CIV/APN/458/2013

CIV/APN/439/2013

CIV/APN/171/2014

IN THE HIGH COURT OF LESOTHO

In the matter between:

LINEO MANAMOLELA	**1st Applicant**
LERATO MOTSEKI	**2nd Applicant**
MOSHE KOATJA	**3rd Applicant**
MONESE RAMOTHOANA	**4th Applicant**

and

COMMISSIONER OF POLICE	**1st Respondent**
ATTORNEY - GENERAL	**2nd**
Respondent	

JUDGMENT

Coram: **Hon. A. M. Hlajoane**

Date of Hearing: **7th May, 2014.**

Date of Judgment: **30th May, 2014.**

Summary

Whether applicants were afforded a hearing before their transfers – Can the Court consider the representation after the decision to transfer was made as having afforded a party a hearing – The audi principle mandatory before decision to transfer is made unless statute has provided for an ouster clause – The application granted with costs.

Annotations

Statutes

1. **Police Service Act No. 1998**
2. **Public Service Order No.21 of 1970 (Though repealed by Act No.13 of 1996)**
3. **Lesotho Mounted Police Service (Administration) Regulations 2003**

Books

Cases

1. **Matebesi v Director of Immigration**
2. **Nqubane v Minister of Education & Culture 1985 (4) S.A 160**
3. **Kepa v Anglican Church (1995 -99) LAC 40, 41**
4. **Limpho Phaila v National Security Service and Another CIV/APN/259/2007&9**
5. **Sefularo v President of Bophuthatswana and Another 1994 (3) SA 80 at 82**
6. **Rees v John and Another [1969] All ER 274 at 400**
7. **Van Huyssten and Others v Minister of Environmental Affairs and Tourism and Others 1996 (1) S.A. 283 at 304-305**
8. **1989 (4) S.A 731 at 750**

9. **1989 (4) S.A Administrator Transvaal and Others v Traub and Others**
10. **1954 (1) S.A 123**
11. **Morokole v Attorney General and Others C of A (CIV) 25/2013**
12. **Sefane v Sefane C of A (CIV) No.15 of 2005**
13. **Consolidated Fish Distributors v Zive 1968 (2) S.A 517 at 522**

[1] Counsel on both sides had applied to the Court to have the three cases consolidated due to their peculiarity and similar facts. The three Applications as shown above were thus consolidated and heard together.

[2] The Applicants are all Police Officers and all stationed here in Maseru. They joined the Lesotho Mounted Police Service in different years ranging from 2001 to 2005.

[3] Applicants also possess varying qualifications. 2nd Applicant has honours degree in Communication Science from University of Free State. 3rd Applicant has a certified Accountant Technician qualification from Centre of Accounting Studies. 4th Respondent is a Bachelor of Commerce Human Resource Management graduate from the University of Free State.

[4] The applicants are challenging their transfers by the 1st respondent as unlawful because they allege they were never

given any hearing before the decision to transfer them was taken. They have approached this Court to review the decision to transfer them, correct it and set it aside.

[5] In their founding papers the applicants have shown that they attended a promotion course at Police Training College here in Maseru on the 1st September, 2013. That following the completion of that course on the 1st October, 2013 they were told that they were promoted to the rank of Inspector. Immediately after that they were informed of their transfers to Mokhotlong and Qacha's Nek. They allege that the proceedings of the day were concluded without them having been afforded any hearing.

[6] Even after they had received the letters of their transfers, they wrote back to advance reasons why they individually felt they could not be transferred. In some instances they had even suggested to swap or even transferred to places nearer Maseru that would allow them to commute. Their requests were turned down without giving any reasons.

[7] The respondents on the other side showed that the applicants were clearly informed that they were going to be transferred to any place across the country after the promotion course. Also

that the **Police Service Act**[1] under **sections 4 and 30** avert that police officers can be transferred to any place in the country. The other point being that applicants must have been aware of the practice in the Police Service that once one is informed of the transfer he has to communicate with the Commissioner through the DISPOL of the area he has been transferred to.

[8] It has been the respondents' case that the applicants were given a hearing before their transfers, as when they were taken for a promotion course they were told that they were later going to be transferred. Also that their correspondence must be taken to have been enough hearing.

[9] Now coming to talk about their correspondence, the annexures to the founding affidavits are letters from the applicants after they had already been informed of their transfers. It was only Manamolela who was informed of his transfer to Leribe by letter. The transfer to Leribe was with immediate effect.

[10] Both sides referred to the case of **Matebesi v The Director of Immigration and Others**[2] where the Court had stated that where normally a decision is likely to affect a person adversely or is potentially prejudicial to him, such person should be asked to make representations prior to making the decision.

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[1] Police Service Act No. 1998
[2] Matebesi v Director of Immigration

[11] In *casu* the question would be whether applicants' transfers were prejudicial or potentially prejudicial to them.

[12] Respondents' counsel has identified issues of common cause. That it is common cause that the applicants were informed about the promotion course and that they attended the promotion course on the dates stipulated in the papers filed of record. But as to whether they were informed that they were taken for the course so that they would thereafter be transferred to places outside Maseru that has been disputed.

[13] Motseki and Koatja were to be transferred to Mokhotlong, Ramothoana transferred to Qacha's Nek and Manamolela to Leribe. After they were transferred the applicants wrote letters in which each advanced reasons why she was asking that she / he should not be transferred but to delay such transfers until they would have sorted out their varying problems.

[14] But, the applicants' case is that there has been failure of observing rules of natural justice in their transfers as they were not given a hearing preceding their transfers. It has been the respondents' case that applicants were told when they were taken for a promotion course that they were going to be transferred immediately after.

[15] Assuming that in fact the applicants were informed that their promotions would necessitate transfers, were they therefore when such transfers made afforded any hearing? Even assuming they were told that the transfers would mean going outside Maseru, could one have surmised that it meant places like Qacha's Nek and Mokhotlong?

[16] For Manamolela in a letter by his counsel, he had even suggested a place outside Maseru that could have allowed him to commute for reasons he had stated in the letter. The response to his request was only that he still has to proceed on transfer as the request has not been honoured without giving reasons why?

[17] Authorities have shown that hearing is a prerequisite before an employee could be transferred, **Nqubane v Minister of Education and Culture Ulundi and Another**[3] where the Court said;

"There can be no doubt that in deciding whether to transfer the applicant, the official concerned would have to enquire into and consider various facts and circumstances which affected applicant's rights."

[3] Nqubane v Minister of Education & Culture 1985 (4) S.A 160

[18] We also have authorities from our jurisdiction which clearly rejected the argument that *audi alteram partem rule* does not apply in respect of transfers, viz **Kepa v Anglican Church**[4]**, Limpho Phaila v National Security Service and Another**[5]**.**

[19] The Court also in **Sefularo v President of Bophuthatswana and Another**[6] had this to say that;

"The audi alteram partem rule is a principle of natural justice which promotes fairness by requiring persons exercising statutory powers which affect the rights or property of others to afford a hearing before the exercise of such powers. It has existed from antiquity and is today the cornerstone of the administrative laws of all civilized countries."

Lesotho is in no doubt one of those civilized countries as under its Constitution had provision for respect of people's rights.

[20] Applicants even referred to English decisions to emphasize the point that observance of rules of natural justice seems to be observed internationally and referred to cases such as **Rees and Another v John**[7] where the Court said;

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that

[4] Kepa v Anglican Church (1995 -99) LAC 40, 41
[5] Limpho Phaila v National Security Service and Another CIV/APN/259/2007&9
[6] Sefularo v President of Bophuthatswana and Another 1994 (3) SA 80 at 82
[7] Rees v John and Another [1969] All ER 274 at 400

even God Himself did not pass sentence upon Adam, before he was called upon to make his defence."

[21] Applicants referred to decisions which in essence demonstrated that it would not be the fairness of the decision made but the manner in which the decision is taken. In **Van Huyssten and Others v Minister of Environmental Affairs and Tourism and Others**[8] the Judge said;

The duty to act fairly, however, is concerned only with the manner in which decisions are taken, it does not relate to whether the decision itself is fair or not."

So that the numerous decisions referred to by the applicants have made it a legal requirement that hearing the person to be affected by the decision to transfer is a condition *sine quo non.*

[22] Counsel on both sides are agreed that as a general rule the *audi* principle requires that hearing be afforded prior to taking a decision by the official or body concerned. Respondents' cited the case of **Traub**[9] and argued that applicants were informed about their transfer before and during the promotion course. He considered that as having given applicants a hearing.

[8] Van Huyssten and Others v Minister of Environmental Affairs and Tourism and Others 1996 (1) S.A. 283 at 304-305

[9] 1989 (4) S.A 731 at 750 Administrator Transvaal and Others v Traub and Others

[23] But counsel for applicants' argued that to have been informed of the transfers before and during the course which he however denied, was not affording applicants' a hearing. To have been given a hearing they could have been told of places they were being transferred to and then allowed to make representations. The practice of police being made to communicate with the Dispol of the areas they are being transferred to denies them the opportunity of being heard before such transfers. And as rightly pointed out by applicants' counsel the Dispol is not even the one who facilitates the transfers.

[24] There are instances where, as pointed out by respondents' counsel, pre-transfer hearing may be rendered impracticable so that giving an *ex post facto* hearing would not be rendered unlawful. These are exceptional circumstances, as in the case of **Administrator Transvaal and Others v Traub and Others**[10] where the Court said;

"the dictates of natural justice may be satisfied by affording in exceptional circumstances, the individual concerned a hearing after the prejudicial decision has been taken."

The Court went further to show that the exception would be where the party making a decision is necessarily required to act with expedition.

[10] 1989 (4) S.A 731

[25] In the instant cases we have not been told that there were exceptional circumstances that could have justified the departure from the general rule. Even after the applicants had written letters explaining their personal circumstances, there was not response to indicate whether or not their circumstances were considered as frivolous, but were told to take up the transfers and then follow the practice of communicating with Dispol of the place transferred to.

[26] Respondents' Counsel elaborated further on instances where it could be permissible to afford hearing after the prejudicial decision would have been taken. That other than expedition, there may be instances where a public official acted in good faith.

[27] The other exception being where the Parliament has expressly or by necessary implication enacted that rules of natural justice should not apply, **R v Ngwevela**[11].

[28] Respondents further referred to **section 6 (3) of the Public Service Order**[12] which allows for the displacement of the *audi* principle in appropriate circumstances, as absence from office or from official duties.

[11] 1954 (1) S.A 123
[12] Public Service Order No.21 of 1970 (Though repealed by Act No.13 of 1996)

[29] Applicants have advanced various reasons in their written requests not to be transferred. Such reasons included pursing chartered accountancy, attending to sick parents and siblings, having minor children attending school. There was also the issue of swapping for Mokhotlong.

[30] It has become clear from the decision in **Morokole v Attorney General and Others**[13] that where the question of prejudice arises then the transferee would be entitled to be heard before the decision to transfer is made. In **Morokole** the Court found that he was not going to be prejudiced in any way by being transferred from the Senate to the Ministry of Public Works in the Building and Maintenance Department as the salary was the same. Even on chances of missing out on promotion the Court found that it was not a problem as promotion is based on merit. Also on loss of fringe benefits some of which were considered to be of doubtful nature as being invited to social gatherings, the Court was informed that such were not even attached to his substantive post.

[31] The Applicants have stated their personal circumstances in their founding affidavits, and considering their nature, this Court is of the feeling that they ought to have been considered before decision to transfer was taken. Applicants in the circumstances

[13] Morokole v Attorney General and Others C of A (CIV) 25/2013

of their cases ought to have been afforded a hearing before their transfers.

[32] The Respondents have not referred the Court to any law applicable to the Applicants' case which has an ouster clause to applicants' right to be heard before being transferred. Neither the **Public Service Act, Regulations** nor the **Police Service Act**.

[33] The Court granted a *rule nisi* as an interim relief. The rule is thus confirmed in terms of the prayers contained in the notice of motion with costs.

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LINEO MANAMOLELA	**1st Applicant**
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MOSHE KOATJA	**3rd Applicant**
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and

COMMISSIONER OF POLICE	**1st Respondent**
ATTORNEY - GENERAL	**2nd**
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ON CONTEMPT

[34] The second leg to the cases as consolidated has been that of stay of the purported demotion of the applicants based on their having advanced requests not to be transferred.

[35] Attached to the application for contempt are letters written by the Human Resource Officer of the 1st respondent, written on the instructions of the 1st respondent. The letters written to each one of the applicants about their demotion. The letters showed the reason for such demotion being due to applicants' inability to accept transfers.

[36] The Court had ordered that pending finalization of the applications, applicants' transfers be stayed. Whilst the applicants were awaiting finalization of their cases with the interim order of stay, the 1st respondent wrote letters to the applicants requesting them to show cause why they could not be demoted.

[37] The applicants' response was to the effect that their being demoted was an interference with the interim order to stay the transfers. The 1st respondent went ahead and instructed Human Resource Officer to write letters of demotion to the applicants.

[38] It has been the applicants' case that what 1st respondent did, by going ahead to write letters of demotion in the face of the existing valid interim order to stay the transfers must be taken as circumventing the Court order and that amounted to contempt of Court.

[39] Also that though respondents claimed to have put their reliance on **Regulation 7 (5) of the Lesotho Mounted Police Service (Administration) (the Regulations)**[14] what they did was not following the dictates of that section.

[40] The Regulations provide as follows:

7 (5) "*If, at any time during or at the conclusion of the period of probation, the Commissioner is of the opinion that an officer is not suited to perform the duties of the higher rank the officer shall revert to the rank held by him or her immediately prior to the promotion. Otherwise, at the conclusion of the period of promotion or extended probation, the officer will be confirmed in the higher rank."*

[41] **Subsection (7) (2) of the Regulations** provides that

"All promotions shall be on the basis of merit."

The Regulation thus makes it clear that before a promotion, an officer has first to be put on a probation. And that for the application of **Regulation 7 (5)** above to apply the officer need to assume the office of the higher rank.

[42] Again to comply with the provisions of the Regulation above, the Commissioner will have formed an opinion about the officer

[14] Lesotho Mounted Police Service (Administration) Regulations 2003

after having assessed and or evaluated the performance of the officer on higher rank.

[43] In *casu* it cannot be said that the applicants were allowed the opportunity to have proved themselves on the work at the higher level. They were demoted even before starting with the duties for higher rank.

[44] Respondents on the other hand argued that applicants were never prevented after their promotions from discharging their functions. That what happened was that they found themselves not having any functions to discharge as were not occupying any positions whilst still here in Maseru. Their former positions had already been filled.

[45] What the Court has to determine is whether the respondents, particularly 1st respondent is in contempt of the orders of this Court by demoting the applicants in the face of the order staying their transfers.

[46] The requisites for coming to a conclusion that one is in contempt are the following:

(a) that an order was granted against the respondent;

(b) the respondent was informed or served with the order and has no reasonable ground to disbelieving same

© Respondent has disobeyed the order or neglected to comply with it, see the case of **Sefane v Sefane**[15]. In the case of **Consolidated Fish Distributors (Pty) Ltd v Zive and Others**[16] it was decided that once it is shown that an order was granted and that the respondent has disobeyed or neglected to comply with it, willfulness will normally be inferred.

[47] Respondents are saying it cannot be said that the Court order was not respected as the applicants were not transferred. The applicants were not transferred but were demoted as a result of having challenged their transfers. Even before knowing of what the outcome of the Court was going to be, the 1st respondent reversed the applicants' promotions. The issue of transfer cannot be separated from that of their demotion.

[48] The 1st respondent dealt with the issue of applicants promotions which was the basis for their transfers. This was a clear sign of contempt of Court. The two issues are inseparable.

[49] The Court has come to the decision that the transfers were null and void as the applicants were not afforded a hearing before such transfers.

[15] Sefane v Sefane C of A (CIV) No.15 of 2005
[16] Consolidated Fish Distributors v Zive 1968 (2) S.A 517 at 522

[50] As shown above, the promotions were based on merit in terms of the Regulations. The 1st respondent also failed to comply with the provisions of **Regulation 7 (5)** *supra*.

[51] In the papers the applicants had asked that 1st respondent be given seven (7) days within which to purge his contempt, otherwise to declare the demotion null and void. The 1st respondent is thus given 14 days within which to purge his contempt failing which come to Court on 13th June, 2014 and explain why he shall not be committed to prison for contempt of Court.

A. M. HLAJOANE
JUDGE

For Applicants: Mr Molati
For Respondents: Adv. Mokuena