

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) NO.56/2021**

In the matter between:

**RETŠELISITSOE BOKOPANE**

**APPELLANT**

**AND**

**COMMISSIONER OF POLICE  
RESPONDENT  
ATTORNEY GENERAL  
RESPONDENT**

**FIRST  
SECOND**

**CORAM:** K E MOSITO P  
N T MTSHIYA AJA  
J WESTHUIZEN AJA

**HEARD:** 13 APRIL 2022

**DELIVERED:** 13 MAY 2022

**SUMMARY**

*Administrative Law - Mootness- unreasonableness as ground  
for review -Appeal not to be disposed off on account of*

*mootness as costs issue still potentially remain to be considered in the appeal- No factual basis for the finding of unreasonableness in casu - Appeal dismissed with costs - Judgment of the High Court confirmed.*

## **JUDGMENT**

### **K E MOSITO P**

#### **BACKGROUND**

[1] On 7 November 2020, Mr Retšelisitsoe Bokopane (the Appellant) approached the High Court for a declaratory order that the decision by the Commissioner of Police (the second Respondent) to transfer the Appellant from the Police Headquarters to Morija Police Station be declared null and void *ab initio*. On 27 November 2020, Mahase J granted an interim order staying the transfer mentioned above pending the final determination of the application.

[2] The order was made returnable on 15 December 2020. Before that date, the Court heard the council on 8 December 2020, and the application was dismissed with costs. The parties made no issue about the dates mentioned above before us. There is, therefore, no need to comment on them.

[3] Dissatisfied with the above order, the Appellants approached this Court on appeal. He raised two grounds of appeal against the said decision. First, he complained that the Court *a quo* erred in dismissing the application without reasons

for the order. Second, he complained that the Court *a quo* erred and misdirected itself in dismissing the application in the face of salient facts, evidence and a clear position of the law.

## **Facts**

[4] The facts giving rise to the present dispute are not contentious. They are that, on 7 September 2020, he received a letter from the second Respondent notifying him of the second Respondent's intention to transfer the Appellant from the Police Headquarters in Maseru to Morija Police Station, still in the Maseru district. The Appellant was invited to make representations on why he should not be transferred as aforesaid. The Appellant, a Superintendent in the Lesotho Mounted Police Service (LMPS), proceeded to his lawyer to instruct him to answer the second Respondent's letter.

[5] His lawyer (Advocate L.A Molati) answered the second Respondent's letter through a letter dated 8 September 2020. Advocate Molati's letter raised several issues. First, the letter stated that the intended transfer had no merit and would not be in the best interests of the LMPS. In this regard, the Appellant stated that he still had a pending disciplinary and criminal case. He further stated that the LMPS, as an organisation is involved in a litany of wrong administrative decisions, including promotions. He stated that it is a fact that he is an applicant in many of those applications in the courts of law.

[6] Second, he stated that Appellant is building a residential house, and he would not be able to supervise the construction activities if he were to be transferred to Morija. Third, he stated that the Appellant was residing with two (2) minor children, and there would be no one to mind them were the Appellant to be transferred to Morija. The letter concluded that '[i]n the event that the above reasons notwithstanding, you proceed to transfer client, we shall sue you.' The letter concluded that the transfer is not honest as it aims to prevent the Appellant from suing on the alleged wrong administrative decisions, including promotions.

[7] In the founding affidavit, the same reasons were repeated. The Appellant concludes his founding affidavit by averring that his transfer is unlawful as it was not made for the best interests of the Lesotho Mounted Police Service Act or justice but rather to defeat the ends of justice. He also states that he is being transferred without due regard to his representations. Fourth, Appellant also pointed out that his transfer will prejudice the LMPS because he has information relating to serious cases of murder and a case of a suspect whom some women beat up at the State House. He also avers he is still investigating whether or not the Commissioner of Police had any role to play in this incident.

[8] The first Respondent reacted to the above statements in his letter dated 16 November 2020. It also appears that the Appellant and the first Respondent had a face to face meeting

on the subject on 15 October 2020, where the same issues were discussed. It appears from the first Respondent's letter dated 16 November 2020 that, despite the correspondence and the face-to-face meeting, the first Respondent remained unpersuaded by the Appellant's representations. The first Respondent then transferred the Appellant.

[9] At the hearing of this appeal, this Court enquired from Counsel for the Appellant about the whereabouts of the Appellant and his children. The reason for the enquiry was that we were aware that more than a year had passed since the decision to transfer had been made. Since Counsel could not testify on these issues from the bar, we then invoked Rule 17(1)(c) of the Rules of this Court to order evidence (by way of affidavit) of the Appellant on the above two factual issues. The Appellant complied and filed a supplementary affidavit.

[10] In the supplementary affidavit, the Appellant deposes that he is currently stationed at Morija Police Station after being transferred thereto, which is the subject of these proceedings. He further avers that after he had noted this appeal, he applied for a stay of execution pending the determination of the appeal before the Judge *a quo*. The application was dismissed without any reasons for the judgment. On 1 April 2022, he resumed duty at Morija Police Station, where he had been transferred to.

[11] Regarding the children, he avers that they are still in Maseru, where they attend school. The elder is attending school

at Lesotho High School doing grade nine, while the younger is doing standard five at Unity English Medium School in Maseru. He avers that he had to hire a domestic assistant to assist children at great financial suffering because of his salary, which cannot accommodate all his expenses. He further avers that he has to commute from Maseru to Morija every day at his own cost as there is no accommodation at Morija Police Station. He further avers that he cannot, as a result, stay with his children at Morija for the foregoing reason.

## **ISSUES FOR DETERMINATION**

[12] Therefore, the two issues for determination are whether (a), on the facts of this case, the appeal is not moot; and (b) the Court *a quo* erred in dismissing the Appellant's application, thereby acting unreasonably. It is apposite first to consider the law applicable to the resolution of this appeal.

## **THE LAW**

[13] The two legal principles governing the present enquiry are mootness and unreasonableness. In *Tefo Hashatsi v Prime Minister and Others*<sup>1</sup>This Court remarked as follows regarding mootness:

"The test for mootness which should, in my view, be applied in Lesotho is that stated in Viscount Simon LC in *Sun Life Assurance Co. of Canada v Jervis* (1944) 1 A11 ER 469 (HZ) at 471 A -B, which was quoted with approval by Plewman JA in *Coin Security Group v SA National Union for Security Officers* 2001 (2) SA 872(SCA) at 875 C -E.

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<sup>1</sup> *Tefo Hashatsi v Prime Minister and Others* C of A (CIV) No. 5 of 2016.

That test is whether there exists between the parties to an appeal a matter in actual controversy which (the Court) undertakes to decide as a living issue."

The second legal principle is unreasonableness. Stratford JA formulated the legal principle in *Union Government v Union Steel Corporation (South Africa) Ltd.*<sup>2</sup>, in the following terms:

"There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of discretion on the mere ground of its unreasonableness. It is true that the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of *mala fides* or ulterior motive' ...."

[14] In *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere*,<sup>3</sup> Jansen JA proposed that a distinction should be drawn between the "formal test" and the "material/extended formal standard test". In the case of the former, the learned Judge of Appeal opined that the courts will not interfere with the merits of the decision and are concerned only with how the decision was exercised. In the case of the latter, which Jansen JA held to apply in the case of judicial bodies created by statute or contract, a decision could be set aside on the basis that the evidence did not reasonably support

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<sup>2</sup> *Union Government v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 237.

<sup>3</sup> *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) (at 13F-G)

it.<sup>4</sup> It is clear from the above quotation that, in our law, unreasonableness in the exercise of its discretion by a decision maker is not a ground of review unless the unreasonableness was of so gross a nature that it led to the necessary inference of *mala fides* or improper motive or a failure by the decision maker to apply its mind to the matter.

### **DETERMINATION OF THE APPEAL**

[15] In the course of the hearing of this appeal, this Court raised the issue of whether the appeal would not be moot if the Appellant had complied with the transfer instruction. Advocate Molise said it would not as it is important to have a decision in this matter in the interest of predictability and development of jurisprudence. Advocate Sehloho argued that it would be moot because there would no longer exist between the parties this appeal, a matter in actual controversy which this Court would have to decide as a living issue.

[16] For the avoidance of doubt, Rule 4(5) of the Court of Appeal Rules, 2006 provides that the Court, in deciding the appeal, may do so on any grounds whether or not set forth in the notice of appeal and whether or not relied upon by any party. Indeed, the issue of mootness was raised, not by the parties but by the Court. A case is moot and therefore ordinarily not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.<sup>5</sup> However,

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<sup>4</sup> Ibid, 20D-21C.

<sup>5</sup> National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at para 21.



since the Court had ordered costs against the Appellant, and that issue may still have to be considered in this appeal as a corollary to the grounds raised by the Appellant, I am of the opinion that this is not a proper case to be disposed of based on mootness.

[17] I now turn to consider the grounds of appeal raised in this appeal. The first ground of appeal advanced by the Appellant was that the Court *a quo* erred in dismissing the application without giving reasons for judgment. However, when the matter was called before us, the learned Judge had already filed her reasons. Advocate Molise informed us that he was abandoning the ground of appeal. We will therefore say no more on this ground.

[18] The second ground of appeal was that “the court *a quo* erred in dismissing the application in the face of salient facts, evidence and a clear position of the law which were all in favour of granting the application.” Before we consider this second ground of appeal, we express our concern about the growing trend of Counsel failing to abide by the rules of this Court when drawing grounds of appeal. Rule 4(4)(b) of this Court’s Rules is very clear. It provides that the notice of appeal shall set forth concisely and clearly the grounds of objection to the judgment or order, and such grounds shall set forth the findings of fact and conclusions of law to which the appellant objects and also state the particular respects in which the variation of the judgment or order is sought.

[19] Advocate Sehloho for the respondents submitted before us that "this ground of appeal is framed in a verbose and general manner rendering the respondents, not in the position to respond issuably to appellant's ground of appeal." I agree. This ground is too sweeping to be rightly considered by this Court. Furthermore, the Appellant has failed to show which salient facts, evidence, and a clear position of the law were in favour of granting the application. There has not been set forth concisely and clearly the ground of objection to the judgment or order in the second ground. The findings of fact and conclusions of law have not been set forth to which the appellant objects. It also does not state the particular respects in which the variation of the judgment or order is sought.

[20] In his written and oral submissions before this Court, advocate Molise clarified the ground of appeal and review by invoking the learned Judge's reasons for judgment.

[21] The learned Counsel argued that the Court *a quo*, having found that the First Respondent did not apply his mind to the Appellant's representations, nevertheless erred by going ahead to dismiss the application. He contended that the learned Judge should have found that the decision was unreasonable. In a case such as the present, the unreasonableness relied upon must be so great as, on a preponderance of probabilities at the end of the case, to warrant the inference of the existence of *mala fides* or one or other of the further features mentioned by

Stratford JA in the above-cited passage.<sup>6</sup> The statements to be found in the cases are to the effect that the Court can interfere if a decision is so unreasonable that no reasonable authority could ever have come to it. There is copious authority for the proposition that interference by the Court in a case such as this on the ground of unreasonableness is only acceptable if it is gross to so striking a degree as to warrant the inference that the repository of the discretionary power has acted in bad faith and from an ulterior or improper motive.<sup>7</sup> Aside from the fact that the effect of the above contention was to clarify that the legal foundation of the Appellant's case was unreasonableness, there remained a lack of factual basis for the unreasonableness as a legal theory upon which to mount the attack in this case.

[22] The observation by the learned Judge that the First Respondent had not applied his mind to the Appellant's representations is, on the facts, incorrect. This issue is pleaded explicitly in paragraph 13.5 of the Answering affidavit. In that paragraph, the first Respondent considered and dismissed the issue on the basis that the Appellant has to employ a childminder to look after the children. In annexure RB3, the first Respondent states that "[r]esiding with your minor children could not be a bar to your transfer as you can still move with them to Morija or find a childminder to look after them while you are in Morija." It could be that a different Commissioner of Police could have come to a different decision on this point, but

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<sup>6</sup> see *Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd and Rhodesia Railways and Others* 1956 (3) SA 480 (FC) at 487 - 91.

<sup>7</sup> See eg *Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another* 1975 (4) SA 1 (T) at 8B - G.

this is a different issue from saying the first Respondent did not apply his mind to the issue.

[23] In his founding affidavit, the Appellant contends that his transfer is not honest as it is intended or aimed at preventing him from finding and arresting the high profile suspects. In his annexure RB3, the first Respondent denies this averment. Instead, he states that his office assures the appellant 'that this transfer is genuine, without any malice and in the best interest of the Lesotho Mounted Police Service, not any other reason.' The case sought to be made was that this alleged lack of honesty was fatal to the transfer. In my respectful view, the first Respondent's statement disavowing any imputation of *mala fides* and assuring the Appellant that 'this transfer is genuine, without any malice and in the best interest of the Lesotho Mounted Police Service, not any other reason', meant that the question of dishonesty and the *mala fides* of the transfer was unfounded.

[24] He avers that the applicant failed even to show the RCI of any sensitive case he is investigating because there is nothing of such a nature. He further avers that it is the first Respondent's office which is in charge of investigations in Lesotho and that the Appellant could not proceed with any investigations without the first Respondent's knowledge. In reply, still, the Appellant does not attach or show any RCI of any such sensitive case he is investigating. He contents himself

by saying, "I deny the contents therein and reiterate the contents of my founding affidavit."<sup>8</sup>

[25] It cannot be said that the first Respondent's decision to transfer the Appellant to Morija Police Station was so unreasonable to the extent that it is inexplicable, save on the assumption of *mala fides*. The learned Judge in the Court *a quo* did not find that it was, and, speaking for myself, I have not been persuaded that it was unreasonable at all. Advocate Molise submitted that the First Respondent did not have regard for the representations of the Appellant and his circumstances.

[26] Bearing in mind the remarks of Lord Denning MR in *Secretary of State for Education and Science v Metropolitan Borough of Tameside*<sup>9</sup> I agree with Advocate Molise that the first Respondent must direct himself properly in law. He must call his attention to the matters he is bound to consider. He must exclude matters that are irrelevant to that which he is to consider. Furthermore, the decision to which he comes must be reasonable in that it can be supported with sound reasons or, at any rate, be a decision that a reasonable person might reasonably reach.

The possibility that the First Respondent did not properly direct himself to the representations should immediately be dismissed. As the learned Judge put it:

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<sup>8</sup> Para 13.7 of the Replying Affidavit.

<sup>9</sup> *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (HL) at 671.

[16] Be that as it may, what remains clear from the contents of annexure RB3 is that the first Respondent has "found nothing cogent enough in your representations (both verbal and written)".

[27] The next argument by the Appellant is that what appears in the answering affidavit is entirely different from the reasons advanced in annexure RB3. I am afraid I have to disagree that anything mentioned in annexure RB3 was irrelevant to the representations contained in annexure RB2. As to what it is that is different, we were not told. In my view, the first Respondent had to consider whether the representations, as reflected in paragraphs 38.1 to 38.13 of the founding affidavit, were reasonable. These averments were issuably answered by the first Respondent in paragraphs 13.1 to 13.8 of the answering affidavit. In my view, the relevant representations by the Appellant and his personal circumstances were considered and addressed by the first Respondent.

[28] The fact that the first Respondent has honestly and fairly arrived at his decision upon the relevant representations by the Appellant and his personal circumstances, a point which lies within the discretion of the First Respondent who has decided it, the Court has no functions whatever. It has no more power than a private individual's interference with the decision merely because it is not one at which it would have arrived.<sup>10</sup>

## **DISPOSAL**

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<sup>10</sup>See Bristowe J's judgment in *African Realty Trust Ltd v Johannesburg Municipality* 1906 TH 179 at 182.

[29] It follows from the foregoing that interference with the First Respondent's decision would not be justified on the ground of unreasonableness. The possibility that the Respondent did not properly direct himself in the law should immediately be dismissed. There are, in my view, no grounds for interfering with the Respondent's decision. It follows that the appeal must fail.

### **THE ORDER**

[30] The appeal is dismissed with costs.

[31] The order of the Court *a quo* is confirmed.



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

I AGREE



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**N T MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

I AGREE



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**J WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

For the Appellant: Advocate M.A.Molise  
For the Respondents: Advocate N.C. Sehloho