CIV/APN/93/95

IN THE HIGH COURT OF LESOTHO

In the matter between :

MATSEPO MOHALE (duly assisted by her husband)	1ST APPLICANT
BELINA MATHAHA (duly assisted by her husband)	2ND APPLICANT
and	
THE PRINCIPAL SECRETARY HEALTH	1ST RESPONDENT
ATTORNEY GENERAL	2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 4th day of January, 1996

The Applicants sought to urge me that their letters of transfer from Mohale's Hoek Government Hospital to Leribe Hospital were a result of undue pressure and influence brought to bear on the writer who did so on behalf of the Principal Secretary for Health and Social Welfare (the First Respondent). That the latter was also so influenced. That the First Respondent did not make an independent decision, objectively speaking. And furthermore that for this and other reasons the letters of transfer dated the

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24th May 1995 should be declared null and void.

I was being further urged that the circumstances that led to the writing of the letters of transfer are such that the Court could not conclude but that they unduly influenced the transfer of the Applicants. The circumstances were that at the different meetings the matter of the Applicants' misunderstanding with the District Medical Officer (the DMO) and the insults by phone or anonymous letters that were addressed to the D.M.O. were discussed. All or most of these were directly or indirectly attributed to the Applicants, and in the result the Applicants were seen in bad light. For convenience either of the Respondents is referred to as Respondents.

Briefly summarised, Mr. Matooane submitted that the letters of transfer were motivated by bad faith. Furthermore that they did not take into account personal circumstances of the Applicants in connection with necessary considerations on transfer and that the Applicants were never given a hearing on transfer and at the various meetings at which their lot was discussed. What was discussed in these meetings included matters that were in the nature of complaints against the Applicants.

While accepting that it was public knowledge that the D.M.O. was not administering the hospital well, the Applicants took the view that this should have been considered before their being transferred. In other words it was the D.M.O. who should have been transferred. This was obliquely stated in another vein in paragraph 5 of the Applicants' replying affidavit, in that: "The only consideration has been the feelings of the District Medical Officer who is hardly a year in Mohale's Hoek" which suggested that the calm waters and the affairs of the hospital were disturbed by the arrival of the D.M.O.. It was not denied that the D.M.O. was strongly suspected of poor administration.

The following week, on the 24th May 1995, the Honourable Minister of Health together with the Honourable Minister of Transport and Telecommunications who were accompanied by Mr. Masenyetse a member of Parliament for the Mohale's Hoek Constituency had a meeting with the management team. The District Secretary for Mohale's Hoek was present. Respondents admit that the meeting took place to address serious problems of the administration of the hospital. Firstly there had been threats to kill the D.M.O. as a result of which the Ministry had engaged the

services of the Mohale's Hoek police. Secondly, it followed an attempt by the head office of the ministry and the hospital administration to solve the apparent poor working relations within the hospital. Most specifically it came out clearly, at least from the bar, that there was a serious misunderstanding between the Applicants and the D.M.O. The Respondents added that:

> "the involvement of the Minister of Transport and Communications goes to show how serious the problem was and let alone seriousness with which the Government viewed the problem. The Ministers were simply appealing to everybody including members of public to assist the Government in making the hospital a home for everybody and not to politicize the hospital administration." (my underlining)

This would confirm that there were political undercurrents. The Minister of Health was clearly involved in at least one of these meetings.

The Respondents do not deny that in this meeting the District Secretary disclosed that the police had

investigated the circumstances surrounding the result of letter written to the D.M.O. Mr. Masenyetse further stated that "they know the identity of its author." The meeting was closed before anybody from the management committee was shown the letter. Mr. Masenyetse did not reveal his source of information.

In the afternoon of the 24th May 1995 there was another meeting between the Ministry's team and the B.C.P. Women's League and other members of the public. The ubiquitous Mr. Nqojane was the one who told the Applicants what went on in the meeting. He put it in the following manner in his supporting affidavit:

> " In this meeting we were informed that the Second Applicant was responsible for the offending letter which was written to the District Medical Officer and that this was done with approval of the First Applicant. Furthermore, one member of the B.C.P. Women's League suggested in very strong terms that both Applicants should be removed from Mohale's Hoek with immediate effect as they were saboteurs of the ruling government." (my underlining)

Mr. Nqojane did not say who it was who gave information about the identity of the author of the offending letter. The Respondents were not able to deny the outlined events. They retorted that the meeting was for politicians to whom

a report was being made about the administrative problems of the hospital which had in the first place prompted the meeting. No public servants were allowed in the meeting.

The Deputy Principal Secretary of the Ministry of Health who is the Respondents' deponent described the nature of the meeting mentioned in the above paragraph. That the meeting was to warn politicians not to involve themselves in the Civil Service matters. She further wished to inform the Court that when this meeting took place the decision to transfer Applicants had already been taken by the Assistant Principal Secretary, Chief Nursing Officer, Director of Nursing Service, and Director of Health. It was argued that it was before the date of the last meeting. That the decision was based on the bad relations and misunderstanding between the Respondents and the M.D.O. and not for any motives to do with political matters as Mr. Nqojane suggested in the above paragraph where his statement is underlined.

It was conceded by the Respondents that it was not stated what the grounds of the transfer were, in the letters of transfer themselves, as this was purely administrative matter that needed no justification by way

of writing in the letters. It was further contended by the Respondents that there was no need, as Respondents for the Applicants to be called, to be informed and a justification be formally put before them of the need or reasons for their transfer. This means that the Applicants need not have been given a hearing before they were transferred. I would find it difficult to agree with Respondents on this generalized submission. It did not depend on whether the Respondents have a right to transfer the Applicants. It depended on whether the right to transfer has been exercised in a fair and reasonable way viewed objectively. This is the duty to act fairly. That is how then the duty to act fairly gets involved and becomes an intrinsic part of the administrative machinery.

One of the tests would consequently be whether the exercise of the right was prejudicial to an existing right, liberty or property, despite that one cannot here speak of a legitimate expectation on the part of the person affected by the exercise of the right. (See NGEMA v MINISTER OF JUSTICE KWAZULU & ANO. 1992(4) SA 349(W) at 360 I-J and COUNCIL OF CIVIL SERVICE UNION & ORS vs THE MINISTER OF CIVIL SERVICE 1984 3 ALLER 935 HL 943 J - 944A). "The expectation which may arise either from an express promise

on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue ...." per Lord Fraser at 943J-944G.

In speaking of prejudice to the Applicants one must necessarily speak of the individual circumstances on case to case basis. The applicants are being removed from one corner of the country to another. This in itself has an element of disruption and an obvious psychologic impact. They have to relocate to a new place and premise. They live with spouses and children or sometimes without. If there is a husband he has to relocate or is left behind. If Applicants are accompanied by school going children they have to make necessary changes. So that the effect of any transfer is rarely ever or very negligible. It is against the obviousness and the inevitability of these consequences that the Respondent replied that in law they are entitled to transfer the Applicants without giving them a hearing. But can they completely ignore giving the Respondents a hearing? Yes they can if the time within which the public officer is intended to transfer is a reasonable one. If it is not, such as in the instant matter, they ought to have given the Applicants a hearing.

The grant of a reasonable time will in no way suggest that the individual circumstances of the Respondents are ignored. It is a way of acting fairly. This still brings the question as to what a reasonable period is, the absence of which the principles of natural justice shall apply. It depends on each individual case. In my reckoning any period of time that is less than thirty days or one calendar month, (the ordinary period) is a generally too short and unreasonable. It is upon such a lesser time that a public officer must be heard. This is in no way a derogation from the right of the Respondents to transfer the Applicants. I have already stated that while it is difficult to lay a general rule, except as to what I consider to be a reasonable period, I took the view that the Applicants should have been heard or called in accordance with the tenets of natural justice, where the period of notice was too short.

This was a difficult case in that the various issues which were brought into the matter were such as to bring about confusion where none was due. I have made a finding that the Applicants have failed to make a case on affidavits that the Respondents had been actuated by malice or political pressure either from the Respondent's

superiors or elsewhere. I found it difficult to determine the question on affidavits. This is understandable in the nature of the application procedure which the Applicants have used.

A serious hurdle which I have found which the Applicants had to surmount was due to the concession by the Respondents themselves that, firstly there was a misunderstanding between the Applicants and the M.D.O. Was this not a good enough reason to transfer Applicants? Secondly, there was a general feeling that the hospital was not being well administered and thirdly that there had to be meetings initially involving politicians and certain ministers of State. This had been a result mostly of the pressure put in by Mrs Masiloane, one of the politicians. All these things on their own justify a concern on the Respondents as a result of which they ought to take steps to ameliorate the situation. That the politicians' interest was aroused was well justified in the circumstances and in an open and democratic society. I would find no fault with their concern and the demonstrated enthusiasm of all concerned.

What I find to be incapable of resolution in favour of

the Applicants is that the decision to transfer was motivated by pressure of politicians and the First Respondent's superiors. I did not find that the decision was unreasonable nor motivated by ulterior motive or intention to victimize. There was general concern that the hospital was not well run. But I would find that there were (even without the meetings) good grounds and a clear basis upon which the First Respondent would have been entitled to transfer the Applicants or the M.D.O. This they could have done presumably as a remedial administrative action having nothing to do with the question of disciplinary action or a disguised punishment. To seek and always characterize the decision to transfer in terms of apportioning blame or looking for motives would in the end ground the authority to transfer in the public service to a standstill. The decision to transfer might as well be based on administrative expediency.

The fourth hurdle is that the Applicants are not able to discredit the Respondents that even before the meetings and particularly of the 21st May 1996 the First Respondent had already reached a decision to have them transferred. I have already spoken about the difficulty of deciding contentious issues on affidavits. In the circumstances I

would not find in favour of the Applicants on this aspect. This is because I am bound to accept the Respondent's version.

I have decided in favour of the Applicants more by luck or chance than skill on the aspect of prejudice that would be brought about by giving of short notice of transfer. The notice having been given on the 24th May 1995 to take effect on the 1st June 1995. I reasoned that the Respondent had a duty to act fairly and this they would do by inviting the Applicants to make representations or a form of hearing that would take cognisance of the fact that the transfer on short notice would be prejudicial to the Applicants. Or alternatively that a reasonable time of notice ought to be given in which case the Respondent would not be bound to give a hearing unless the Applicants felt the need to ask for opportunity to make representations.

I have not premised my decision on that the Applicants had a legitimate expectation. There was none. But on the basis of the view that I took namely, that the Applicants retained the rights or advantages of their present posting, which they would seek to protect by making necessary arrangements or persuading the Respondents to take

alternative course of action. There would be no basis for thinking or speculating that they would wish to abandon such rights. The granting of a reasonable time would have the effect of allowing the Applicants to make necessary arrangements and enough time to be able to approach the Respondents.

Indeed the basis of legitimate expectation is the existence of a regular practice or our express promise. The doctrine seems not to have been the basis for annulling or allowing transfers of public officers and teachers in all South African cases including NGUBANE vs MINISTER OF EDUCATION AND CULTURE 1985(3) SA 160. This case was a pre-Traub's case (see infra) Howard J decided in his judgment that the test prepounded by Roper J in HACK v VENTERSPOST MUNICIPALITY AND OTHERS 1950(1) SA 172(a) at page 90 having been satisfied in that:

> "Upon a proper construction of the relevant provision of S.19, the decision to transfer the applicant <u>was a quasi-judicial one and the audi alteram partem rule</u> is presumed to have been applicable. ..... As the applicant was not given a hearing of any kind the decision was not validly made and must be set aside." (page 163 A-C) (my underlining)

This is the test that has since been soundly criticized,

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the nature of which criticism I need not go into now. The doctrine of legitimate expectation was in no way intended to supplant or to remedy the absence of a duty to act fairly. It was to supplement it. It means that on some occasions it has to be accepted that a decision maker should be a part and parcel of the duty to act fairly and afford a hearing to affected persons (see CASTEL NO v METAL & ALLIED WORKERS UNION 1987(4) SA 795 (A)). This is moreso in the instant case where a decision was reached to transfer Applicants on a short notice. That is why:

> "The desirability of a decision maker acting fairly in the broad sense of the word is clearly something which our law should in the future aspire to promote sound administration. The sentiments are also echoed by Didcott J in the Hlongwa's case. It seems to me, however, that at the present stage of development of the law on this topic I am constrained to find that the Respondents in the present application did not act unlawfully when they decided to transfer the respective applicants. I should make it clear that this case has been argued on the footing that if the applicants were entitled to a hearing that hearing should have been given prior to the decision having been made. If I am wrong in the decision to which I have come and the Applicants were entitled to have been heard I would have found the representation invited subsequent to the decision having been made would have complied with the *audi alteran* rule. In this regard the dicta of Corbet CJ in TRAUBS case at 750 are apposite." (my underlining)

NGEMA v MINISTER OF JUSTICE KWAZULU & ANOTHER, CHULE vs

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MINISTER OF JUSTICE KWAZULU & ANO. 1992(4) SA 349(N) at 361 E-H).

The reference to Traub's case in a quotation in above paragraph is reference to Administrator of the Transvaal and Others vs Traub and Others 1989(4) SA 731 which is regarded as having laid the foundation for a flowering of jurisprudence around the principle of *audi alteram partem.* This approach to natural justice has been compendiously stated in the dictum of Milne JA in SOUTH AFRICAN ROAD BOARD vs JOHANNESBURG CITY COUNCIL, 1991(4) SA 1(A) that:

> "the audi principle comes into play whenever a statute empowers public official or body to do an act or give a decision prejudicially affecting an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary." - at 10H.

It is important to note that reference to HLONGWA vs MINISTER OF JUSTICE KWAZULU GOVERNMENT'S case 1993(1) SA 269(D) in NGEMA and CHULE vs KWAZULU GOVERNMENT does not mean that it was followed. In the Hlongwa case Didcott J felt that:

> " ..... would not one think be transferred willingly and unilaterally without any consideration at all of the personal

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circumstances and wishes." At 341-B-E.

The learned judge felt further that:

> " These factors ought at least to have been considered by the Respondent and amounted to a benefit or advantage or privilege of remaining where she was and it would be unfair to deny her *without proper consultation, and the opportunity* to make representations." At 342 C-D

It is also clear that the trend is the Republic of South Africa, even in the case of public servants, was to give hearing on transfers. Mr. Molapo's submission that the opposite was the trend was therefore not valid. I am in full agreement that :

> " Generally speaking, in my view *audi* principle required the hearing to be given before the decision is taken by the official or body concerned, that is while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken (See Blom's case supra at 668 C-E, Omars case supra at 906F, Momoniat vs Minister of Law & Order and Others, Naido and Others 1986(2) 264(N) AT 274 B-D. Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial action has been taken (see Omar's case at 906 I, Chikane's case supra at 379 G, Momoniat's case supra at 274E - 275C.) <u>This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition or where for some other reason it is no feasible to give a hearing before decision is taken"</u> (See ADMINISTRATOR TRANSVAAL & OTHERS VS TRAUB & OTHERS page 750 C-F) (My underlining)

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The present appears to have been a case of similar circumstances to those underlined above. It means that a hearing would still have been required.

It is not my view that, in all cases of transfer of public servants in this country, a hearing will be required to be given. I have made a distinction between cases which are exceptional and those which are ordinary. Those which are exceptional are those in which notice is in fact very short and as a result very prejudicial. I grant that one cannot completely avoid the effect of any transfer on the employees' rights and privileges. The effect of the ordinary period of time is to lessen the harsh impact and has intrinsic fairness built into the decisions. In this regard it becomes clear that my decision is not in all fours with the South African cases and their very progressive trend. The instant matter also has to be distinguished from our cases such as LEFUTSO KHOMARI vs PRINCIPAL SECRETARY and 2 OTHERS CIV/APN/319/92 19 April 1993, per Kheola J (as he then was) unreported, where in the light of the nature of the applicant's contract:

> " The First Respondent was under an obligation to give her a chance to be heard and then inform her that her interpretation was wrong". (page 5)

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The other case is J. M. KEPA vs ANGLICAN CHURCH OF LESOTHO & ANOTHER C of A CIV No. 32 of 1994, 29th July 1995, per Steyn A.J. (unreported), where without laying down general rules the Court of Appeal observed that the respondents ought to have acted in accordance with natural justice where the appellant had been treated with manifest unfairness, where the transfer "was *prima facie* a matter that could cause her grave prejudice and almost undoubtedly would have done so in the circumstances described above" (page 14). And "The spurious reasons for transfer, the falsity of the information conveyed to the Appellant and the unreasonable time given to her to comply with the unauthorized directive were all factors that fatally flawed the decision conveyed to her." (page 14)

I have clearly demonstrated in the body of the judgment that most of what consist of factual disputes are those matters which I found it difficult to decide for the Applicants. This was so most particularly because the Applicants failed to prove that the Respondent's decision was not only unreasonable but it was accompanied by bad faith or ulterior motive (See Baxter Administrative Law 1st Edition page 475-478). The genuinely free discretion of the Respondents was acknowledged while a higher standard of

good administrative behaviour was expected in the circumstances of the transfers of the Applicants. That is why I spoke of the Applicants succeeding on luck than skill on an aspect in which they had laid minimum emphasis in the papers but showed opportunistic tenacity only in argument. It is the reason why I did not award them any costs despite their success.

I allowed and confirmed the of prayers (a) and (b) of the notice of motion. I may record that Mr. Matooane for the Applicants duly conceded on the question of costs. Also in that regard see N MPHOFE v RANTHIMO & ANOTHER C of A (CIV) NO. 22 OF 1988. While the learned Judge of Appeal (Schutz P.) may have felt that the costs ought to be awarded to the victor who won "more by chance than skill" (page 17) the reason for the decision was not made very clear.

T. MONAPATHI
JUDGE

4th January, 1996

For the Applicants : Mr. Matooane

For the Respondents: Mr. Molapo