

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/71/16

In the matter between:

Tšolo Rammokoane

1st Applicant

Samadula Khalala

2nd Applicant

Ntsoaki Koqo

3rd Applicant

Motlatsi Matona

4th Applicant

Mphasa Tshabalala

5th Applicant

Libakiso Makhetha

6th Applicant

‘Mamotsamai Ntlaloe

7th Applicant

Thabiso Makara

8th Applicant

Joalane Phakiso

9th Applicant

Nthabiseng Ngaka

10th Applicant

Maputle Ntlaloe

11th Applicant

Puseletso Bolata

12th Applicant

Litsietsi Motloli

13th Applicant

Mafošo Mosakeng

14th Applicant

‘Maneo Mohaila

15th Applicant

Reitumetse Lekhooa

16th Applicant

Seipati Nkonkoane

17th Applicant

‘Mafabia Moleko

18th Applicant

Lerato Mokheleli

19th Applicant

Tumelo Nkone

20th Applicant

Mashea Khalala

21st Applicant

Tau Moliseneyane	22nd Applicant
Lerato Kopo	23rd Applicant
Tšelisehang Kopo	24th Applicant
Moitheri Tjopa	25th Applicant
Kaizer Letele	26th Applicant
Mashome Mothothoseli	27th Applicant
Tlhakanelo Mabea	28th Applicant
Thabiso Ntsoele	29th Applicant
Tšeliso Sefantši	30th Applicant
‘Mammulana Thulo	31st Applicant
Ramokone Motseko	32nd Applicant
Lisema Khasipe	33rd Applicant
Mohapi Mohapi	34th Applicant
‘Mathapelo Akhente	35th Applicant
Mphonyane Lebesa	36th Applicant
Mabandlas Motoa	37th Applicant
Santeli Molotsi	38th Applicant

And

The Principal Secretary, Ministry of Defence And National Security	1st Respondent
The Attorney General	2nd Respondent
The Public Service Commission	3rd Respondent

JUDGMENT

CORAM: **Hon. J.T.M. MOILOA J.**

DATES OF HEARING: **15th July, 2016**

DATE OF JUDGEMENT: **26th January, 2017**

ANNOTATIONS

Statutes:

1. The Constitution of Lesotho
2. The Public Service Act 1/2005
3. Public Service Regulations, 2008

[1] Background

Applicants are Office Assistants in the Ministry of Defence and National Security. They are before court following their receipt of identical letters addressed to them by 1st Respondent. In those letters 1st Respondent expressed her intention to bring to an end any form of employment relationship with Applicants being (a) stoppage of wages, (b) withdrawal and (c) cancellation of their appointment letters. The reasoning of 1st Respondent is that their respective appointments as Office Assistants in the Ministry was not made by the Public Service Commission. Only the Public Service Commission is empowered by **Public Service Act, 2005** to appoint public servants.

- [2]** Applicants were advised in those letters that they may comment on the matter in writing within seven days of receiving the letters if they so

wished. See Annexure “TR3” to Founding Affidavit of Tšolo Rammokoane. TR3 aforesaid is titled: “Invitation to show cause why relationship between the parties may not be ended.” They elected not to make any written response to the letters aforesaid. Instead they approached this court on an urgent basis seeking in their notice of motion, a declarator that 1st Respondent lacks authority in law to terminate their appointments except following a disciplinary process. They also seek an interdict preventing 1st Respondent from interfering with their appointments and terms of office. The other prayer in the notice of motion is for an interdict preventing 1st Respondent from terminating their appointments pending finalisation of the matter, or staying/suspending whatever steps 1st Respondent might have already undertaken to terminate the said appointments. Respondents filed a counter claim to the effect that the purported appointment of the Respondents (Applicants in the main) be reviewed and set aside. I deal with the respective applications jointly. At the beginning of the proceedings the Commission was not party herein. Respondents had raised a point in *limine* of the non-joinder of the Commission. 1st and 2nd Respondents moved an application for the joinder of the Public Service Commission. Applicants opposed it. But after hearing argument on the issue the Court allowed the joinder. The Commission became 3rd Respondent and their stance has been to assist the court to come to a just determination of the matter and not to be embroiled in the factual controversies of the matter. The issues to be determined in this litigation are (1) whether Applicants are public servants in the service of Public Service of Lesotho and (2) whether 1st Respondent has the power to terminate their appointments which have been made by her predecessor in office contrary to the **Public Service Act, 2005**.

[3] Applicants contend that they were appointed into the public service on probation in April, 2014. In support of this contention they refer to letters dated 6th March, 2014 written by 1st Respondent's predecessor in office. See Annexure "RTI" to Founding Affidavit of 1st Applicant. They further say that they have now all been confirmed by operation of the law as permanent and pensionable. In the counter application 1st Applicant avers that upon presentation of documents to him by 2nd Applicant (1st Respondent in the main) it has come to his attention that the Respondents in reconvention are receiving salaries and appear to have been allocated employment numbers purporting to be permanent and pensionable employees of the Government of Lesotho yet they have not been appointed by the Commission. Applicants (in the main) also argue in the alternative that the 1st Respondent be estopped from contending that their letters were invalid because they were issued by her office; that she cannot benefit from her own misrepresentation.

[4] **Applicants' case**

In his founding affidavit 1st Applicant (and this applies to all Applicants) relies upon certain facts to make up their case. He attaches a copy of a letter titled "Offer of Appointment on Probation;" marked "RT1." The letter is dated 06th March, 2014. It is signed by the Principal Secretary for the Ministry of Defence and National Security as well as the respective Applicants (on theirs). Applicant goes on to say that they were then allocated official employment numbers. They are members of the mandatory Public Service Officers' Defined Contribution Pension Fund which is exclusive to public officers only and indeed contribute to the fund. Moreover, that since their appointment in April, 2014 they perform their duties as public officers and receive a salary. The letter purports to be a

letter of appointment. It does not say the offer is subject to the authorisation of the Public Service Commission.

- [5] Applicants argue that all relevant statutory requirements precedent to their appointment as public officers were followed and that in the circumstances the termination of their said appointments should be done consistent with provisions of the Public Service Act 2005 read with the Public Service Regulations 2008. They argue in the alternative that since their appointment letters were issued by the office of the 1st Respondent she cannot now be allowed to assert anything to the contrary and benefit from her misrepresentation.

[6] **Respondents' Answer**

First Respondent has detailed out a “practical manner” in which the appointment of persons into the Public Service on probation works out in practice.

- (a) There has to be a position that exists
- (b) There has to be a vacancy in that position
- (c) The position has to be budgeted for
- (d) If the person who is to fill the vacancy has been identified the Principal Secretary (in this case of defence) seeks the concurrence of the Minister of Defence and National Security (using this case as an example) to the appointment.
- (e) If the Minister concurs in the appointment being made the Principal Secretary drafts a proposal to be submitted to the Public Service Commission for it to consider whether to make an appointment.
- (f) When the Public Service Commission has appointed the person, it sends minutes reflecting the appointment to the relevant line Ministry.

- (g) Concurrently with the above minute, the Public Service Commission sends all the minutes of the appointments it has made to the Ministry of the Public Service for record and filing.
- (h) Once the appointment has been made, an offer of appointment is sent to the candidate signed by both the candidate accepting the offer of appointment, and the Principal Secretary.
- (i) The original GP 103 form (first appointment form), and the personal details form are all sent to the Ministry of the Public Service for allocation of an employment number.
- (j) Once the employment number is allocated, a Casualty Return is issued. This is a form that is filed to denote any changes in the Public Service, be it first appointment confirmation, transfer, increment, promotion and termination of appointment etc. In the case of a first appointment attached to the Casualty Return are the following:
 - (i) First appointment letter, copies of the Public Service Commission minutes appointing the public servant, Bank details form, and personal details form filled by the candidate.
 - (ii) The Casualty Return is done quintuplicate and bears different colours. The white copy goes to the treasury department in the Ministry of Finance, Pink copy goes to the Ministry of Public Service, Green copy to the office of the Auditor General, yellow one into the personal file of the appointee, and the blue one goes into the departmental file.
 - (iii) This completes the recruitment process and makes the appointee eligible for performance of duties and payment of salary.

She refers to four categories of appointment in terms of the Public Service Act 2005 namely (a) permanent and pensionable terms (b) contract terms (c) temporary terms and (d) casual labour terms. (See paragraph 7 of 1st Respondents Answering Affidavit).

- [7] That detailed step by step procedure is not seriously disputed. I have no reason not to accept that version of how in practice a person appointed in the Public Service travels his journey of being settled into the Public Service. In *casu*, had things been done correctly the Commission would have sent minutes to the Ministry of Defence and National Security which minutes would have served as an authority for the appointment of Applicants. However this was not done. All Applicants have attached are their copies of letters of Appointment from their Ministry and nothing whatsoever from the Commission. Their papers have nothing from the Commission to support their case.
- [8] For purposes of appointments to permanent and pensionable position being the category claimed by Applicants, First Respondent relies on section 137(1) of the Constitution of Lesotho read with the Public Service Act 2005 as well as its regulations of 2008. She states that those provisions are to the effect that an appointment in permanent and pensionable terms is done by the Public Service Commission. She avers that from the files of Applicants she could find in the Ministry none of them were appointed by the Public Service Commission.
- [9] Applicant in his Reply notes the process but argues that it is incomplete, that it is wrong for 1st Respondent to conclude that the process as outlined by her completes the recruitment process.
- [10] First Respondent denies that “RT1” is a prerequisite for appointment into the Public Service, that instead the prerequisite for appointment is a letter of the Public Service Commission communicating its decision to the Applicants; and that “RT1” is no such communication from the Commission. In short the Respondents’ case is that the appointment of

Applicants was a nullity in law as it was not done by the Public Service Commission.

- [11] Following the joinder of the Commission an answering affidavit was filed on its behalf and sworn to by the Secretary to the Commission. In principle he supports the view of 1st Respondent that the Public Service Commission is the proper authority to appoint public officers in terms of the Constitution of Lesotho, the Public Service Act and Regulations, which power the Commission may exercise directly or delegate it. 3rd Respondent avers that the Commission was not involved in any manner in the alleged appointment of Applicants as public officers nor did it delegate its authority to the Principal Secretary to appoint them; and as such Applicants were not lawfully appointed into the public service.

[12] **Applicant's Reply**

In brief 1st Applicant in his replying affidavit contends that focus is being lost by enquiring into whether or not they (he and other Applicants) were lawfully appointed as public officers. He states that, that is a misdirection. Indeed he cannot overemphasize a clarification that these proceedings are not about whether or not they have been properly appointed but challenge the 1st Respondent's authority to terminate their appointments. Of course this is not the only point he makes in his reply but it is one I consider an issue to determine, together with the validity of their appointments. I do not intend to divorce the two and deal with one to the exclusion of the other. The question will be discussed later as the second leg. For now I will deal with the enquiry into the lawfulness or otherwise of their appointment into the public service.

- [13] It is not disputed that First Respondent's predecessor in office had never been delegated by the Commission in writing to make appointments of public officers in the name of the Commission.

[14] **The Law**

It is common cause that the relevant statutes regulating appointments into the public service are **the Constitution of Lesotho 1993, the Public Service Act 2005 and the Public Service Regulations 2008.**

(a) The Constitution

Section 137 (1) and 137(2) of the Constitution confer power to appoint public officers on the Public Service Commission (the Commission) which power the Commission can exercise directly or delegate in writing to anyone or more members of the Commission or to any public officer with the consent of the Minister.

(b) Section 154(1) of the Constitution defines "public office", and "public Officer." The term "public office means any office of emolument in the public service." The term "public officer" means a person holding or acting in any public office." Section 4 of Public Service Act 2005 defines "public officer as having the meaning assigned to it in the Constitution.

(c) The Public Service Act 2005

Section 6 of the Public Service Act 2005 reiterates the provisions of Section 137(1) of the Constitution and reads:

"Subject to the provisions of the Constitution, the power to appoint persons to hold or act in offices in the public service (including power to confirm appointments) and the power to terminate appointments of such persons, save the power to discipline and terminate appointments of such officers for disciplinary reasons, is vested in the Commission."

The Act also provides for different categories of appointment of public officers namely permanent and pensionable, contract, temporary and casual terms.

(d) *The Public Service Regulations 2008*

Of the categories mentioned above, permanent and pensionable terms are provided for under Chapter II of the Public Service Regulations 2008. Regulation 8(1) provides that an appointment on permanent and pensionable terms shall be made by the Public Service Commission or a person so authorised by the Commission. The probationary period for an officer appointed on permanent and pensionable terms is 12 months as provided for under Regulation 8(2). Regulation 8(6) carries the process further by providing that at least 3 months before the expiry of the 12 months probationary period the Head of Department shall “recommend the probationer for confirmation in appointment to the Commission.” Regulation 8(10) provides that “if at the end of the probation period the confirmation has not been processed, the probationer shall be deemed to have been confirmed.

[15] The Commission therefore has the sole power to appoint public officers, the sole power to confirm appointments, and the sole power to terminate such appointments. In *casu* the relevant category of appointment under discussion is the permanent and pensionable terms category which is claimed by Applicants. An officer falling under that category undergoes probation for a period of 12 months, at the end of which an officer shall be deemed to have been confirmed if the confirmation has not been processed. It is important to note that this applies to officers who have been validly appointed into the public service.

[16] Applicants have indeed attached copies of letters of their offer of appointment on probation. The letters are dated 06th March, 2014. Applicants’ contention is that they were appointed into the public service on probation with effect from the 1st April, 2014. Indeed it is stated in those letters that their appointment will be on one year probation, at the

end of which (and subject to fulfilment of requirements of Public Service Regulations 2008) they will be eligible for confirmation to permanent and pensionable terms. It is also their case that they WERE (my emphasis) confirmed by operation of the law upon the completion of their probation and appointed on permanent and pensionable terms. Applicants further contend that as they were appointed in March 2014 and the letter purporting to terminate their “appointment” is dated February 2016 they had by then completed 12 months probationary period and in terms of Regulation 8(10) been confirmed by operation of law. Of course Respondents on the contrary submit that the appointments were a nullity to start with as they were not done by the Public Service Commission. Both 1st and 3rd Respondents share a view that upon perusal of documents and records the Commission has not appointed any of the applications. This fact is not refuted by Applicants. On the facts of this case therefore it is in my view not disputed that none of the Applicants have been appointed by the Public Service Commission.

- [17] The Public Service Commission (Third Respondent) has filed an answering affidavit through its Secretary (Mr. Pholo Mapetla). He avers that he is Secretary of the Third Respondent and that he keeps custody of all records of the Commission. He states that Applicants were not lawfully appointed into the Public Service of Lesotho: as the Commission was not involved in any manner in the alleged appointment of Applicants as public officers. Neither had the Commission delegated its authority to the Principal Secretary to appoint them. Applicants were not appointed by the Commission and therefore Applicants are not public officers. The issue of application of Rule 8(10) does not arise for all these Applicants were not Public Officers as they had not been appointed by the Public Service Commission.

[18] **Section 7 of the Public Service Act 2005** enables the Commission to delegate its power under Section 6, in writing in the engagement of officers on permanent and pensionable terms among others. First Respondent has pointed out that the Applicants' letters of Offer of Appointment were not done under the authority of the Commission nor did the Commission delegate any of its powers to the Principal Secretary for Defence. This averment of First Respondent when read with averment of Mr. Mapetla in paragraph 3 and 4 puts the issue beyond doubt that Applicants were never appointed into the Public Service of Lesotho and that letters of appointment (Annexure "TRI") dated 6th March 2014 were never made on the authority of the Public Service Commission or with its knowledge. I have not on the papers before me found a basis that in fact the letters Annexure "TRI" were issued on the authority of the Commission as required by the law. The fact that the letters of "offer of appointment (Annexure TRI) purport to have been copied to the Commission in itself is not proof that they were indeed authorised by the Commission. In any case as we have seen in Paragraph 3 and 4 of Commission Secretary's Answering Affidavit there is no record of anything to do with Applicants having been referred to the Commission nor having been dealt with by the Commission. Significantly the Answering Affidavit of Mr. Mapetla stands completely unchallenged. I accept the version of Mr. Mapetla as conclusive on the issue whether or not Applicants were appointed by the Commission or on its authority. In my view the authorisation of the Commission is paramount in the appointment of public officers. Its involvement is material and I find that the appointments in this matter were not done by the Commission neither directly nor through delegation.

[19] First Respondent has the power to correct and undo an unlawful act done by her predecessor in title. She is correcting an unlawful appointment done by her predecessor in title, that Applicants are not public officers as defined in the law. What is 1st Respondent is doing by the “release from work” letters is actually a corrective measure of an unlawful act done within her Ministry by her predecessor. She is well aware and appreciative of the fact that her office does not appoint public officers nor does it terminate their appointment. Fact remains, she has found a group of people purporting to be in service. It is unclear how they got to be in those positions but it is clear that it was not through the Commission. There are people within her Ministry whose being there has to be corrected. And she did.

[20] **CONCLUSION**

The Constitution of Lesotho defines a public officer as a person holding or acting in any public office. Public office is defined as any office of emolument in the public service. See also Section 3 of Interpretation Act, 1977. It is the role of the Public Service Commission to appoint persons to so hold or act in offices in the public service. Applicants in this matter rely on a number of factors that they claim make them public officers. For instance they rely on letters of appointment on probation. I have not found an authority from the Commission for the letters to have been written. The “operation of the law” argument would apply to persons who held their positions at the instance of the Commission. That is not the case with Applicants. I need not get into the ancillaries of employment numbers, receipt of salaries and contributions to the Public Officers Defined Contribution Pension Fund. They certainly have not been appointed in terms of the Constitution of Lesotho 1993 or the Public Service Act. Had they been appointed in terms of the Public Service Act and Regulations,

the same would be followed towards terminating their appointments. But they were not.

I accordingly dismiss the application with costs.

J. T. M. MOILOA
JUDGE

For Applicants:

Mr. T. Mosotho

For 1st and 2nd Respondents:

Mr. M. Teele KC

For 3rd Respondent

Mr. K. Mohau KC