

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/407/16

In the matter between:

‘MAKHAHLISO PHAKISI

APPLICANT

And

PRINCIPAL SECRETARY MINISTRY

OF LOCAL GOVERNMENT

1st RESPONDENT

MINISTRY OF LOCAL GOVERNMENT

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

JUDGMENT

CORAM:

HON. J. T. M. MOILOA J.

DATE OF HEARING:

17 FEBRUARY 2017

DATE OF JUDGMENT:

13 MARCH 2017

ANNOTATIONS:

Statutes

1. Public Service Act 2/2015
2. Public Service Regulations 38/2008

Cases

1. Ngema/Chule v the Minister of Justice, Kwazulu and Another 1992(4) SA 349
2. Morokole v Attorney General and Others LAC (2000-2004) 850
3. Selikane and Others v Lesotho Telecommunications and Others LAC (1995-1990) 739
4. Matebesi v Director of Immigration and Others LAC (1995-1999) 618

Applicant is a public officer within the Ministry of Local Government. This matter is about Applicant's right of hearing before a decision to transfer her to another duty station was reached. She is before court on an urgent basis stating that the urgency is prompted by her medical condition which requires her to have emergency medical services should there be need.

[2] **BRIEF FACTS**

In her notice of motion Applicant seeks an interdict preventing First and Second Respondents from transferring her from Land Management Department (LSPP) in Maseru pending finalisation of the matter. She is serving the Ministry as a Physical Planner. The purported transfer is to the District Administrator's office in Mohale's Hoek. Prayer 2.2 is that Applicant's transfer from LSPP Maseru to the District Administrator's office in Mohale's Hoek shall remain ineffective pending finalisation hereof. The other prayer is that First Respondent's decision to transfer Applicant without affording her (Applicant) a hearing be reviewed and set aside as unlawful and irregular. Also that First Respondent be ordered to dispatch the record of proceedings pertaining to Applicant's transfer within fourteen days. This court is required to determine whether Applicant is entitled to a hearing before being transferred to a different station more than 120 kilometres away from her current station.

[3] **ON URGENCY**

It is not in dispute that Applicant received the letter of transfer on or about 6 September 2016. The matter was filed in court on 10 November 2016. In motivating the urgency aspect, Counsel for Applicant avers that it is because of the peculiar Applicant's medical condition which requires her to have emergency medical services should the need arise. Also that in view of the said peculiar circumstances she ought to have been given an opportunity to make representations before the decision to transfer her could be made. In answer thereto, 1st Respondent raises a point in *limine* that there is no urgency in the matter. In fact avers that the urgency is self-created and on that basis prays for the dismissal of the claim with costs. The letter in question is not annexed to the papers before court. I am of the view that it would have been of assistance for the court to read it and see how it was drafted. As things stand I do not see what prevented Applicant from making representations regarding her peculiar circumstances after receiving the letter of transfer. Granted, she was not heard before receipt of the letter. But receiving it was invitation for her to bring forth that which she felt ought to have been considered by her employer before deciding to have her transferred to a new duty station. And this she should have done at the earliest convenience following receipt of the letter. Instead she pleads urgency before court about 2 months later. On that basis alone her application is dismissed with costs.

[4] **ON MERITS**

Applicant in her Founding Affidavit states that she received a letter of transfer on or about 6 September 2016. The letter she says, was from Second Respondent (although I believe she meant from First Respondent). That letter informed Applicant that she was being transferred to the District Administrator's office in Mohale's Hoek with

effect from 2 January 2017. This notification gave Applicant a period of three months to make necessary preparations to move to the new station.

[5] Applicant is of the view that the purported transfer is unfair and illegal. At paragraph 6 of her founding Affidavit she gives reasons to support her view. Without necessarily dealing with the reasons in a particular order, the core of Applicant's case is that her transfer was unlawful as she was not given a hearing before the decision to transfer her was made. Applicant avers that she is entitled to a hearing in accordance with the rules of natural justice before she is transferred to another station (Mohale's Hoek) which is more than 120km away from her current station Maseru.

[6] She avers further that she had been sick and granted sick leave for the period 21/12/2015 until 8 January 2016 and attaches annexure "MP2". She was granted another one from 3 February 2016 until 11 March 2016 and on 4 February 2016 underwent a medical operation ("MP1"). This medical report does not say what the nature of the surgery was done. It does not say it is unsafe to transfer her to Mohale's Hoek Town. In that sense it does not help her for no medical reasons are mentioned or even alluded to why she cannot take up her duties in Mohale's Hoek. One has to bear in mind that Mohale's Hoek has a major Government Hospital and private medical practitioners doing their trade there. It is not as if she is transferred to a duty station that has no medical facilities available. There simply is no medical evidence that it would be medically unsafe to transfer Applicant to Mohale's Hoek on the grounds that Mohale's Hoek has no medical services to address her peculiar medical condition. In that sense the issue of prejudice against her does not arise. On 9 March 2016 (while still on sick leave) Applicant says she applied to the Human

Resources Office to be allowed her sick leave days which overlapped with her sick leave (“MP4”). The request was declined. Applicant goes on to say that she was recalled to report back to work on 5 February 2016 while still on sick leave and having just underwent the operation. Applicant says her supervisor’s reasoning was that her leave days had expired and that there was work to be attended to by Applicant. Applicant reported to work on 1 April 2016. She avers that her supervisor begrudges her for unprofessional reasons. She does not say what these reasons are she is referring to.

- [7] Other reasons advanced by Applicant are that firstly, she has just built a house in Maseru where she is stationed. Secondly, her children school in South Africa. Thirdly, her husband works at Letšeng Diamonds mine (in Mokhotlong). She is the only one staying in the house and a transfer to Mohale’s Hoek is prejudicial to her interests. She avers that her house will be exposed to burglary and/or theft if she leaves for Mohale’s Hoek. These in my view are the Applicants real reasons why she refuses to go to Mohale’s Hoek. I seriously wonder what kind of Civil Service Lesotho would have where civil servants like Applicant can elect to work only in the capital city (Maseru) and posting to districts could be for lesser souls than herself. In my view these are all voluntary elections of options of life chosen by her which can easily be remedied. Instead of leaving her house exposed as she fears, she could commute between Maseru and Mohale’s Hoek. She could have a house minder in the premises. It is admitted on her behalf, in my view correctly so, that her conditions of employment unequivocally state that she is subject to being posted anywhere where her services are required. Paragraph 6.7 of Applicant’s founding Affidavit immediately poses a challenge she faces. She avers that it is impossible for her to travel regularly as she is still recovering

from the medical procedure; which medical procedure requires that she regularly consults with her doctor who is based in Maseru as well as specialist medical practitioners in Ladybrand and Bloemfontein. But there is no medical evidence produced by her to that effect. I would have thought there being a major Government Hospital and private doctors in Mphahle's Hoek who are qualified and able to attend to someone in Applicant's condition while in their area of practice there would be no serious risk to health to Applicant. Of course I do take cognizance of and appreciate the importance those she is already used to. Might I add, the medical procedure or operation remains undisclosed by Applicant throughout the proceedings; which makes it difficult for the court to appreciate the nature and effect of her peculiar circumstances and the impact of transfer on same.

[8] **RESPONDENT'S ANSWER**

I have already dealt with Respondent's view on the point of law of urgency, at paragraph 3 of this judgment. On merits First Respondent avers that Applicant's transfer was effected pursuant to the Public Service laws. She says she was empowered by law and she complied with same, by giving Applicant a 3 months' notice in terms of **Regulation 32(5)** since the purported new duty station is beyond 40km. First Respondent also avers that Applicant is not sick whatsoever except that she became sick somewhere in February/March 2016. The Applicant attached "MP1", "MP2" and "MP3", to support her alleged illness and having been on sick leave. On "MP1" Applicant's sick leave runs from 03/02/2016 until 11/03/2016. "MP2" the sick leave is from 21/12/15 to 08/01/15 while on "MP3" she was found unfit for work from 03/12/15 to 18/12/15. But there is nothing on record to that she was still sick in

September/October 2016 when she received a letter of transfer. All these MP1, MP2 and MP3 are ordinary sick leave notes. None of them suggests even remotely that Applicants health would be prejudiced by posting her to Mohale's Hoek town. They raise no exceptional circumstances pertaining to Applicant that a transfer away from Maseru would constitute a threat to her life and therefore a prejudice to her necessitate a pre-transfer hearing.

- [9] I do appreciate that in September 2016 when Applicant received the letter of transfer she had not been sick at that point in time. In fact she states that she reported back to work on 1 April 2016. Counsel for Applicant submitted in court that this would not have happened had Applicant been afforded a hearing before the decision to transfer her was reached. In this case transfer to any duty station was always a contemplated possibility in terms of Applicant's conditions of employment from the beginning of her service in the Public Service. It is an administrative decision/act that raised no prejudice against Applicant. But the truth of the matter is that upon her receipt of her transfer letter in September 2016 she made no representations. He says it was at that point that she would have disclosed that she was still unwell. However, having received the letter of transfer in September 2016, I find that nothing prevented Applicant from bringing forward this impediment to her transfer if it was genuine. It seems obvious to me that she did not wish to be posted at any station other than Maseru. Applicant's Counsel maintained that it was the duty of First Respondent to invite her (Applicant) in order to make representations. In my view the letter she received in September 2016 was invitation enough for her to bring to the attention of her employer her state of health if genuine; particularly since she felt it was a factor to be taken into account in deciding on her transfer. Instead she rushes to court

on an urgent basis 2 months later in mid-November. It cannot be right that some civil servants work only in Maseru and that when posted to other duty station in Lesotho they are free to decline.

[10] **THE LAW**

Central to this case are the Public Service laws, namely the **Public Service Act 2005** as well as **Public Service Regulations 2008**. **Section 13** of the Act provides for functions of the Principal Secretary which include transferring and rotating public officers from one department to another within the Ministry. The regulations detail out the transfer of public officers and this is under **Regulation 32**. **Regulation 32(5)** reads thus:

“where the transfer is to a new duty station which is a distance of 40km and above from the public officer’s old duty station, the Head of Department shall notify the officer of the transfer, at least, 3 months before the date of transfer...”

Indeed First Respondent relies on **Regulation 32**. She avers that Applicant’s transfer was lawful in the sense that it complies with **Regulation 32 of the Public Service Regulations 2008**. She avers further that since Applicant’s new duty station was beyond 40km she (1st Respondent) was empowered by law to give Applicant a 3 months’ notice, and she did. I have already indicated at paragraph 3 of this judgment that as a matter of fact Applicant received the letter of transfer in September, 2016. In terms of that letter she was expected to be at the new duty station in January 2017. She was given a 3 months’ notice as the law requires.

[11] I have noted Applicant's other reasons why she regards her transfer to be unlawful; her new house, children schooling in South Africa and husband working afar, her supervisor begrudging her for unprofessional reasons (the nature of which she does not disclose to the court) as well as the refusal that she used her leave days. I do hear all of it. However, central to her reasoning is the fact that she was not given a hearing before the decision was reached that she would be transferred to Mohale's Hoek. This assertion is factually incorrect. There is no magic in how notice of intention to transfer a public servant ought to be made. It is a fact that she was notified of the employer's intention to change her duty station to Mohale's Hoek in September 2016 and that the transfer takes effect on 1st January 2017. She made no representation to the contrary presenting evidence of prejudice to her. Instead she rushed to court for an interdict against Respondents.

[12] **WAS APPLICANT ENTITLED TO A PRE-TRANSFER HEARING?**

First Respondent contends at paragraph 6.5 of her Answering Affidavit that there is no provision for a hearing before an officer can be transferred; that what is required is that the officer be given sufficient notice. There is no provision in the **Public Service Regulations 2008** which requires a hearing before an officer can be transferred (nor is it excluded anywhere). What is provided for is notice of 3 months to the officer.

[13] The question has been discussed in a number of authorities. Applicant relies on the decision in **Matebesi v Director Immigration and Others (LAC) 1995-1999, 618** wherein the court stated on page 621 that:

“Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by implication indicates the contrary, that person is entitled to the application of the audi alteram partem principle.”

Well, in this case Applicant knew beforehand that in terms of her condition of service she was subject to being posted anywhere in the country. She was given notice in September that she would be stationed in Mochale’s Hoek with effect from January 2017. She made no representations. The medical notes which she attached as MP1, 2 and 3 do not medically recommend that it would be unsafe for her health to be posted away from Maseru. They are in the form of sick notes for specified period only.

Applicant when referring to this authority submits that the principles of natural justice dictate that she is entitled to a hearing before a decision is taken by First Respondent which decision prejudices her rights and interests. I am mindful of what she says; that the decision “prejudices the rights and interests” of the Applicant: And I ask what prejudice is Applicant referring to, regarding her rights and interests? Leaving her house in Maseru; the fact that her child schools in Ladybrand; that her house would be burgled; that her husband works at Letšeng mine in Mokhotlong and that she does require to consult Doctors from time to time? None of these things to me are good enough reasons in the circumstances of this case for Applicant to refuse a legitimate transfer to another station other than Maseru. The Matebesi case is distinguishable on the facts from the present case. Matebesi case was a case of dismissal of a public officer without affording him a hearing. That is a drastic step the employer took without affording such public servant a hearing. The effect of such a step was drastic and detrimental to the interest of the

employee concerned. There is no such thing in the present case before me.

[14] Applicant touches on the issue of prejudice yet again by referring to the decision in **Selikane and Others vs Lesotho Telecommunications and Others LAC (1995-1991) 739**. The court held in that decision at page 744 that “the rule is rather that the right to a hearing in relation to a potentially prejudicial decision applies unless excluded either expressly or by necessary implication.” In *casu* I have already found that the Regulations do not exclude the right of hearing while at the same time not providing for it. In **Morokole vs Attorney General and Others LAC (2000-2004) 850** the court held that Appellant had failed to establish that his transfer had involved any prejudice to him and was therefore not entitled to a hearing before he could be transferred. All these authorities share one thing in common; prejudice. I did ask earlier on as to what prejudice is suffered by Applicant as a result of this transfer.

[15] In **Ngema/Chule vs Minister of Justice, Kwazulu and Another 1992(4) SA 349**, Applicants were employees of the Department of Justice of the Kwazulu Public Service. The full bench had to determine the legality or otherwise of the respondents’ decision to transfer applicants from their existing stations. The court said on page 356 of the judgment that “the two cases proclaim the principle that the decision to transfer a civil servant which does not affect his salary or status does not confer a right to be heard. The decision can be classified as purely administrative and taken in the public interest and does not impinge upon existing rights and liberties.” Nowhere is it suggested here that Applicant’s salary or status is adversely affected by the transfer to Mohale’s Hoek. She is a public

servant and she must abide by the conditions of her employment in the Public Service.

- [16] All the authorities referred to above speak to the issue of prejudice, existing rights and status which in *casu* have not been affected in a negative way. The only change carried by this transfer is the location of the duty station. It is the distance from Applicant's home to her office. She knew of it in advance when she joined public service. Her existing rights to her salary and position remain unchanged and as such there is no need for a pre-transfer hearing in terms of these authorities. A hearing prior to a decision of transfer is not even a requirement in terms of the **Public Service Act 2005 and Regulations 2008** which directly govern Applicant's employment terms.

[17] **CONCLUSION**

The court stated on page 748 of the Selikane case *supra* that "I am prepared, for the purposes of this case only, to assume without deciding that the audi principle generally would apply to cases in which employees are transferred (where this is prejudicial or potentially prejudicial to them), but without stating that to be an inflexible rule. The facts of each particular case must determine this." Taking the facts of this particular case I do appreciate the state of health of Applicant. But that does not qualify for prejudice in her status, property, liberty. Her state of health is not a form of prejudice suffered as a result of the intended transfer. Instead it is a pre-existing condition before the transfer, which in terms of the law does not justify a pre-transfer hearing. If she felt so strongly about it in my view the door was open to her from September 2016 to bring it to the attention of her employer that which she felt was an

impediment to her being transferred. If she relied on health grounds she should have provided her employer with unequivocal medical evidence that transferring her to her duty station outside Maseru would constitute a serious health hazard to her. If her employer had ignored that medical evidence and proceeded with her transfer, I would then understand Applicant's complaint to the Court to be protected. The Application is dismissed with costs.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: Adv. Fiee

FOR RESPONDENT: Adv. Molise