

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MOLEFI KOME 1ST APPLICANT

RETIMELETSOE MARAI 2ND APPLICANT

JAKOBO MOTHEBESOANE 3RD APPLICANT

TEBOHO MARTINS 4TH APPLICANT

REALEBOHA RAMOHOLI 5TH APPLICANT

MABUSETSA MAKHARILELE 6TH APPLICANT

TAELO LEHANA 7TH APPLICANT

TS'ELISO TS'ENOLI 8TH APPLICANT

THOLENG MOFOKENG 9TH APPLICANT

MOTLATSI MOHAPELOA 10TH APPLICANT

And

MINISTRY OF PUBLIC SERVICE 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Coram : Hon. Mr. Justice T. E. Monapathi
Date of Hearing : 29th May, 2013
Date of Judgement : 6th September, 2013

SUMMARY

It is not necessary where a remedy (prayer) is conceded such as in the present, that all other remedies flowing therefrom should be by way of damages. In the instant matter arrear salaries were claimed. This could be granted under further and alternative relief.

CITED CASES

Makesi & Anor v. Attorney General LLR-LB (1999-2000) 306

Attorney General & Ors v. Bolepo & Ors LAC (2000-2004) 522

STATUTES

Public Inquiries Act of 1994

[1] I have already made decision on the 6th June, 2013 to grant this application.

[2] The Applicants have filed a notice of motion in the following prayers:

- a) The decision or action by First Respondent of unfairly discriminating Applicants from Honourable Ministers' and Honourable Assistant Ministers' Chauffeurs to be declared invalid and of no force and effect, *null and void ab initio* to the extent that it offends and violates section 18 and 19 of the Constitution;
- b) Declaring that Applicants should be treated equally and be afforded equal treatment, protection, rights, seniority and status from grade D to F similar to that afforded to Honourable Ministers' and Honorable Assistant Ministers' Chauffeurs;
- c) Directing Respondents to pay salary arrears to Applicants from the date a decision was taken to improve and enhance the status of Honourable Ministers' and Honourable Assistant Ministers' Chauffeurs from grade D to F;
- d) Review and set aside First Respondent's decision of unfairly discriminating Applicants from Honourable Ministers' and Honorable Assistant Ministers' Chauffeurs;
- e) Costs of suet;
- f) Granting Applicants such further and/or alternative relief.

[3] The Applicants in this matter are all public servants employed as Chauffeurs by the Ministry of Public Service of the Lesotho Government (Public Service). The First to the Sixth Applicants are Chauffeurs for Judges of the High Court whilst the Seventh to the Tenth Applicants are respectively Chauffeurs for the Director of Public Prosecutions, the

Ombudsman, the Auditor General, and the Government Secretary. All the offices which the Respondents are serving are statutory offices. In terms of their salary structure, the Applicants are in grade 'D'. The dispute has a long history.

- [4] It is common cause that the Applicants had been ordinary drivers not until the 30th September, 2002 when authority was granted by the then acting Director of Remuneration and Benefits to elevate them to the position of Chauffeur. It is a matter of history that measure was taken to facilitate the implementation of **Public Inquiries Act of 1994** which is said to make provision for entitlement of the Judges of the High Court to a chauffeur-driven vehicle. It is not clear whether that initiative equally applied to the Seventh, Eighth, Ninth and Tenth Applicants. It can only be assumed that the same state of affairs (as Chauffeurs) applied to them. Following the aforementioned elevation from the positions of Driver to Chauffeur, the Applicants were upgraded from grade 'C' to 'D' (which they still presently occupy).
- [5] The instant application was precipitated by the fact that on the 6th January, 2006 the Public Service made a decision to re-grade and promote all the Chauffeurs for Ministers from the position of Chauffeur grade 'D' to Senior Chauffeur grade 'E'. The decision was to be effective from the 1st April, 2006. That decision per Annexure 'B' expressly excluded the Applicants. In relevant parts, it provided that:

“Ministries are to note that Chauffeurs for Statutory Position Holders will not be affected by this change and their designation will remain Chauffeur at grade ‘D’”.

The following year on the 11th April, 2007, the Senior Chauffeurs were further upgraded to grade ‘F’. That decision was to be effective from the 2nd March, 2007. The Applicants who were still only ordinary Chauffeurs were once again left out of that development. These facts are all common cause. The Applicants complained about that selective upgrading and this is the kernel of their application in this case.

[6] It is on the basis of the above selective upgrading that the Applicants approached this Court claiming that they had been unfairly treated and discriminated against. They contend that they were entitled to be upgraded all along when the Ministers’ Chauffeurs were upgraded since their terms of employment were relatively similar – they were all Chauffeurs. They claim that the decision of leaving them stuck at grade ‘D’ while their counterparts were upgraded, contradicted Section 18 of the **Constitution** and therefore rendered the decision of leaving them behind of no force or effect.

[7] The Applicants claim that they should therefore be put to the position they would have been had the decision to enhance the Ministers’ Chauffeurs’ grades included them all along. They then claim what they call ‘*salary arrears*’ from the date a decision was made to enhance the status of Ministers’ Chauffeurs from grades ‘D’ to ‘E’ and from ‘E’ to ‘F’. Their basis for this claim is that they had at all material times been

rendering the services similar to those rendered by the Ministers' Chauffeurs. They also claim to be elevated to grade F which is the grade they feel they rightly belong to.

- [8]** The Ministry of the Public Service in principle appeared to agree that the Applicants should be upgraded. In response to some of the Applicants' colleagues letter of complaint (Annexure D) to Public Service about the issue in question, save noting that the Applicants were not Senior Chauffeurs, Public Service noted thus in Annexure E:

“The aggrieved officers’ request has already been taken into consideration in that the Ministry of Public Service is in the process of reviewing the current salaries and grading structures as well as job evaluation in all categories of the public service. Factors such as job requirements and work load will be considered to ascertain that all officers earn what is commensurate with their contributions and qualifications”.

The contemplated review appeared to take inordinately longer period (now over five years) than the Applicants understandably could stomach. It is conceded that they were being exceedingly prejudiced.

- [9]** Whilst agreeing that the Applicants should now be upgraded the Respondents have problem with only prayer Four (4) of the Applicants Notice of Motion. The prayer in issue is to the effect that the Respondents should be directed to

“pay salary arrears to Applicants from the date a decision was taken to improve and enhance the status of Ministers’ Chauffeurs from grade D to F.”

The nub Respondents contention is that before the Applicants can talk of arrear salary they should first be upgraded to the grades in question retrospectively. Further that only after that can the Applicants claim arrears retrospectively.

[10] The Respondents claim that the Applicants in their papers did not pray to be upgraded retrospectively, particularly in prayer Three (3), and cannot therefore even talk of arrear salary. It is the Respondents view that the Applicants cannot be granted what they have not claimed. The Respondents could barely advance an authority for the proposition that the Applicants should not be paid retrospectively. The Counsel for the Respondents however submitted that if their point that Applicants should not be paid salary arrears is not upheld, then they submitted that such arrear salaries is damages and could not be claimed through motion proceedings in the further and alternative relief.

[11] The Applicants on the other hand deny that their prayer Three (3) is silent about claim for retrospective payment of arrear salary. They however claim that they had specifically asked that the upgrading should take effect from the time when Annexures B and C were made. They contend that the cumulative effect of that prayer is that it has a

retrospective effect. For ease of reference the Applicants' prayer Three (3) was couched in the following terms:

“Declaring that Applicants’ (sic) should be treated equally and be afforded equal treatment, protection, rights, seniority and status from grade D to F similar to that afforded to Honourable Minister’s (sic) and Honourable Assistant Minister’s (sic) Chauffeurs”.

The Applicants further claim that their position is fortified by the fact that at the time the upgrading of the Ministers' Chauffeurs was made they also were still rendering similar services rendered by such Chauffeurs, as they alluded earlier. They contend that *ipso facto* there was no reason why they should not be placed to the position they should have been had they been treated fairly and equally. They claim that once it is accepted that their discrimination was unjustified in terms of the upgrading in question, it follows that they should be paid their arrear salary.

[12] The Respondent maintained that prayer Three (3) does not make reference to retrospective upgrading therefore there is no basis for Applicants to claim salary arrears in prayer Four (4). Further that *the Makesi & Anor v. Attorney General LLR-LB (1999-2000) 306*, case which the Applicants seemed to rely on for claiming arrear salary, was distinguishable because in that case there was a circular which created a legitimate expectation promising applicants salary upgrading. They contend that the position is different in this case. The Respondents are not opposed to the view that the Applicants should now be elevated to grade F but refutes the claim that Applicants are

entitled to arrear salary, on the basis that the Applicants were not substantive occupiers of the grades in question at a time.

[13] It is now trite that matters of policy making or unmaking is the exclusive right of policy makers and the courts being no administrators will not lightly interfere with policy decision making unless such policy decisions unreasonably and unjustifiably affect rights of individuals. Matters of promotion and salary upgrading or increment are matters of policy. For whatever considerations, the Public Service had decided to promote the Ministers' Chauffeurs to the post of Senior Chauffeur and expressly excluded other Chauffeurs, Applicants included.

[14] The explanation advanced by the Public Service as per Annexure 'E' for exclusion of the Applicants when upgrading was done, is that such a decision was made

“explicitly for positions in the offices of Ministers as part of Ministers privilege for their personal staff”.

The situation would have been different if the Applicants were claiming to have been Ministers' Chauffeurs at all material times. None made such a claim. In further attempting to justify the decision to exclude the Applicants, the Principal Secretary of Public Service noted thus as per Annexure 'F':

“It will be noted...that differential treatment does not necessarily amount to discrimination. It will amount to discrimination if it is unjustified. What is common between Chauffeurs for Honourable

Ministers and Honourable Judges is that they are Chauffeurs. That is where similarities end. They are otherwise not similarly circumstanced, as the other category is for Honourable Ministers and the other for Honourable Judges. The duties of Chauffeurs for Honourable Ministers are more diverse than those of Chauffeurs for Honourable Judges. If that is so, treating Chauffeurs for Honourable Ministers differently from those of Honourable Judges can be justified even though they are all Chauffeurs. What is important therefore is a justification for alleged differential treatment”.

The Applicants might have a diametrically opposite view to what the Principal Secretary said above, rightly or wrongly, but unfortunately that was the wisdom of the decision maker at the time.

[15] Respondents submitted that the case under review appears distinguishable from the ***Makesi case*** (*supra*), where the decision to upgrade the Local and Central Court Presidents to their respective grades applied to all Local and Central Court Presidents without any categorization or distinction. This case is further distinguishable from the case of ***Attorney General & Ors v. Bolepo & Ors LAC (2000-2004) 522***, where the decision to upgrade nurses was clear that the upgrading applied to all nurses. The nurse tutors who were left out successfully claimed to be upgraded and such decision had to be retrospective from the date when the decision was made. The reasoning behind that case was simple, the decision to upgrade nurses by the Public Service was made without any distinction but applied to all nurses. [Emphasis in the judgment].

[16] Respondents lastly submitted that in the present matter, the decision to promote Chauffeurs to the position of Senior Chauffeur was “specifically and expressly” meant for Ministers’ Chauffeurs. The further decision of upgrading Chauffeurs to grade F applied only to Senior Chauffeurs. It is a fact that at both instances, there is no evidence to suggest that any of the Applicants was a Ministers’ Chauffeur or at least a Senior Chauffeur at any point in time. On this score alone, the Court should find it difficult to upholding the Applicants’ prayer Four (4) in the Notice of Motion. The Applicants cannot claim arrear salary for positions they had never occupied nor promoted to, that would be nothing short of absurdity. I have already rejected this argument that the Respondents should have conceded that it should not stand in the way of granting relief for payment of salaries.

[17] I found it difficult to follow the above reasoning of the Respondents. That is to say if it was conceded that there had been that discrimination. It could easily be that the Applicants salaries were similar and equal to those of the other Chauffeurs by reason of elevation. The question of damages and review which ought to be made be reason of view would be mere arithmetical calculation Otherwise what would be the value of the concessions made.

[18] It is noteworthy that the entire Applicants’ prayers in the Notice of Motion were not opposed save for only prayer Four. It can only mean

in the circumstances that the prayer ought to be granted under further and alternative relief.

[19] In the circumstances, the following Order is made:

1. The Application succeeds in terms of all prayers in the Notice of Motion. Costs are awarded to Applicants.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Applicants: Mr. L.T. Makholela
For Respondents: Mr. R. Motsieloa
Judgment noted by Mr. Makholela