



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 19/23

CIV/APN/107/2019

In the matter between

TS'EPANG RAMOTS'OARI

APPELLANT

AND

**THE DIRECTOR - TEACHING SERVICE
DEPARTMENT (TSD)**

1ST RESPONDENT

**PRINCIPAL SECRETARY - MINISTRY OF
RESPONDENT
EDUCATION & TRAINING**

2ND

MINISTRY OF EDUCATION AND TRAINING

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM : MUSONDAAJA
VAN DER WESTHUIZEN AJA
BANYANE AJA

HEARD : 13 OCTOBER 2023

DELIVERED: 17 NOVEMBER 2023

SUMMARY

Application for review and reinstatement- employee alleging summary dismissal-employee resisting placement in the highlands on the grounds of ill-health-resultantly barred entry from the head office where she had been reporting for duty since appointment-barring consequent upon instruction to assume duty at her workstation-Court a quo finding this not to amount to dismissal-conclusion correct-appeal dismissed.

JUDGMENT

BANYANE AJA

Introduction

[1] This appeal is against the decision of the High Court (per Monaphathi J) in terms of which the appellant's claim for reinstatement and consequential relief was dismissed.

Factual Background

[2] The pertinent facts underlying the dispute between the parties are that the Public Service Commission (PSC) appointed the appellant as an Assistant Human Resource officer in November 2010. What happened thereafter until 2016 is immaterial for purposes of this appeal. On the 5th December 2016, the Principal Secretary (PS) of the Ministry of Education, addressed correspondence to PSC requesting it to reconsider

the appellant's re-placement in the Mokhotlong District office where a vacancy existed, I may add, still does.

[3] The Commission approved the request. The appellant then received an offer of appointment on probation with effect from the 1st of October 2016. This offer was subject to certain conditions. For purposes of this dispute, I highlight only two of them.

"4" your appointment will be on one (1) year probation, on the satisfactory completion of which, and subject to fulfillment of the requirements of the Public Service Rules 2008 you will be eligible for confirmation in your post and for appointment to the permanent and pensionable establishment".

"7 You will be liable to serve anywhere in Lesotho or offices of Lesotho Abroad."

[4] For various reasons, she did not assume duty at Mokhotlong but reported for duty at the Teaching Service Department (TSD) head office in Maseru. In March 2017, she applied for a transfer from Mokhotlong on account of her alleged ill-health. The Human Resource Director of the relevant Department requested proof of the alleged illness. It is not clear from the founding affidavit as to when and to whom the medical records

were submitted. In August 2017, the appellant was instructed to assume duty at her station. She did not comply with the instruction but reported for duty at the head office in Maseru as usual. She was, as a result, barred entry into the TSD premises. In September 2017, the appellant's salary was stopped based on the work-no-pay principle. She was thereafter charged with absenteeism from her duty station and consequently invited to a disciplinary hearing, a process halted by her attorney's request for a postponement. The founding affidavit is again silent on what transpired thereafter.

[5] Against this background, the appellant approached the Court *a quo* in April 2019 and mainly sought reliefs framed as follows:

- 1. The purported verbal dismissal and/or suspension of the applicant by the 1st respondent without affording the applicant a hearing be set aside as irregular, null, and void and of no force and effect.*
- 2. The applicant be reinstated to her substantive position as the Assistant Human Resource Officer without loss of benefits.*
- 3. The applicant be confirmed in her post and for appointment to the permanent and pensionable establishment,*

4. The applicant be paid full salary from the date of the purported dismissal or suspension to the date of reinstatement

The appellant's case

[6] In her founding affidavit, the appellant deposed that after her appointment, the Ministry encountered problems regarding her transportation to Mokhotlong and accommodation there. According to her, it was incumbent on the Ministry to make proper arrangements for her accommodation.

[7] She was, for these reasons allowed to report for duty at the head office. Due to ill health, she applied for transfer to Maseru. She was requested by the Director of Human Resources to submit supporting documents for her condition. She complied. She thereafter awaited a response. Instead of addressing her request, in July 2017 the Director gave her an ultimatum to find accommodation in Mokhotlong within a month. She (appellant) notified her doctor about this. The orthomolecular doctor then prepared a report. The report is attached to her founding affidavit. Ex facie, it was prepared on the 11th of July 2017.

According to this report, certain medical tests revealed that the appellant *has irritable tissue transparency caused by a shortage of hemoglobin in the blood*. This leads to a shortage of bone marrow production. Due to this condition, she must be closely supervised for at least nine months before going for surgery.

[8] The appellant thereafter made attempts to resolve the issue of her placement and until October 2017 she was not given a satisfactory response. Her salary was also stopped in September 2017. In November 2017 she consulted a lawyer who followed up on the matter. Her supervisors promised to address the issue. She was surprised to receive a letter inviting her to a disciplinary hearing in April 2018.

The respondents' case

[9] Besides raising a preliminary point of non-joinder of the Public Service Commission (PSC)(an issue not raised in this appeal), the PS refuted allegations of dismissal or suspension. He conversely asserted that the appellant was only debarred entry into the TSD premises in Maseru because her duty station was in Mokhotlong.

[10] He admitted that the appellant's salary was stopped but explained that before this step, the appellant was invited to show cause on the 12th of October 2017 why her salary may not be stopped for her failure to render services at her duty station. According to the officer, the appellant did not react to the request. He further averred that the appellant's salary would be restored once she reported herself for duty.

Judgment of the Court *a quo*

[11] At the close of the arguments, the court *quo* dismissed the appellant's claim. According to the learned judge, the appellant failed to make out a case for either dismissal or suspension, because barring her entry into TSD offices in Maseru does not amount to dismissal or suspension. The Court *a quo*'s reasoning for this conclusion is captured as follows in paragraphs 16 and 17:

[16] according to the facts narrated in the affidavits of both the applicant and respondent, the applicant was hired to fill a post in Mokhotlong District. When the time came to take up the post, she requested a transfer. The request for transfer was turned down. She did not proceed to Mokhotlong or challenge refusal if grounds so

existed. She was then barred from reporting for duty at the Teaching Service Department in Maseru. That in itself is not equivalent to or amount to dismissal or suspension as alleged by applicant. Therefore, prayer one (1) is not tenable.

17 The above events took place during a provisional offer of appointment, a probationary period which began on the 1st of October 2016 and ought to have ended on the last day of September 2017. Once twelve (12) months of service are completed a permanent appointment would be considered by the Commission. Applicant was requested in July 2017 to seek for accommodation to prepare to move to Mokhotlong and was given a month notice. On the 10th August 2017 she was again reminded that her post was in Mokhotlong. The next day she was told not to report to Maseru. Unauthorized, applicant choose not to report to Mokhotlong. It is not for this Court but for the Public Service Commission to decide whether applicant is eligible and ought to be confirmed into permanent and pensionable position.

The grounds of appeal

[12] The appeal is predicated on several grounds that the learned judge erred and misdirected himself;

- a) In dismissing the appellant's case on grounds that the appellant did not make a case for review yet there is evidence that the appellant*

was summarily dismissed by the Acting Director after she requested transfer to which there was no response.

b) In finding that the appellant's request for transfer was turned down and the appellant did not challenge the refusal when there was no evidence that the request was turned down, even if it was, there is no evidence that reasons were given,

c) In failing to find that the respondent acted arbitrarily and unlawfully by transferring the appellant without first affording her hearing.

d) In failing to take into account evidence of illness on the part of the appellant which was the main reason the appellant was not placed at Mokhotlong.

e) In finding that the appellant was placed in Mokhotlong when there was no such evidence.

Issues

[13] From these grounds arise two main issues. The first is whether the appellant was summarily dismissed or suspended from the public service. The second is whether the appellant's request for transfer was rejected or ignored. The 1st, 2nd and 5th grounds are interconnected. It is convenient to consider them simultaneously.

Consideration of the appeal

[14] The undisputed facts of this matter show that the PSC appointed the appellant in 2010. In 2016 there still was a vacancy in Mokhotlong so she was re-appointed to fill the vacancy. Although the last ground of appeal seems to suggest that the appellant's placement was disputed in the Court *a quo*, her founding affidavit reveals otherwise. In paragraph 6.4 she deposed as follows:

"6.4 I was again reappointed by the Public Service Commission on 19th August 2016 for the same position. According to the minutes of the appointment, I was going to be placed in Mokhotlong. This notwithstanding, I was placed in Maseru since the Ministry encountered problems with transportation and accommodation.

"6.5 Knowing my condition and the Doctor's advice not to be exposed to cold and dusty weather conditions, I wrote to the 2nd respondent herein seeking transfer because although I was still working in Maseru, I was waiting for transfer to Mokhotlong when the ministry would have made proper transport and accommodation arrangements."

[15] The appellant's request for transfer is, without more, dispositive of the 5th ground of appeal. Her affidavit clearly shows that Mokhotlong is her duty station hence the request for

transfer to Maseru. The 5th ground is meritless and falls to be rejected.

The alleged summary dismissal

[16] The appellant's complaint in the High Court and before this Court is that she was dismissed on the 10th of August 2017. The learned judge noted that the appellant tersely dealt with her alleged dismissal under paragraphs 6.8 and 6.9 of her founding affidavit as follows:

"6.8 The 1st respondent could not heed the doctor's recommendations as I was verbally informed by the then Acting Director on 10th August 2017 to leave the Maseru TSD and seek accommodation myself in Mokhotlong. I found this to be grossly unreasonable..."

6.9 The following day I reported for work and was dismissed summarily by the then Acting Director. The security officers were also instructed not to allow me entrance at the TSD from that day."

[17] Two occurrences postdating the alleged dismissal show that the appellant's employment remains extant. The first is that in October 2017, the appellant was requested by the PS Ministry of Training, to show cause why her salary should be stopped. The letter penned by the PS in this regard reads as follows:

“RE: Failure to assume duties at your Duty station.

You shall recall that since your appointment in October 2016, you have not reported yourself at your duty station - Mokhotlong. Several attempts by the office of Director Human Resources and the Senior Education Officer - Mokhotlong to facilitate your resumption of duty at Mokhotlong, including a recent instruction for you to report for duty on 01st August 2017 have failed”.

Please show cause why your salary cannot be stopped on account of your failure to render services, in accordance with Regulation 49 of the Public Service Regulations 2008.

Your response to this communication should be made by 20 October 2017.”

[18] According to the respondents, the appellant ignored this letter. Notably, the appellant did not refute this allegation in her reply.

[19] The second incident occurred in 2018. She was charged with unauthorized absenteeism from her duty station from the 8th of August 2017, in contravention of section 15(1)(a)(ii) of the Public Service Act, 2005 read with section 3(2) of the Public Service (Codes of Good Practice) 2005. She was consequently invited to a disciplinary hearing scheduled for the 11th of April 2018. It is undisputed that she was served with the notice of

hearing on the 6th of April 2018. On the date appointed for the inquiry, the appellant's attorney wrote to the Director of Human Resources. He requested a postponement of the hearing on grounds of unreasonably short notice given to the appellant. He also sought, through this correspondence, to be furnished with certain documents from the client's employment file, the list of witnesses to testify at the hearing, and their written statements.

[20] I observe in passing that the notice period allowed to the appellant is in sync with the minimum notice period stipulated in the Disciplinary Code embodied in the Codes of Good Practice 2008¹. Section 8(1) of the Code provides as follows:

8(1) If a public officer commits misconduct after being issued with a written warning, or commits misconduct that warrants a disciplinary hearing inquiry, the supervisor shall-

- a) Arrange for a disciplinary inquiry to be conducted.*
- b) Give the officer adequate notice of at least 48 hours or 2 working days before a disciplinary inquiry is held.*

[21] Although the record does not reveal what became of the disciplinary action, these two incidents are indicative of the existence of the employment relationship. The Court *a quo's*

¹Legal notice 184 of 2008

conclusion that the appellant's employment was not terminated as alleged cannot therefore be faulted.

[22] It is perhaps helpful to also indicate that the Public Service Act 2005²(PSA) and Regulations made thereunder govern among others, appointments, confirmation, and dismissal of public servants. In terms of section 6 of the PSA, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments) and the power to terminate the appointment of such persons, save the power to discipline and terminate the appointment of such officers for disciplinary reasons, is vested in the Commission.

[23] Regulation 40 of the Public Service Regulations provides that a public officer's appointment may be terminated by the Head of Department by way of dismissal for misconduct after a fair hearing instituted in accordance with the Disciplinary Code. It seems to me that the disciplinary action against the appellant was initiated in compliance with this regulation.

[24] Salary stoppage in the circumstances is also not indicative of termination of the appellant's employment. The learned

²1 of 2005

judge concluded, based on a slew of authorities from this Court that the onus rests on the employee to establish that they earned a right to a salary. Indeed, it is well established that an employer is entitled to withhold remuneration from an employee who refuses to work.³

[25] The Public Service Regulations 2008, mirrors this principle under Chapter III that governs remuneration, benefits, and allowances. Regulation 46 provides that:

“a public officer shall be entitled to a salary for services rendered as shall be determined by the Minister after consultation with the Minister responsible for Finance which shall be set out in the establishment list in respect of the office and shall be paid in accordance with the Finance Regulations.”

[26] Regulations 49 in turn provides that:

(1) “If the officer absents himself or herself from duty without permission, the principle of no work no pay shall apply without prejudice to any disciplinary action which may be undertaken under the Disciplinary Code.

(2) If an officer is aggrieved by an action under sub-regulation (1), the officer may institute an action in accordance with the grievance procedure set out in the grievance Code”.

³Teaching Service Commission v Moeketsi Makhobalo C of A(CIV) 2/2015, Commissioner of Police v Ntlotsoeu, LAC 2005-2006 156, para 3, Makhetha and another v Commissioner of Police C of A CIV 2 of 2008, para 14

Was the appellant's request for transfer ignored or rejected?

[27] Another point taken by the appellant is the Court *a quo* erred in its finding that her transfer request was turned down. The learned judge considered facts narrated in the affidavits of both parties and concluded that:

'The applicant was hired to fill a post in Mokhotlong District. When the time came to take up the post, she requested a transfer. The request for transfer was turned down. She did not proceed to Mokhotlong or challenge refusal if grounds so existed...'

[28] The question for consideration is whether the respondents did not respond to the appellant's request as alleged or whether the request was declined as the learned judge found. Based on the case pleaded by the appellant *a quo*, however, nothing turns on the finding of the judge on the refusal or otherwise of the transfer. In the ensuing discussion, I illustrate the shortcomings in the pleadings *a quo*.

[29] A rehash of the pleading reveals that although the appellant never assumed duty at her station, she applied for

transfer on grounds of ill health on 17 March 2017, to which the Director of Human Resources replied on 29 March 2017. The letter reads as follows;

"This letter is subsequent to your application for transfer from Mokhotlong to Maseru.

In response to your request please note that you need to u.f.s (under flying seal) the Chief Education Officer (CEO) who is my supervisor and the Head of the Teaching Service Department. You are also requested to attach documents of illnesses you stated in your letter from your doctor as supporting Documents. This is just a reminder as you indicated that supporting documents is not a problem because you already have them.

[30] The founding affidavit is silent on whether the appellant complied with this instruction because she did not attach any correspondence to either the office of the Human Resource Director or Chief Education Officer. The record only reveals that on 24 April 2017, Dr. Mohaleroe penned a letter addressed to the Human Resource Manager for the Ministry of Education and Training. The letter reveals that the appellant is her patient treated for osteoarthritis since 2012. Although her condition was improving, according to the Doctor, the condition is exacerbated by cold weather.

[31] The appellant does not disclose when and to whom she submitted this doctor's report. Her affidavit is sketchy on this issue. In paragraph 6.6 she states:

'My request was met with a response from the Director of Human Resources Mrs. Metsing to furnish documents of the illness from my doctor. I sought a formal certificate from my doctor and a letter was written by my doctor to the human resource manager confirming my condition. It is hereto attached and marked TR5'.

[32] The only correspondence attached to her affidavit is that of her attorneys dated 15 February 2019. It reads as follows:

15 February 2019

Ministry of education and training

Teaching service department

c/o Mr. Mofoka

Maseru

Sir: Discovery of requested medical certificates/ Tsepang Ramotsoari.

The above caption bears reference

We refer again to several telephonic conversations between our Mr. Mosotho and your Mr. Mofoka as well as the recent one with our advocate Thejane on 14 February 2019,

Your good office has requested that we furnish a medical certificate showing that indeed Ms. Tsepang Ramotsori's condition is exacerbated by cold conditions and therefore incapable of working

in the cold mountain districts. Kindly find attached hereto the said certificates obtained from her medical doctor”.

[33] According to paragraph 6.15 of the appellant’s founding affidavit, the medical certificates were submitted to Mr. Mofoka before her lawyer's correspondence. When this was, she did not say. As I stated earlier, the Director requested the medical records on 17 March 2017. The record reveals that the appellant obtained two reports from different doctors. The first was obtained in April 2017. The second was obtained in July 2017 when she was again reminded to move to Mokhotlong. The appellant’s affidavit did not reveal whether she submitted these two reports in 2017 as requested, and if yes, when.

[34] *Ex facie* the letter authored by the appellant’s attorney, it seems to me that the required documents were only furnished to the Ministry two years after they were requested. The affidavit did not explain when the lawyer’s letter reached the relevant Ministry.

Pleading a new case on appeal

[35] I turn to address the remaining grounds of appeal, the third and fourth grounds. These grounds are somewhat connected to the second ground of appeal(addressed in the

preceding paragraphs) although, to a great extent, they raise issues that were not pleaded in the Court *a quo*. The appellant's counsel on appeal contended that the Court *a quo* erred and misdirected itself in ignoring evidence of the appellant's health, proof of which was filed as part of the record. He further argued that failure to afford the appellant a hearing on her request to be transferred to Maseru violated the *audi alteram partem* principle and consequently rendered the refusal to transfer irregular.

[36] The appellant's case as pleaded was anchored on the alleged dismissal as correctly observed by the learned judge. Nowhere in the founding affidavit did she say the refusal of her transfer to Maseru was unreasonable.

[37] It is a trite principle that in motion proceedings, affidavits constitute both the pleadings and evidence. They are expected to be clear and to accurately identify issues and averments in support of the parties' case so that both the court and the litigants can be properly apprised of the relevant facts.⁴

[38] This Court has recognized that it is wrong to permit the appellant to plead a new cause of action on appeal based on

⁴Transnet Ltd v Rubenstein 2006(1) SA 591(SCA)para 28

averments never canvassed in the High Court but averred for the first time on appeal because to do so would amount to an attempt to institute a fresh action instead of addressing the appeal against the decision of the High Court.⁵

[39] The appellant did not apply for review against the alleged refusal to transfer as correctly found by the learned judge. She cannot therefore be allowed to plead a new case on appeal.

Disposition

[40] In all circumstances and having regard to the evidence adduced, there is no reason why the decision of the High Court should be disturbed. As a result, the following order is made:

- i) The appeal is dismissed.
- ii) Each party is to bear its costs.



P. BANYANE
ACTING JUSTICE OF APPEAL

I agree

⁵Makhele and others v Minister of Defence and Internal Security LAC (1995-1996)303 at 306



**PT DAMASEB
ACTING JUSTICE OF APPEAL**

I agree

**JW VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

FOR APPELLANT : ADV T.D THEJANE

FOR RESPONDENTS : ADV M. NCHEKE