

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

**CIV/APN/637/2010
CIV/APN/76/2011**

In the matter between:

MOEKETSI D. MAHETLANE	1ST APPLICANT
MOSHE KOATJA	2ND APPLICANT
MASIPHOLE NTHOALO	3RD APPLICANT
PHETHISANG EDWIN LUKA	4TH APPLICANT
RETŠELISITSOE MOLAOLI	5TH APPLICANT
KATISO FOTHOANE	6TH APPLICANT
MOTLOLI PETER MORALELI	7TH APPLICANT
THABO JOHN DOTI	8TH APPLICANT
MAPABALLO GRESCENTIA MATSELETSELE	9TH APPLICANT
LEHLOHONOLO BOROTHO	10TH APPLICANT
TEBOHO MODIA	11TH APPLICANT

AND

COMMISSIONER OF POLICE	1ST RESPONDENT
MINISTER OF HOME AFFAIRS	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

JUDGMENT

**Delivered by the Honourable Madam Justice L. chaka –
Makhooane on the 22nd March, 2011**

[1] The Applicants approached this court in CIV/APN/637/2010 seeking the following prayers:

1. *That the commissioner of Police be and is hereby ordered to pay respective applicants' salary underpayments from their respective dates of submission of their university degree qualifications or equivalent within a period of three months of final order hereof.*
2. *That the Commissioner of Police be and is hereby ordered to compute respective applicants' salary underpayments in terms of usual monetary scales applicable to the police and file with the Registrar the formula used to compute the said salaries.*
3. *That it is hereby declared that the respective applicants' salaries should be determined in terms of prior 2010 Lesotho Mounted Police Service Promotion Policy 113 that was in force as at the time that the applicants enrolled for degree and equivalent higher education qualifications.*
4. *That it is hereby declared that the Lesotho Mounted Police Service Promotion Policy 113 of 2010 does not apply to applicants in respect to determination of their salaries and promotion for being retrospective in effect.*

5. *That the Commissioner of Police is hereby ordered to re-consider, and implement promotion of the applicants to the higher ranks based on their degree equivalent qualifications other than trooper rank or police constable rank within the Lesotho Mounted Police Service and should further cause written reasons to be furnished to the applicants why they cannot be promoted in the event that they are not promoted.*
6. *That the respondents be ordered to pay costs hereof at attorney and client scale.*
7. *Further and/or alternative relief as the Honourable Court deem appropriate.*

[2] On the 11th February, 2011 **Mr Molise** for the Applicants, approached the court again in CIV/APN/76/2011 on an urgent basis seeking an order in the following terms:

1. *That the Rules of this Honourable Court pertaining to normal procedural formalities, modes and periods of service and time limits be dispensed with on account of urgency hereof.*
2. *That a rule nisi be and it is hereby issued and returnable on the time and date to be determined by this Honourable Court calling upon the respondents to show cause, if any, why an order in the following terms cannot be made final, to wit.*
 - (a) *That the commissioner of Police and the Minister of Home Affairs be restrained and interdicted from*

*considering and/or employing any applicant within the LMPS on the basis of the memo dated 1st February 2011 pending finalization of **CIV/APN/637/10** involving the applicants and the Commissioner of Police.*

- (b) That the proceedings in **CIV/APN/637/10** be determined on urgent basis and pending its determination, the Commissioner of Police be restrained and interdicted from considering and/or employing any applicant within the LMPS on the basis of the memo dated February, 2011.*
 - (c) That this application be consolidated with **CIV/APN/637/10** for speedy disposal of the two cases.*
 - (d) That the iterim court order herein be published in a newspaper circulating widely in Lesotho to allow other interested parties to intervene if they so elect.*
 - (e) Costs of suit on attorney and client scale.*
 - (f) Further and/or alternative relief as the Honourable court deem appropriate.*
- 3. That prayers 1,2 (a), (b) and (d) operate with immediate effect as interim relief.*

- [3]** Prayers 1 and 2 (a) and (d) were granted by my sister Majara J as they appeared in the Notice of Motion and the *rule nisi* issued was made to be returnable on the 28th February, 2011. The *rule nisi* was further extended to the 21st March, 2011.
- [4]** On the 2nd March, 2011 the Respondents filed and served upon the Applicants a Notice of Anticipation. They anticipated the *rule nisi* and the return day to the 7th March, 2011 as a date of hearing of this matter. However, the matter was eventually heard before me on the 10th March, 2011. I have also agreed to the consolidation of the two (2) applications.
- [5]** It is the Applicants' case and this is also common cause that the Applicants are police officers within the Lesotho Mounted Police Service ("LMPS") holding the rank of police troopers ("Tpr")/police constable ("PC"). It is not in dispute that the Applicants furthered their studies and are currently degree

holders. It is further not in dispute that notwithstanding their educational qualifications, the Applicants' salaries have not been adjusted to a grade in line with other degree holders in the Public Service.

- [6]** The Applicants argue that at all material times prior to 2010, the LMPS had a Promotion Policy, annexure "M1", referred to as "LMPS 113" which reads at paragraph 5.1;

5.1 "Members of the LMPS, who having served the organization for a period not less than two years, furthered and completed their studies at university level, shall be promoted to the rank equivalent to their grades"

It is their case that having completed their studies and having accordingly registered their degrees with the Human Resource Officer ("HRO") their situation did not change as they had expected. According to 1st Applicant, he even took the initiative to write a letter of inquiry to the HRO in April, 2010 to get an explanation as per annexure "M4". A month later in

May, 2010 the HRO responded, (annexure “M5”), by saying the following in relevant parts:

“We wish to inform you that salary adjustments within the Lesotho’s Public Service are made in tandem with promotion. What this Implies (sic) is that you could only receive a salary higher than the current one after promotion... You are further referred to the new promotion policy which clearly outlines conditions on which a police officer shall be promoted.”

[7] At paragraph 4.9 of the Founding Affidavit as deposed to by 1st Applicant, he avers that it has been an established practice that people who joined the police service with university degree qualifications, were promoted to the position of 2nd Lieutenant/Inspector as soon as they completed their training at the Police Training College (“PTC”). As a result of this practice, 1st Respondent the Commissioner of Police herself, her deputies and several other senior police officers benefited.

[8] The Applicants further contend that they deserve to have their salaries adjusted accordingly as per the Ministry of the **Public Service Circular NO.8 of 2000**, annexure “M10”, which reads, where it is relevant at paragraph 3 (e) that:

“Serving degree graduate officers who are at Grade E or below, will be regraded F, while other officers who are already at F will retain their respective notches in Grade F.”

[9] **Mr Molati** for the Applicant’s submitted that the 1st Respondent cannot be heard to suddenly change the LMPS Policy “M1” as and when she wanted, to the Applicants disadvantage. **Mr Molati** further submitted that the Applicants had a legitimate expectation arising from practice, see **Administrator, Transvaal and Others V Traub and Others 1989 (4) SA 731 (A)** and a promise made by the official, see **Letlaka Banyane V Commissioner of Correctional Services and Another CIV/APN/80/2008** (unreported).

[10] The Respondents allude to the fact that ‘M1” was indeed the policy until it was found to be unlawful, as it did not comply with proper Public Service procedures on promotions and salary increments. According to the Respondents, in terms of the law an officer was to be paid a salary commensurate to the position he/she is holding. Respondents agree that a holder of a university degree would be promoted provided there is a vacancy. According to 1st Respondent the **Public Service Circular NO. 8 of 2000**, “M10”, shows that “*Grade F shall be an entry level and this can only happen if there are equivalent positions to Grade F,*” see 1st Respondent’s Answering Affidavit at paragraph 6.

[11] The Respondents deny that the Applicants have a legitimate expectation because the practice and promotion policy have since been declared faulty and unlawful by the Public Service and as a result the LMPS has stopped abiding by it. Degree holders are now promoted provided there are vacant positions. The Respondents further argue that no rights accrue where

the law does not provide for them. **Mr Sekati** for the Respondents further argued that infact the Applicants' expectation would be illegitimate under the circumstances because they placed it on a practice that was contrary to the law. He referred to court to the case of the **Ministry of Local Government V Mamualle Moshoeshe, C of A (CIV)15/09** to show that an illegality committed in the past cannot be continued in the future. It must be regarded as never having been done.

[12] It is common cause that the Applicants eventually came to court because as far as they were concerned they had been dealt a bitter blow, when after acquiring degrees and as a result therefrom were expecting their salaries to be adjusted accordingly, or better still that they would be promoted, instead they were informed that, the practice as they knew it no longer applied. This practice according to them, was based on two (2) things, a practice based on "M1" the then

LMPS Promotion Policy – paragraph 5.1 and “M10” the **Public Service Circular NO. 8 of 2000** at paragraph 3 (e).

[13] The question to be asked is whether indeed the Applicants ought to have been regraded following their acquiring university degrees, notwithstanding their rank. The Respondents answer that question in the negative in that they argue that it is not automatic that a degree holder would be regarded to a higher grade, to be more precise to Grade F. According to the Respondents the **Public Service Circular of 2000**, does not apply to the Applicants since it was only meant to regularise the situation that was prevailing in the year 2000 and prior, (paragraph 11 of the Respondents Heads of Arguments). The argument goes further to show that the circular does not extend to serving officers who have furthered their studies. **Mr Sekati** argues that such officers would at least stand a better chance when vacancies exist (paragraph 11).

[14] With respect I disagree with the Respondents' argument that "M10" does not affect the Applicants who are serving degree graduate officers, as envisaged by "M10" at paragraph 3 (e). In terms of this paragraph, such officers who are at Grade E or below should be regraded to F. I agree with my sister Majara J in **Letlaka Banyane v Commissioner of Correctional Services and Another** (supra) where at page 7 of that judgment she said;

" The circular affects all Public Servants and has since it was passed, become a rule of practice that carries with it a legitimate expectation. Its legality has never been challenged..."

[15] The Respondents are suggesting by reference to annexure "ML3", which is a Savingram from some official in the Ministry of Public Service that 'M10" no longer applies. "ML3" at paragraph 5 says;

"Grading of positions is not about individual educational background and qualification but it is more about the job itself."

With respect I again disagree. Nothing has been advanced to show who the writer of “ML3” is, or what authority he has, as opposed to “M10” whose author was the then Principal Secretary of the Ministry of the Public Service. His authority and the legality of the circular has never been either challenged or replaced by any other document. I therefore, find that “ML3” does not in any way replace the rule of practice that have been relied on since it was issued in 2000.

[16] With regard to ‘M1”, the LMPS Promotion Policy, it would certainly be irresponsible of the Respondents not to heed the warning by the Ministry of Finance (Treasury) and the Ministry of Public Service, if the policy that had prevailed prior to 2010 was flawed and was contrary to lawful procedures. I cannot imagine that this is what the Applicants are asking for. I therefore, hesitate to agree that the Applicants demand to be promoted as argued by the Respondent. I am of the view that the Applicants would agree that if that policy was wrong, inspite of the fact that so many police officers benefited from

it, it cannot be allowed to continue. See **Schierhout v Minister of Justice 1926 AD 99.**

[17] The Applicants have argued that they had a legitimate expectation arising out of practice. That may very well be so, however, we have already established that the practice as contained in “M1” the LMPS Promotion Policy, has been done away with since it has been found to be contrary to law. It may however, be argued that the Respondents could have at least apprised the Applicants as soon as they submitted their academic qualifications, that the practice as they know it had changed. I agree with the Applicants’ argument that they were encouraged in terms of “M1” to improve their qualifications with the hope that eventually it would culminate into their attaining higher ranks.

[18] Corbett CJ in the **Administrator, Transvaal and others v Traub and Others** (supra) found that the courts need to carefully handle the doctrine of legitimate expectation. He went on to show that:

“Courts, in working out when doctrine applicable, will from time to time need to apply the curb in order to maintain a reasonable balance between protecting the individual from decisions unfairly arrived at and avoiding undue judicial interference in the administration of affairs by public authorities.”

I find that the decision to change the practice in “M1” may seem as if the rug was pull from under the feet of the Applicants but the court cannot enforce an unlawful practice. See **Minister of Local Government and one V ‘Mamualle Moshoshoe** (supra)

[19] As far as the application in CIV/APN/76/11 is concerned, the pressing issue arising out of that application is whether or not the Applicants have a right to be promoted to the exclusion of other potential Applicants. This is according to the Respondents. The response thereto is also in the negative.

The Applicants must apply for the positions that they qualify for like everyone else. Their reaction to the advertised positions was a natural one in that, while they were engaged in a court case on a matter touching on promotions, vacancies were suddenly announced. Their apprehension was based on the fear that while they were locked in litigation the positions would be filled without them.

[20] It is for the foregoing reasons that I make the following order:

1. Prayers 1 and 2 are granted as prayed for in the Notice of Motion in the main application CIV/APN/637/10 with costs on an ordinary scale.
2. Prayers 3, 4 and 5 in the main application are dismissed with costs.

3. Prayers as they appear in the Notice of Motion in CIV/APN/76/11 have been absorbed in the main application. No order as to costs.

L. CHAKA-MAKHOOANE
JUDGE

For Applicants : **Mr. Molati**

For Respondents : **Mr. Sekati**

