). The applicants' letters of transfer are dated 28 April 2021 and directed them to be at their respective receiving Ministries on 3 May.

[5] It was common ground *a quo* that the transfer with immediate effect was without the applicants being afforded an opportunity to be heard or to make representations. Because of the transfer, the applicants approached the High Court on an urgent basis and obtained an interim interdict pending the finalisation of a review application to set aside the transfers. The interim relief was granted, the review heard, and the transfers reviewed and set aside. Sakoane CJ made the following order:

- '1. The applications are granted.*
- 2. The transfers of the applicants per the letters of the Principal Secretary of Public Service dated 28 April 2021 are reviewed and set aside.*
- 3. The respondents must pay the costs.'*

Pleadings

[6] The 7th respondent, Mr Ramoroke, deposed to the founding affidavit on behalf of all the applicants. He alleged that he was transferred with immediate effect to the Ministry of

Labour and Employment by the PS of the PS. The letter of transfer (which is similar in respect of all the applicants) reads:

'Kindly be informed that it has been decided to transfer you from the [MFAIR] to the Ministry of Labour and Employment to assume full duty and responsibility of the position of Administrative Officer, Grade, with effect from 03rd May 2021. Your conditions of service will in other respect remain the same'.

[7] It is apparent from the face of the letter that no reasons are given for the transfer nor for the shortness of the period to report to the receiving Ministries. Mr Ramoroke alleges that 'our efforts with my co-applicants to get those reasons from our superiors were futile'. He asserts that the letters are 'motivated by ulterior motives and bad faith'. The deponent states further that when he reported for duty at the receiving Ministry on 4 May, it became clear to him that the Minister for Labour and Employment neither played no part in the transfer nor concurred in the transfer as required by Regulation 32(1) of the Public Service Regulations 2008.

[8] One of the co-applicants, Ms 'Nyane Moeti, in a confirmatory affidavit alleged that in her case she was transferred to the Ministry of Tourism, Environment and Culture and when she reported for duty the principal secretary of the receiving Ministry informed her that they had not been consulted. She could thus not be accepted to commence work in the receiving Ministry.

[9] According to Mr Ramoroke, prior to the transfers, he and the other applicants had instituted court proceedings against the GoL in *CIV/APN/85/2021*. Those proceedings are pending. He alleged that the PS of the MFAIR 'expressed his dissatisfaction and unhappiness' about that litigation. At management meetings, the PS of the MFAIR 'expressed his feelings of frustration' about the litigation and that the GoL had the option to 'frustrate' the litigation by transferring the applicants to other ministries in order to 'render such litigation abortive'. On another occasion, the deponent states, the PS of the MFAIR accused the applicants of instituting the litigation to embarrass the 'authorities and that we should know that the authorities have the means to retaliate.'

[10] Mr Ramoroke asserts further that because he and the other applicants were not given a hearing before their transfers, the transfer decisions are unlawful. He maintains that the rules of natural justice required that they be given a hearing before the transfers. He adds that had they been given a hearing they would have demonstrated that it would not be fair to transfer them 'given that the transfers are highly prejudicial to our career development'.

[11] Mr Khumalo, the PS of the PS, deposed to the opposing affidavit on behalf of the GoL. He states that he is not in a position to comment on allegations made about the PS of the MFAIR who he says had in any event not been cited. According to him, those allegations are in any event irrelevant to the

issue whether or not the respondents were entitled to a hearing. According to Mr Khumalo, every now and then and for the 'effectiveness and efficiency' of the public service, public servants are transferred from one ministry to another. He denies that the respondents made any effort to obtain the reasons for their transfers and that, in any event, they were not entitled to reasons.

[12] The deponent denies that the transfer decision was motivated by ulterior motives or bad faith. Mr Khumalo states further that a pre-transfer hearing is only required where a public servant stands to be prejudiced by a transfer. According to him, it would 'hamper the very goal of an efficient and effective public service if every transfer would have to be preceded by a hearing'.

The applicable legislative framework

[13] Before I summarise the High Court's judgment, I propose to reproduce the relevant statutory framework which the Chief Justice quoted in his judgment. The Public Service Act 1 of 2005 (as amended) in s 13(2)(e) empowers the PS of the PS to make transfers. It states:

'13(2) Without limiting the generality of sub-section (1), the Principal Secretary is responsible for-

...

(e) transferring and rotating officers from one department to another, within, and reorganizing the Ministry under the Principal Secretary's supervision'.

[14] In terms of Regulation 32 of the Public Service Regulations 2008:

'(1) The Principal Secretary may transfer a public officer to work anywhere within the public service with the concurrence of the Minister and in consultation with the Head of Department of the receiving Ministry, department or agency.

(2) The Head of Department may transfer a public officer within the Ministry, department or agency.

(3) In instances where the transfer is to another ministry, department or agency the Head of Department shall consult with the Head of Department of the receiving ministry, who shall also seek the concurrence of the relevant Minister, and such transfer shall be authorised by the principal Secretary.

...

(6) Notwithstanding sub-regulation (1) an officer is liable to immediate transfer if it is necessary for operational requirements.'

[15] Section 11(1) of the Basic Conditions of Employment for Public Officers 2011 states:

'A public officer shall be liable to be transferred to any public office from one service to another inside and outside Lesotho'.

[16] The High Court also referred to Regulations 102 and 106 governing deployment and transfers in the foreign service. I will not repeat them here because they are not relevant to the outcome of the appeal.

High Court's approach

[17] The Chief Justice first considered the alleged non-compliance with Regulation 32(1). Contrary to the Crown's argument that the regulation is not peremptory as to consultation, the learned Chief Justice, correctly in my view, came to the conclusion that the PS of the PS has no discretion in the matter. According to the Chief Justice, 'Ministerial concurrence and departmental consultation are the jurisdictional facts for the proper exercise of the power to transfer'.

[18] The High Court added:

'[19] The purpose served by these two jurisdictional facts is to make the process of transfer smooth, coordinated and orderly. This is to avoid misunderstandings and friction between the Principal Secretary as the administrative head and the Minister as the political authority on the one hand, and between the Principal Secretary and Heads of Departments (sic) of receiving ministries on the other.

[20] Transferring "with the concurrence" and "in consultation" obliges all three functionaries to engage in a meaningful dialogue to reach an agreement on the necessity to make transfers. The dialogue also constitutes a system of checks and balances of the power to transfer.

[21] Where the decision to transfer is non-compliant with the regulation 32(1) procedure, there is no room for an argument that the exercise of the power is unlawful. The exercise of a power contrary to law is void ab initio. A letter of transfer issued thereby is pro non scripto. In my judgment, a public officer affected thereby is within his or rights to challenge same.'

[19] The Chief Justice found, as a fact, that in the case of Ms Moeti the receiving Ministry was not consulted. He found the

denial by the Crown in the case of the other applicants implausible. The Chief Justice said:

'The disputed fact on consultation must be resolved in favour of the respondents. The reason is that the Principal Secretary could easily have produced evidence of the consultative process he engaged in once the applicants challenged his averments.

...

As to when and how the consultations were made, the court is none the wiser.'

[20] In relation to the assertion by Mr Khumalo that there was consultation, the learned Chief Justice said: *'This statement does not inspire confidence in me that the receiving ministries were consulted.'*

[21] The court therefore concluded that:

'The applicants have made good their cause of action of non-compliance with regulation 32(1). On the authority of Lloyd (supra), the transfers of the applicants stand to be reviewed and set aside.'

[22] The passage quoted by the Chief Justice from *Lloyd v McMahon*¹ reads:

' . . . [I]t is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness'.

¹ *Lloyd v McMahon* [1987] 2 WLR 821 at 878.

[23] The High Court next considered the applicants' alleged entitlement to a pre-transfer hearing. After extensively discussing Lesotho's and comparative jurisprudence on the issue, the court below held that there is no invariable right to *audi* when an employee is being transferred; that the power of transfer is the prerogative of the government; that in a transfer situation the right to *audi* only arises if the transfer has the potential to cause prejudice to the transferee (such as diminution in benefits or radical change in responsibility); that, excepting Ms Kanono, the respondents stood to suffer no such prejudice.

[24] The Chief Justice found, again as a fact, that except for Ms Kanono, 'All the applicants ...do not complain about the transfers having any changes to their grades, salaries or benefits. Their only gripe is that they have new and different responsibilities. Absent any diminution of responsibilities, I do not see how these new responsibilities constitute prejudice to their rights or interests.' In so concluding, the court *a quo* rejected respondents' pleaded reliance on pre-transfer *audi*.

[25] The legal and factual conclusions underpinning the High Court's judgment on the pleaded reliance on *audi* has not been cross-appealed by the respondents and I prefer not to say anything further about it.

[26] The Chief Justice found the applicants' right to *audi* for a different reason: The Crown's non-compliance with Human

Resources & Development Policy Manual (the Manual) approved by the Cabinet on 1 November 2017. According to the Manual, a public officer must be given three months' notice of a transfer unless operational requirements dictate an immediate transfer.

[27] The Manual was not relied on by the respondents in their pleaded case as a ground of review. That must explain the fact that the learned Chief Justice did not cite it in the part of his judgement dealing with the applicable legal framework. The Manual appears as part of *Annexure A1* to Mr Ramoroke's affidavit and no specific reference is made that it is relied on as invalidating the transfers. It clearly was intended as mere background information. In any event, the applicable legal principle is clear:

*'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions to be drawn from such passages have not been canvassed in the affidavits.'*²

[28] I am satisfied that the court below was not entitled to invalidate the transfers on the ground that the transfers did not comply with the Manual.

[29] It remains to consider if the other basis on which the transfers were invalidated can be sustained – that is non-compliance with Regulation 32(1).

² *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43. See also *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA and Others* 1999 (2) SA 279 (T) at 323G-J.

[30] The Crown criticises the High Court's conclusion on Reg. 32(1). It is said that it:

'... erred ... in holding that concurrence of the receiving Ministry is mandatory in every case where transfer of a Public officer is effected by the Principal Secretary under regulation 32(1) of the Public Service Regulations 2008'.

[31] The approach adopted by the Chief Justice on Reg. 32(1) is sound. I have already quoted the Chief Justice's main findings in full and need not repeat it, except to add a few observations of my own in support of it. In so doing, I proceed from the premise that the fact-finding by the court below that there was no consultation with the receiving Ministries is unassailable and is, in any event, not challenged in the grounds of appeal filed of record.

[32] It does not avail the Crown to criticise *that* fact-finding in its heads of argument when the grounds of appeal are silent on the matter. Be that as it may, and in so far as it may be considered a live issue, the failure by the GoL to produce proof of the consultation is telling. That failure and the clear evidence of Ms Moeti corroborate the respondents' version that no consultation with the receiving Ministries had taken place.

[33] Compliance with Reg. 32(1) is not a mere formality. The embarrassment Ms Moeti and Mr Ramoroke found themselves in demonstrates its importance. Not only does consultation

promote sound administration as stated by the Chief Justice, but it also promotes fairness to an affected public officer. It is, in that sense, a legislative enactment intended for the benefit of public servants and which can found an actionable cause of action if breached.³

[34] Baxter explains the principle as follows:

*'Where legislation has been enacted in the interests of a particular or individual or class of persons, the courts will presume that a violation of the legislation will automatically affect the interests of such individual or class and anyone falling within the protected category will have standing to challenge actions taken in violation of the legislation without having to establish that his interests are in fact affected.'*⁴

[35] I am satisfied that the High Court's finding that Reg. 32(1) was breached and invalidated the transfer of the applicants in the *Mabaso matter* cannot be faulted and that the appeal should be dismissed.

[36] In the court below, the Crown had raised a point *in limine* that there was non-joinder in that the individuals who replaced the applicants in the positions from which they were transferred ought to have been joined, but were not. That was rejected by the High Court and in one of the grounds of appeal the Crown alleged that the objection was good and ought to have been sustained. I see no merit in the objection for the reasons that the High Court advanced.

³ *Patz v Green & Co* 1907 TS 427 at 433; *Roodeport - Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 96.

⁴ L. Baxter *Administrative Law* (1984) at p 659-660.

[37] Although our understanding is that the point was abandoned on appeal, the High Court's conclusion needs to be confirmed in the event it is later suggested that the concession was not properly made.

[38] Frankly, I fail to see what contribution those individuals could have made to the inquiry whether the Crown acted unlawfully, save to seek to justify their retention in the offices to which they were transferred. Besides, and as I have shown, the requirement to comply with the procedure dictated by Reg 32(1) had to be complied with, and as the Chief Justice correctly held, rendered the transfers void *ab initio*. As the High Court said:

'The Principal Secretary ...is the source of any impossibility that may arise from the reversal of his unlawful decision. A favourable court order would be putting right what went wrong. No impossibility can stand to what the law puts right.'

Kanono matter

[39] I have already explained that the Crown has conceded that its actions in relation to Ms Kanono are unlawful and that her transfer was equally liable to be set aside. The appeal against the Chief Justice's judgment and order setting aside her transfer must therefore also fail. Because of the concession by the GoL, advocate Setlojoane who on appeal appeared for Ms Kanono asked that the court makes an order dismissing the

Crown's appeal, with costs. Mr Letlatsa for the Crown conceded that Ms Kanono is entitled to her costs.

Order

[40] I accordingly make the following order:

The appeals against the judgement and order of the High Court in CIV/APN/ 146/2021 and CIV/APN/149/2021 are dismissed, with costs.



PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree:



J V D WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



N T MTSHIYA
ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS:

ADV L LETOMPA

FOR THE RESPONDENTS:

MR Q. LETSIKA AND

ADV. R J SETLOJOANE