IN THE HIGH COURT OF LESOTHO
(Sitting in its Constitutional Jurisdiction)

Held in Maseru

CONSTITUIONAL CASE NO 2/2016

In the matter between:

LEBONAJOANG RAMOHALALI	APPLICANT

And

COMMISSIONER OF LESOTHO CORRECTIONAL SERVICE	1ST RESPONDENT
MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	2ND RESPONDENT
MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	3RD RESPONDENT
MINISTER OF PUBLIC SERVICE	4TH RESPONDENT
ACCOUNTANT GENERAL	5TH RESPONDENT
THE ATTORNEY GENERAL	6TH RESPONDENT

JUDGMENT

Coram **:** Honourable Mrs Justice A M Hlajoane
: Honourable Mr Justice E F M Makara
: Honourable Mr Justice P Sakoane

Date of Hearing : 16 August, 2016
Date of Judgment : 13 September, 2017

SUMMARY

Constitutional application lodged against the respondents for, in the main, a declaratory order that a policy in terms of which officers who held the LLB degree at the time of their enlistment into the Correctional

Service, qualified to be remunerated at the Grade G salary scale and almost automatically promotable to a rank of Assistant Superintendent. On the contrary, their counterparts who attained the qualification while already in the service were not entitled to the same treatment. The differentiation was found not to be premised upon any of the constitutionally specified grounds for discrimination but on a characteristically analogous one. The Applicant demonstrated that the policy based interpretation and decision by the 1st Respondent, was not only discriminatory but also unfair since in the circumstances of this case, it was not sanctioned by a constitutional limitation of his equality related rights in pursuit of any legitimate societal goal. She could not, consequently, advance a complementary account that her decision was implemented in the manner which proportionally interfered with his rights in a minimal manner geared towards the attainment of a general benefit for the society.

It was accordingly declared that the decision of the 1st Respondent was unconstitutional and set aside. In addition, it was pronounced that the Applicant was retrospectively entitled to have his salary elevated to a Grade G Scale and be paid retention allowance similarly to his colleagues who have the LLB qualification. Though it is common cause that some officers were clandestinely promoted, the Court declined to set aside those promotions because the beneficiaries of the decision were not joined in the litigation.

ANNOTATIONS

CITED CASES

1. **Harksen v Lane No & Others 1998 (1) SA 300**
2. **Retselisitsoe Khetsi v The Attorney General CRI/T/0079/2014**
3. **Attorney General v Mopa C of A (CIV) 3/ 2002**
4. **Rex v Oakes[1986] 1 S.C.R. 103**
5. **Molefi Ts'epe v Independent Electoral Commission and Others C of A CIV/11/05**
6. **S v Makwanyane1995 (3) SA 391**
7. **Major General H M Singh VSM v Union of India & Another CIVIL APPEAL NO. 192 OF 2014**
8. **South African Broadcasting Corporation Ltd v National Director of Public Prosecution & Others CCT 58/ 06**
9. **Egan v Canada1995) 29 CRP**
10. **Prinsloo v Van der Linde1997 (3) SA 1012**

11. **The Institute of Social Accountability &Center for Enhancing democracy and Good Governance v The National Assembly & Others Petition No. 71 of 2013**
12. **South African Police Service v Solidarity Obo Bernard [2014] ZACC 23**
13. **Amalgamated Engineering Union v Minister of Labour1949 (3) SA 637 (A)**

STATUTES & SUBSIDIARY LEGISLATION

1. **The Constitution of Lesotho 1993**
2. **The Central and Local Court Proclamation No 62 of 1938**
3. **Narcotics Control Act (NCA)**

BOOKS & ARTICLES

1. **International Labour Organization (I.L.O) 1951 C – 100**
2. **the Discrimination (Employment and Occupation) Convention1958 C – 111**
3. **the Universal Declaration of Human Rights, 1948**
4. **Civil and Political Rights (ICCPR)**
   J De Wall & Others, The Bill of Rights Handbook , 2nd Ed, Juta & Co, Kenwyn: South Africa - (Original Source : (Nicomachean Ethics, V.3.1131bW Ross trans 1925)

MAKARA J

Introduction

[1] This constitutional matter was brought before this Court by the Applicant seeking for the following orders in *rule nisi* terms:

(a) The decision or act by the 1st Respondent of non up-grading Applicant's salary and non-payment of retention allowance be declared unfairly discriminatory, therefore unconstitutional to the extent that it offends and violates **Sections. 4**, **17**, **18**, **19**, **26** and **30**of the **1993 Lesotho Constitution**, as a result be remunerated accordingly;

(b) The Applicant be treated equally and afforded equal treatment, protection, rights, seniority and status from **grade** "**F**" to "**G**" similar to

that afforded to colleagues of the same class and category in the Lesotho Correctional Service and the entire Civil Service, therefore be elevated in respect of remuneration;

(c) The uncontested promotions be declared a nullity, and of no legal force and effect, ***null*** and ***void ab initio*** retrospectively to the extent that they are unconstitutional and against provisions of other laws governing Public Service;

The Applicant be paid salary difference in arrears retrospectively from June 2013 to when this matter is filed;

(d) The Applicant be paid retention allowance like other Legal Profession Officers in the Public Service retrospectively from 1st July 2013 to when the matter was filed;

(e) The Applicant be paid salary difference per month from the time the Application was filed to the time the matter comes to finality;

(f) The Applicant be paid retention allowance per month from the time the Application was filed to the date of judgment;

(g) Interest thereon at the rate of **18.5%*moratemporae***;

(h) 10% collection fee;

(i) Costs of suit at the Attorney and Client Scale;

(j) Granting Applicant such further and/or alternative relief in that, to allow the Applicant practice Law in the Courts of Lesotho (at own time) to supplement the meager salary rendering Applicant vulnerable and living below Poverty Datum Line conflicting and violating the spirit if not the letter of the **1993 Lesotho Constitution**.

[2] It should from the onset be disclosed that unlike in all constitutional cases in which the Judge authored judgments, there was a delay in delivering judgment in this case. This was mainly on account of a misunderstanding on my part regarding who in particular was assigned to write and deliver it. In the meanwhile, I

was seized with other constitutional and high profile cases which necessitated urgent attention and resolution. The realities were discussed with the lawyers for the parties. They appreciated them and also acknowledged that it was their duty to have enquired about the progress for action to be taken.

Common Cause Facts

[3] The parties agree on the key facts which precipitated this constitutional application. These shall be captured in detail in the subsequent parts where their respective cases would be presented. They also recognize the fact that their disagreement is founded upon questions of law. This basically turns on the application of the right to equality provisions of the Constitution for determining the constitutionality of the decision made by the 1st Respondent on the basis of a circulated Government policy.

[4] To highlight the legal controversy, there is no contestation that the categorization in question constituted of holders of the LLB degree who at the time of their employment in the Correctional Service (Service) held the qualification and those who obtained it while already in the Service. Both categories of officers were basically appointed for the same job. This notwithstanding, the 1st Respondent in an endevour to implement the policy interpreted it to direct that it is exclusively those who had LLB when they joined the Service who would almost automatically be promotable to the rank of Assistant Superintendent, paid salary at a commensurate Grade

G scale plus a retention allowance. In consequence of that understanding, the Applicant who attained the qualification while already in the Service remained holding a position of a Chief Officer which is lower to that of Assistant Superintendent, paid at a Grade F salary scale without any retention allowance. It was not also contested that the latter is by operation of Circular No.11 of 1991 paid to all officers who have LLB throughout the Public Service.

[5] Interestingly, the 1st Respondent has conceded that there are some of the officers who though junior to the Applicant have been elevated above him since according to her they fall in the category which is preferred in the policy. The same applies to the fact that some officers were elevated to higher positions without prior circulars inviting officers to compete for them and in conflict with the applicable procedures.

The Case of the Applicant

[6] A foundation of the application has already been foreshadowed in the listed prayers proceeds basically from a lamentation that the 1st Respondent in particular has violated his rights under **Sections. 4**, **17**, **18**, **19**, **26** and **30** of the **Lesotho Constitution**[1]. He amplified the picture by recounting his historical background in the Lesotho Correctional Service. It commences from the fact that he obtained LLB degree in 2013 while he was already employed in the Service. The

[1]The Constitution of Lesotho 1993

impression he gives is that the discrimination which he complaints about is that after attaining the degree he was not elevated to the rank of Assistant Superintendent. According to him, this is contrary to a standing practice within the Service. To illustrate the point, he refers to the incidences which happened in 2008 and 2009 respectively where even officers who were 3 to 4 years junior to him in terms of service, were by virtue of holding the same qualification, promoted to that rank and correspondingly remunerated at the Grade G salary scale.

[7] On a different though related point, the Applicant protests that some of the promotions are made without reference to the Public Service Circulars, legislation, regulations, policies, standing orders and prior advertisements of the vacant positions for a competition. The Applicant made it clear that he is not asking the Court to order that he be promoted but instead, that it be declared that he deserves to be accorded equal treatment with the holders of the same degree within the Correctional Service and the General Public Service by being paid at the grade G Salary Scale.

[8] In all fairness to the Respondents, the Applicant finally agreed in his replying affidavit that the policy of the Government is that the officers who join the Public Service already in possession of the LLB should have their salaries started at the Grade G Scale. Recognizably, it is in that context that he referred to an instance where some of his juniors in the Correctional Service were by virtue

of that academic credential, assigned to that Scale. Nevertheless, the emphasis of his protestation is that the exclusion of those who obtained the same qualification after joining the Service would represent an unfair discrimination which cannot be constitutionally justified.

[9] It should suffice to be stated that the application was opposed in essence upon the reasoning that it lacked both factual and legal basis. There was no interim decision made. Instead, the matter was scheduled for a hearing date and the counsel were directed to file their Heads of Arguments for the occasion.

The Case of the Respondents

[10] A counter case presented by the Respondents commences from a denial that there is within the Service, a policy in terms of which holders of the LLB are by virtue of that qualification elevated to the rank of Assistant Superintendent. On the contrary, they sought to straighten up the record by explaining that the policy applies to those who held the degree at the time of their enrolment into the establishment as opposed to those in the category of the Applicant who obtained it while they are already in the Service. According to them, the latter are only illegible to be considered for promotion when there are existing vacancies. The impression which they give is that those who join the Service with the degree are given the preferential treatment in compliance with the order of Court.

[11] The 1st Respondent charged that the accusation leveled against her by the Applicant that she makes direct promotions which exclude him and his colleagues similarly situated; to be unfounded since promotions within the Service are not *per se* based upon qualifications. On the contrary, she highlighted that work performance and other relevant factors are also taken into account.

[12] They somehow cautioned the Court that the Application was couched in contradictory terms in that the Applicant prayed for an order that his remuneration be raised to a Grade G yet at the same time he averred that he was not seeking for a promotion. This suggests that according to the Respondents, promotion is *sine qua non* for the enhancement of salary to a higher scale.

Issues for Determination

[13] In the main, the concern is whether the categorization made by the 1st Respondent amongst holders of the LLB degree that became detrimental to the one in which the Applicant fell while beneficial to the other, was in the light of a *right to equality*[2], constitutional. In that regard, emphasis was made on the similarity of the work for which they were all engaged in the Service.

[14] The incidental issues consist firstly of whether this Court could in the event of finding that the Applicant should have been at the Grade G scale; direct the 1st Respondent to pay him salary differences

[2]Sections 4, 17, 18, 19, 26 and 30 of the Constitution.

and retention allowance arrears dating from July 2013; when he joined the establishment. And, the last albeit its complexity, relates to its competency to retrospectively declare that the uncontested promotions are a nullity, and of no legal force and effect, *null* and *void ab initio.*

Exploration of the Relevant Constitutional Matrix

[15] The endeavor in this exercise would be to identify the legal sources through which the Court could navigate in search of the answers to the stated issues to be resolved by this Courtin relation to the question of *right of all persons to equality and equal protection of the law* and the *right to freedom of people from discrimination.* These transcend constitutional, International Law, statutory enactments and the applicable case law.

[16] Section 4 (1) of the Constitution provides:

> Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, **property**, birth or **other status** to fundamental human rights and freedoms, that is to say, to each and all of the following-
>
> (a) .....;
> (b) .....;
> (c) .....;
> (d) .....;
> (e) .....;
> (f) .....;
> (g) .....;
> (h) .....;
> (i) .....;
> (j) .....;
> (k) .....;
> (l) .....;
> (m) freedom from arbitrary seizure of property;
> (n) freedom from discrimination;

(o) the right to equality before the law and the equal protection before the law; and
(p) …..;

[17] The enjoyment of the catalogued rights and freedoms are limited to the extent that they do not prejudice the rights of others or the public interest. Section 4 (2)[3] qualifies the application of same by providing that save where the context otherwise requires, the rights under consideration shall apply as well in relation to things done or omitted to be done by persons acting in a private capacity (whether by virtue of any written law or otherwise) **as in relation to things done or omitted to be done by or on behalf of the Government of Lesotho or by any person acting in the performance of the functions of any public office or any public authority**(Court's highlighting).

[18] S.17 (1) of the Constitution provides for the right of a person to own property and gives a protection against its compulsory seizure or acquisition.

[19] The Constitution addresses the subject of a *right to equality* and *freedom from discrimination* under S. 18 and 19 of the Constitution. It starts with S. 18 (1) which in principle directs that **no law shall make any provision that is discriminatory either of itself or in its effect**. The right is, however, limited to the provisions of subsections (4) and (5) which are respectively inapplicable in this case.

[3]The Constitution of Lesotho 1993

[20] S. 18 (2) is relevant in this case since it expressly prohibits any vertical or horizontal[4] discrimination by anyone acting pursuant to a written law or in the performance of the functions of a public office.

[21] S. 18 (3) defines the legal term "*discrimination"* as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, **property**, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[22] It would for the purpose of this case, suffice to be noted that S.18 (4) circumscribes the application of the right under S. 18 (1). It does so by providing that:

> It would not *inter alia* apply where the law makes provision whereby persons specified therein may be made subject to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, **is reasonably justifiable in a democratic society**. (Court' Emphasis)

[23] Interestingly, in the same vein, the framers of the Constitution visualized under S. 26 (1) that there could be time in the future when it would be conducive to remove any discriminatory law to promote

[4]Vertical denotes discrimination by Government, its urgencies or those acting for it. Horizontal refers to the same act or omission by a private person which has a discriminatory effect.

the equality of all citizens irrespective of the diversity of their specified or analogous backgrounds under S. 18 (1).

[24] S. 19 complements the scheme on the subject by providing that *every person shall be entitled to* ***equality before the law*** *and to the* ***equal protection of the law***. Understandably, this should be read in harmony with the narrated limitations. (Court's Emphasis)

[25] The Constitution has further under S. 30 (a) (i) inscribed a State policy which should inspire Lesotho to work towards achieving within the working environment. This is founded upon an ideal objective to have workers treated justly and equally under conducive conditions. The intention is in particular that they should be equally paid fair minimum wages commensurate with the value of their work without distinction of any kind including gender. This is almost in verbatim, resonated in the International Labour Organization (I.L.O) specifically under Article 2 (1) of the Equal Remuneration Convention[5], and the Discrimination (Employment and Occupation) Convention[6]. Article 2 of the Universal Declaration of Human Rights, 1948 insist that States which are parties to it are to pursue the same policies at the work place.

[26] On the International Law terrain, Lesotho has ratified international and regional treaties and conventions which serve as

[5]1951 C – 100
[6]1958 C – 111

the soft law source of its laws and present guidance in the interpretation of the law. They include International Covenant on Civil and Political Rights (ICCPR)[7]. Article 3 obliges State Parties to ensure the equal right of men and women to the enjoyment of all civil and political rights. Article 26 provides for the equality of all persons before the law and entitles them to freedom from discrimination regardless of their backgrounds. This is reiterated under Article 2 of the African Charter on Human and Peoples' Rights.

Application of the Law to the Facts

[27] There is abundance of case law authorities which provides jurisprudence on the constitutional and international law scheme on the right to equality of all persons under the law. A comprehensive and methodological approach in determining the parameters of this right under a democratic constitution were formulated in **Harksen v Lane No & Others[8].**It applied to the Interim Constitution of the Republic of South Africa and consisted of a four questions approach which would provide guidance towards a constitutionally based answer. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1) (equality before the law and equal protection of the law). Even if it does bear a rational connection, it might nevertheless amount to discrimination;
(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
    (i) Firstly, does the differentiation amount to "discrimination? If it is on a specified ground, then discrimination will have been

[7]1966 which Lesotho ratified on the 9th September, 1992
[8]1998 (1) SA 300

established. If it is not on a specified ground, then whether or not there is discrimination will depend on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) Secondly, if the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed.
If on an unspecified ground, unfairness will have to be established by the complainant.
The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of S.8(2) (unfair discrimination).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (S.33).

[28] The tabulated four stage inquiry was cited with approval and relied upon in **Retselisitsoe Khetsi v The Attorney General**[9]in determining the constitutionality or otherwise of the admitted discriminatory treatment against accused. This was authored by a contract concluded by the Government and a multinational company Nup Nikuv; whilst corruption related criminal charges were pending against the company and its chief employee. At the commencement of the case, the accused charged that a part of the contract in which Government undertook to free all his erstwhile co-accused from prosecution, violated his right to equality and to equal protection of the law. His protestation was that the discriminatory deal was made by the legally unqualified officials and that there were no grounds

[9]CRI/T/0079/2014

upon which his rights under consideration could be limited under a democratic dispensation.

[29] The Court found that the contractual undertakings made by the Government, violated his right to be treated equally with those in his situation and that there was no basis for its limitation under the democratic constitution.

[30] In **Attorney General v Mopa**[10], the Court followed the same methodology, in particular, its last leg to resolve the consistency of S. 20 of the Central and Local Court Proclamation[11] with S. 12 (8) of the Constitution. The former disallowed representation by a legal practitioner in civil matters before Central and Local Courts. Ramodibedi P judged that the categorization introduced by S. 20 in according the accused persons right to a legal representation while denying same to the parties in civil litigation, was consistent with the colonial indirect rule but inconsistent with the *fair* trial rights under S. 12 (8) of the Constitution. The narrative was that courts should, in approaching similar challenges, seek to advance and protect values in a democratic Constitution. These are *human dignity, freedom* and *equality*. Legal representation was recognized as a human right dimension which is subject to the limitation clauses in the Constitution.

[10]C of A (CIV) 3/ 2002 @ para. 32
[11]No 62 of 1938

[31] It contextually emerges from the agreed facts in this case that the 1st Respondent interpreted the policy under consideration to authorize her to make a differentiation between the officers who at the time of their recruitment into the Service, had the LLB in contrast to those who obtained it while already in the Service. Thus, by operation of that differentiation, the former category of officers, were promoted to the rank of Assistant Superintendent, paid a deserving Grade G salary together with retention allowances. On the other hand, there was no such treatment accorded to the latter.

[32] Intriguingly, the 1st Respondent has not in her counter papers stated a legitimate Government purpose which the differentiation sought to achieve in her conception and implementation of the impugned policy. The 6th Respondent has also not pleaded it. So, it follows that the unfavorable treatment under which the Applicant and those in his category, were subjected, was not based upon any of the S. 18 (3) listed grounds for discrimination. Instead, it is attributable to the attributes and characteristics which are found to seriously impair their dignity, prospects for livelihood and self-actualization in contrast to the other LLB holders.

[33] A mere fact that the discrimination complained about is not premised upon any specified ground but rather on analogous considerations, renders its unfairness not to be presumed. Thus, the one who alleges that dimension would have to demonstrate it. In that endevour, the Applicant has revealed in his papers that the

inequitable manner in which he and his colleagues in the same classification were prejudiced, subjected them under serious adverse consequences.

[34] The Respondents did not advance the last and alternative counter position that in the event that the Court finds that the Applicant has established that the discrimination was unfair, it was nonetheless, justified under S. 18 (4) and (5) limitation of the *right* to equality and *equal protection* in the Constitution. They only maintained that they simply implemented the policy and by default, leaving the controversy for adjudication.

[35] In the internationally acclaimed case of **Rex v Oakes**[12]**,** the Supreme Court of Canada formulated two leveled and complementary questioning process for the determination of the constitutionality or otherwise of a legislative provision that curtails the rights and freedoms when tested against the limitation claws in a democratic constitution. There the accused faced a criminal charge on the allegation that he contravened S. 8 of the Narcotics Control Act (NCA) in that he was found in possession of drugs. The Section presumes such a person to be dealing in that substance. The constitutionality of the presumptuous dimension was challenged on the basis that it reversed the onus of proof contrary to S.11 (d) of the Charter which *inter alia* presumed an accused person innocent until

[12] [1986] 1 S.C.R. 103

the Prosecution proved otherwise. Then the Court devised two questions to be asked in resolving the impasse thus:

> Does S. 8 of the *Narcotic Control Act* violate S. 11(*d*) of the *Charter*; and, (2) if it does, is S. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of S. 1 of the *Charter*? If the answer to (1) is affirmative and the answer to (2) negative, then the constitutional question must be answered in the affirmative.

[36] Though *in casu* the main controversy turns on the constitutionality of the discriminatory policy and not specifically on a legislative provision, the jurisprudence propounded in **Rex v Oakes (supra)** is relevant for guidance in resolving the case at hand. This is attributable to the fact that the Applicant is challenging the constitutionality of a policy which is the author of the discriminatory treatment that he is complaining about. It was circulated by her predecessor who acted so on the strength of his comprehension of a Government Circular headed, "*Parity of Positions in the Legal Profession"* apparently read in conjunction with Circular No.11 of 1991 dated 26th February same year. It bears a heading, "*Retention Allowance Table"*. Resultantly, both documents conveyed a decision of the Government which renders them subject to a constitutional attack under S. 4 (2) as it would apply to any legislation.

[37] The telling aspects in this case commence from the fact that the 1st Respondent has not contested the material averments made by the Applicant. All she says is effectively that whatever degree of discrimination he experienced together with its consequences, resulted exclusively from her implementation of the Government

policy. On the same note, she ought to have concluded her case by stating and proving in accordance with the judgment in **Molefi Ts'epe v Independent Electoral Commission and Others**[13]that the limitation (if any) was reasonable, proportionate, acceptable and demonstratively justified in a free and democratic society. It has already been observed that the 1st Respondent did not contradict the testimony of the Applicant that her decision lacked constitutional justification. This is indicative that it was not her case that the decision was ever founded upon any limitation clause. It is, therefore, appreciable that it was irrelevant for her to justify the proportionality of the policy pursuant to which she discriminated against the Applicant including its ramifications.

[38] Strikingly, it is nowhere expressly inscribed in both circulars that the enhanced salary scales to be paid to the legal professionals in the Public Service exclude Correctional Officers who obtained the professional degree while already in the service. This is not even implied. It is inconceivable what could have been the source of the 1stRespondent and her predecessor to have assigned such an interpretation to both circulars. Even if the circulars could be construable as such, the established unfair discrimination particularly against the Correctional Officers who secured the qualification after joining the Service would have to be constitutionally tested. The application of the methodological questioning process introduced in the main in **Harksen v Lane No &**

[13]C of A CIV/11/05 (CC 135/05)

Others (supra) has revealed that the discriminatory treatment under consideration contradicts the equality clauses in the Constitution. This is traceable from the discovery that it does not demonstrate any societal legitimate goal which the discrimination seeks to achieve and that it is within the context of a democratic constitution proportionally measured to minimally interfere with the affected rights.

[39] It seems to have escaped the wisdom of the 1st Respondent that she as a Commissioner of Correctional Service should in principle make decisions which would not constrain the Chapter II human rights in the Constitution. This is so by operation of the vertical obligation of the Government to respect them. The exception applies where the limitation clause sanctions otherwise in rhythm with the ideals in a democratic constitution. She apparently also inadvertently failed to realize the implications of S. 2 of the Constitution (Supremacy Clause) which *inter alia* renders all laws, actions, decisions and policies which are inconsistent with it void to the extent of their inconsistency. The Court of Appeal emphatically cautioned in **Attorney General v Mopa**(supra) that courts, the Legislature and State officials should in the execution of their respective assignments, be cognizant of the predominance of the Constitution[14]. The sub text is that those aspects should be circumscribed by its *letter, spirit and purport.*

[14]@ paras 16 and 17

[40] Also, it has to be appreciated that the nature of the present case, dictates that whilst in principle the Applicant must prove his case on the balance of probabilities, there are incidences where for the time being they shift over to the Respondents. This denotes the notion that he who alleges must prove. In this regard, the initial challenge facing the Applicant is to factually demonstrate that the 1st Respondent unfairly discriminated against him in a manner that undermined his right to *human dignity*. On the other hand, the 1st Respondent as it was directed in **S v Makwanyane**[15]bears the onus to prove that the policy based curtailment of the right under consideration, is permissible under the limitation clause in the Constitution. This could under deserving circumstances, be complemented with an incidental justification that the measure taken was proportionate towards the achievement of a legitimate societal goal in a constitutionally open democratic dispensation.

[41] It ironically transpires from the pleadings of the 1st Respondent that notwithstanding her filing of the Notice of Opposition against the application and subsequently her counter affidavit, she has not in the latter, contested material charges which cumulatively represent a foundation of the case of the Applicant. A synopsis of them constitute of her failure to:

1. Contradict the allegation that she arbitrarily seized the property of the Applicant by not up-grading his salary and not paying him

[15]1995 (3) SA 391 (CC)

retention allowance and demonstrate otherwise with reference to any limitation clause in the Constitution[16];
2. Discharge her onus by proving as legally obliged, that whichever degree of discrimination she made against the Applicant and its effect, were justifiable and proportionate under the limitation provision;
3. Specifically contradict the averment that she acted arbitrarily and capriciously without applying reason or principle;
4. Demonstrate any legitimate objective befitting an open democratic State which the differentiation sought to achieve;

[42] The tacit admission made by the 1st Respondent that some of the promotions made within the Correctional Service were not competed for or managed through the prescribed regulations, amounts to a violation of *transparency* and *accountability* which are the elementary principles of our democratic Constitution. A testimony of this fact lies primarily under the Chapter II rights and the *Separation of Powers* which stands as its major features. This configuration is intended to facilitate for awareness, checks and balances and meaningful responsiveness by the electorate or its representatives in the running of the affairs of a democratic State.

[43] It certainly leaves more questions than answers in seeking to find out what could have been the rationale and justification for the favourable treatment accorded to officers who had LLB when they joined the establishment and do otherwise to the Applicant who attained it after joining the Service. Perhaps, it would make sense if the former were recruited on the basis of experience or some legal specialty which would benefit the organization. A *prima facie*

[16]S 4(1) and 18 (4) (e) of the Constitution

evidence is that the Applicant commanded better credentials to have been considered for promotion to the rank of Assistant Superintendent and a commensurate Grade G scale than his inexperienced counterparts who were preferred by the 1st Respondent. This lends support from the fact that his qualification is complemented by what appears to be years of a clean record in the Service.

[44] *Transparency* and *accountability* were acknowledged by the Constitutional and Human Rights Division of the High Court of Kenya as the indispensable feature of a democratic constitution which is *inter alia* inherent in the separation of Powers. This was pronounced in the case of **The Institute of Social Accountability &Center for Enhancing democracy and Good Governance v The National Assembly & Others**[17]. Here the Court upheld the petitioners challenge against the constitutionality of the Constituencies Development Fund on the basis that it *inter alia* allows each Member of Parliament to administer and spend moneys allocated for the Fund. It accordingly declared that the applicable provisions in the Act, undermines the democratic constitutional principles of *good governess, transparency, unaccountability, separation of powers between* and *division of powers.*

[17]Petition No. 71 of 2013

[45] In India, the Supreme Court in **Major General H M Singh VSM v Union of India & Another**[18] dealt with the question of a right of the Appellant who was a senior most Major General in the Indian Army to be considered for promotion to a vacant office of Lieutenant General. This was triggered by the declination of the Promotions Board to consider him for promotion on the grounds that he was due to retire from the military in 3 months time when he attained 60 years, and that he had not held the rank of Major General for 18 months. Instead, it preferred another Major General. The decision was reached despite the fact that the President had decorated him with the Award of the Siva Medal in recognition of his outstanding service in the army, earned two confidential reports in that rank and granted Vigilance Clearance. Moreover, the President had just extended his service for three months apparently to make him considerable for promotion to the office of Lieutenant General. The Court in setting aside the decision of the High Court which recognized merit in the reasons advanced by the Board, held that a refusal to consider the Appellant for promotion though he was a qualifying candidate for promotion, was a violation of his fundamental *right* to *equality* and *equal protection of law* under S. 14 of the Constitution of India. It was simultaneously stated that the transgression extended to his right to enhance his status at the last moment of his service and to receive a corresponding fiscal benefit for a while, however, short. A deeper message was that the right is personal to the Appellant

[18]CIVIL APPEAL NO. 192 OF 2014
Arising out of SLP (C) No. 2008 of 2010

[46] Closer home, in **South African Broadcasting Corporation Ltd v National Director of Public Prosecution & Others**[19] Chief Justice Langa (as then was) acknowledged that the foundational values of *accountability, responsiveness* and *openness* also applies to the functioning Judiciary[20]. Appreciably, the judgment was simultaneously directed at all organs of the State as the creatures of a democratic Constitution and its supremacy over them.

[47] The traversed case law jurisprudence on the imperativeness of *transparency* and *accountability* under democratic governance reveals that the 1st Respondent had equally not observed those sacrosanct constitutional values when differentiating the Appellant from the other LLB holders. This is attested to by the admitted facts that she unilaterally treated the Applicant differently from the other LLB graduates in the Service by not informing him about the vacant offices of Assistant Superintendents and, thereby, inviting him to compete for appointment to that rank. Resultantly, she violated his *right to equality* and *equal protection under the law*[21]without reference to any constitutional provision limiting them to proportionally achieve a legitimate societal goal.

[48] The explained absence of *transparency* and *accountability* in the manner in which the 1st Respondent approached the subject matter

[19]CCT 58/ 06
[20]Paras 31 and 32
[21]Sections 18 and 19 of the Constitution

and its foreseeable serious adverse consequences on the future of the Applicant pertaining to status, financial income, dignity, serenity of mind, spirituality and progress in life, justifies skepticism that she acted in good faith, did not pursue nepotism, patronage or some other sectarian related biases. The degree, to which he was unfairly segregated within his country institution, has a high propensity to perpetually torment him spiritually or otherwise and ultimately destroy him. It has to be underscored that no State Official regardless of his or her status, including political office has a right to abuse State power entrusted upon them by victimizing other citizens in pursuit of what could be perceived as an anterior motive. This can only create a circle of vengeance, disunity among the citizenry and counter development.

[49] Moreover, the inherence of *openness* and *accountability* in a democratic dispensation directly obliged the 1st Respondent to be seen to have exclusively employed merit in the recruitment and promotion of Correctional Service officers across all the ranks. She should in exercising such a power be able to account that her decision accorded each concerned candidate an equal and fair administrative treatment. This would facilitate for a possible public responsiveness for the enhancement of checks and balances in our democratic governance. The approach is *sine qua non* for a meaningful socio - economic development in any country and one of the mechanisms for ascertaining *equal treatment* and *protection* of the

public service against abuse and manipulations by *inter alia* political authorities or any one in authority.

[50] At the end, the cumulative effect of the interpretation which the 1st Respondent assigned to the Government policy and implemented it against the Applicant seriously undermined his *right to dignity* as a human being. This manifested itself especially when others who held the same qualification including his juniors, were promoted over him without constitutionally justifiable reasons. The right can *inter alia* only be realizable where one has a*right to self determination and actualization.* Though the r*ight to human dignity* is not inscribed as such into our Constitution, it is, nevertheless, decipherable therein since it together with *a right to life* represent a foundation of all human rights and freedoms. It is on that account, versatile since its violation could be tested against any right.

[51] It must towards a conclusion of this case, be over emphasized that the root cause of the transgressions against several constitutional rights of the Applicant emanates from a stereotyped misinterpretation which the 1st Respondent assigned to the Government policy. Its implementation resulted in the constitutionally unfair discriminatory treatment of the Applicant in contrast to others with whom he is similarly situated. This satisfies

a renowned classical hypothesis postulated by Aristotle the philosopher[22] (322 – 384) on *equality* and *discrimination* that:

> Equality in mortals means those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness[23].

[52] The 1st Respondent perceived and applied the policy in such a manner that it relegated the Applicant to an inferior and seriously disadvantaged status in comparison to the other LLB graduates without any constitutional justification. As it has already been recorded, *equality, freedom* and *human dignity* are the key pillars of a democratic constitution which have been inspired by International Law, Common Law, legal literature etc. Therefore, her policy based decision which effectively deprived the Applicant to enjoy these human endowments without prove that it is constitutionally sanctioned, less intrusive and in furtherance of public interest; does not pass the constitutional scrutiny. This finds reinforcement from a precise expose in **Egan v Canada**[24]that:

> Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens that demean them, that treat them as less capable for no good reason, or otherwise offend fundamental human dignity.

[53] This was partially reiterated in **Prinsloo v Van der Linde[25]**

> In our view unfair discrimination .. … principally means treating people differently in a way which impairs fundamental dignity as human beings, who are inherently equal in dignity.

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[22] J De Wall & Others, The Bill of Rights Handbook , 2nd Ed, Juta & Co, Kenwyn: South Africa - (Original Source : (Nicomachean Ethics, V.3.1131bW Ross trans 1925)
[23]Ibid @ p 188
[24](1995) 29 CRP (2d) 79 104 - 5
[25]1997 (3) SA 1012

[54] The extracted principles enunciated in **Egan's Canadian case** and in **Prinsloo** (supra)are *mutatis mutandis* equally applicable *in casu*. This is because our democratic Constitution in particular its equality clauses, cannot tolerate the decision which caused the Applicant to be effectively relegated to the status of a second class citizen and treated as such to the detriment of his human dignity without any constitutionally justifiable cause.

[55] Towards a conclusion of this case, it is worthwhile to be highlighted that the constitutionally unjustified discriminatory act against the Applicant, directly undermined the S. 30 (a) (i) declared commitment by the State to work towards an ideal working environment where workers are treated justly and equally under conducive conditions; equally paid fair minimum wages commensurate with the value of their work without distinction of any kind including gender. The provision seems to have been instigated by Article 2 (1) of the Equal Remuneration Convention[26], Article 2 of the Discrimination (Employment and Occupation) Convention[27] and Article 2 of the Universal Declaration of Human Rights, 1948 which advocates for States which are parties to it to pursue the same policies at the work place.

[26]1951 C – 100
[27]1958 C – 111

[56] En route towards a conclusion of this judgment, it is paramount to be appreciated that the case pertains to a violation of a personal *right to equality* and *equal protection under the law.* To illustrate the point, the Applicant wails that he is not being accorded a similar treatment with those with whom he holds an LLB degree. And, in the same breath, that there is no legal justification in affording officers who had the qualification when they were enlisted into the Service better treatment in contrast to those who acquired it post enlistment. Despite the challenge, the 1st Respondent has not advanced a scintilla of a rationale connection between the discrimination against the Applicant, its legitimate Government objective and the proportionality of the invasion of his rights towards its attainment in a less intrusive manner.

[57] In any event, it is trite that in principle, the Court should in interpreting the law, practice or policy adopt an inclination which would least interfere with the enjoyment of the existing personal rights by applying a strict interpretation which would favour the retention of same where necessary in order to render the limitation less intrusive.[28]

[58] The dismal failure of the 1st Respondent to justify the discrimination with reference to any provision in the law in particular the Constitution which is a foundation of this case, justifies a conclusion that she abused her power. In the circumstances, there

[28]South African Police Service v Solidarity Obo Bernard [2014] ZACC 23 para 164

is a founded fear that in addition to the narrated unjustified human rights violations against the Applicant, the 1st Respondent abused her power and authority. This *per se*, undermines a constitutional spirit of good governance in a democratic State.

[59] The Court finds that the order that the Applicant seeks for under prayer (c) poses an intriguing procedural challenge. For ease of reference, he asks for a declaration that the uncontested promotions are a nullity, of no legal force and effect, *null* and *void ab initio* retrospectively to the extent that they are unconstitutional and against provisions of other laws governing Public Service. It is clear that if the pronouncement is made, it would amount to the demotion of the officers concerned in terms of their status and salary scale. Logically, this is suggestive that they have a direct and substantial interest in the contemplated outcome of this case. So, by virtue of that fact, they ought to have been individually cited as some of the Respondents to accord each of them an opportunity to respond accordingly. In **Amalgamated Engineering Union v Minister of Labour[29],** the employer had not been joined despite having a direct and substantial interest in the case and bound to be prejudiced by the outcome of the case. It was cautioned that *the question of joinder should ….. not depend upon the nature of the subject matter ….. but …. on the manner in which, and the extent to which the court's order may affect the interests of third parties.*[30] In the instant case, failure

[29] 1949 (3) SA 637 (A)
[30]Ibid p. 657

of the Applicant to have joined the officers who would be negatively affected by the declaration renders prayer(c) unsustainable.

[60] In passing, the Court found it worthwhile to address the relevancy of S.24 (3) of the Constitution to determine if the Applicant who happens to be a member of the disciplined forces, is qualified to complain over the violation of any of the Chapter II rights. It provides:

> In relation to any person who is a member of a disciplined force raised under a law of Lesotho, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than section 5, 8 and 9.

[61] The interpretation which the Court assigns to the section is that the exclusion is limited to a case where a foundation of the challenge concerns the disciplinary law.

[62] To this end, the Court having interfaced the material facts in the matter with the determinative constitutional provisions which are substantially inspired by the narrated international law instruments and case law relied upon; ordered thus:

1. Prayers (a), (b), (e) (f) and are granted save that costs would be on an ordinary scale and interest be at the ordinary scale since no justification was made for a prime rate of 18.5%;
2. Prayer (d) is for the reasons already explained, refused;
3. Prayer (g) is refused. Its basis in the rules was not established; the same applies to prayer (h);

4. Prayer (i) is refused since there was no reference to an enactment which sanctions such an extra ordinary relief for a public officer.

_____
E.F.M. MAKARA
JUDGE

I concur:

_____
A.M. HLAJOANE
JUDGE

SAKOANE J

I. INTRODUCTION

[**63**] Having read the judgment by *Makara* J, I regret to say that I do not agree with the reasoning and conclusion reached. For this reason, I hereby write separately to state my views.

Constitutional and legal frameworks

[**64**] The Correctional Service is established under section 149 per 1st **Amendment to the Constitution 1996**. Its superintendence is vested in the Commissioner

who, subject to the direction of the Minister, is responsible for the administration and discipline of the Correctional Service.

[**65**] Section 149 (5) directs Parliament to enact a specific law to regulate the Correctional Service thus:

> "An Act of Parliament shall make provision for the organization, administration and discipline of the Prison Service including the appointment of persons to offices or ranks in the Prison Service, the removal from office or reduction in rank, their punishment for breaches of discipline and the fixing of their conditions of service."

[**66**] Section 149 (5) so directs enactment of a special Act for the Correctional Service because section 137 (3) (h) does not allow appointments, discipline and removal of correctional service officers to be made by the Public Service Commission as the appointing authority in the public service.

[**67**] It is common cause that the envisaged Act of Parliament had not seen the light of any day when these proceedings were instituted by the applicant. Consequently, the **Prisons (Amendment) Act No.30 of 1970** remains the operative legal framework within which the legal issues are to be interrogated as it has not been repealed.

[**68**] Section 4 of the **Prisons (Amendment) Act, 1970** is relevant to the status of the applicant as it provides:

> "The power to appoint a person to hold or act in an office of the rank of Senior Chief Officer or below (including the power to confirm appointments and to appoint by way of promotion), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall be exercised by the Director of Prisons without consultation with the Public Service Commission."

II. MERITS

Applicant's case

[**69**] The applicant describes himself as a Chief Officer in the Correctional Service. He has been in the employ of the Correctional Service since 1 December 2008. In 2010 he went on unauthorized leave to study for an LLB degree at the National University of Lesotho which he acquired in June 2013.

[**70**] On 17 October 2013, he wrote to the Commissioner (as the Director came to be called per **5th Amendment to the Constitution, 2004**) submitting a copy of the degree with the "Hope you will find this in order and will reach your favourable consideration".

[**71**] Between then and 2014, several internal circulars were issued notifying the correctional staff about names of officers that were promoted. The applicant's name did not feature in all these internal circulars.

[**72**] On 3 January 2014, the applicant served what he styled "A Letter of Demand" to the Commissioner seeking "to be paid just like any other LLB holders in the Public Service". He also complained about having "a feeling that I have been unjustly and unfairly discriminated following the recent graduates' case who have been re-graded to grades F and G".

[**73**] The Commissioner responded on 28 February 2014 indicating, among others that "you will recall that you were employed as Correctional Officer as junior degree holder of which you are being remunerated according to those credentials".

[**74**] It appears that the applicant wrote back on 13 January 2014. The letter was captioned "**Re: Follow Up To "A Reminder" On Letter of Demand**". To that letter, the Commissioner responded on 11 February 2014 thus:

> "Lesotho Correctional Service Staff Association
> P.O. Box 187
> Mazenod 160
>
> Dear Secretary General,
>
> RE; FOLLOW UP TO "A REMINDER" ON LETTER OF DEMAND
>
> Reference is made to your correspondence dated 13th January 2014 on the afore-caption subject.

> The office notes that in the absence of a formal and defined department policy, we are bound to invoke the general policy dictated by the Public Service legislation, regulations, and circulars or standing orders thereof. In this case the national policy on the same stipulates that officers who earn degree qualifications while already in the Public Service may only be considered for mobility when there are vacancies; the promotion to a vacancy is considered on the basis of merit, performance and good service. This criteria applies to all employees whether more qualified or not.
>
> The situation is different with degree holders who are already qualified upon entry into any government department; they are automatically entitled to a salary commensurate to their level of education as dictated by Public Service Circulars.
>
> Yours faithfully
>
> _____
> N.E. SEFALI (MR)
> COMMISSIONER"

[75] On 5 May 2014, the applicant penned what he termed "A Letter of Demand – Revisited" in which he accused the Commissioner of the following:

75.1 Ignoring "two issues concerning Constitutional Provisions spelling out discrimination".

75.2 Other "two issues regarding Basic Conditions provisions".

75.3 Turning "a blind eye regarding Incremental credit and Retention Allowance".

75.4 Threatened litigation "to compel the Commissioner "to upgrade and pay me salary arrears retrospectively" if his plea "for upgrade into same grade as those LLB holders with retrospective effect" is ignored.

[**76**] Despite the complaint about not being promoted, the applicant's affidavit disavows relief in that regard. What he wants is to be up-graded to the grade and level of remuneration of LLB degree holders.[31]

Respondents' case

[**77**] The respondents' answer is that the way to fill vacancies is by promotion, transfers and new appointments. Promotion is, however, based on discipline, performance, experience and qualifications. But qualifications alone are not sufficient [32].

[31] Founding Affidavit paras 11.2 and 11.3
[32] Answering Affidavit para 4

[**78**] The promotion of officers who obtain qualifications while already in the service is dependent on vacancies and done on the basis of merit, performance, discipline and good service.[33]

[**79**] There are no grades in the Correctional Service and no position that equates to LLB. Officers with LLB degrees who are at grade G are those who held such degrees on entry of the service and were thus graded per a court order. This has resulted in anomaly of them being paid at public service grades and not numbered grades in the Correctional Service[34].

[**80**] The Public Service Act and its regulations do not apply in the Correctional Service. This is according to section 137 (3) of the Constitution[35].

III. DISCUSSION

[**81**] The starting point in the determination of this case is whether the jurisdiction of this Court under section 22 (2) of the Constitution should be availed to assist the applicant. In other words, in the light of abandonment of the

[33] Op. cit. para 6
[34] Op. cit. paras 5, 8
[35] Op. cit. para 9

complaint about discrimination in promotions and the focus on alleged automatic re-grading and remuneration on the basis of qualifications only, we should consider whether or not to decline to exercise our powers on the ground that other adequate means or redress are or have been available to the applicant under other laws.

[**82**] The important aspect of the phrase "under any other law" in the proviso to section 22(2) is to point the way beyond the Constitution to public law and private law remedies. Palmer L.V. and Poulter S.M. (1972) **The Legal System Of Lesotho** (Virginia: Mitchie) p.351

[**83**] The positive answer that there exists other remedies or means of redress comes, in my respectful opinion, from the mouth of the applicant in his letter of demand dated 5 May 2014 wherein he said:

> "I humbly pray for upgrade into same grade as those LLB holders with retrospective effect and pay arrears accrued from when the Court Order was issued or when I submitted my credentials, whoever is earlier. Alternatively, likewise I should take this matter to the High Court seeking a Declaratory Order or seeking **writ of mandamus** to compel your office to upgrade and pay me salary arrears retrospectively."

[**84**] Given the above attitude of the applicant, it is my considered opinion that it is the right one and he should have followed it through. And yet the applicant

invokes the Court's section 22 jurisdiction. This is improper and should not be countenanced.

[**85**] What in reality the applicant seeks is specific performance by an employer: re-grading and payment of salary retrospectively. He dresses it up as a constitutional complaint when it is not.

[**86**] The onus is on the applicant to establish his automatic elevation to the desired grade on the basis of qualifications and entitlement to back-pay. These entail the computation of the amounts owed and due as well as the suitability of applicant for elevation. And I do not think that given the disputes of fact on the papers, this Court should resolve them by hearing *viva voce* evidence.

[**87**] Although the applicant seeks elevation to a higher grade (and not promotion as he says), coupled with payment of salary retrospectively, he is in fact saying that he automatically entered the desired grade in 2010 when he acquired the LLB degree but the respondents have wrongly refused to accept this as a fact and have under-paid him.

[**88**] We should heed the cautionary note in **Botsane v. Commissioner And Another** LAC (2011-2012) 136 para [9] that where three are no statutory provisions regulating either reinstatement (read re-grading) or arrear payment, these issues must be determined on the basis of the common law principle on decree of specific performance, which is that the court retains a judicial discretion not to so decree if it is inequitable in the particular circumstances of a case.

[**89**] These are issues that should be pursued before the High Court exercising its ordinary civil jurisdiction and not when it exercises a constitutional jurisdiction. Up-grading and the relevant remuneration are matters that are person-specific done by taking into account an employee's record of discipline, performance etc. These are not constitutional problems but labour law problems.

[**90**] Regarding reliance on Principles of State Policy under sections 26 and 30 of the Constitution as a basis for invoking this court's jurisdiction, it suffices to say the reliance thereon is misplaced. Section 25 unequivocally states that "these principles shall not be enforceable by any court". This says to me that

no court order may issue to enforce them as they are merely guides to the public institutions and agencies in the performance of their functions.

IV. DISPOSITION

[**91**] The result is that I would decline to exercise the constitutional jurisdiction because, as earlier indicated, the applicant is aware of other adequate remedies available under the High Court's ordinary jurisdiction. He has made a deliberate choice not to pursue them. The jurisdiction of this Court should not be the first but last port of call.

[**92**] **Order**

The application falls to be dismissed. There will be no order as to costs in accordance with the trite principle of not awarding costs in such applications barring bad faith or frivolity.

S.P. SAKOANE
JUDGE

For Applicant : Adv. R.G. Makara instructed by T. Hlaoli & Co.

For Respondent : Adv. R. Motsieloa from the office of the Attorney General