



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO

01/2024

CIV/APN/301/2012

In the matter between:

THABO MPAKANYANE

1ST

APPELLANT

TAELE MOHALE

2ND

APPELLANT

'MALETHOLE MATELA

3RD

APPELLANT

'MALILA SEKONYELA

4TH

APPELLANT

AND

PS MINISTRY OF COMMUNICATIONS

SCIENCE AND TECHNOLOGY

1ST

RESPONDENT

MINISTRY OF COMMUNICATIONS

SCIENCE AND TECHNOLOGY

2ND RESPONDENT

MINISTRY OF PUBLIC SERVICE

3RD RESPONDENT

CORAM: MUSONDA, AJA
CHINHENGO, AJA
VAN DER WESTHUIZEN, AJA

HEARD: 12 APRIL 2024

DELIVERED: 3 MAY 2024

SUMMARY

Ministry introducing new structure in its establishment in 2005/2006 but failing to assimilate appellants into that structure or remunerate them in accordance with grades comparable to those appellants held under old structure; Appellants literally discarded and left in limbo but not relieved of employment.

Appellants seeking relief from High Court in 2013; After hearing matter High Court reserving judgment in same and delivering it 10 years later in 2023, dismissing appellants' claim for, in the main, failure to show or prove that the work or duties they were carrying out after introduction of new structure differed from that they had been carrying out under the old structure to justify different and high remuneration under new structure;

On appeal held respondents' failure to assimilate appellants into new structure fatal to their defence; Appellants according entitled to relief sought subject to adjustment thereof; Undesirability and consequences of inordinate delay in delivering judgment discussed; Court opining that inordinate delay amounts to violation of right to fair trial but consequence thereof to be left to discretion of appellate court whether to nullify judgment or not depending on whether affected persons have suffered incurable miscarriage of justice; On facts of case found appellants had not suffered incurably prejudice;

Appeal upheld with costs in High Court to be paid by employer Ministry

JUDGMENT

CHINHENGO AJA:-

[1] This is an appeal from a judgment of the High Court (Monapathi J). The learned judge heard the matter on 11 December 2013 and delivered the judgment just under ten years on 12 November 2023. He dismissed the appellants' claim with no order of costs. The respondents were served with the notice and grounds of appeal, but they have not opposed the appeal.

[2] The appellants are employees of the 2nd respondent. The 1st appellant was employed in 1985 as a postal officer and rose through the ranks to hold the position of senior postmaster grade E by 2006. The 2nd, 3rd, and 4th appellants were all first employed as postal officers in 1988, 1984 and 1985, respectively. They also rose through the ranks to hold positions of postmaster grade I/E by 2006. On 14 June 2006, the 3rd respondent by a savingram addressed to the 2nd respondent and titled "Variations in the Establishment 2005/2006" ("the new establishment"), approved changes to the 2nd respondent's 2006/2007 establishment. The new establishment created new positions, changed some designations of positions and

improved the grades of positions. Four positions of senior postmaster grade E and eleven positions of postmaster grade I/E were abolished. Thus in terms of the new establishment, the positions of all the appellants as they had existed in the 2nd respondent's structures were abolished. The appellants were not advised of changes that had taken place or the issuance of the new establishment. They became aware of them only in 2012. At this time, they were still in employment holding the same positions that they held in 2006 and receiving remuneration commensurate with those positions and grades. They are still employed and holding the same positions with the same designations and grades.

[3] Pursuant to the new establishment, the 2nd respondent also came up with an organisational structure in which, according to the appellants, the position of senior postmaster was re-designated regional manager grade H and that of postmaster retained its designation but now at grade G. In terms of that structure there are three regional manager grade H positions and 12 postmaster grade G positions. The appellants occupy none of the new positions nor have their salaries be adjusted according to new grades. Apparently, the appellants became aware of the existence of the new organisational structure after filing their founding affidavit in the matter now before this Court.

[4] It is not very clear from the papers how the transition from the old to the new organizational structure was handled. It however appears that some of the senior postmasters and

postmasters were appointed to take up positions under the new structure and at higher grades. It may even be that new persons were appointed to the positions under the new structure. It is common cause that the appellants were not given any positions under the new structure nor were they given higher grades.

[5] The appellants were naturally aggrieved by changes wrought by the new establishment in the operations section of the Lesotho Postal Services, where they were and are still employed. When they became aware of the new establishment in 2012, they instituted motion proceedings in early 2013 which have culminated in this appeal. They based their claim on the savingram of 14 June 2006, annexure PO1 to the founding affidavit, and sought the following relief –

“1. That the continued conduct of the respondents to remunerate the applicants in accordance with the old remuneration structure is unlawful.

2. That the applicants are entitled to be remunerated in accordance with the new structure.

3. That the applicants be paid the difference of monies that they ought to have been paid under the new remuneration structure.

4. Directing the respondents to pay costs of this application in the event of opposition hereto.”

Basis and nature of claim

[6] The basis and nature of appellants' claim is made in the founding affidavit in these terms:

"4.5 What is apparent from the savingram itself is that the position of senior postmaster was abolished, and the duties of the senior postmaster are now performed by the Courier Services Manager. I am now entitled to be in the latter position. This position is graded H on the structure.

4.6 As far as the other applicants are concerned, their positions were not literally abolished although they do not appear ex facie the new structure as is contemplated under annexure PO1. What seems to be the practical situation is that such positions have traded places with the positions of International Mail Supervisor and Courier Services Supervisor. These positions are graded G on the structure.

4.7 Subordinate to the positions that are currently held by second to fourth appellants are assistant postmasters who are graded at F on the structure. These people are directly responsible to the said applicants.

4.8 The great injustice we are complaining of is that despite the fact that the said assistant postmasters are subordinate to and are responsible to the postal controller which does not even exist in the new structure, the second to fourth applicants are remunerated at grade E while the said assistant postmasters are remunerated at a higher grade of F. As matters are now at present, there is a vacancy in those offices of postal controllers hence these other applicants are not even aware as to who they are responsible to.

4.9 An explanation was sought on the part of the employer as to why this situation was prevailing and the answer that we got was that we did not have

appropriate qualifications as such we could not be placed on the grades that appear on the structure.”

[7] The appellants averred that they were discriminated against when the employer did not remunerate them in accordance with the new structure from 2006. They suffered financial loss being the difference between the remuneration they continued to receive in terms of the old structure and the remuneration they ought to have received under the new structure. They averred that 1st appellant was underpaid by M444 912.00, and the other appellants by M422 220.00 each up to the date of the application. They based the calculations “*on the operative Grades payable to each and every employee of the respondents*” as appear on the new structure, annexure PO2 to the founding affidavit.

[8] Confronted with respondents’ answering affidavit, the details of which I set out below, the appellants averred in the replying affidavit that the position of senior postmaster in the old structure was replaced by that of regional manager in the new structure because, under the old structure postmasters reported to the senior postmaster and under the new structure they report to the regional manager. Appellants agreed with the respondents that the position of postmaster was not abolished by the new structure and their complaint is that the 2nd to 4th appellants “are not remunerated in accordance with the corresponding grade which is Grade G.”

[9] I pause to observe that if the remuneration claim of M444 912.00 by 1st appellant was calculated based on the remuneration of the Courier Services Manager as averred in the founding affidavit and that of the other appellants of M422 220.00 was calculated based on the remuneration of the International Mail Supervisor and Courier Services Supervisor, also as averred in the founding affidavit, these claims may not be correct depending on whether the Courier Services Manager's remuneration is the same as that of regional manager even though they are in the same grade. The same observation applies in respect of the postmasters and the Courier Services Supervisor and International Mail Supervisor who are in the same grade G. It may well be that the appellants' calculation is correct just as it may not be.

[10] Appellants averred in the replying affidavit that it is not feasible that two structures can co-exist in the same organisation or establishment. They reiterate that their responsibilities are those of positions under grade H and grade G, as shown in the new structure. They maintain their point that they acquired positions in the organisation through promotion and not on the basis of academic qualifications, and accordingly they "cannot be removed or removed without any hearing." In regard specifically to the position equivalent to his own in the new structure, and positions equivalent to those of his co-appellants, 1st appellant makes a slight change to his averments in the founding affidavit and states at paragraphs 6.1 and 6.2:

“6.1 ... I however aver that the position of Senior Postmaster has been abolished and has effectively been replaced by the position of regional manager. I say this because before this structure could come into place, the post masters were reporting to the senior post master just as they do report to the regional manager under the current structure. This means that I am now entitled to be in the position of regional manager . I am therefore entitled to be remunerated accordingly.

6.2 I also agree with the deponent [for respondents] that the positions of post masters have not been abolished. I however aver that our major concern is that the second to fourth applicants are not remunerated in accordance with the corresponding grade which is Grade G.”

Respondents defence

[11] Respondents averred that the restructuring of the organisation took place before the savingram of 14 June 2006. The savingram merely advised of the “*variations of positions*” which took place after the restructuring in the early part of 2006. Such variation was not a once off event, but an on-going exercise as shown by annexure 3 dated 25 February 2010 to the answering affidavit, being another variation of the

establishment for the year 2009/2010. The respondents state that the appellants' positions have not been abolished and will only be abolished upon "*retirement or otherwise*" by the appellants. The positions of Courier Services Manager, International Mail Supervisor and Courier Services Supervisor under the new structure are held by graduates or degree holders.

[12] It is respondents' contention that the positions held by the appellants are the only positions left in the old structure, which are positions held by non-degreed personnel. Assistant postmaster positions in the new structure are held by degreed personnel. In the words of deponent to respondents' answering affidavit -

" I aver that the positions held by applicants are the only positions left in the old structure. Further, applicants are placed at the posts at which there are no graduates. Assistant Postmasters are the positions in the new structure and therefore cannot be directly responsible to the applicants. Applicants confuse the new structure with the old structure in which they belong."

[13] The respondents contend that the appellants are claiming to be entitled to hold positions in the new structure to which they are not qualified. They further allege that the main duties of positions held by appellants are different from those of the positions they claim to be qualified for. In this connection they attached to the answering affidavit the job profiles of Courier Services Manager and International Mail Supervisor which,

among other things, stipulate the holder thereof must have, in the case of the Courier Services Manager, a Master's Degree in Business Administration or Public Administration plus one year working experience or a University Degree in Business Administration or Public Administration plus two years' working experience, or a Diploma in a Business Management related field plus 5 years' experience. In the case of the International Mail Supervisor, the new position requires a University Degree in a Business Management or Public Administration related field, or a Diploma in a Business Management related field, plus five years' relevant experience.

[14] Responding to the allegation of discrimination, the respondents state that appellants have not been discriminated at all in regard to remuneration: they are being remunerated "in accordance with their job as per the old structure as it has not been completely phased out." They contend that they are not liable to the appellants for any outstanding remuneration because appellants *"have completely failed to substantiate their claim in as much as they demand promotions to positions which are totally different from the positions, they are currently holding ... we submit that they are lawfully remunerated for the positions they are holding."*

High Court decision

[15] The learned judge *a quo* found as a matter of fact that 1st, 3rd and 4th appellants' highest academic qualification was a

Junior Certificate. That of 2nd appellant was Cambridge Overseas School Certificate. Accepting the respondents' standpoint, he makes further findings of fact that the position of Senior postmaster was not abolished and replaced by that of Courier Service Manager, and that the 2nd - 4th appellants' positions "*which were graded E in the old structure which they were still being occupied were re-designated to Retail Clerk and Mail Clerk Grade E, which applicants have been placed on since 25th June 2013.*" These factual findings are not supported by the papers filed of record by the parties. Perhaps these details came out during submissions before the judge. Appellants have however not challenged these facts on appeal.

[16] The learned judge's understanding of the basis of appellants' claim is this:

*"It is common cause that sometime in 2006 there was a structural change of positions in the ministry of the 2nd respondent. Essentially new positions were created while old ones were abolished. The root of the cause of action in this matter revolves around the effect of such changes on the already existing positions under the old structure and the incidental effect on the remunerations of the holders of such positions."*¹

[17] He identified as the single issue for determination whether the appellants are to be remunerated in terms of the new structure, and if not, whether that amounts to discrimination. He dismissed the appellants' case based on the reasoning appearing at paragraphs [18] - [20] of the judgment:

¹ Para [7] of judgment

“[18] This Court understands applicants’ argument to be that since there had been introduction of new structure, they should be remunerated in accordance with the new structure. The question is whether introduction of the new structure was incidental to promotions. The answer is in the negative. Creation of the new structure was not meant for any promotions as has been explained and argued by the respondents, the purpose was to gear up the needs of the Ministry and such positions were to be filled by persons with higher qualifications. All the applicants did not qualify for such positions, it cannot therefore be possible that creation of new structure was incidental to the promotions.

[19] Another important aspect which needs to be discussed is the nature of the duties which the applicants were executing prior to the introduction of the new structure. Applicants failed to prove that after the introduction of the new structure, their duties which they had always been doing changed thereof. Therefore, this Court agrees with the respondents’ version that even after the new structure was introduced, applicants’ duties remained the same, and they cannot therefore claim to be remunerated in terms of the new structure.

[20] In the present application, the onus of proof rested on the applicants to prove on the balance of probabilities that their respective positions were effectively abolished; that each and everyone of them is entitled to the positions in the new structure; and respective remunerations and lastly that they had been discriminated by the employer by failing to remunerate them in accordance with the structure. Applicants continued with their original duties while the new structure was gradually taking effect under which the applicants did not qualify. It is therefore improbable that their positions were abolished when the new structure was introduced.”

[18] The learned judge found that the appellants did not discharge the onus of proof, which is proof on a balance of probabilities. He cited authorities on this trite legal principle – *Ramabanta v Ministry of Police and Another*², *South Cape Corporation (Pty) Ltd v Engineering Management Service (Pty) Ltd*³, *Naidoo v Senti*⁴, and *National Employers General Insurance Co. Ltd v Jagers*⁵.

The appeal

[19] The appellants challenge the High Court decision on six grounds. First, that the learned judge erred in holding that there are two structures in the 2nd respondent when documentary evidence produced shows only the existence of one structure, being the new structure. Second, he erred in holding that appellants failed to prove that their duties changed after the introduction of the new structure, when in fact the issue was not change of duties but remuneration in terms of the operative new structure under which their positions were re-graded. Third, he erred in holding that the positions of appellant were not abolished at introduction of the new structure: no evidence was led to establish that the old structure had not been phased out completely resulting in the appellants' positions existing only in the new structure despite the savings clause "*reflecting abolishment and or re-grading of appellants' positions in the old structure*". Fourth, he erred in holding that appellants are not

² (2054/2020) [2022] ZAPS HC 131 (31 May 2022)

³ 1977 (3) SA at 548 B

⁴ LAC (2007- 2008) 160 E

⁵ 1984 (4) SA 437 (E) at 440E-G

being discriminated against when they are the only employees being remunerated in terms of the old structure. Fifth, he erred in making the determination that the introduction of the new structure was not incidental to promotions when this was not an issue before the court. Sixth, that-

“the delay in delivering the judgment amounted to a violation of section 12(8) of the Constitution of Lesotho in that it amounts to a failure to afford the appellants a fair trial within a reasonable time and therefore amounts to violation of appellants’ rights.”

Discussion

[20] The respondents did not oppose the appeal. This means either they are content to accept whatever decision this Court makes, or they consider that the appeal should succeed. The latter is less probable. The question must be asked whether the mere fact that an appeal is not opposed means that it must succeed? I do not think so. In my view an unopposed appeal is akin to an unopposed default judgment application. The absence of an opposition by a respondent has no direct procedural consequences and the court must conduct a substantive examination of the lower court’s decision and can only uphold or set aside that decision if that is merited having regard to the applicable law, the evidence submitted by the respondent in the lower court and submissions of appellant on appeal. The effect of non-opposition is that the respondent ceases to be a party to the appeal proceedings as regards the substantive issues before the appeal. An appeal places the burden on the appellant to show entitlement to the order

sought on appeal and establish the merits of his case. An appeal cannot succeed merely because it is unopposed.

[21] The appellants' counsel submitted, in respect of the first ground of appeal, that that *"remuneration structures cannot co-exist side by side within one establishment."* In making this submission reliance is placed on a paragraph in respondents' answering affidavit where it is stated that -

"the positions held by the applicants are the only positions left in the old structure... applicants are placed at the posts at which there are no graduates. ... Applicants confuse the new structure with the old structure in which they belong."

[22] This averment is not clear whether respondents' contention is that there is only one structure or that there are two structures, the old to which the appellants belong or just the new where appellants are placed in posts not occupied by graduate or degressed personnel.

[23] In my opinion it is not necessary to resolve this issue because the picture that emerges from the evidence is that although a new structure was introduced, the appellants were simply not assimilated into it. They remain outside the new structure until they retire or otherwise leave employment. It is also not necessary to resolve this issue because the appellants' contention is that whatever the actual position may be with respect to structures, they must be remunerated according to

grades in the new structure comparable to the positions they hold and the duties they perform.

[24] The 1st appellant's contention is that he is performing the same duties as the regional manager and should be remunerated at grade H applicable to regional managers. The learned judge *a quo*, basing himself on the appellants' founding affidavit and not on the replying affidavit erroneously states-

"[8] 1st applicant is of the view that the position of Senior Postmaster when abolished, was effectively replaced by that of Courier Services Manager (CSM) and its remuneration. At paragraph 4.5 of founding affidavit, 1st applicant contends that the position of Senior Postmaster was abolished, the duties of such position are now performed by CSM. He therefore argues that he is entitled to be remunerated under Grade H."

[25] As already stated the 1st appellant in the replying affidavit made it clear that the comparable position for him is that of regional manager. This error by the learned judge may be the result of the long delay in delivering the judgment.

[26] A similar error is made in relation to the other appellants. The learned judge states at paragraph [11] of the judgment that -

"According to the respondents, the positions which were graded E in the old structure which were still being occupied were re-designated to Retail Clerk and Mail Clerk Grade E, which applicants have been placed on since 25th June 2013."

[27] I have thoroughly perused the respondent's answering affidavit and nowhere do the respondents aver that the 2nd to 4th appellants were re-designated to, or placed at, position of Retail Clerk or Mail Clerk. If that were so respondents, as part of their defence, would simply have stated in the answering affidavit that 2nd to 4th respondents were so re-designated and therefore assimilated in the new structure. It could well be that these facts were disclosed to the court during closing submissions.

[28] The two factual inaccuracies by the judge *a quo* is not material to the real issue before the court except to the extent that the finding is made that 2nd to 4th appellants have been given positions at Grade E in the new structure, a point not made by the respondents in the answering affidavit and not accepted by the appellants. The 2nd - 4th appellants' contention is that they should be remunerated at grade G similarly to postmasters at that grade in the new structure.

[29] The third ground of appeal is the same in substance as the first. It is concerned with the question whether or not there are two structures in operation at the establishment.

[30] In regard to the second ground of appeal, appellants contend that their duties did not change after the introduction of the new structure and they should be remunerated according to the new grading system under the new structure for

performing the duties they have always performed. They contend that it is incorrect, as found by the judge *a quo*, that because their duties did not change, they must continue to receive the remuneration under the old structure.

[31] The fourth ground of appeal is on the alleged discrimination against the appellants based on the contention that they are paid in terms of the old structure when all other employees are paid in terms of the new structure. The argument is made that employees doing the same work must be paid equally. If the employer decides to pay employees doing the same work differently then, in my view, such employer must have a rational and objective basis for doing so, as submitted for appellants. Appellants fault the judge *a quo* for failing to interrogate the reasons advanced by the respondents for paying the appellants in terms of the old structure and consequently failing to determine whether the reasons are rational and objective.

[32] Although the appellants' counsel refers to the prohibition against discrimination in s 18(1) and (2) of the Constitution, they do not rely on those provisions. They submit that "*the appellants are not alleging that they are being discriminated against on the basis of the proscribed enumerated grounds appearing under section 18, the action of the appellants based on being disadvantaged and/or discriminated on the basis of 'other status'.*" They refer to *Timothy Thahane & others v Specified Officers Defined Contribution Pension Fund*⁶ for the

⁶ C of A (CIV) No. 2 of 2016 at para 72

proposition that 'status' is not a prohibited ground of discrimination under s 18 of the Constitution. As stated in Thahane -

"Status is not a prohibited ground of discrimination and that in the context, "or other status' means an attribute related to status that is equivalent or analogous to, but not the same as the specific grounds mentioned. These might, for example, be marital status or sexual orientation."

[33] The appellants submitted that the learned judge *a quo* based his decision in part on an issue that was not raised by the parties or otherwise placed before him. Appellants contend that the learned judge made a finding of fact that the introduction of the new structure was not meant to create promotional posts for employees but to "gear up the needs of the Ministry" by filling positions in the new structure with persons possessing higher qualifications. The submission goes-

"... it is not appellants' case that the introduction of the new structure amounted to promotion of employees including appellants. The court a quo made the determination of the case and/or issue that was not before court as parties will have not addressed the court on such issues. This Honourable court declined to deal with the issue as it was never before court, Lesotho People's Congress v Makharilele (C of A (CIV) 76/2022) [2023] LSCA 3 (17 November 2023); Lebohang Moreke v The Prime Minister (C of A (CIV) 15/2023) [2023] LSCA 7 (17 November 2023)."

[34] I do not think this criticism of the judge's finding is fair. Whether raised by the parties or not the judge was simply

interpreting the scheme introduced by the respondent in coming up with a new structure, as explained by them. The new structure was indeed not intended to create new positions to which employees could seek promotion to but one to which deserving and qualified personnel already in the establishment would be assimilated, and where necessary new personnel would be appointed to. Essentially the idea was to upgrade the minimum requirements for taking up positions in the establishment as restructured, hence the respondent's emphasis on higher minimum educational qualifications for persons to be assimilated into the new structure or to join the establishment based on the new structure and grades. The learned judge *a quo* was therefore merely laying out the rationale for the new structure and the scheme it was intended to serve. I therefore find no merit in the complaint that the judge *a quo* dealt with an issue that was not before him or upon which the parties had not made submissions.

[35] In addressing the issue before him the learned judge *a quo*, as is apparent from paragraphs [18] to [20] of the judgment, already quoted, the decisive consideration for him was that appellants

“failed to prove ... that after the introduction of the new structure, their duties which they had always been doing changed thereof. Therefore, this Court agrees with the respondents' version that even after the new structure was introduced, applicants' duties remained the same, and they cannot therefore claim to be remunerated in terms of the new structure.”

[36] The above appears at paragraph [19] of the judgment. At paragraph [20] the learned judge makes the decisive point that the appellants failed to discharge the onus on them to prove that their positions were effectively abolished, that they are entitled to positions in the new structure and respective remuneration levels, and that they were discriminated against. He was satisfied that the appellants “continued with their original duties while the new structure was gradually taking effect under which the applicants did not qualify. It is therefore improbable that their positions were abolished when the new structure was introduced.” He thus dismissed the appellants’ application.

[37] From a reading of the affidavits, the judgment of the court *a quo* and the submissions made on appeal, there can be no doubt that the facts of the case are not in serious dispute between the parties. They are no more than that the appellants were not assimilated into the new structure because the employer was of the view that their low level of academic learning did not suit them for assimilation into a new structure of the establishment underlain by the need on the part of employees to be in possession of higher academic qualifications for positions in the new structure. The establishment, as newly restructured, no longer wanted or needed them: they were to be effectively discarded but without being fired from employment.

[38] The appellants’ contention is that for as long as they remain in employment they must be graded and remunerated

according to the duties they are performing. The respondents did not re-grade them or assign them to positions under the new structure to which, as employers, they considered was commensurate with the work they are doing. Except for bald denials that the comparative positions pointed out by appellants as being the positions they must take under the new structure are not positions designed for them as less academically achieved individuals, the respondents did show why, going by the work they are doing or duties they are performing, appellants cannot take up positions on the new structure. Respondents had only to determine, as erroneously stated by the judge *a quo*, that 2nd to 4th appellants were now Mail Clerks grade E and 1st respondent was demoted or re-designated as postmaster grade G. They saw it fit to leave the appellants in limbo or in an uncertain or undecided state or condition. The appellants' case is simply that they must be graded and remunerated under the new structure according to the work they are doing. Respondents did not state where under the new structure appellants are slotted, which would have assisted in determining whether they are commensurately remunerated for the duties they are carrying out in the organisation. When assessed against appellants' assertions as to where they fit in the scheme of things, the respondents' position cannot hold. To my mind the appellants discharged the onus on them to prove where in the new structure they belong and on the basis of which they must be remunerated. I consider that appellants' contentions should have been upheld by the court below.

[39] I have left the appellant's sixth and last ground of appeal for consideration after the other grounds because it is not based on the merits or demerits of the judge's decision or on any error or misdirection arising from the matter before him. Appellants contend that the delay of about ten years in delivering judgment in this matter amounts to a violation of their constitutional right to a fair trial within a reasonable time guaranteed by s 12(8) of the Constitution.

[40] It is a prerogative of an appellate court to comment positively or adversely on the conduct of trial judges lower in the judicial hierarchy, see *New Clicks SA (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238.) In my view the right to a fair hearing in civil litigation encompasses the whole process from filing of the proceedings through to hearing of evidence and addresses and to the delivery of judgment. It is generally accepted that an unconscionable delay in delivering a judgment amounts to a violation of the right to a fair trial. A survey of how superior courts in South Africa, Nigeria and Namibia have grappled with this problem was undertaken by C Okpaluba in an article titled *Delay in delivering judgment or a case of "washing" judicial "dirty linen in public"? Reflections on Myaka v S.*⁷

[41] Superior courts have in some instances considered that a judgment delivered after an unreasonably long period of delay

⁷*Journal for Juridical Science* 2013:38(2) (scholar.ufs.ac.za) and full citation of case is *Myaka and Others v S* [2012] ZAGP JHC 174 (21 September 2012)

is a nullity but conclusive jurisprudence on the subject is lacking. In some jurisdictions, legislation has been put in place to deal with this problem, but it appears generally that it is left to the superior courts to determine on appeal or review whether a person complaining of delay has suffered a miscarriage of justice as would warrant a declaration of nullity of the impugned judgment or that the judgment is in violation of the right to a fair trial. This discretionary approach is informed by a consideration that a judgment of a court may not be set aside or treated as a nullity solely on the ground that there has been an unconscionable delay in delivering it. I think that one of the considerations by a superior appellate court is whether the inordinate delay affected the trial judge's perception, appreciation and evaluation of the evidence as would show that the judge had lost the impressions made on him by witnesses.

[42] In motion proceedings such as implicated herein, an inordinate delay is unlikely to compel a conclusion that a judge has lost his perception of the evidence. An added difficulty in this case is that no explanation whatsoever has been given to this Court for the delay in delivering the judgment. If it is that the judge was merely not diligent enough, as it seems, it suffices for present purposes that this judgment be referred to the Chief Justice for possible transmission to the Judicial Service Commission for its consideration.

[43] Another consideration that has weighed with me is that the prejudice occasioned to the appellants by the long delay in delivering the judgment in the High Court is not incurable. An order granting the relief that they sought in the High Court cures the prejudice suffered in large measure. I am therefore not inclined to declare the judgment of the High Court a nullity. Setting it aside and granting the appellants the relief they sought in the High Court not only disposes of the appeal on the merits, but it addresses the issue of prejudice suffered by the appellants from the ten-year long delay in delivering the judgment in the High Court.

[44] I have determined that the appellants succeed in this appeal. I think however that the order that this Court makes must recognise that the respondents have not determined, and must therefore determine, within a stipulated period, the level at which the appellants must be assimilated into the new structure based on the work they are doing or the duties they are performing and be remunerated accordingly. If the respondents fail to do so, then the appellants are deemed to be in the positions they claim to be and that they be remunerated at that level, namely the position of regional manager Grade H for 1st appellant and the position of postmaster grade G on the new structure for 2nd to 4th appellants and remunerated accordingly.

[45] The order is therefore -

The appeal succeeds, the order of the High Court is set aside and substituted with the following:

“It is ordered that -

(a) Within 30 working days of this Order, the respondents shall determine the level at or grades on which the appellants are assimilated into the new structure based on the work they are doing or the duties they are performing in the 2nd respondent’s Ministry and be remunerated accordingly.

(b) If the respondents fail to comply with paragraph (a) hereof the 1st appellant shall be deemed to hold the position of regional manager Grade H on the new structure and the 2nd to 4th appellants shall each be deemed to hold the position of Postmaster Grade G on the new structure and remunerated accordingly.

(c) The appellants shall each be paid the difference in remuneration between the level or grade they have been on from the introduction of the new structure and the level or grade determined in terms of paragraph (a) or (b) hereof, as the case may be.

(d) The 2nd respondent shall pay the appellants’ costs of suit in the High Court.

M H Chinhengo

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

P Musonda

P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

J Van der Westhuizen

J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV N B PHEKO

FOR THE RESPONDENTS: NO APPEARANCE