

IN THE HIGH COURT OF LESOTHO

KEFUOE KOATSA	1st APPLICANT
LIEKETSENG MORAKE	2nd APPLICANT
MOCHESELA NTISA	3rd APPLICANT
T'SEPO MOEKETSI	4th APPLICANT
NT'ELISENG LETETE	5th APPLICANT
DLADYS PHIRI	6th APPLICANT
NTOLO QHASHELE	7th APPLICANT
MOSALA QOFA	8th APPLICANT
NTHATISI KOEPE	9th APPLICANT

And

PRINCIPAL SECRETARY MINISTRY OF HOME AFFAIRS	1st RESPONDENT
MINISTER OF HOME AFFAIRS	2nd RESPONDENT
PUBLIC SERVICE COMMISSION	3rd RESPONDENT
ATTORNEY GENERAL	4th RESPONDENT

JUDGMENT

Coram : Hon. N. Majara J
Date of hearing : 24th March 2014
Date of judgment : 4th August 2014

Summary

Application for review of administrative decision withdrawing list of applicants' names after notification to attend interview - whether withdrawal and /or suspension of shortlist from the Public Service Commission wrongful and unlawful - whether 1st respondent had power to suspend the shortlist and was correct to do so without giving applicants a hearing - whether the shortlist prepared in the past financial year was excluded from consideration by the Civil Service Establishment List in the next year - 1st respondent's decision ultra vires as matter was already before the Public Service Commission - applicants had legitimate expectation to be interviewed and to have been given prior consultation before decision affecting them could be taken – application granted with costs.

ANNOTATIONS

BOOKS

1. Wade; Legitimate Expectation and Proportionality in Administrative Law; 6th Edition 200, 522

STATUTES

1. The Lesotho Constitution of 1993
2. The Public Service Act No. 1 of 2005
3. The Public Service Regulations

CASES

1. Noka-Ntso Primary School & others v Khaboliso & Ano. LAC 1995-99 783

2. South Africa Road Board v Johannesburg City Council 1991 (4) SA
3. Omar & Others v Ministry of Law and Order & Others 1987 (3) SA 859
4. Administrator Transvaal & Others v Traube & Others 1989 (4) All SA 924 (AD)
5. National Director of Public Prosecutions v Phillip 2002 (4) SA 60
6. Madras City Wine Merchants Association v State of Tamil Nadu (1994) SCC 509
7. U.P Awas Evan Vikas Parishad v Gyan Devi (1995) 2 SCC 326
8. Nthati Mokitimi v Central Bank LC/23/2013
9. R v Ngwenya 1954 (1) SA 123
10. Ministry of Home Affairs v Mampho Mofolo C of A CIV/No. 2 of 2005
11. Sechele v Public Officers Defined Pensions Fund & Others Con/Case No. 6 of 2006
12. BP Lesotho v Stanley Maitse Moloi C of A CIV/No. 1 of 2006
13. Setlogelo v Setlogelo 1914 AD 221

[1] This is an urgent application in which the applicants seek an order from this Court in the following terms; that a rule nisi be issued and be returnable on the date to be determined by the Court calling upon the respondents to show cause if any, why the orders sought shall not be confirmed;

- (a) That the process of filling the positions of Passport Services Managers for the Ministry of Home Affairs pursuant to Circular NO.2 of 2013 dated 9th September 2013 be stayed pending the finalization of this application.
- (b) That the first respondent's decision dated the 23rd June 2011 to withdraw the applicants' names as short-listed from being interviewed by the third respondent for the position of Passport Services Managers be reviewed and set aside.

- (c) That the third respondent be ordered to proceed with the applicants' interviews for the positions of Passport Services Managers in respect of which they had been short-listed.
- (d) That the respondents be ordered to pay costs of this application
- (e) That the applicants be granted such further and/or alternative relief as the Court may deem fit.

[2] On the 28th of October 2013, Counsel representing both parties appeared before the Court and by consent an interim order in terms of prayers 1, 2(a) and 3 was granted as prayed for and the Rule Nisi was made returnable on the 24th March for the hearing of the matter.

[3] Facts that are common cause are that the applicants are employees of the Ministry of Home Affairs and currently hold the position of Senior Passport Manager respectively, save the second applicant who is the Acting Production Manager. They are stationed in various districts of the country. Sometime in February 2011, the Ministry of Home Affairs advertised the positions of Passport Services Managers for interested and qualified persons.

[4] The applicants applied and were duly short-listed for an interview which was scheduled to take place on the 4th of July 2011 before the Public Service Commission. On the date in question the applicants attended the interview. However, upon arrival at the stated venue they were informed by the Public Service Commission that the short-list on which they appeared had been withdrawn and as result the interview could not proceed. They were not informed why the shortlist was withdrawn save to be told there were ongoing investigations against them but were also advised to take their case up with the relevant Ministry.

[5] It is the case of the applicants that ever since the shortlist of which they were all part was withdrawn, they have not heard any-thing from the Public Service Commission but they learned that the positions in question were re-advertised in September 2013. The applicants contend that the Ministry cannot lawfully re-advertise the positions without first doing the interview which had already been scheduled to take place on the 4th July 2013 and only re-advertise the positions if the Commission was of the view that the short-listed candidates did not meet the requirements for the positions.

[6] Further that it was wrongful and unlawful for the 1st respondent to withdraw the short-list from the Public Service Commission while the latter was already seized with the matter.

[7] The matter is opposed and the opposing affidavit is deposed to by the 1st respondent in terms of which he avers that the Ministry could not use the short list as the financial year within which it had been made had lapsed and the advertised posts were no longer funded in the new financial year. Thus, a new advertisement had to be made to meet the procedural requirements of the Public Service Commission.

[8] The 1st respondent also disputes the contention that the withdrawal of the short-list and re-advertisement was wrongful and unlawful on the basis that there is no law that prohibits the Ministry from acting in the manner that it did. Further that it was within his powers to withdraw the shortlist on the basis that there was a suspicion of misconduct or insubordination against some or all of the shortlisted candidates.

[9] He adds that the withdrawal was an administrative decision premised on that suspicion which had to be addressed before the interviews could proceed and was

not in any manner interference with the business of the Public Service Commission and in this regard he is supported by the Secretary to the Public Service Commission, one Pholo Mapetla.

[10] Against this backdrop, there are three issues that have to be determined by this Court namely;

- (a) Whether the withdrawal and /or suspension of the applicant's shortlist from the Public Service Commission by the 1st respondent, was wrongful and unlawful?
- (b) Whether if the Principal Secretary had power to suspend the shortlist, he was correct to do so without prior consultation with the parties to be affected by his decision?
- (c) Whether the 1st respondent's contention that the shortlist prepared in the past financial year was excluded from consideration by the Civil Service Establishment List is sustainable?

[11] In this connection, **Adv. Ratau** who appeared on behalf of the applicants made the contention that the Principal Secretary Home Affairs suspended an interview that was already before the Commission and thus usurped the authority exclusively given to the Commission in terms of the Constitution and the Public Service Act.¹

[12] Counsel added that the decision to withdraw the shortlist from the Public Service Commission by the Principal Secretary Home Affairs was ultra vires and therefore must be reviewed and set- aside. He argued further that even if it could be accepted that the Principal Secretary had the powers to do so, he did not give the applicants a hearing before he could make that decision and was therefore in

¹ Section 136 of the Lesotho Constitution of 1993; Section 8 (3) of the Public Service Act No. 1 of 2005

violation of the principle of the *audi alteram partem*. It was his submission that in terms of this principle, applicants were supposed to be afforded a hearing first more especially when serious allegations were being leveled against them and failure by the Principal Secretary to do so, renders his decision null and void.

[13] **Adv. Ratau** also pointed out that the contention by the 1st respondent that the shortlist was prepared in the past financial year and thus could not be used in the following year cannot be true, the reason being that if the positions had not been abolished, then the Ministry still needed them in the new financial year. He added that the contention would be applicable if the positions were rendered redundant by the Ministry which is not the case in present matter.

[14] For the respondents **Adv. Leokaoko** countered the applicants' argument by arguing that the Principal Secretary had the powers to withdraw the shortlist as the Chief Accounting Officer because there were serious allegations of misconduct and insubordination leveled against the applicants. She added that it was his duty to deal with the internal affairs of the Ministry before the interviews could be conducted by the Commission. She submitted that the applicants could not even claim that they had a legitimate expectation because they did not establish a clear right. However, she did not address the issue as to whether the applicants were afforded any hearing before the decision to withdraw the shortlist was done.

[15] I now proceed to deal with the first issue for determination. With respect to the powers of the Public Service Commission which the applicants herein invoke, the relevant provision is **section 8 (3) of the Public Service Regulations**. It reads as follows:-

“The Commission shall have the power to reject the shortlisted candidates who, in view of the Commission, are not qualified for the

job. And in the exercise of its functions, it shall not be subject to any control by anybody.” (my underline)

[16] In the light of the above provision, it is my view that once the shortlist had been presented before the Commission the powers to proceed with or suspend the interview lay with it. Thus, while the 1st respondent could very well have acted on the bona fide belief that there were serious allegations of misconduct and/or insubordination against the applicants, what he should have done was bring this fact to the attention of the Commission so that it and not he, could make its decision either to reject or proceed with the interviews as the case may be. In other words, by acting in the manner he did the 1st respondent’s decision was *ultra vires* his powers because at the material time the Commission was already seized with the matter per the precepts of the law.

[17] It is for this reason that I accept the submission that was made on behalf of the applicants that the 1st respondent’s conduct was also contrary to **section 136 (11) of the Lesotho Constitution** which reads thus:-

“The Commission shall in the exercise of its functions under this Constitution, not be subject to the direction or control of any person or authority.”

[18] In addition, the respondents have failed to quote any law on the basis of which the Principal Secretary could have withdrawn the shortlist that had already been presented before the Commission. In my view and as I have already stated, if the Principal Secretary had heard allegations of misconduct by the applicants, due to the fact that no action had been taken before they were shortlisted, he ought to have at least passed this information on to the Commission which is vested with

the powers to either accept or reject candidates that it in its opinion do not qualify for the job. Thus, this application stands to be granted on this ground alone.

[19] However, for the avoidance of doubt, I find it necessary to deal with the question whether assuming the 1st respondent had acted within his powers by withdrawing the shortlist the applicants ought to have been given a fair hearing. In this connection, it was submitted on their behalf that they had acquired an interest in the advertised positions and that by virtue of having been shortlisted, their interest deserved to be protected by the law as they might have been appointed to the positions.

[20] Further that it being common cause that the shortlist was withdrawn on the basis of serious allegations of misconduct leveled against them, they were entitled to the *audi alteram partem* so that they could make representations. The *audi alteram* principle means the opportunity to be given a fair before a decision can be taken against one. To support his submission, Counsel for the applicants quoted the Court of Appeal's decision in the case of **Noka-Ntso Primary School & Others v Khaboliso & Another**.²

[21] In response thereto, **Adv. Leokaoko** made the submission that the 1st respondent did not err in withdrawing the shortlist without giving the applicants a hearing because they did not have a prima facie right to be heard and/or legitimate expectation to be interviewed.

[22] In this connection, it is worthy to note that it is trite that the *audi alteram partem* principle is the cornerstone of justice and fairness in any given case. It applies amongst others, where '*the authority exercising the powers is obliged to consider the particular circumstances of the individual affected. Its application has*

² LAC 1995 -99 p 783

a two-fold effect. It satisfies the individual desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of power'.³

[23] This principle has been described in various decisions as embodying a fundamental right which a public official cannot deprive the subject of unless he or she is empowered by statute to do so. A legitimate expectation may also arise from the existence of a regular practice which the claimant can reasonably expect to continue. In this regard see the case of **Omar and Others v Ministry of Law and Order and Others** and that of **Administrator Transvaal and Others v Traube and Others**.⁴

[24] It is thus not debatable that the principle of legitimate expectation goes hand in glove with that of the right to be heard. It is now well established that a person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in law to receive such treatment. The expectation may arise from a presentation or promise made by the authority or from consistent past practice. It is basically founded on three aspects namely; if there is an express promise given by a public authority, or because of the existence of a regular practice which claimant can reasonably expect to continue and such an expectation must be reasonable.

[25] This doctrine is to be confined mostly to the right to a fair hearing before a decision which results in negating a promise or withdrawing an undertaking is taken. Its application takes place side by side with rules of natural justice and reasonableness. It is accepted as an integral part of the rules relating to the *audi* principle and obliges decision-makers to act fairly. Therefore, for it to apply it is

³ South Africa Road Board v Johannesburg City Council 1991 (4) SA (A)

⁴ 1987 (3) SA p 859; 1989 (4) All SA 924 (AD)

not always necessary for the affected person to establish a clear right. To this end, see the comments of the Court in the cases of **National Director of Public Prosecution v Phillip** and **Madras City Wine Merchants Association v State of Tamil Nadu**⁵ respectively.

[26] Coming back to the present case, it is not in dispute that the applicants applied for the positions of Manager in response to the Ministry's advertisement on the basis of which they were shortlisted and duly notified. On the basis of these facts, it is my view that they had acquired a legitimate expectation that they would undergo the interview. I have already stated that where a party has successfully established a legitimate expectation he need not establish a clear right.

[27] In other words, the applicants were entitled to be heard pursuant to the dictates of the *audi alteram partem* principle prior to the withdrawal of their interview. In conducting investigations in relation to misconduct, it was important to have advised the persons suspected of misconduct of the allegations leveled against them in as much detail as possible and to have afforded them the opportunity to reply to the allegations.

[28] This is more so when taking into account of the fact that in her submissions before the Court, Counsel for the respondents made the concession that the allegations complained of were long submitted to the Commission before the date of the interview yet the Principal Secretary and the Commission decided to surprise the applicants on the day of the interview. It is my view that this action was against the basic concept of the principle of natural justice. It accordingly rendered the decision a nullity because the applicants were not given a chance to be heard before an adverse decision could be taken against them.

⁵ 2002 (4) SA 60; (1994) SCC 509

[29] To this extent, it is also salutary to note the comments of the Court in the case of **U.P Awas Evan Vikas Parishad v Gyan Devi** ⁶ in which the doctrine of legitimate expectation was succinctly summarized in the following words:-

‘ where even though a person has no enforceable right yet he is affected or likely to be affected by the order passed by a public authority, the doctrine of legitimate expectation come to play and the person may have a legitimate expectation of being treated in a certain way by the administrative authority’.

[30] It is on the basis of these sacrosanct principles that the Court will not allow any authority to take a decision that adversely affect the rights of the subjects without providing the reasons for such action. See in this connection the remarks of the Court in **R v Ngwenya, Minister of Home Affairs & Others v Mampho Mofolo and Sechele V Public Officers Defined Pension Fund and Others** ⁷ respectively.

[31] It is also my view that the case of **Nthati Mokitimi v Central Bank LC/23/2013** is distinguishable from the present one for the reason that therein the applicant had attended an interview and had failed it whereas in this case applicants were never interviewed despite having been shortlisted and notified of the appointed date for the interview. If there were reasons to cancel it, there was need for prior consultation by the Commission. Further, if the 1st respondent had failed to consult them before he could withdraw the short-list they should have at least been consulted before the posts could be re-advertised.

[31] In addition, I am of the view that Counsel for the respondents misconstrued the principles as discussed in the cases of **BP Lesotho (PTY) LTD v Stanly**

⁶ (1995) 2 SCC 326

⁷ 1954 (1) SA 123; C of A (CIV) No. 2 of 2005 11; Con/ Case No. 6 of 2010

Maitse Moloi⁸ and that of **Setlogelo v Setlogelo**⁹ which has been quoted with approval by the Lesotho Courts. The cases referred to above do not deal with the concept of legitimate expectation as the applicants therein were seeking an interdict hence the requirement for them to establish a clear right amongst others.

[32] Consequently, as **Adv. Ratau** correctly submitted, the present applicants' expectation arose from the fact that having responded to the advertisement placed by the Ministry, they were notified that they had been shortlisted for the interview, not to mention that it is a well established practice of which this Court takes judicial notice that once a person is called for an interview he/she must be interviewed. The applicants did not expect to pass the interview but to be interviewed by the Commission. See also the work of Wade in **Legitimate Expectation and Proportionality in Administrative Law; 6th Ed.**¹⁰

[33] The last question for me to deal with is the respondents' last contention that the short list prepared in the past financial cannot be used in the subsequent year in terms of the Civil Service Establishment list. In this regard, it is worthy to note that the respondents have not placed any authority before this Court to back this contention up. The establishment list states that funded positions from grade E upwards will be filled through advertisement.

[34] It is my understanding that if the positions are not filled in the current year, there is nothing that stops them from being filled in the subsequent year(s). This is because in my view, unless abolished, the positions remain in existence and are thus budgeted for by the Government. At any rate, I am not persuaded to accept

⁸ C of A CIV/No. 1 OF 2006

⁹ 1914 AD 221

¹⁰ 6th Edition 200, 522

this argument because it is not backed by the facts or evidence that have been placed before this Court. Thus, it is my opinion that this contention cannot stand.

[35] It is on the basis of all the foregoing reasons that I find that the applicants have successfully made out their case for the relief sought for and I accordingly order as follows:-

The application is granted as prayed for in terms of prayers a, b, c, and d, in the notice of motion with costs.

N. MAJARA
JUDGE

For the applicants : Mr. Ratau

For the respondents : Ms Leokaoko