

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

LUCIA THATO LENEA	1 st Applicant
MAOKHOLA MATEE	2 nd Applicant
And	
PASSPORT OFFICER	1 st Respondent
THE CHIEF IMMIGRATION OFFICER	2 nd Respondent
THE PRINCIPAL SECRETARY – MINISTRY OF HOME AFFAIRS	3 rd Respondent
THE PRINCIPAL SECRETARY – MINISTRY OF PUBLIC SERVICE	4 th Respondent
ATTORNEY GENERAL	5 th Respondent

JUDGEMENT

Coram : Hon. Acting Chief Justice T. E. Monapathi
Date of Hearing : 6th May, 2013
Date of Judgment : 13th June, 2013

SUMMARY

An official commits a jurisdictional error when he purports to exercise a jurisdiction which he does not possess. It is more so where the power sought to be exercised has been reposed in a different official in terms of the law or legislative provisions. When

power to delegate is not prescribed there is no jurisdiction to delegate. It purportedly delegated authority does not give power to adjudicate or preside. The rationale behind prescribing for a head of department to preside is that an accounting officer who has intimate knowledge of a department or a ministry must exercise control and discipline in the most effective way. He is most capable of doing that.

CITED CASES

Koatsa vs National University of Lesotho LAC 1985-89 335 at 340-341

Minister of Home Affairs and 3 Others vs 'Mampho Mofolo C of A (CIV) No. 2/2005

Standard Lesotho Bank vs Lijane Morahanye LAC CIV/06/2008

Motumi Ralejoe vs LHDA

Ramothamo and 3 Others vs PEP Stores and Another LAC/REV/02/2007

STATUTES

Public Service Act 2005 and Code of Good Practice 2005

BOOKS

Administrative Law L. Baxter

[1] The two (2) Applicants are employees of the Third Respondent in the division of the First Respondent and Second Respondent as Passport Officers.

[2] Applicants have filed notice of motion before this court for relief as follows: Declaring unlawful the disciplinary proceedings which have been held against the Applicants in the months of May and June 2010. Secondly, reviewing, correcting and/or setting aside the decision of the Second Respondent to dismiss the Applicants

on the 24th June 2010. Thirdly, ordering the Second Respondent to reinstate the Applicant in their positions with immediate effect without any loss of benefits. Fourthly, directing the Second Respondent to pay Applicants their salaries in arrears with interest thereof at 18% per annum, from the date of dismissal to the date of judgement hereof. Fifthly, costs of suit in the event of opposition of the same. And further and /or alternative relief.

[3] On or about January 2009, the First Respondent initiated disciplinary proceedings against Applicants in terms of the ***Public Service Act 2005*** and ***Code of Good Practice 2005***. It is not in dispute that when the said hearing was held it was chaired by one Mr. Mashinini of the Police Directorate, who recommended dismissal of the Applicants from the Public Service. He was not from the department or ministry of the Applicants. The question is whether he was properly delegated. Applicant submitted that it was even doubtful whether anyone so delegated would have jurisdiction to adjudicate.

[4] The crux of the Applicants' case is that the said hearing was procedurally irregular as the said Mashinini was not head of department in terms of the law. And furthermore this became a serious procedural irregularity in terms of the law as it violated "established and written rules by the employer". See section 2 of the ***Public Service (Amendment) Act 2005*** and 8 of ***Code of Good Practice 2008***. Applicant submitted further.

[5] The law pertaining to procedural irregularity is a fundamental rule of natural justice and is based on doctrine of legitimate expectation which is now trite in our law. The general principle is that the Respondent who is an employer exercising a public function must act fairly. This is the fundamental principle of our labour law

enshrined in the celebrated *Koatsa vs National University of Lesotho LAC 1985-89 335 at 340-341*.

[6] Once a rule or policy is introduced in the employee's contract of employment, it becomes part of that employee's contract, and as such it raises a legitimate expectation on the employee that the employer who wants to interfere with it must act fairly. See *Minister of Home Affairs and 3 Others vs 'Mampho Mofolo* (CIV) no. 2 of 2005 (unreported). In *Standard Lesotho Bank vs Lijane Morahanye LAC CIV/06/2008* at para. 13 it was held that an employer who set an instrument for himself is bound by that instrument.

“The Appellant had itself undertaken to give retrenchment packages to its retrenchees. It was therefore bound by the instrument in terms of which it had so bound itself”, (my emphasis).

[7] In fact in terms of the principle in *Motumi Ralejoe vs LHDA*'s case at page 17 it would not even be open for the employer to come and argue that the procedure which they followed for consultations was just as fair. “It is no answer to say that the alternative procedure adopted by the employer was just as good”.

[8] Further, the Respondents boldly admit that Mr. Mashinini was not the head of department in terms of the rules. But they allege that this was in order. See para. 8 of the answering affidavit. This is as Applicants submitted was untenable. How can the Respondents argue that the violation of their very rules is in order. This is a point that actually settles the Applicants' case. On this point alone the application has to be granted as papers prayed in the notice of motion.

[9] In the instant case the head of department had not even purportedly¹ delegated his duties or rights under the act to the “passports” department. See the case of *Ramothamo and 3 Others vs PEP Stores and Another LAC/REV/02/2007* at page 5, where the court had this to say on delegation, that is:

“Firstly, there is no averment on the papers before us that the Labour Commissioner had indeed so delegated her powers to the Third Respondent. Secondly, an examination of the letter of exemption itself does not reflect the fact of delegation. Thirdly, the language used in the document shows that, the decision to exempt was not made by the Labour Commissioner but by some other person”.

Even assuming without admitting that there was any delegation, the delegated authority had no power in law to enter into contracts which are contrary to the main regulations.

[10] Acting in conflict with legislative provision is emphasized in **Administrative Law** by L. Baxter on page 444 where the learned author says that:

“Public authorities are at liberty to devise the procedures most appropriate for the exercises of their powers, as long as these procedures do not conflict with the provisions, express or implied of the empowering legislation.” (Emphasis added).

Secondly, the Applicants allege a double jeopardy rule as they allege that Mr. Mokoena who is their head of department actually did give the hearing and instructed them to replace the money and write letters of apology.

[11] It was submitted that the **Code** does accommodate this process of stability a wrong head of department and on a balance of probabilities it does appear from the facts that this is what the head of department actually did even though it is denied by the Respondent. However, there was no affidavit from Mr. Mokoena to actually support such a denial.

[12] It was thus sought that the application be granted as prayed in the notice of motion. I agreed that the rationale behind prescribing that a head of department shall adjudicate or preside was clear. It was to empower that head, who has to discipline his subordinate and who has knowledge of the facts and circumstances and who has day to day control, to exact discipline and control as he normally would. Hence the need to repose those powers in him. This is clearly the policy behind the seeking regulation to repose power and to follow the **Code**.

[13] In my opinion appointing someone other than the head of department was a jurisdictional error. Any delegation of such authority is not prescribed in the relevant law. It is therefore irregular. The application succeeds with costs. Further proceedings may be instituted.

T. E. Monpathi
Acting Chief Justice

For Applicants : Mr. H. Sekonyela
For Respondents : Mr. M. Sekati
Judgement noted by Mr. Motsieloa (Law Office)