

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**'MATHATO SEKOAI**

**APPLICANT**

And

**JUDICIAL SERVICE COMMISSION**

**1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY – MINISTRY OF  
JUSTICE AND CORRECTIONAL SERVICES**

**2<sup>ND</sup> RESPONDENT**

**MINISTRY OF JUSTICE  
AND CORRECTIONAL SERVICES**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

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**JUDGMENT**

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**CORAM:** His Honour Justice Keketso L. Moahloli

**Heard:** 15 August 2019

**Delivered:** 13 December 2019

**SUMMARY**

*Administrative law –Judicial service –Transfer of applicant from position of Registrar to that of Chief Magistrate –Requirements for a substantively and procedurally fair transfer --Whether Judicial Service Commission was obliged to afford Registrar opportunity to make representation before decision to transfer –Whether Registrar acquiesced to transfer –When does a lateral transfer qualify as an adverse employment action*

## ANNOTATIONS

### Cases:

Commissioner of Police v Manamolela, LAC (2013-2014) 310  
Czekalski v Peter, D.C. Cir. No. 05-5221 (2/02/07)  
Director of Trade v Mosooane, LAC (2013-2014) 324  
Hlongwa v Minister of Justice, Kwazulu 1993 (2) SA 269 (D)  
King v Beacon Island Hotel (1987) 8 ILJ 485 (IC)  
Marais v Member of the Executive Council, Department of Education, Eastern Cape (2008) 29 ILJ 1697 (E)  
Matebesi v Director of Immigration, LAC (1995-1999) 616  
Minister of Foreign Affairs & International Relations v Tsikoane [2016] LSCA 18  
Morokole v Attorney-General, LAC (2000-2004) 850  
Nxele v Department of Correctional Services (2008) 29 ILJ 2708 (LAC)  
Outley v Luke & Associates, Inc., 840 F. 3d 212 (5<sup>th</sup> Cir. 2016)  
Phakisi v Principal Secretary Ministry of Local Government, CIV/APN/407/2016  
Radebe v SA Quilt Manufactures (Pty) Ltd (1992) 1 LCD 80 (IC)  
Salojee v McKenzie (2005) 26 ILJ 330 (LC)  
Sebophe v Commissioner of Police [2019] LSCA 2  
Selikane v Lesotho Telecommunications Corporation, LAC (1995-1999) 739  
Theron v Minister of Correctional Services (2008) 29 ILJ 1275 (LC)

### Statutes:

Administration of the Judiciary Act 16 of 2011  
Constitution of Lesotho 1993  
High Court Act 5 of 1978  
High Court Rules 1980 [LN 9 of 1980]  
Judicial Service Commission Rules 1994 [LN 102 of 1994]

*“Procedural unfairness is an own goal  
and should never occur”  
Andrew Levy’s Labour Law in Practice*

## **Moahloli J**

### **I. EXORDIUM**

#### **Nature of the motion**

[1] The Applicant, Mrs. ’Mathato Sekoai (hereafter “Sekoai”) is a judicial officer appointed by the Judicial Service Commission (“the JSC”) in terms of section 133 of the Constitution<sup>1</sup>. She started working at the High Court as Assistant Registrar in 2003, was elevated to Deputy Registrar in 2006, and confirmed as Registrar of the High Court and Court of Appeal (“Registrar”) in 2008.

[2] She is suing the JSC, the Ministry of Justice and Correctional Services (“the Ministry”) and its Permanent Secretary (“the PS”) for alleged unfair and unlawful transfer from her position as Registrar and unlawful suspension as such. More specifically Sekoai is praying for an order in the following terms<sup>2</sup>:

*1. That the JSC’s decision to transfer her from the position of Registrar to the position of a Chief Magistrate be set aside as unlawful, null and void and of no legal force and effect;*

*2. Declaring her said transfer unlawful, null and void and of no legal force and effect;*

*3. Declaring the JSC’s ostensible suspension of her from performing her duties and functions as Registrar unlawful, null and void and of no legal force and effect;*

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<sup>1</sup> Constitution of Lesotho 1993

<sup>2</sup> as amended

4. *Ordering and directing the Respondents to allow her to resume her duties and functions as Registrar;*
5. *Ordering the Respondents to pay the costs of suit;*
6. *Granting her such further and/or alternative relief*

## **The parties**

[3] The JSC is being sued as the institution established by section 132 of the Constitution, with powers to, *inter alia*, appoint and remove judicial officers, and exercise disciplinary control over them<sup>3</sup>. The 3<sup>rd</sup> Respondent is cited as the Ministry having an interest in the matter, and the PS, in his capacity as the chief accounting officer in the Ministry. Lastly, the Attorney General is cited as the representative of Government in all civil litigation.

[4] The JSC opposes this application. Its case is set out in the Opposing Affidavit of Lesitsi Mokeke (“Mokeke”), then Acting Registrar of the High Court, who attests that at all material times to this application he has been Secretary of the JSC and by law the keeper of its records. He claims to have personal knowledge of the material facts relevant to the application, and that he is entitled to depose to the opposing affidavit on behalf of the JSC<sup>4</sup>.

[5] The Ministry, PS and Attorney-General have not filed any opposition. On the contrary the Attorney-General opined that the impugned transfer could not be seriously opposed as the primary motivation behind it had no basis<sup>5</sup>.

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<sup>3</sup> Section 133 of the Constitution

<sup>4</sup> RP: 37 para 1

<sup>5</sup> Record Proceedings (“RP”) at page 33-34 (Annexure “MS 14”). See paragraph [16] *supra*

## II. NARRATIO

### **The material adjudicative facts**

[6] In order to properly understand this case, it is imperative to accurately examine the circumstances from which it arose, so as to place it in proper context.

[7] It is common cause that Sekoai served as Registrar from 14 December 2008, after acting in the position from 12 October 2007<sup>6</sup>. As such, in addition to her powers and functions in other laws, she was the chief administrator of judiciary<sup>7</sup>; its chief accounting officer; exercised administrative and day-to-day control over the members of staff of the judiciary; liaised and coordinated with PS's and HOD's; and in carrying out her functions in matters concerning the courts was not subject to the direction or control of any persons, institution or authority except the President of the Court of Appeal and the Chief Justice in their respective spheres of authority<sup>8</sup>.

[8] On 17 November 2011 the Judges of the High Court submitted a letter to the Chief Justice<sup>9</sup> bringing to his attention their concerns about himself, the Registrar in particular and the administration of the High Court in general. The relevant parts of this letter, relating to Sekoai, read as follows:

*“[3] We note again with grave concern that there prevails an atmosphere of general dissatisfaction and low morale amongst the Judges caused by amongst others lack of adequate supervision of staff and apparent disinterest in addressing serious concerns raised by the Judges.*

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<sup>6</sup> RP: 6 para 8.3

<sup>7</sup> RP: 6 para 9.2 and section 6 of the Administration of the Judiciary Act

<sup>8</sup> section 6 of the Administration of the Judiciary Act

<sup>9</sup> RP: 14-20 (Annexure “MS3”)

*[4] Most disturbing is the attitude of the Registrar of the High Court and Court of Appeal to the Judges which can be described as most discourteous at times, disrespectful and unhelpful, oftentimes downright arrogant. It is our feeling that the Registrar should be reminded of her true status in relation to the Judges of High Court to whom she owes and must demonstrate respect and courtesy. She must be accessible to all Judges at all times and when exigencies of Judicial work so demand.*

*[5] At present there is an acute lack of proper channels of communication and necessary interaction between the Judges on the one hand and the Honourable Chief Justice and the Registrar of the other. This condition adversely affects the Judges' morale and productivity in their work as they generally feel helpless. We iterate that the office of the Registrar must be accessible to and cooperative with all the Judges in work related matters.*

*[6] There also disturbingly exists a clear unbalanced over-protectiveness towards the Registrar vis-à-vis the Judges when her shortcomings are being pointed out and/or challenged especially in meetings and this does not augur well for the Judges' relations with the Registrar. Indeed because of her utter lack of respect to the Judges, they have completely lost all faith, trust and confidence in her to an extent that there is a general consensus amongst the Judges that her deployment elsewhere will be in the best interests of the general effectiveness of the entire judiciary. Surely His Lordship will agree that this is unprecedented as there have been several Registrars before her against whom Judges have never felt so strongly and/or noted such concerns.*

.....

*[9] We also note with concern that though annually budgeted for, international travel no longer benefits the entire bench as used to be the case in the past and this needs to be addressed to promote equal opportunities for all the Judges. In recent times, only His Lordship and the Registrar have enjoyed the said benefit. In those few exceptional cases where they have travelled, the Judges have had to travel economy class due to budgetary constraints which unfortunately do not seem to affect His Lordship and the Registrar.*

.....

*[14] These are but only a few of our concerns as we feel we should not tabulate all of them and run the risk of over-burdening this letter. We will hopefully discuss the rest with His Lordship as soon as he has had the opportunity to read and consider these our genuine grievances.*

*[15] We trust that His Lordship will treat this letter with the utmost expedition and seriousness it deserves."*

[9] Sekoai depones that following this letter, she was directed by the JSC Chairperson to proceed on leave for reasons she did not and still does not understand. She says however that it was suggested that she was to be on leave pending some investigation to be conducted into the matter<sup>10</sup>. In answer the JSC avers that it is most improbable that the then Chief Justice could have sent Sekoai on leave without giving her any reasons. It asserts that Sekoai knew and understood why she was being required to proceed on leave<sup>11</sup>. Strangely, the JSC itself never discloses to the court why Sekoai was suspended and subsequently transferred, even though it is the body that made and implemented these decisions.

[10] Sekoai deposes further that while on leave she received a copy of a letter from the Director-General of the Directorate on Corruption and Economic Offences (“the DCEO”) to the Chief Justice dated 20<sup>th</sup> December 2011<sup>12</sup> stating:

**“Re-Summary Report on Suspected Misappropriation of funds through Transcripts”**

*The office of Directorate on Corruption and Economic Offences (DCEO) received information which was as follows:*

1. *That the registrar of the High Court Miss Sekoai is typing transcripts and uses the names of Mr. Sesioana and one, as if they have transcribed Court proceedings and thereafter claim from the Government funds for her own benefit.*

*Preliminary investigations were fully made into the matter and found no substance or evidence which may implicate the aforesaid officer to the alleged fraud. On the 19<sup>th</sup> December 2011 at 14:30, the Chief Justice was briefed about DCEO’s findings regarding these allegations on his request.”*

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<sup>10</sup> RP:6 para 10.2

<sup>11</sup> RP:39 para 7

<sup>12</sup> RP:7 para 10.3 r/w RP:21(Annexure “MS4”)

[11] On 25 January 2012, Mokeke wrote the following Memo to the Judges<sup>13</sup>:

“

**Re: Request for provision of written individual statements**

*It has come to my attention that honourable Judges are complaining about the conduct of the Registrar in her line of duty which may amount to insubordination and therefore, invite the initiating of the disciplinary proceedings against her.*

*It is against the above outlined background that I kindly request written statements from individual honourable Judges each indicating the individual encounter he/she had with the Registrar to be used in the disciplinary proceedings to be instituted against her.*

*In view of the urgency of the matter, I would humbly request that such individual statements be furnished on or before Friday 10<sup>th</sup> February, 2012 in order to enable my office to kick-start the disciplinary hearing process.”*

[12] Sekoai attests that on or about 6 February 2012 she reported for work as directed by the JSC Chairperson, but to her “utmost shock, surprise and dismay” this “sparked a strike and/or go slow on the part of the Judges” for reasons she does not understand as she had been cleared of any wrongdoing by the DCEO, and the Judges had not submitted written statements to substantiate their allegations against her as requested by the Acting Registrar. She says that as a result of the Judges response to her resumptions of work she was directed to proceed on leave yet again.<sup>14</sup>

[13] On 8 February 2012 the JSC adopted a resolution approving the “recommendation by the Head of Department of the lateral transfer of the Registrar to the vacant position of the Chief Magistrate-South with effect from 08<sup>th</sup> February, 2012”. This was, *inter alia*, communicated to Sekoai herself and the Chief Magistrate-Central.<sup>15</sup>

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<sup>13</sup> RP: 23

<sup>14</sup> RP: para 10.6

<sup>15</sup> RP:7 para 10.7 and RP:57



[14] And on 23 March 2012, the JSC Secretary wrote the following letter to Applicant<sup>16</sup>:

“

**Re: Lateral transfer from the position of a Registrar to a Chief Magistrate**

*At its 65<sup>th</sup> sitting of the 08<sup>th</sup> of February, 2012, the Judicial Service Commission resolved that you be appointed on transfer from the position of Registrar – Grade K to the position of a Chief Magistrate – Grade K.*

*The transfer is with effect from 08<sup>th</sup> February, 2012.*

*Your other terms and conditions of employment remain the same.*

*The Secretary to the Commission has been instructed to thank you on behalf of the Commission for your hard work and dedication in your form position (Registrar).”*

[15] Then, on 8 August 2012, the JSC Secretary issued the following correspondence to Applicant<sup>17</sup>:

“

**Re: Your transfer to the position of Chief Magistrate**

*Reference is made to the above subject.*

*You will recall that the Judicial Service Commission (JSC) made a resolution to transfer you to the vacant position of the Chief Magistrate on 08<sup>th</sup> February, 2012.*

*I am however directed by the Commission to stop you from assuming the occupation of the said office until further notice.*

*This request is necessitated by the fact that the prevailing situation in the Judiciary is not conducive and every single attempt is currently being made to try and normalize the situation.”*

[16] And on 22 January 2013 applicant’s counsel served the Secretary of the JSC with the following letter<sup>18</sup>:

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<sup>16</sup> RP: 24

<sup>17</sup> RP: 25

<sup>18</sup> RP: 26-7 (Annexure “MS 9”)

“

**Re: Reinstatement of Mrs ‘Mathato Sekoai to her position as the Registrar of the High Court and Court of Appeal**

*We have been instructed by Mrs ‘Mathato Sekoai to write this letter to you and to demand as we hereby do that she be reinstated with immediate effect to her position aforementioned.*

*Client informs us that during or about March 2012, she was served with a letter purporting to transfer her without affording her any hearing whatsoever from her position to the position of a Chief Magistrate. That subsequently the said transfer, which was undoubtedly unlawful, was revoked and she was told to wait until further notice. It has been nearly a year since the unlawful transfer aforesaid and it has been nearly six (6) months since the revocation of same.*

*Client cannot wait indefinitely without discharging her duties as a public servant. She is a professional and a lawyer for that matter who is anxious to render a service to her people.*

*Our instructions are that if client is not reinstated within fourteen (14) days hereof then we should seek redress from the Courts of Law, a process which is undesirable for obvious reasons. We trust that this matter will be handled with extreme care again for obvious reasons.”*

[17] After the JSC Secretary and later the Attorney-General requested and were granted extensions of time by Sekoai’s counsel, for the purpose of considering the proposed reinstatement and attempting to resolve the matter amicably out-of-court<sup>19</sup>, the Attorney-General on 7 March 2013 wrote a Savingram to the Acting Registrar<sup>20</sup> stating:

“

**Re: Re-instatement of the Registrar of the High Court and Court of Appeal/re-deployment in the executive branch of the State**

*I enclose herewith self-explanatory demand letters and responses thereto. The complainant is insisting on re-instatement on the basis that her transfer had been revoked or was legally invalid (done under dictation, as it were, to relieve the then prevailing situation). There is unfair aspect of the transfer. The complaining Justices were alleging some form of misconduct, yet flatly refused to come to the party to lay bare the misconduct in a disciplinary hearing. Cannot one say, therefore, the primary motivation behind her transfer had no basis? The bottom line appears to me to be that in the event of some other*

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<sup>19</sup> See RP:28-32

<sup>20</sup> RP:33-4 (Annexure “MS 14”)

*judiciary-cum-executive administrative solution not being found quickly to take her out of the judiciary, she is entitled (on setting aside of her transfer, which is a given) to resume her position of Registrar.*

*It is clear that shortly we will be served with application to impugn the transfer and for the re-instatement. It cannot be seriously opposed, and we are back to where we left off initially, with the resultant chaotic situation which is bound to arise in the administration of justice in the courts.*

*I take the liberty to make a copy of hereof for the information of the Principal Secretary of Justice, Principal Secretary of Law, and the Director of Directorate of Anti-corruption and Economic Offences.*

*Hopefully, Ms Sekoai will soon be afforded a placement elsewhere.”*

[18] Sekoai also annexes, to her replying affidavit the following signed statement by the Acting Registrar:

“

**A STATEMENT ISSUED BY THE HEAD OF DEPARTMENT ON THE FORMER REGISTRAR OF THE HIGH COURT AND COURT OF APPEAL ALLEGED UNETHICAL CONDUCT**

*This brief statement is intended to bring clarity and put matters in their proper perspective regarding the former Registrar’s alleged unethical conduct.*

*A short historical overview of the matter reflects that the Registrar was amongst others charged of corruption, arrogance, disrespectfulness and insubordination by the Honourable Judges of the High Court who also requested the Honourable Chief Justice to deploy her to other position within the Judiciary other than the High Court following what may be described as the irreconcilable difference between themselves and the Registrar.*

*The Honourable Chief Justice instantly reacted thereto by calling Mr. Leshele Thoahlane the Director General of the Directorate of Corruption and Economic Offences (DCEO) with a view to investigating the alleged corrupt practices on the part of the Registrar, along with Mr. Sello Motebele the gentlemen who was engaged to attend the High Court air conditioning and Mr. Sesioane for transcription of tapes but nothing surfaced to link the Registrar with the said allegations of corruption.*

*On other charges which could reasonably have led to the institution of disciplinary case against her, I humbly requested the Honourable Judges to file written individual statements indicating different encounters they had had with her so as to kick-start the processing of the disciplinary hearing in my capacity as Head of Department but nothing was forthcoming.*

*It must be understood that all the said efforts were undertaken with the sole purpose of dealing with her accordingly if anyone of the abovementioned charges was successfully proved against her but none materialized.*

*The Judicial Service Commission (JSC) yielding to the pressure exerted by the Honourable Judges laterally transferred her to the vacant position of the Chief Magistrate for the Southern region. The transfer also sparked controversy from the Magistracy as the Magistrates vehemently insisted that the said transfer was improper in that she had no iota of judicial experience that justified her appointment to the bench, and asked the JSC to review its decision to transfer her to the position.*

*It is worth noting that given all the facts of the case and in terms of the Constitution of Lesotho Section 12 (2) (b) the former Registrar is still presumed innocent until proven or has pleaded guilty.*

*L. MOKEKE (MR)  
REGISTRAR – HEAD OF DEPARTMENT OF THE HIGH COURT (a.i)”*

### **III. DIVISIO**

[19] Applicant contends that the decision to transfer her must be nullified because it is procedurally and substantively improper and unlawful. She submits that it is procedurally improper because (i) it was made without affording her an opportunity to make representations; and (ii) the Judges exerted both direct and indirect influence on the JSC to make the decision. And it is substantively unfair because it was taken without any valid reason and had no basis.

[20] The JSC, for its part, argues that (i) it was not unduly or unlawfully influenced by the complaints of the Judges to transfer Applicant; (ii) there was no need for Applicant to be heard before being laterally transferred to another position; (iii) the Applicant did not establish what prejudice she suffered as a result of the transfer; (iv) the JSC did not act capriciously or arbitrarily; and

(v) the Applicant accepted the transfer and only changed her mind when the appointment was met with resistance by the Magistrates.

#### **IV. CONFIRMATIO A CONFUTATO**

##### **Preliminary observations**

[21] From a reading of the pleadings and annexures, particularly the statement of the Secretary of the JSC set out in detail at paragraph [18] above, it is very clear that Sekoai's suspension and eventual transfer came as a sequel to accusations of misconduct and complaints about incompatibility, made against her. Her suspension and transfer did not just come out of the blue. It is not her employer's case that she was transferred on account of her employer's operational requirements.

[22] Our law prescribes specific procedural requirements to be followed in such instances. If the action was taken against her because of her alleged misconduct, then she ought to have been subjected to a disciplinary hearing. But it seems that the employer did not pursue misconduct charges after receiving the DCEO's letter absolving her of any misconduct. It also did not prefer any charges against her for insubordination, insolence or any other misconduct suggested in the Judges' letter at paragraph [8] above.

[23] So the only remaining reason that could have precipitated her transfer is her alleged incompatibility. In our common law, incompatibility arises when an employee is unable to work harmoniously with his/her colleagues, subordinates or supervisors, and they are unable to tolerate his/her behaviour.

It is regarded as a form of incapacity if the employee concerned is not to blame for the conduct that renders him/her incompatible. On the other hand if the employee is to blame for the behaviour it is viewed as misconduct.

[24] As already intimated above, where the incompatibility is viewed as misconduct the procedural requirements for discipline for misconduct are applicable. However, where the incompatibility is not regarded as misconduct, the correct procedure is that laid down in *King v Beacon Island Hotel*<sup>21</sup>:

*“[W]here there is incompatibility ... the employee must be advised what conduct allegedly causes the disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity of putting his version; and that where it was found that he was responsible for the disharmony he must be given a fair opportunity to remove the cause for the disharmony.”*

[25] *In casu* neither of the misconduct or incapacity routes were followed by the JSC. Consequently, if the transfer was a disciplinary sanction short of dismissal, it was undoubtedly procedurally unfair.

[26] If the transfer was not as a result of misconduct or incompatibility, but was for the reason of the employer's operational requirements then the legal requirements are that it must have been effected for a valid reason/rationale and the decision must have been taken in a procedurally fair manner. The JSC does not anywhere in its evidence state the reason why Sekoai was transferred. It just says that its action was not capricious or arbitrary because it was taken upon a recommendation by the Head of Department (“HOD”). But it does not disclose what valid reason the HOD had for making this recommendation. I

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<sup>21</sup> (1987) 8 ILJ 485 (IC) at 490-1; see also *Radebe v SA Quilt Manufactures (Pty) Ltd* (1992) 1 LCD 80 (IC)

find this type of reasoning totally unsatisfactory and unacceptable. Surely, the JSC could not legitimately just blindly follow the HOD's recommendation without satisfying itself that there was a valid and reasonable reason/rationale to transfer Applicant. If it did then it acted capriciously and arbitrarily.

### **No pre-transfer hearing**

[27] Adv Thabane, Applicant's counsel, submits that her purported transfer was improper because this drastic decision, having far-reaching and adverse effects on her life was taken without giving her a hearing<sup>22</sup>. In support of this contention she cites the cases of *Matebesi*, *Selikane*, and *Morokole*, amongst others.

[28] In response the JSC's counsel, Teele KC, submits that there is no merit in this contention because Applicant does not explain what prejudice she suffered as a result of the transfer, whereas the true test is that there is no need for a hearing before a transfer unless there is prejudice. He cites the case of *Phakisi v Principal Secretary Ministry of Local Government* as authority for this proposition. In his view, since Applicant has not produced evidence of any prejudice then she has not proved that there was a need for a hearing. Teele KC goes further and asks the Court not to allow Sekoai to supplement her case in the replying affidavit by claiming for the first time that the transfer was a demotion.

[29] I do not agree with the approach Teele KC proposes I should take. It has been Sekoai's complaint from the onset that her transfer was unfair because it

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<sup>22</sup> RP:9 para 13, esp. 13.2 & 13.4

had adverse effects on her. Even if this court accepts the JSC's contention that Sekoai's transfer, at the time it was effected, was a lateral transfer without a reduction in pay grade (i.e. from one Grade K position to another Grade K position) this is not the end of the enquiry into its fairness. Whether or not the transfer entailed a demotion is not the sole criterion for its fairness. An otherwise lateral transfer will qualify as an adverse employment action if, for instance, it is objectively worse than the employee's former position based on factors such as changed employee benefits, duties and responsibilities<sup>23</sup>. Examples of purely lateral transfer which would not *per se* qualify as adverse employment actions in our judiciary are transfers of Magistrates or Clerks of Court or Interpreters from one Magistrate's Court to another. Also transfers of Interpreters, Court Recorders, Assistant Registrars or Judge's Clerks from one posting to another. But to say that the transfer of a Registrar to the position of a Chief Magistrate is a purely lateral transfer which does not qualify as an adverse employment action is in my view really stretching the legal envelope beyond permissible extents. I say this because such a transfer entails a dramatic change in benefits, duties, responsibilities, status, prestige etc. What, colloquially speaking, adds insult to injury, is where this is done without even affording the affected employee an opportunity to make representations before the decision is taken.

[30] In *Czekalski v Peter*<sup>24</sup> the U.S. Court of Appeals for the District of Columbia held that a lateral transfer could constitute an adverse employment action even though the plaintiff did not experience a loss of salary, grade or benefits, if it entailed withdrawing the employee's supervisory duties or a reassignment with significantly different responsibilities. This was the case

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<sup>23</sup> *Outley v Luke & Associates, Inc.*, 840 F. 3d 212 (5<sup>th</sup> Cir. 2016) the Court of Appeals for the Fifth Circuit

<sup>24</sup> D.C. Cir. No. 05-5221 (2/02/07)



*in casu*. The common denominators, in these two US cases is that although the lateral transfers were without any loss in pay, the changes in the employees' duties and responsibilities were "materially adverse consequences" affecting their terms, conditions or privileges of employment.

[31] In *President of the Court of Appeal v Prime Minister*, where the complaint was a Judge, the court held that common sense dictated that as the initiation of disciplinary proceedings would invariably taint the reputation of a judge that gave rise to the presumption that a fair procedure must precede the initiation of such proceedings<sup>25</sup>. I would by analogy hold that since *in casu* the abrupt transfer of the Registrar from her prestigious, high status position at the administrative apex of the country's judiciary would inevitably adversely taint her dignity and reputation, this gave rise to the presumption that a fair procedure (i.e. *audi alteram partem*) had to precede the transfer.

[32] As I see it, in the circumstances of the present case the decision to transfer Sekoai without affording her the opportunity to state her case was grossly unfair because it had an immediate adverse effect on her tenure as Registrar and her reputation and dignity. It also entailed a significant narrowing of her supervisory duties and a reassignment with significantly different responsibilities. It therefore qualified as an adverse employment action.

[33] On the issue of demotion, I would like to mention *en passant* that, contrary to the view expressed in Mokeke's opposing affidavit, under the common law demotion involves a variation or amendment of an employee's terms of employment to the extent that he/she is required to

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<sup>25</sup> At para [12] – [13]

fill a different position or to fulfill different functions to that which he/she normally holds or fulfils, coupled with a reduction in status<sup>26</sup>. This is exactly what happened to Sekoai. Further, at common law, the employer is not entitled to lower the employee's status unilaterally, even if it does not involve any loss of benefits, unless it is permitted by statute, the contract of employment itself, or by a subsequent agreement. Unlawful demotion or lowering of status constitutes a repudiation of the contract by the employer entitling the employee to, *inter alia*, hold the employer to the agreed terms<sup>27</sup>.

[34] In South African law when transfers involve major disruption for employees, such as a change of city, the employees' views should be taken into account and the employee should be given a say in the matter before the decision to transfer is finally taken. In *Hlongwa v Minister of Justice*, a case about the transfer of a prosecutor from one station to another, the court made the following very instructive holdings:

- That the employee, enjoying a benefit or in being posted where she was, which she would reasonably be expected to retain, must accordingly be given opportunity to make representations before a decision to transfer is taken
- That generally speaking people on the professional staff of concerns such as the public service would not be transferred willy-nilly and unilaterally without any consideration at all of their personal circumstances and wishes

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<sup>26</sup> Rycroft & Jordaan. 1992. A Guide to South African Labour Law. p. 187

<sup>27</sup> Rycroft & Jordaan, op. cit.

- That in certain situations an employer could however not be faulted for going ahead with a proposed transfer, despite the personal inconvenience, even hardship, to the employee to be transferred, provided that the transferee had had the opportunity to have his/her say in the matter, so that what there was to be said the other way might fairly be taken into account together with the pressing needs of the department concerned
- That generally speaking non-observance of the *audi* principle before a decision to transfer is taken will lead to invalidity

[35] In *Salojee v McKenzie*<sup>28</sup> the court laid down a rule very relevant to our case. It held that the transfer of an employee for ulterior reasons (to move him from an office because of complaints by colleagues there) was unlawful. And in *Theron v Minister of Correctional Services*<sup>29</sup> it was held that although the department had a right to transfer employees for valid reasons, the making of a protected disclosure was not among them. Lastly, in *Marais v Member of the Executive Council, Department of Education, Eastern Cape*<sup>30</sup> the full bench held that the transfer of an employee in bad faith was not only unlawful, but may found an action for damages for *injuria* against the employer concerned. In my judgment, Sekoai's transfer is unlawful because no valid reason has been provided. And in view of the surrounding circumstances set out earlier, it can even be said to have been for ulterior motives.

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<sup>28</sup> (2005) 26 ILJ 330 (LC)

<sup>29</sup> (2008) 29 ILJ 1275 (LC)

<sup>30</sup> (2008) 29 ILJ 1697 (E)

[36] In the most recent case in our jurisdiction on the right to a pre-transfer hearing, the Court of Appeal in *Sebophe v Commissioner of Police*<sup>31</sup> made the following significant legal holdings, which are relevant to this case:

- That even though the governing legislation does not place an obligation on the employer to have a pre-transfer hearing such as obligation flows from common law and practice<sup>32</sup>.
- That the law in this jurisdiction and South Africa supports the conclusion that there must be a pre-transfer hearing<sup>33</sup>.
- That the existence of exceptional circumstances may override the requirement for a pre-transfer hearing. In which case the onus is on the employer to prove their existence.

*In casu*, it is not the JSC's case that there existed any exceptional circumstances justifying its failure to avail Sekoai a pre-transfer hearing.

### **Improper influence**

[37] Adv Thabane further submits that the Judges exerted both direct and indirect influence on the JSC for it to reach the decision to transfer her from the position of Registrar in contravention of the *Judicial Service Commission Rules No.102 of 1994*, particularly *rule 10* which reads:

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<sup>31</sup> [2019] LSCA 2 (31 May 2019)

<sup>32</sup> At para [32]

<sup>33</sup> At para [33]

*“10. (1) No **person** shall, otherwise than in accordance with the Constitution and these rules, **directly or indirectly** influence or attempt to influence the Commission or any members of Commission.”*

[38] She argues that in their letter to the Chief Justice<sup>34</sup> the Judges stated that her deployment to another position would be in the best interests of the general effectiveness of the judiciary. It was upon receipt of this letter that the JSC Chairman instructed the Applicant to go on leave pending investigation of the allegations levelled against her in the letter. This was clear direct influence on the JSC.

[39] Furthermore, after the Applicant resumed her duties, the Judges embarked on a go slow and two days later she was “transferred”. This resistance by the Judges led to her purported transfer and constituted indirect influence of the JSC to finally decide to transfer her in compliance with their “suggestion” in their letter of November 2011.

[40] Adv Thabane contends that this influence was so clear that the Acting Registrar himself stated:

*“The Judicial Service Commission (JSC) **yielding to the pressure exerted by the Honourable Judges** laterally transferred her to the vacant position of the Chief Magistrate for the Southern Region.”<sup>35</sup>*

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<sup>34</sup> Extracts of the letter quoted at paragraph [8] supra, especially see para 6 thereof.

<sup>35</sup> See his statement at paragraph [18] supra (para 6 thereof)

[41] She says that it is clear from the above that the Judges employed both overt and subtle measures to influence the JSC to transfer her in contravention of the JSC Rules.

[42] The JSC's counsel asked the Court to reject this argument on the basis that it was not supported by any cogent evidence, but was entirely based on far-fetched and untenable inference. I agree, particularly because no minutes of the JSC were produced to assist the Court determine what actually transpired at the relevant JSC meetings and what informed its decision. I cannot base my decision on conjecture.

### **Acquiescence**

[43] Lastly, Teele KC argues that Sekoai cannot be heard to challenge the fairness of her transfer, because she accepted it without lodging any complaint/protest, and was ready to take up the position of Chief Magistrate but only changed her mind when the appointment was prevented by the Magistrates threatening a strike. Save for the allegations in the affidavit of Mokeke no cogent evidence of such acceptance has been provided.

[44] Now, in labour matters the courts approach arguments of waiver with extreme caution because, *inter alia*, the potential abuse of the employer's stronger economic position is obvious<sup>36</sup>. Secondly, the court will only accept that a litigant has acquiesced to, say, a transfer if it has performed some act which *unquestionably and necessarily* leads to the conclusion that it has accepted the transfer and waived its right to challenge it. Nothing *in casu* leads me to such conclusion. Lastly, the onus rests on the party alleging waiver, and the evidence supporting such acquiescence must be *clear and irresistible*. This means that the conduct of the party who is alleged to have acquiesced to the transfer must point *indubitably and necessarily* to that conclusion<sup>37</sup>. The evidence before me falls far short of the above requirements. Hence, I am constrained to reject the JSC's allegation of acquiescence.

## **HOLDING**

[45] For the above reasons, I come to conclusion that the decision of the JSC to transfer the Applicant to the position of Chief Magistrate was procedurally and substantively unfair and unlawful, and therefore null and void.

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<sup>36</sup> Le Roux & Van Niekerk. 1994. The South African Law of Unfair Dismissal. p. 92

<sup>37</sup> Grogan. 2019. Labour Litigation and Dispute Resolution. pp.482-3; 509-11.

**ORDER:**

1. The application is upheld with costs.
2. The 1<sup>st</sup> Respondent's decision to transfer the Applicant from the position of Registrar of the High Court and Court of Appeal to the position of Chief Magistrate is set aside and declared unlawful and void.
3. The 1<sup>st</sup> Respondent must immediately allow the Applicant to resume her duties and functions as Registrar of the High Court and Court of Appeal.

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**KEKETSO L. MOAHLOLI**  
**PUISNE JUDGE**

**Appearances:**

For Applicant: Adv P.N. Thabane instructed by Mofolo, Tau-Thabane & Co.

For 1<sup>st</sup> Respondent: M.E. Teele KC instructed by T. Matooane & Co.