

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C of A (CIV) NO. 48/2022
CIV/APN/304/2021**

In the matter between

MINISTER OF PUBLIC SERVICE APPELLANT	1ST
PRINCIPAL SECRETARY MINISTRY OF PUBLIC SERVICE APPELLANT	2ND
REGISTRAR OF HIGH COURT APPELLANT	3RD
PRINCIPAL SECRETARY MINISTRY OF FINANCE APPELLANT	4TH
ATTORNEY GENERAL APPELLANT	5TH

And

**RABUKA CHALATSE
RESPONDENT**

CORAM: DAMASEB AJA
MUSONDA AJA
CHINHENGO AJA

HEARD: 14 OCTOBER 2022
DELIVERED: 11 NOVEMBER 2022

SUMMARY

Respondents approving new structure of Judiciary; Before implementation of approved new structure, advertisement flighted calling for applications by interested persons to fill vacant position of Senior Judicial Commissioner and stipulating that the position is remunerated at grade K level as provided in old structure;

Respondent applying and succeeding; Letter of appointment on promotion to advertised position written to him specifying appointment is at grade K level; Over three years later respondent applying to court for a declarator that he be placed at grade L, being grade of Senior Judicial Commissioner under the new approved structure; Respondent also applying for salary at that grade L be paid to him with effect from date of appointment on promotion;

High Court granting relief as sought; On appeal, accepting appellants' contention, held there was no evidence that the new approved structure was implemented although approved - declarator and back pay should not have been ordained by High Court;

Appeal upheld with each party to bear own costs, such order of costs being justified on appellants' failure to clarify the position of Judiciary structure at time of respondent's interview or appointment

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] Mr R Chalitse, the respondent herein, is the beneficiary of a High Court order declaring that he is a grade K employee in the Judiciary and that he be paid the salary of that grade retrospectively from 23 April 2018. In reaching this conclusion the High Court (Khabo J) stated:

“The revised judicial structure having been approved when the applicant (Chalitse) was appointed to his position, the court finds that he was rightfully and lawfully entitled to be paid at grade K. Salary arrears

have vested as he ought to have been paid at grade K from his appointment on 23rd April 2018.”¹

[2] The appellants are aggrieved by the decision of her Ladyship and have appealed to this court on the grounds that the court erred in holding -

(a) that the respondent’s salary be at grade K level when it should remain at grade J level;

(b) that the position to which the respondent was appointed, that of Senior Judicial Commissioner, carries a salary at grade K level when the structure of the Judiciary approved on 22 February 2017 has not been implemented; and

(c) that he be paid salary at grade K level with effect from 23 April 2018, being the date that he was appointed to the position he currently holds.

Factual background

[3] In the founding affidavit, short and to the point, the respondent averred that he was appointed as a Senior Judicial Commissioner in the Judiciary at grade J on 20 April 2018.² The date of appointment is wrong. It is 23 April 2018. His letter of appointment dated 20 April 2018 reads-

“APPOINTMENT ON PROMOTION: MR RABUKA
CHALATSE

It is my pleasure to inform you that the Judicial Service Commission at its 131st sitting on the 19th March 2018 resolved that you be appointed on promotion to the position of Senior Judicial

¹ Para [23] of High Court judgment

² Para 4 of founding affidavit

Commissioner, Grade J, tenable at Judicial Commissioners Court with effect from 23rd April 2018.

You will enter that office in the scale of M324 480.00 p.a. point and your incremental date will be determined under Regulation 88(2) of the Public Service Regulation 2008.

Your other terms and conditions of employment will however remain the same.

Yours faithfully

*P Phafoli (Miss)
Registrar of the High Court and Court of Appeal.”³*

[4] By the time of his appointment on promotion, a new structure for the Judiciary had been approved by the relevant authorities on 22 February 2017, with the position to which he was promoted being placed at grade K level.

Respondent’s case on affidavit

[5] The respondent avers that despite that the appellants knew “that I am entitled to be remunerated at grade K they continue to remunerate me at grade J, much to my prejudice and in violation of my constitutional right to be treated fairly and afforded equal protection of the law.”⁴ He avers further that in fact the position of Senior Judicial Commissioner has to be remunerated at a higher grade, grade L, the same remuneration grade as that of the Registrar of the High Court, because a savingram (Annexure “RC3”) addressed by 2nd

³ Annexure RC1 to founding affidavit

⁴ Para 4 of founding affidavit

appellant to 3rd appellant on 4 March 2017, states that “the Senior Judicial Commissioner reports directly to the Chief Justice and not the Registrar of the High Court as stated in the new approved structure.” He thus contended that he should be remunerated at grade L level because of the reporting structure. That is the reason why, in his notice of motion and paragraph 6 of the founding affidavit, he sought, as his main relief, a declarator that he too be remunerated at that grade. Only in the alternative did he seek to be placed at grade K level. His legal representative however abandoned the main relief at the hearing in the High Court. He drew the court’s attention to the fact that deputy High Court registrars, who report to the Registrar, are at grade K, and, as logic would dictate, he who reports directly to the Chief Justice must, at least, also be remunerated at grade K level.

[6] The relief that he ultimately sought is a declaration that he be remunerated at grade K level in terms of the approved new structure and be paid a salary of that grade with effect from 23 April 2018.

Appellants’ case on affidavit

[7] The Registrar deposed to appellants’ answering affidavit. The affidavit focussed more of the abandoned prayer. To the extent that it does so, it is no longer relevant to the present dispute because the respondent abandoned that prayer.

[8] In relation to the prayer that the respondent's grade be declared to be grade K, the Registrar averred in opposition that the advertisement for the position to which the respondent was promoted was made under the old structure, which placed a Senior Judicial Commissioner at grade K. When the respondent applied for the position he was aware that the salary level was at grade K. When he succeeded at the interviews, a letter promoting him to Senior Judicial Commissioner and sent to him clearly indicated that he would be remunerated at grade K level. He accepted the appointment of that basis. The Registrar admits that by the time the advertisement was flighted and the respondent successfully applied for promotion to the position of Senior Judicial Commissioner, a new structure for the Judiciary had been approved. She, however, avers that it had not yet been implemented. The implementation of the structure was a separate exercise involving, among other things, a thorough job evaluation. The salary level sought by the respondent has therefore not yet been changed from grade J in the old structure to grade K in the new structure. The Registrar accordingly disputed that the respondent is entitled to receive a grade K level salary although he occupies the position which, under the new structure, had it been implemented, would entitle him to a salary at that level. She also disputes that the respondent is entitled to back-pay.

High Court decision

[9] It is important, in my view, to understand the facts that informed the High Court decision and their sequence. Common cause is the fact that the new structure for the Judiciary was approved by the 1st and 2nd appellants in February 2017 and that the 2nd appellant clarified the reporting lines in terms of that structure in March of the same year. The advertisement calling for the filling of the vacant position of Senior Judicial Commissioner at grade J level of remuneration was flighted in December 2017⁵. The respondent applied for the position on the basis of the advertisement and was successful. The letter appointing him on promotion to that post was sent to him on 20 April 2018, just over a year from the date of approval of the new structure. It specified that his promotion was with effect from 23 April 2018. It specified that he would be remunerated at grade J level. The letter was in conformity with the advertised position in all respects. It cannot therefore be disputed that the respondent got what he had bargained for – position of Senior Judicial Commissioner at grade J level of remuneration.

[10] No explanation is given in the affidavits why this apparent anomaly was not clarified and settled at the time the respondent was interviewed, if he was, or at the time that the letter of appointment was written. The respondent seems to have woken up to the fact of the anomaly in August 2021, some three years and four months from date of appointment, when he lodged the motion proceedings and sought the reliefs therein. The only explanation, subject to its acceptability, is

⁵ See annexure RH1 to answering affidavit

that given by the Registrar, to wit, that the new structure had not been implemented by the time that the motion proceedings were lodged and the salary level of the position that the respondent occupied had not been adjusted to grade K level. In this regard the Registrar states in the answering affidavit:

“5. The advertisement of the position.. was done under the old structure and as such he was appointed under the same structure and his position properly graded at grade J. ... It is worth mentioning that the approval of the new structure does not automatically mean the structure is implemented. To implement the approved structure, the Judiciary would have to follow the establishment processes for implementation, which may result in recreation of new positions, re-designation or upgrading. The position which the applicant is seeking in the new structure has not been upgraded as the processes have not yet been followed and therefore applicant cannot claim prejudice or violation of constitutional rights over a position which has not yet been upgraded.

6. ... the grading of positions is not based on the reporting line. It is done through job evaluation which is informed by job description. ...”.

[11] The Registrar’s explanation is not adequate or sufficiently informative. The question remains unanswered whether the new structure, as a whole, was not implemented or it was not implemented only with respect to the office of Senior Judicial Commissioner. If the former, there is nothing unusual in a government department coming up with a new structure for the department and not implementing it for various reasons, one of which could be a lack of funds to implement it. It is not unknown that new organizational structures are shelved until it is practical to implement them. If the latter, there must be an explanation peculiar to the office concerned which militated against implementation of the new structure when that new

structure was implemented in respect of other positions in it. This then is the factual background which informed, or should have informed, the learned judge's decision.

[12] The learned judge *a quo* identified the issue for determination as "very straightforward" but not necessarily simple. In her opinion the issue is "that applicant salary be upgraded retrospectively from grade J to grade K in accordance with the revised approved structure of the Judiciary", it being common cause that the revised structure has been approved. She summarises the respondent's case in these terms:

*"It is that he is still being remunerated at grade J, contrary to the approved structure that puts him at grade K and he finds this a violation of his right to be treated fairly and to be afforded equal protection of the law. Applicant's case is, in a nutshell, that the position he holds is not properly graded."*⁶

[13] The learned judge also summarises the appellants' case as being that the respondent was employed in terms of the old structure which places him at grade J and not grade K. That was the grade advertised and to which he was appointed. She referred to the savingram from the 2nd appellant, the Principal Secretary of Ministry of Public Service, and makes a passing comment that *"It is interesting to note that the Principal Secretary invoked the new structure in respect of reporting lines but not in respect of the salary."*

⁶ Para [4] of judgment

[14] I do not think that anything interesting emerges from the Principal Secretary's savingram. It must be recalled that the savingram was written on 14 March 2017, which was less than a month from the adoption of the new structure in February of the same year. In my view, the Principal Secretary was clarifying the reporting line for the Senior Judicial Commissioner under the approved structure. That cannot be construed as some indication that the new structure had been implemented by that time. No date of implementation of the structure is disclosed by any of the affidavits. This tends to support the Registrar's contention that no effect has been given to the new structure.

[15] The learned judge however arrives at a conclusion that does not appear to me to be supportable on the facts. She states:

"[7] In my considered view, respondents' defence and reliance on the old structure does not receive the favour of this court. The corrigendum aside, the advertisement ("RH1") was issued out by the respondents on 1st December 2017, months after the approval of the structure in issue. We are not told why the advertisement was issued in terms of the old structure when there was a new one in place and due to be implemented. It has been established as a fact that applicant assumed the position of Senior Judicial Commissioner post after the coming into effect of the revised structure, not before."

[16] Contrary to what the learned judge says above, the Registrar informs us why the advertisement was issued in terms of the old structure. That was because the new structure

had not been given effect to or implemented. And, dealing with the appellants' contention that the new structure was not implemented because other processes had to be met before it was implemented, the learned judge had this to say:

"[10] I would have thought that such establishment processes were considered in motivating the approval of the revised structure. This argument beats logic. In terms of "RC2", the approved structure, applicant's position is graded at K. If, as argued by the respondents, in order for the structure to be implemented, a lot of factors had to be considered, this begs the question, what informed the position of Senior Judicial Commissioner to be graded at K? For me that would include subjecting the proposed (not approved) structure to such processes as job evaluation, job analysis, costing to determine financial viability of the structure, so on, and so forth. ...

[14] For me, considerations that respondent's counsel refer to ideally have to come before approval, then be followed by the implementation which entails putting the approved structure into force. Immediately upon approval, the structure becomes legally enforceable and binding. Hence, the applicant having been appointed subsequent to the approval of the revised structure, ought to have been graded in accordance with it. Fairness so dictates."

[17] I have difficulties with the learned judge's reasoning. At paragraph [7] of the judgment quoted above, she expresses the view that because the advertisement ("RH1") was flighted on 1st December 2017, months after the approval of the structure, and there being no explanation why it was flighted in terms of the old structure when a new one was in place and due to be implemented, it must follow that the respondents

acted in terms of the new structure, and consequently, the respondent was appointed in terms thereof. This does not logically follow as a consequence of the approval of the structure. The reason is precisely what the Registrar said. The new structure had not been implemented.

[18] The learned judge also says that it was established as a fact that the respondent assumed the position of Senior Judicial Commissioner after the coming into effect of the revised structure, not before. It is unclear what she means by “the coming into effect of the revised structure.” If she meant the approval of the structure, then that is an established fact. But if she means the implementation of the structure then that cannot be so. The Registrar was clear that the new structure was not implemented.

[19] In addition, by stating that the respondent “assumed the position of Senior Judicial Commissioner after the coming into effect of the revised structure”, it is possible to draw the inference that the position of Senior Judicial Commissioner was a new post in the new structure. The facts however suggest otherwise. The respondent was promoted into that position and, as averred by the Registrar, the position existed prior to the approval of the new structure.

[20] I agree with the learned judge’s analysis that a new structure and the grades attaching to the posts therein is a product of several factors having been considered and

consequent to the structure having been subjected to the processes outlined at the end of paragraph [10] quoted above. However I have a difficulty with the reasoning and conclusion at paragraph [14] of the judgment. She reasons that once a structure is approved, “[it] becomes legally enforceable and binding” and so, “the applicant having been appointed subsequent to the approval of the revised structure, [he] ought to have been graded in accordance with it.” I have already expressed the view that it does not follow that once approved, a new structure is implemented. It may not due to various reasons. The learned judge does not cite any authority for the conclusion that once approved, the structure becomes legally enforceable and binding.

Submissions by counsel on appeal

[21] Counsel for the appellants succinctly sets out in his heads of argument the issue on which his submissions would be based:

“1.2 The central question is whether the structure that was proposed for the Judiciary and approved by the Ministry of the Public Service on 22 February 2017, became operative and legally enforceable such that the Respondent’s position automatically upgraded from grade J to grade K.

1.3 The High Court held that the structure, upon approval, became operative, legally enforceable and binding and as a result thereof the Respondent having been appointed after the approval of the structure ought to have been placed at grade K.

1.4 The appellants shall submit that the approval of the structure does not mean that the structure automatically became operative. The structure is yet to be implemented.”

[22] He submitted along these lines. The very fact that the advertisement and the letter of appointment all referred to the grade under the old structure is alone proof that the new structure had not yet been implemented. The implementation of any structure is done by or with the authority of the Ministry of the Public Service in terms of s 10(2) of the Public Service Act 2005, which empowers the Minister for the Public Service to make provision on the policy on salary administration, remuneration and benefits, job evaluation and job grading. He does so after consulting with the Ministry of Finance. In this case he never did. Although the new structure put the position of Senior Judicial Commissioner at grade K salary level, that does not mean that that structure and salary level would automatically be implemented. The judiciary would have had to follow the processes for such implementation. Counsel also submitted that the decision of the High Court, if it survived, would set a wrong precedent that the approval of a structure means implementation thereof.

[23] The respondent's submissions are unusually brief. The substance thereof is to be found in three short paragraphs, 7 to 11, in the written heads of argument. The submissions amount to no more than saying that the office of Senior Judicial Commissioner is created by statute - the Judicial Commissioner's Proclamation 1950 and its scope cannot be

altered without legislative intervention. Appellants concede that the new structure has been approved but the challenge lies with implementation but there is authority to the effect that once a structure has been approved, its implementation is the responsibility of the Ministry concerned, or in this case the Judiciary. *Attorney General and Others v Makesi and 85 Others*⁷ is such authority. In that case it was held on appeal that the Minister concerned had unlawfully failed to implement a decision therein mentioned when that was within his legal mandate.

[24] I think the decision in *Makesi* is distinguishable from the present case. In that case Cabinet approved an increase in the criminal and civil jurisdiction of certain judicial officers and the upgrading of their salary grades. The jurisdiction was increased but the salary grades were not adjusted. The appellants alleged that the Cabinet had since changed the decision but no proof was given that it had. The Minister responsible had made a public announcement that the judicial officers concerned had been given increased jurisdiction and their salary levels upgraded. Evidence was led that the Minister concerned had failed to give effect to an extant decision of the Cabinet. The court stated that the order they were called upon to issue was in the nature of a mandamus and issued it.

[25] In the present case, the respondent's application was not designed to force the Minister to implement the approved new structure. Had he so moved and no satisfactory reason were

⁷ C of A (CIV) No. 3 of 2000 (NULL)[2001] LSHC 141 (01 January 2001)

given why it should not be implemented, then the implementation would have carried with it the salary upgrading of the respondent's position. Another distinguishing feature is that the respondent *in casu* applied for promotion to a grade which carried a certain level of remuneration. He got the job. His grade was J. His salary was accordingly adjusted to that grade. The old structure remained the operative structure. His situation is therefore different from that of officers in *Makesi* whose jurisdiction was increased but no commensurate upgrading of salary was affected despite a Cabinet decision that that be done.

[26] The brief nature of the heads of argument filed for the respondent is suggestive of a party so confident that its success in the High Court would be replicated on appeal, hence the submission by counsel that –

“Appellants cannot be heard to be saying that the problem of paying Respondent in terms of the grading approved in the structure of the Judiciary Structure lies with implementation.”⁸

Discussion and disposition

[27] The critically important question of fact that was before the court was whether the new structure had been implemented when the respondent approached the court for relief. We know the position of the Registrar. It is that the new structure had not been implemented. *In Re: Makeka v Africa*

⁸ Para 10 of respondent heads of argument

Media t/a Lesotho Times,⁹ which came before this Court in this October 2022 session, I distinguished between a question of law and a question of fact and said:

“A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising it: rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise, it is a question of fact.”

[28] Clearly the issue whether the new structure was implemented or not was a question of fact that had to be resolved before applying the law. That dispute of fact could not be resolved without further evidence, for example, as to when the new structure was implemented and whether it was so implemented only in respect of some positions and not others, the latter category to include the respondent’s position. Guided by the rule in *Plascon-Evans*¹⁰, the court was bound to take the appellants’ version and find that that the new structure, though approved, was not implemented.

⁹ In *Re:Felleng ‘Mamakeka Makeka v Africa Media t/a Lesotho Times & 2 Others C of A (CIV) No. 14/2022*

¹⁰ *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 635 – 635*

[29] The judge *a quo* referred to *Attorney General and Others v Makesi and 85 Others*.¹¹ That case is distinguishable from the present because in that case the Cabinet had approved the increase of the respondent's salaries and the Minister concerned had failed to implement that decision following upon an application in the nature of a mandamus by the respondents. The present matter does not present a similar case: it falters on the hurdle whether the new structure was implemented. That is why the learned judge expressed surprise that the court was not informed why the implementation has not been done to this point.¹²

[30] In regard to the second issue before her, that of the back payment of salary to the respondent from the date of promotion, the learned judge granted relief in reliance on *The Ministry of Public Service and Another v Molefi Kome and Others*¹³ and *Attorney General and Others v Bolepo and Others*.¹⁴ The conclusion I have reached on the first issue makes it unnecessary to consider the issue of payment of respondent's salary at grade K from the date of his promotion to that post. It falls with the fall of the first issue. The appellants accordingly succeed on both issues.

[31] A costs order invariably has to be made in disposing with an appeal. The respondent prayed for the dismissal of the appeal with costs. Now that he has lost on appeal the tables are

¹¹ C of A (CIV) No. 3 of 2000

¹² Para [16] of judgment

¹³ C of A (CIV) No. 44 of 2013

¹⁴ LAC (2004-2005) 522

turned against him. In exercise of court's discretion in relation to costs, I am of the view that the respondent instituted proceedings in the High Court because the appellants did not clarify issues to the respondent in relation to non-implementation of the new structure, whether at the interviews or on appointment. Had it been made crystal clear to him that the new structure remains unimplemented either as a whole or in relation to the office of Senior Judicial Commissioner, I doubt very much that the respondent would have mounted the proceedings resulting in this appeal. I think that a fair order of costs is that each party bears its own costs in the High Court and in this Court.

[32] In light of the foregoing the order of this Court is that-

1. The appeal succeeds with no order as to costs.
2. The order of the High Court is altered to read-
"The application is dismissed. Each party to bear its own costs."



**MH CHIHENGO
ACTING JUSTICE OF APPEAL**

I agree



P T DAMASEB

ACTING JUSTICE OF APPEAL

I agree



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR APPELLANTS:
FOR RESPONDENT:

ADV R KANETSI
ADV M P TLAPANA