

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/480/2014

In the matter between:-

TSELISO KHOMARI

APPLICANT

AND

**THE RIGHT HONOURABLE THE PRIME MINISTER
GOVERNMENT SECRETARY
COMMISSIONER OF POLICE
NONKULULEKO ZALY
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : Various dates
Date of Judgment : 3rd March, 2015

Summary

Civil Procedure – Urgent application – Applicant seeking to be declare a de facto and legitimate Principal Secretary in the Ministry of Communications, Science and Technology – 4th Respondent having been reinstated in that position by two judgments of the High Court and the Constitutional Court. Redeployment of applicant to another Ministry – Decision for his redeployment been subjected to review proceedings, on grounds that the redeployment is tantamount to a demotion.

Attorney General withdrawing as legal representative of the 1st and 4th Respondents only – Effect of same as well as his none filing of any affidavits and his none appearance in Court.

ANNOTATIONS

CITED CASES:

- **Graspeak Investment P/L v. Delta Corporation P/L & Another 2001 ZLR 551 (H) 555C-E**
- **Nonkuleleko Zaly v. Prime Minister and three Others Constitutional case No. 15 of 20 (unreported)**
- **Makenete v. Lekhanya 1991 – 1992 LLR & LB page 126**
- **Commander LDF v. Sekoati 2007 – 2008 LAC**
- **Reeders v. Jacobsz 1942 A.D. 395 at 396**

STATUTES:

- **The Constitution of Lesotho of 1993**
- **Attorney General Act No. 6 of 1994**
- **High Court Rules, Legal Notice No. 9 of 1980**

BOOKS: None

- [1] The main application herein was filed before this Court on the 19th November 2014 on an urgent basis.
- [2] Subsequently, on the 8th December 2014, this Court made a decision that there was no urgency and it ordered parties to file and exchange pleadings in accordance with the rules of this Court in a normal way. Pleadings having been closed, the matter was once again argued before this court on the 9th February 2015.
- [3] Both counsel have raised points of law, which points were argued without counsel arguing the merits. They are entitled to have made such an election.
- [4] Before dealing with the above, one should indicate very briefly the reasons why the court declined to entertain that there was urgency in the matter. In a

nutshell they are that the applicant and the 3rd respondent have been communicating about the redeployment of the applicant to some other ministry or government department as far back as around the 25th August 2014 following the delivery of the judgment of the Constitutional court dated the 29th July 2014. The Constitutional court had ruled in favour of the 4th respondent herein consequently she had to resume her position as Principal Secretary for the Ministry of Communications, Science and Technology. Earlier on, in CIV/APN/272B/2013, the High Court, had, per the judgment of my brother Honourable Moiloa J also ruled in favour of the 4th respondent (applicant in this application).

[5] The applicant herein as well as the office of the Attorney General, who were parties in all of these cases, became aware that as a result of the two court judgments the 4th respondent had to be reinstated into the position of Principal Secretary in that Ministry which had by then been occupied by the current applicant. There can therefore be no urgency alleged by the applicant four months after the said judgment were delivered and he became aware of same. He even took some steps to assist in accommodating 4th respondent to resume her duties.

[6] There has to date, not been any appeals launched by any of the parties who have lost in those cases. This includes the 3rd respondent in the constitutional case No. 15 of 2013; and 2nd respondent in CIV/APN/272B/2013. This far the said two judgments of those two courts still stand valid and unchallenged.

- [7] In short, the two courts of law before which the issues pertaining to the unlawful suspension of the fourth respondent from her duty or position as Principal Secretary of or in the Ministry of Communications, Science and Technology, have issued final orders/judgments in favour of the fourth respondent. What remains is for the government of Lesotho, through its officials; to wit, the first up to the fifth respondent (with the exception of the fourth respondent) to put into effect and execute the orders of the said courts.
- [8] This can only be done by having the fourth respondent reinstated to her position of Principal Secretary in the said Ministry from where she had been unlawfully suspended. The issue whether or not the fourth respondent's suspension from her position in that ministry is no longer sub-judice so that the status quo ante of the fourth respondent has to be normalized, so that she is reinstated to her former position which she held prior to her unlawful suspension.
- [9] Consequently, the effect of the applicant's application is to either stall, or to frustrate and or to prevent the execution of the said orders of court. Refer to his notice of motion prayer (b) where he specifically prays this court to not reinstate the fourth respondent to the office of Principal Secretary for the Ministry of Communications. He prays that he be declared as the de facto and lawful Principal Secretary for this Ministry.
- [10] The questions to be answered, are if indeed he is already lawfully a Principal Secretary for that Ministry as he alleges; why does he then seek this declaratory order? Secondly, the applicant is not a party to the applications

CC No.15 of 2013 and CIV/APN/272/2013; upon which basis does he seek this prayer without his having applied to have been joined as a party in same?

- [11] The applicant has not approached these courts for joinder as an interested party in those cases, while he was, as far back as the 2nd May 2014, according to contents of “TK2” aware that in fact, there was already a substantive holder of that position, though she was then suspended.
- [12] He cannot now be heard to apply for a review and the setting aside of orders in which he was never a party. This step taken by the applicant is an abuse of court process and is not sanctioned by the provisions of Rule 45 of the Rules of this court. The word party as described in the interpretation section of the Rules of this court does not include the applicant in this application. This application flies in the face of the provisions of the said Rule 45 particularly also because even the Ministry of Communications has also not been cited as a party to this application.
- [13] This brings this court to deal with the points of law raised by both counsel. Firstly, counsel for the applicant raised the following points of law;
- Objection to the appointment of K.J. Nthontho as Attorneys of record because the Attorney General has not delegated Mr. Nthontho or his associates to perform the Attorney-General duties as spelt out or as provided by the provisions of section 98 (2) of the Lesotho Constitution.
- [14] However, this turned out not to be so because Mr. Nthontho has in fact been instructed by the Attorney General to represent and appear for the said

respondents in this application CIV/APN/480/2014 in which the parties are Tseliso Khomari v. The Prime Minister and Others. This brief to counsel is dated the 23rd December 2014. Obviously, Mr. Nthontho accepted this brief/instructions hence why he has appeared before this court in this application. This then puts to an end this point of law.

[15] Be that as it may, a notice of withdrawal dated the 28th January 2015 was filed and served upon applicant's counsel. This was filed by yet another officer in the Attorney General's office. In this notice, the Attorney General has withdrawn as the legal representative of only the first up to the fourth respondents.

[16] This notice of withdrawal is in contrast with the brief of counsel referred to above dated the 23rd December 2014, in which the instructions to Mr. Nthontho to represent the respondents refers to all the respondents; whilst this notice of withdrawal only singles out the first to the fourth respondents. Why that is so has not been explained. As it is it, the position which is portrayed in these two documents is ambiguous as to the extent to which the office of the Attorney General is committed to represent the respondents in this application.

[17] It also gives an impression that there is no communication or consensus between the officers of the Attorney General in how they execute their duties. This becomes clearly so when regard is had to the fact that, the drafter of the notice of withdrawal was himself not before court to perform his duties in respect of the 5th respondent in respect of whom he had not withdrawn as its legal representative.

[18] Be that as it may, it is a matter of great concern to this court to realize that even though the office of the Attorney General is an office in the public service, there is clearly, as demonstrated by this notice of withdrawal, some public officers in this office who seem, nowadays, not to understand what their duties and their role is for as long as they are officers in that public office.

[19] Such duties are spelt out clearly in the provisions of section 98 of the Constitution of Lesotho of 1993. This is the section through which the office of the Attorney-General has been established. This section is written in mandatory terms/in mandatory language, and makes no allowance for any officer in that office to ignore all those provisional mandate and duties spelt out therein.

[20] The duties which are to be performed by this office are spelt out in subsection two (2) of this section. For removal of doubt, this court quotes such provisions which are relevant for purposes of this application.

ATTORNEY GENERAL

98 (1) *There shall be an Attorney-General whose office shall be an office in the public service.*

(2) *It shall be the duty of the Attorney – General –*

a) *to provide legal advice to government;*

b) *to exercise ultimate authority over the Director of Public Prosecution;*

c) *to take necessary legal measures for the protection and upholding of this Constitution and the other laws of Lesotho;*

d) *to exercise or perform any of the rights, prerogatives, privileges or functions of the state before courts or tribunal; and*

e) *to perform such other duties and exercise such other powers as may be conferred on him by this Constitution or any other law.*

(3) *The Attorney-General may exercise his functions personally or through officers subordinate to him in accordance with his general or special instructions.*

[21] Now, in the instant case, when a notice of withdrawal was filed by an officer subordinate to the Attorney-General, who is presumably acting in accordance with the provisions of section 98(3); he acted contrary not only against the Constitution but he also, deliberately elected to marginalize and or to discriminate against the said first to the fourth respondents who are public officers performing public duties. This he did without having notified them of this notice of withdrawal as their legal representative.

[22] The Attorney-General, has a constitutional mandate to represent the first to the fourth respondents who are being sued in their official capacities; but for undisclosed reasons he did not do so. This clearly constitutes a dereliction of his constitutional duties on his part.

[23] This officer has not only refrained from performing his constitutional duties; he also violated the provisions of Rule 15 of the High Court Rules by having not notified the said respondents numbers one up to four of his withdrawal as their legal representative in this application. In that way he made it sure that these respondents were not afforded an opportunity to instruct another Attorney/lawyer to defend them; and has in a way contributed to the late

filing of the said respondents' answering affidavit within the period prescribed by the said Rules of the High Court.

[24] The period from the 15th December 2014 when he filed a notice to oppose this application on behalf of the all the respondents, to his filing a notice of withdrawal as their legal representative herein is a total of 30 days, because this notice was filed in the civil registry of this Court on 28th January 2015 when it was also served only upon the applicant's counsel in total disregard to the first up to the fourth respondents.

[25] The handling of this matter by this officer is most unfortunate and inexcusable because being an officer in the Attorney-general's office, he is a public officer who is expected to perform his public duties with diligence and honestly. He is also an experienced lawyer who should appreciate the importance of compliance with the Rules of this Court. This is not only for his own interests, but it is for the interest of that esteemed office and for the Court as well as for all the litigants in this application.

[26] Rules of court have been promulgated for the purpose of regulating the business of the court as well as the conduct of parties and to provide certainty so that the administration of justice should not be brought into disrepute. The fact that, another officer in the Attorney-Generals' office later instructed Mr. Nthontho to represent and appear for the said respondents in this application is no justification for Adv. Sekati not to have complied with the Rules of this Court and to ignore his constitutional duties as alluded to above.

- [27] This officer had initially appeared before this Court on behalf of all the five respondents in this application; on the 8th December 2014. However, when on the 9th February 2015; the date that the application was argued, he did not appear before court, he also has not filed any opposing affidavits nor any written submissions, at least on behalf of the fifth respondent against whom he has not withdrawn as his legal representative. He has just disappeared without any word and has not attended court, even at least so that he can explain his reasons for having withdrawn as a legal representative of the first up to the fourth respondents.
- [28] This officer has also in addition acted contrary to the provisions of section 3 of the Attorney-General Act. The fact that another officer in the Attorney General's senior office, Mr. L.V. Letsie saved the situation is no excuse for Mr. Sekati to have disregarded his duties as he did after he had filed that notice of withdrawal referred to above.
- [29] Secondly it has been argued on behalf of the applicant that the respondents' answering affidavit be ignored because it has been filed out of time and contrary to the provisions of Rule 8(10) (b). It is noted however that counsel for the applicant has relied and read the respondents' answering affidavit; hence why he has referred, at paragraph 4 of his notice to raise points of law to the contents of the answering affidavit. This he did because he is aware that the brief in question includes all the respondents in this application.
- [30] He has also had that notice filed at the office of Mr. Nthontho but not upon that of the fifth respondent, because he was aware of that brief to counsel.

[31] In short, while knowing and being aware of the irregular or improper proceeding or improper step, counsel for the applicant took a further step in the cause by making reference to that irregular pleading. This, he is estopped from doing. Refer to provisions of Rule 30 (1).

[32] It has further been argued in this regard that the respondents should have had their answering affidavit filed accompanied by the application of the late filing of same; i.e. accompanied by an application of condonation of filing same late. That, in that application they should have explained and set forth the reasons for that late filing of the answering affidavit; as well as showing that they have prospects of success.

[33] Indeed this is trite law; but the argument so advanced misses the points that, firstly the office of the fifth respondent has itself brought about and engineered this unfortunate turn of events. It failed to act diligently by its apparent lack of dereliction of its duties displayed by an officer who has initially handled this application on behalf of the respondents who failed to inform the first up to the fourth respondents of his having withdrawn as their legal representative. This has been alluded to above. It needs no further elaboration.

[34] Further on, this court is empowered, in deserving cases, such as in this one to condone any proceeding in which the provisions of these Rules are not followed. However, the Court has to exercise its discretion judiciously. This Rule provides as follows: (I quote)

59 *“Notwithstanding anything contained in these Rules the Court shall always have a discretion, if it considers it to be in the interests of justice, to*

condone any proceedings in which the provisions of these court are not followed”.

[35] Of course, such a discretion should always be exercised judiciously. Of paramount importance, one should consider whether or not the alleged non-compliance with the relevant provisions of the Rule in question will cause prejudice to the other party.

[36] Counsel for the applicant has not anywhere in his written submissions nor in argument before this court alleged any prejudice which is or will be occasioned by his client for non-filing of the application of condonation of the late filing of the answering affidavit. This court cannot find the existence of any prejudice on the part of the applicant for non-filing by the respondents of that applicant of condonation of their answering affidavit.

[37] It is an undeniable fact that this application, which deals primarily with issues or matters pertaining to governance is of a sensitive nature, it is one of those rare cases in which technical issues such as the one now being complained about by the applicant, and where prejudice has not been alleged, should be dealt with in terms of the provisions of Rule 59 (supra).

[38] The authorities cited and relied upon by and on behalf of the applicant are distinguishable from the current application because, in all of them there was already a final judgment granted in favour of the respondents. In those cases the appellants could indeed talk of prospects of success on appeal.

[39] In the instant matter there is no final judgment because the matter has not at all been argued on merits. The only issue which this court dealt with was

the urgency. This court made a ruling that the matter was not urgent. So there are issues which have to be argued on the merits. One cannot therefore talk about prospects of success in an application which has not been finally argued and where there is no final judgment on the merits.

[40] In any case, and as has already been indicated above, the officers of the fifth respondent acted differently at different times with regard to the issue of withdrawal and that of briefing and instructing Mr. Nthontho to represent and defend the respondents. One cannot overlook this issue. Be that as it may, this court is baffled by the fact that, one officer in the fifth respondent's office had elected not to represent public officers who are sued in their official capacities. This he did in stark violation of the laws which have created this office which is an office in the public service. Section 3 of the office of the Attorney-General Act No. 6 of 1994, provides in very unambiguous terms, and in addition to the provisions of the Constitution of Lesotho that: (I quote)

Functions of the Attorney-General

3. *“In addition to the duties vested in the Attorney-General by the Constitution of Lesotho, the Attorney-General shall represent the government of Lesotho in all legal proceedings in which the government is a party”.* (My underlining)

[41] This court is not aware of any other law(s) which empowers the office of the Attorney-General to ignore its above stated duties in any specified circumstances; nor has counsel for the Attorney-General provided any

reasons upon which it supports its stance of withdrawing and neglecting with impunity its duties to represent the government and its official officers.

[42] In the premises, the points of law raised by and on behalf of the applicant are dismissed.

[43] I now turn to deal with points of law raised by and on behalf of the respondents. The first one being that of material non-disclosure. This relates to the fact that the applicant has not disclosed to court anywhere in his papers that he is actually actively participating in party politics so much so that his name is listed in the proportional representation list of the Lesotho Congress for Democracy as PR candidate No. 13.

[44] It is argued that other than this material non-disclosure; the applicant's active participation in party politics while he is a substantive holder of an official position of Principal Secretary for Communications, Science and Technology flies in the face of the provisions of the Public Service Act No.1 of 2005 as well as Regulations 2008; and indeed is further contrary to the conditions of the contract of his employment which he signed on the 21st May 2015 (annexure "TK2").

[45] The above point of law raised on behalf of the respondents has not at all been dealt with by applicant's counsel either in his written submissions or in argument before this court. In the circumstances, and in view of the principle of our law, this stands admitted.

- [46] Indeed according to the contents of annexure “GS1” the applicant’s name appears as number 13 in the above shown proportional representation list and is a proposed member of the LCD party at Thaba-Phechela constituency.
- [47] By provisions of section 143 (1) of the Public Service Regulations of 2008, a public officer shall not be an active member of a political party. Further on, in terms of the provisions of these regulations “*a public officer who wishes to stand for general elections to the National Assembly or Local Government elections as a candidate shall resign or retire from the public service by giving a written notice of at least a month prior to the nomination day for general elections*”. (My underlining).
- [48] Once again, and for undisclosed reasons, the applicant has with impunity disregarded and flouted the above shown provisions of the laws of this country. He remains in official office to date hence why he has moved this application before this court. This he has and continues to do and remains an active politician to date.
- [49] Nowhere in his written submissions nor in oral argument before this Court has it been disclosed that to date, the High Court as well as the Constitutional Court have in CIV/APN/272B/2013 and in Constitutional case No. 15 of 2013, set aside as unlawful the suspension of the fourth respondent and that such a suspension has been declared as null and void.
- [50] This is an important issue which should have been disclosed to court because, as it has been indicated above, in essence, the applicant is asking this court to indirectly review the orders or judgments in the said two

applications to which he was never a party and contrary to all known principles of the law. With the greatest respect this material non-disclosure of certain very material issues which will have a bearing not only upon this instant application but upon the two above named final courts judgment which have not been appealed against by the interested, cited parties constitutes dishonesty and mala-fides on the part of the applicant.

[51] Without much deliberations on the above, it is patently clear that the said above-named attitude of the applicant is calculated and or meant to frustrate the re-instatement of the fourth respondent to her official position as Principal Secretary in the Ministry in question.

[52] In fact, regard being hand to the outcomes of the cases referred to above, the only logical conclusion is that the respondents have to restore the status quo ante and have the fourth respondent reinstated to her official position which she held prior to her unlawful suspension. No court of law can ignore the said two judgments which were granted in favour of the fourth respondent. It is therefore untenable for the applicant to wish this court to simply ignore those two judgments.

[53] The applicant is also alleged to have not disclosed to court that in fact the deponent to the supporting affidavit Mr. Selibe Mochoboroane is no longer a Minister in the Ministry of Communications, Science and Technology.

[54] The said deponent to the applicant's founding affidavit has long been removed from such office, of being the Minister in that Ministry by Legal Notice No. 83 of 2014; dated the 16th October, 2014. Such removal of this

deponent from office as a minister in the said ministry is with effect from the 16th October, 2014.

[55] By Legal Notice NO. 84 of 2014 another minister has since been assignment in that ministry. There is no other legal notice through which the said minister deponent to the applicant's founding affidavit has been reinstated to the position in that Ministry. There is also, to date, no order of court in which the said legal notice No. 83 of 2014, through which deponent was removal from this position of Minister in the Ministry of Communications, Science and Technology has been set aside and or declared a nullity. For all intends and purposes, Mr. Selibe Mochoboroane is no longer a minister in any Ministry of His Majesty's Government. He is accordingly none suited to depose to any affidavit in support of the applicant in support of the applicant in this, or in any other Ministry in his official capacity. In law, his affidavit is a none starter and as such this court ignores it completely as well as.

[56] Mr. Selibe Mochoboroane has no legal standing of any kind to depose to any affidavit in an official capacity because of the existence and contents of Legal Notice No. 83 of 2014. In fact since an affidavit is a form of sworn evidence, he is actually committing the crime of perjury by deposing to any affidavit as if he is still holding the position of a minister in his Majesty's Government because he ceased to be such an officer way back on the 16th October, 2014.

[57] This Court is entitled to take judicial notice of this fact. It is also noted that in fact even the applicant is deliberately and intentionally misleading this

Court by referring to this deponent as a minister in that ministry. He is also perjuring himself.

[58] For the foregoing reasons, this Court declines to countenance the illegality that is being perpetuated by the deponent to the founding affidavit as well as by the applicant who is intentionally and deliberately ignoring the contents of Legal Notice No. 83 of 2014; as well as the provisions of the Public Service Act and the relevant Regulations referred to above.

[59] In the premises all the points of law raised by and on behalf of the respondents are upheld. In fact, counsel for the applicant has not at all addressed the said points of law raised on behalf of the respondents. They are therefore to be taken as having been admitted. This application is accordingly dismissed with costs to the respondents.

M. Mahase

Judge

For Applicant: Mr. T. Matoane

For Respondents: Mr. K.J. Nthontho