IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/197/2019**

In the Matter Between:-

MOOROSI MATELA AND 12 OTHERS **APPLICANT**

AND

THE GOVERNMENT OF THE KINGDOM OF LESOTHO	**1ST RESPONDENT**
P.S MINISTRY OF TOURISM	**2ND RESPONDENT**
MINISTRY OF TOURISM, ENVIRONMENT	**3RD RESPONDENT**
P.S MINISTRY OF PUBLIC SERVICE	**4TH RESPONDENT**
PUBLIC SERVICE COMMISSION	**5TH RESPONDENT**
MINISTRY OF PUBLIC SERVICE	**6TH RESPONDENT**
ATTORNEY GENERAL	**7TH RESPONDENT**

CORAM: **MOKHESI J**

HEARD: **19TH SEPTEMBER 2019**

DELIVERED: **14TH NOVEMBER 2019**

CASE SUMMARY:

Administrative Law – *Applicants are former employees of Lesotho Highlands Water Authority engaged in various positions in Nature Reserves in the north of the country known as Northern Parks– Upon the Lesotho Highlands Development Authority(LHDA) winding down some of its operations in 2005, the Lesotho Northern Parks were transferred to the Government of Lesotho to fall under the aegis of the Ministry of Tourism, Environment and Culture (MTEC) in terms of the Memoradum of Understanding signed between the Government of Lesotho and the LHDA, in the year 2005. The applicants were engaged on a three year fixed term on promise that they would ultimately be absorbed into MTEC on permanent and pensionable basis. MTEC Kept on giving the applicants three year contracts for a period spanning ten years and when the last of these contracts expired in March 2019, the MTEC decided to selectively engage some the colleagues of the applicants who were from LHDA – The process of creating and grading positions for the former LHDA employees as promised has been abandoned effectively, without any explanation from MTEC to the applicants. When the applicants could not be awarded fixed term contracts pending finalization of creating and grading position for their ultimate absorption into MTEC, they launched this application seeking a review of the decision by Principal Secretary – MTEC not to afford them a hearing before deciding not to engage them on a fixed term contract pending finalization of creating positions for them, and further sought an order directing the respondents to engage them on permanent and pensionable basis as public officers under MTEC as they had a legitimate expectation of such happening.*

Held*: Despite the applicants' contracts having a clause that their contracts carried no expectation of renewal, the applicants have succeeded in proving that they had a procedural expectation that they would heard before the decision not to further engage them on fixed term contracts is actualised.*

***Held**: Further that the applicants have **substantive legitimate expectation** of being absorbed into MTEC as permanent and pensionable public officers.*

ANNOTATIONS:

BOOKS :

*Hoexter **Administrative Law in South Africa** (2007 Juta)*

Paul Craig, ***Administrative Law*** *(Sweet and Maxwell, 4th Ed, 1999)*

CASES :

Administrator, Transvaal v Traub 1989 (4) SA 731(A)

Walele v City of Cape Town and Others 2008 (6) SA 129 (CC)

Otubanjo v Director of Immigration and Ano. LAC (2005 – 2006) 336

Meyer v Iscor Pension Fund 2003 (2) SA 15 (SCA)

R v North and East Devon Health Authority; Ex Parte Coughlan [2000] 2 WLR (CA) 622

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 A11 ER 680 (CA)

R v Secretary of State for Education and Employment, Ex Parte Begbie [2000] 1 WLR 1115

R (Bibi) v Newham London Borough Council; R (A1 – Nashed) v Newham London Borough Council [2001)] [2002] 1 WLR 237

R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (N9. 2) [2008] UKHL 61; [2009] 1 AC 453

Schimidt v Home Secretary [1969] 2 Ch 149

Mount Senai Hospital Centre v Quebec (Minister of Health and Social Service) (2001)2 SCR 281

R(Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755

New South Wales v Quin (1990) 93 ALR1 (HC)

ARTICLES :

Quinot, G. Substantive legitimate Expectation in South Africa and European Administrative Law ***[2004] German Law Journal vo. 105 No. 01. 2004J****, available at Scholar.sun.ac.za, (visited on 02/08/2019)*

Christopher Forsyth, ***The Province of Legitimate Expectations Determined***, an unpublished Lecture delivered at the University of Witwatersrand, School of Law on the 27th August 2008

Grove, Mathew *"Substantive Legitimate Expectations in Australian Administrative Law"* ***[2008] Melbu Law RW 15: (2008) 32 (2) Melburne University Law Review 470***

JUDGMENT

[1] INTRODUCTION

The applicants approached this court seeking relief termed as follows:

1. ***Interim relief***

That the Rule Nisi issue, returnable on such date and time as this Honourable Court may determine, calling upon the Respondents to show cause, if any, why:

1.1 Dispensing with the Ordinary Rules of Court pertaining to periods and modes of service and notice

1.2 1st to 6th Respondents shall not be restrained and interdicted from advertising and/or filling the Applicant's posts/positions within the Ministry of Tourism, Environment and Culture by employing any other persons thereto, pending the determination of this Application.

Final Relief

2. *Reviewing and setting aside the decision of 2nd Respondent to terminate Applicants' employment status in the 3 Respondent Ministry as irregular, procedurally unfair and unlawful.*

3. *ALTERNATIVELY to 2 above, reviewing and setting aside the failure or refusal by the 1st Respondent to renew Applicants' employment contracts with the 3rd Respondent Ministry as irregular.*

4. *Correcting the decision in 2, Alternatively, the failure/inaction in 3, by Re-instating the Applicants to their respective positions in the 3rd Respondent Ministry.*

5. *Directing and Ordering the 2nd to 6th Respondents, inclusive, to facilitate the engagement, appointment and employment of the Applicants as permanent and pensionable public officers under the 3rd Respondent Ministry.*

6. *ALTERNATIVELY, declaring that the Applicants legitimately expected to be engaged, appointed and employed as permanent and pensionable public officers under the 3rd Respondent Ministry.*

7. *Directing and Ordering the 2nd and 3rd Respondents to pay the Applicants compensation equivalent to the Applicants' monthly salaries for 3 years contract period.*

8. *Further or alternative relief this Honourable Court may deem fit.*

9. *Costs of the application against the Respondents.*

[2] Factual Background:

The applicants are former employees of the Lesotho Highlands Development Authority (LHDA) engaged on contractual basis and occupying various positions within what are known as the Lesotho Northern Parks (LNP). LNP is made up of Liphofung Nature Reserve, Tśehlanyane Nature Reserve and Bokong Nature Reserve. Per the agreement between the Government of Lesotho and the LHDA, the Lesotho Northern Parks were transferred to fall under the aegis of the Ministry of Tourism, Environment and Culture (MTEC). The decision was made in the year 2005. A total of fifty two (52) employees were to be transferred together with the Lesotho Northern Parks (LNP) infrastructure to be under the MTEC. The said transfer took place in the same year, and since 2008 the MTEC had engaged the said employees on a three-year contract which were renewed continually until this year when MTEC through Principal Secretary 'Mamasiane (2nd respondent)decided not to renew the same. Since the year 2008 the said contracts contained a clause which stipulated that the contracts carried no expectation of renewal, but, despite the existence of this clause, the applicants were given new three-year

contracts when the old ones lapsed. The decision not to renew the contracts was communicated to the applicants on the 18th February 2019, a month and two weeks before the contracts could expire. Clearly aggrieved by this decision not to give them new three-year contracts as has always been the practice for the past ten years, the applicants sought the intervention of the Ombudsman. While this intervention was being undertaken, the 2nd respondent went ahead with the process of giving three-year contracts to some of the applicants' colleagues and other new recruits, to the exclusion of the applicants. It is common cause that before the decision was taken not to give the applicants new three-year contracts, they were not afforded any hearing.

[3] RESPECTIVE PARTIES' CASES:

It is the applicants' case that when the LNP infrastructure and human resources were transferred to MTEC, the latter undertook to absorb the employees to be its permanent and pensionable staff. They argue that several promises were made by MTEC corridors of power to absorb the applicants into its establishment list on terms outlined in the preceding sentence. They argue that the arrangement to engage them on a fixed term contracts which kept on being renewed since 2008 was so as to facilitate their ultimate absorption into MTEC establishment list. To prop up their argument of promises, they annexed a Memo from the Director of National Environment Secretariat (an officer within MTEC) to the Director Human Resource (also an officer within MTEC) dated 14th March 2016, in terms of which the former said: (in relevant parts).

> *"**RE: RENEWAL OF LESOTHO NORTHERN PARKS STAFF CONTRACTS***

Subject matter refers.

You may be aware that contracts of Lesotho Northern Parks staff expires on 30th March 2016. Further, you may be aware that the Ministry has made promises to absorb this staff into permanent and pensionable employment so that they can enjoy the benefits similar to those of public servants.

While fulfilment of this promise is still awaited, the only option is to renew their contracts with the Ministry by three (3) years to allow preparation for their absorption.

Your usual expedition's response will be most appreciated.

cc: PS
DPS"

The above request was actualized when the applicants were awarded three-year fixed term contracts which ended on 30th March 2019. Correspondence between the then MTEC Principal Secretary Tau and Principal Secretary Moreke (Public Service) regarding facilitation of the absorption of the applicants into MTEC establishment list bears reproduction.

"SAVINGRAM
FROM: PS – MINISTRY OF TOURISM, ENVIRONMENT AND CULTURE
TO : PS – MINISTRY OF PUBLIC SERVICE
REF : MTEC 19/2
SIGNED:
NAME: K. T AU (MR)
DATE: 10TH APRIL 2017

ABSORPTION OF LESOTHO NORTHERN PARKS STAFF IN THE MTEC ESTABLISHMENT LIST

Your good office is kindly requested to consider and approve inclusion and absorption of the Lesotho Northern Park Staff into the establishment list of Ministry of Tourism, Environment and Culture (MTEC).

This request follows CAB/DEC/23 dated 11/10/2005 where the Cabinet of Lesotho approved and decided that the Lesotho Highlands Development Authority (LHDA) nature reserves, being Liphofung, Tsehlanyane and Bokong nature reserves be transferred from LHDA to the MTEC.

Consequent to the above, MTEC and LHDA entered into a Memorandum of Understanding that transferred the mentioned three nature reserves. Amongst the issues agreed in the Memorandum of Understanding, the two organizations undertook that all the resources (material and human capital) were handed over to the Ministry.

Since April 2005 to date MTEC ensured the appropriate management and administration of the facilities by budgeting for, among others, the salaries of Northern Park staff under Grants vote head. This situation poses a threat to the staff engaged in the Northern Parks as they are not Public officers but rather temporary employees.

In total there are fifty two (52) positions in the structures of the Northern Parks and currently there are only thirty five (35) occupied positions.

....”

The said absorption did not materialize to date due to issues around job description and grading of the posts, per the current PS Public Service Mr. Tśeliso Lesenya. It is the applicants’ contention further that, when Mr. `Mamasiane decided not to renew their contracts, this, he did without affording them a hearing.

[4] RESPONDENTS' CASE

The respondents are, on the other hand, arguing that the applicants and MTEC had entered into a fixed term contract for three years and that when it expired, the applicants cannot seek to be reinstated, especially when regard is had to a specific term of the said contract that it carried with it no expectation of renewal. They argue that the annexures which the applicants sought to rely on do not help the applicants' case as those are internal communications between the authors and recipients and not for consumption of the applicants. The respondents argued that applicants' expectations were unreasonable as MTEC does not have power to establish permanent position but the Ministry of Public Service, and further that the expectation of renewal could not have been legitimate given that more than a month before their contracts could come to an end, they were notified that the same would not be renewed.

[5] ISSUES FOR DETERMINATION:

a) Whether or not the failure or refusal by the 1st Respondent to renew applicants' employment contracts should be reviewed and set aside as irregular, procedurally unfair and unlawful.

b) Whether in the event that this Court finds that the non-renewal of the said contracts was irregular and unlawful, this Court should further order the 1st respondent to award the applicants three-year fixed term contracts pending their absorption into the establishment list of the MTEC.

c) Whether this Court can competently order the 2nd and 6th respondents to facilitate the engagement or appointment and of the applicants as permanent and pensionable public officers under the 3rd respondent Ministry.

[6] The Law:

This case implicates the doctrine of legitimate expectation in both its facets. The doctrine of legitimate expectation was introduced into our jurisdiction through the decision of ***Administrator, Transvaal v Traub 1989 (4) SA 731(A)***. Expectations are broadly divided into two groups; procedural expectations – where legitimate expectation require a certain procedure to be followed – and substantive legitimate expectations – where a favourable decision of some kind is expected. Since its introduction in this jurisdiction the focus has mainly been on protection of procedural expectations **(*Traub ibid*)**. Prior to ***Traub*** the application of rules of natural justice especially *audi alteram patem,* was restricted to situations where failure to observe the *audi* principle affected "Liberty, property and existing rights" (***Traub***).

[7] The introduction of the doctrine of legitimate expectation extended the scope of application of procedural rights affected by administrative decisions to cover situation where a person has legitimate expectation engendered by the express promise, regular or long standing practice by the administrator, has a right to be afforded procedural justice before the decision affecting that expectation is taken **(Quinot, G. Substantive legitimate Expectation in South Africa and European Administrative Law *[2004] German Law Journal vo. 105 No. 01. 2004J*** at p. 66, available at Scholar. Sun. ac. za, visited on 02/08/2019). Legitimate expectations can arise even in situations where mere privilege or benefit is expected which would be unfair to deny a person without giving him or her a hearing '(***Walele v City of Cape Town and***

Others 2008 (6) SA 129 (cc) **para. 35; see also Quinot, G. et al *Administrative Justice in South Africa An Introduction (2015)* (Oxford University Press) at 151).** It is within the context of procedural expectations that the courts within this jurisdiction have been intensely engaged (see; ***Otubanjo v Director of Immigration and Another LAC (2005 – 06) 336*).**

[8] The applicability of the doctrine of legitimate expectations in the context of procedural justice is well settled. It is the protection of substantive expectations that still divides judicial opinion the world over (the doctrine was rejected in Canada and Australia respectively in the decisions of Mount ***Senai Hospital Centre v Quebec (Minister of Health and Social Service) (2001) 2 SCR 281 at para. 35, and in New South Wales v Quin (1990) 93 ALR 1 (HC).*** The current matter implicates the applicability of substantive legitimate expectations in this jurisdiction. In South Africa substantive legitimate expectation has not yet been recognized, and so this matter will be determined based on what obtains in England, but before I do that, a brief historical excursion into its evolution will be undertaken, and the supposed reasons against its adoption highlighted.

[9] Before examining how substantive expectations are protected in England, it is apposite to remind ourselves why protection of substantive legitimate expectations is such a controversial topic; the concern in this regard, that is, against protecting substantive legitimate expectation relates to separation of powers, because "substantive protection sits awkwardly with the need not to fetter the exercise of administrative discretion. The decision – maker should be free to form judgment of where the public interest lies. Substantive protection also tends to undermine the *ultra vires* doctrine. And it also sits awkwardly (but not that awkwardly) with the need to preserve the distinction

between merits and review. So, there are deep reasons in principle why the courts should not give free rein to the substantial protection of legitimate expectation..." (**Christopher Forsyth,** ***The Province of Legitimate Expectations Determined***, an unpublished Lecture delivered at the University of Witwatersrand, School of Law on the 27th August 2008 at p. 4 para. 12).

[10] **Hoexter** ***Administrative Law in South Africa*** **(2007 Juta) at 382** posits the court's reticence in protecting substantive legitimate expectations, substantively as being the result of the court's concern as regards"… enforc[ing] promises or practices where this would undermine the basic requirement of legality or where it would have the effect of fettering the future exercise of an agency's discretion."

[11] When looking to the English law and other jurisdictions as to how legitimate expectations are substantively protected, I am mindful of the warning which was sounded in ***Meyer v Iscor Pension Fund 2003 (2) SA 15 (SCA) para. 27*** against blind and uncritical transplantation of a legal concept from one system to another. With these warnings in mind, the ensuing discussion will examine the English approach to substantive protection of legitimate expectation, in any event the doctrine of legitimate expectation was brought here following the English decision in ***Schmidt v The Home Secretary [1969] 2 Ch 149.***

[12] The leading case on the substantive protection of substantive expectations in England is ***R v North and East Devon Health Authority; Ex Parte Coughlan [2000] 2 WLR (CA) 622***. Lord Woolf, writing for the court outlined three scenarios in terms of which unfairness can arise when the administrator reneges on the promise given or policy previously adopted, and the possible

outcomes when such decision is challenged on review based on legitimate expectations, thus:

> *"There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds….(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to reside from it… (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon the change of policy… [M]ost cases of an enforceable expectation of a substantive benefit (third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract."*

[13] The above categorization by ***Coughlan*** of unfairness and their "possible outcomes" (ibid para. 57) when the court is seized with a review based of expectations, as can be seen, draws a distinction between the first category of cases which it says fell to be reviewed on ***Wednesbury*** unfairness based on irrationality ground (***Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 A11 ER 680 (CA) at 682 H – 683A***), while

the second category deals with procedural expectations which can be disappointed on the basis of competing and overriding reasons; the third category deals with expectations of a substantive nature which the court can allow the administrator to upset unless the decision is so unfair as to amount to abuse of power. So, in terms of the substantive expectations category as framed in the above decision, the court which is seized with the review based on substantive expectation has to decide whether disappointing such expectations is so unfair as to amount to abuse of power.

[14] Although, ***Coughlan*** had sought to draw a distinction between expectations "involving policies or promises of wide or general application (1st category) and third category expectations which the court said "involved specific promises to one or only a few people", concerns had been expressed that in actual fact cases falling into category (a) and (c) are essentially expectations of a substantive nature, the court did not justify why they should be treated differently. This view was expressed, and doubt cast on this categorization, in ***R v Secretary of State for Education and Employment, Ex Parte Begbie [2000] 1 WLR 1115.*** In that case Laws LJ expressed doubt that the two categories are "hermetically sealed" (at ibid at 1130) given that they are both substantive in nature. Laws LJ expressed a view that rather than subjecting the two categories differentiating treatment of review, the sliding scale approach which takes cognizance whether the impugned decision lies in the sphere of "macro-political field" or whether the promise was made to one or few people, should be adopted. He explained the point thus;

> *"The more the decision challenged lies in what may in elegantly be called the macro-political field, the less instructive will be the court's supervision. More than this: in that field, true abuse of power is less*

likely to be found, since within it changes of policy, fueled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

[15] The other concern raised about ***Coughlan*** is whether and to what extend detrimental reliance operates as a requirement, but this concern was answered in the negative in ***R (Bibi) v Newham London Borough Council; R (A1 – Nashed) v Newham London Borough Council [2001)] [2002] 1 WLR 237*** when the court said that "reliance and consequent detriment is factual, not legal" (ibid at para. 31) and accepted a view expressed by **Paul Craig, *Administrative Law (*Sweet and Maxwell, 4th Ed, 1999)** at 619 where he said:

"Where an agency seeks to depart from an establishment policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such."

[16] In the year 2008, the House of Lords had an occasion to examine the doctrine of substantive legitimate expectations, and it recognized it in ***R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (N9. 2) [2008] UKHL 61; [2009] 1 AC 453****;* Lord Hoffmann stated the position regarding substantive protection of substantive expectations as follows **[**ibid at para.60];

"It is clear that in a case such as the present, a claim to legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': See Bingham LJ in R v Inland Revenue Comrs, Ex P MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have

relied upon the promise to his detriment, although this is relevant consideration in deciding whether adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the area of what Laws LJ called 'the macro-political field'; See R v Secretary of State for Education and Employment, Ex P Begbie [2000] 1 WLR 1115, 1131."

[17] It is important to observe that Lord Carswell (ibid) adopted the ***Coughlan*** formulation that in reviewing an administrative decision based on substantive expectations, the court has to determine whether deviation from the express promise is so unfair as to amount to abuse of power. A summary of principles involved in the substantive protection of legitimate expectations was made in ***R (Patel) v General Medical Council [2013] 1 WLR 2801****:*

1- The statement or representation being relied on must be "clear, unambiguous and devoid of relevant qualification" (ibid para. 40).

2- The party relying on the statement or representation must have made full disclosures, "this is important because it can define the context in which the statement or representation is made'. (*ibid* para. 41)

3- The statement or representation must be pressing and focused. This is a requirement because "….while in theory there may be no limit to the number of beneficiaries of a promise for purpose of a substantive legitimate expectation, in reality it is likely to be small if the expectation is upheld because, first, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class, and secondly because the broader the class claiming the benefit of the expectation the more likely it is that the

supervening public interest will be held to justify the change of position of which the complaint is made."

4- The burden of proof:

The burden of proof lies with the applicant to establish legitimacy or reasonableness of his expectation. Once the applicant will have proved clear, unambiguous and unqualified promise, and that the statement was pressing and focused, the onus shifts to the administrator to justify frustrating the expectations by providing proof of overriding interest to renege on the promise with the Court being the final arbiter by weighing "the requirements of fairness against that interest." (*ibid* para. 58)

5- The standard of review.

The standard of review in terms of which the court weighs whether there are any overriding interest to justify reneging on the promise or to be more precise, whether frustrating the expectation is so unfair as to amount to abuse of power, is a sliding scale approach or standard which recognizes the character of the decision being challenged (ibid para. 61)

6- Although not mentioned in the above decision it has always been the requirement of the law that expectation must be reasonable. This is particularly important as [t]his requirement provide[..] an apparently objective quality to the concept and, therefore, was thought to provide a useful limit by precluding the recognition of expectations that were somehow unrealistic or inappropriate. "(**Grove, Mathew "Substantive Legitimate Expectations in Australian Administrative Law"** ***[2008] Melbu Law RW 15: (20080 32 (2) Melbourne University Law Review 470,*** **under Part II The Concept of Legitimate Expectations).**

In cases involving review based on substantive expectations, unlike in procedural fairness cases, the court determines the substantive outcome of the matter after the weighing up process referred to above. Having thus considered the English position on substantive protection of substantive expectations, a pertinent question may be asked whether the time has come to introduce it in this jurisdiction. The answer to this question, in my considered view should be in the affirmative. I do not honestly find any plausible reason why substantive expectations should not be accorded substantive protection. There are enough safeguards built into the doctrine to cater for the concerns against its adoption. Without adoption of this doctrine cases such as the current one would fall through the cracks with disastrous consequences for the people involved. Legitimate expectation is based on good administration and consistency of treatment by public officials, and therefore, where such public officials make promises they should be held to those ***R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ****. 755* at para.30.

[18] ***Application of law to the facts:***

Before applying the law to the facts it is worth mentioning that after both counsel had concluded their submissions given that counsel for the respondents made mention of the fact that the contract positions which the applicants had occupied have already been filled out; as there was a dispute regarding this I requested counsel for the respondents, Mr. Moshoeshoe, to require the Principal Secretary in MTEC to state on affidavit whether the contract positions have indeed been filled out. The Principal Secretary (PS) deposed to such a supplementary and had attached a list of fifty individuals he alleges were successful candidates. Significantly, also, PS-MTEC averred

that the decision not to renew the applicants' contracts was as a result of the change in the policy of Government to give priority to the Community Conservation Forum (CCF) composed of villagers of the community wherein Parks are located.

[19] ***Procedural Fairness: Procedural Expectations****:*

It is the applicants' argument that when MTEC did not renew their contracts per the practice which had been operational since the year 2008, without giving them a hearing, MTEC's decision ought to be quashed on this basis. On the one hand MTEC argue that the applicants' contracts were fixed for three years and that they were terminated by effluxion of time, and that more importantly, the said fixed-term contracts contained a clause which specifically provided that the contract carries no expectation of renewal. It is on these bases that the respondents argue that there was no obligation to hear the applicants regarding non-renewal of their contracts.

[20] It needs to be repeated that since the year 2008 the applicants were engaged on a three- year fixed term contract which always contained a specific clause which stipulated that the contracts carry no expectation of renewal, but despite this, the said contracts kept on being renewed. A practice spanning ten years had been established in terms of which these fixed term contracts were renewed despite containing this clause. In my considered view, the applicants have succeeded in proving existence of a practice, and this practice engendered an expectation that the applicants would first be heard should MTEC not wish to renew their contracts as has always been the practice for the past ten years. As regards the respondents, the way I see it, it is a simplistic

way of looking at things to simply say that because the contracts contained a clause which says the contracts carried no expectation of renewal, therefore, the applicants should not be heard to be saying they should have been heard before the decision not to renew them was taken. This perspective is flawed as it ignores the practice which has been going on for ten years (of renewing the said contracts despite the existence of this term). It follows that the 2nd respondent ought to have afforded the applicants a pre-decision hearing before deciding not to renew their contracts. The presence of this clause should not be the determining factor. The reasonableness of expectation should be determined from the circumstantial material from which the employee says the expectation wells from. The long-standing and consistent practice of giving the applicants three-year fixed term after the expiration of the previous one created an expectation that should MTEC decide to go against it, that decision should be preceded by pre-decision hearing.

[21] ***Substantive Expectations:***

In this regard it is the applicants' argument that following their transfer from LHDA to MTEC they were promised absorption into the permanent establishment list of MTEC. This much is made clear in the memo referred above in para.[3], from the Director of National Environment Secretariat to the MTEC Director of Human Resource. Acting in line with the tenor of the Memo, the applicants' contracts were renewed accordingly. What is disputed is the reason why the applicants' contracts kept on being renewed all these years (at least for ten years). It is the applicants' case that they were awarded new contracts every three years because they had been promised to be absorbed into the permanent and pensionable establishment list of MTEC following their transfer from the LHDA, and that pending their absorption they were engaged on fixed term contracts. The said representations

according to the applicants were made to them through their representative (that is 6th applicant) and this not denied by the respondents. On the other hand, the respondents argue that there has never been any undertaking on the part of MTEC to absorb the applicants permanently; that in any event they could not make such a promise because it is only the 4th respondent Ministry (Public Service) which can lawfully create and grade positions. They argue that annexure "C" being a Savingram in terms of which PS – MTEC addressed to PS – Ministry of Public Service in terms of which the former requested the latter "to consider and approve inclusion and absorption of the Lesotho Northern Parks Staff into the establishment list of Ministry of Tourism Environment and Culture (MTEC)" on the 10th April 2017 carries no weight in the light of the fact that it runs counter to placement procedures under Public Service Regulations.

[22] To the extent that the respondents would like to suggest that there was no representation or promise to absorb the applicants into the permanent establishment list of MTEC, the version of the respondents ought to be rejected as palpably false, regard being had to conspectus of the facts surrounding this matter. It is not denied that the 6th applicant was present as the applicants' representative in meetings where such a representation was made. Furthermore, the correspondence between PS MTEC and PS – Public Service together with Memo by the Director Environmental Affairs to the Director of Human Resource do not support the contention that no representations to absorb the applicants were made. To my mind these proves beyond a reasonable doubt that a representation or promise was made to absorb the applicants into MTEC on permanent and pensionable basis. It follows, therefore that the version of the applicants that their contracts kept on being renewed for ten years, was merely to await finalization of the process

of creating and grading their positions by the Ministry of Public Service for absorption into MTEC, is the correct one, and that of the respondents palpably false, and ought to be rejected on that score.

[23] It will be observed that request to create and grade positions (alluded above) in respect of the applicants and their colleagues was responded to positively. PS-Public Service never raised a finger regarding propriety of this request. In responding to the request, Principal Secretary Moreke from the Ministry of Public Service requested PS – MTEC to submit job descriptions of all positions "to assist in the execution of this exercise." Job descriptions were accordingly submitted to the Public Service on the 22nd May 2017, but to date nothing happened. The reason for this is found in the current PS – Lesenya's (Public Service) supporting affidavit to PS – MTEC's answer where he says:

" *-4-*

I wish to place the following facts on record:-

> *4.1 As regards the issue of creation of positions, I must humbly take this honourable court into my confidence that the request made by P.S. Tau could not be approved on the basis that their grades submitted to our Ministry did not match the grades within the Public Service.*
>
> *4.2 By the same token, the job description submitted did not match the grades within the Public Service, hence the challenge was the assessment could not be executed as the job description and grades were higher than those in the public service and such made it impossible to absorb applicants.*
>
> *4.3 Eventually I must take this honourable court into my confidence that absorption is not automatic as after the assessment, some of the grades*

and job description may change. Moreover, once such positions are created, they have to be submitted to the placement department at Public Service and/or advertised by the relevant Ministry depending on the prevailing circumstances at the given time. Thus, it is our contention that absorption is impossible owing to the above facts."

[24] In seeking to justify frustrating the applicants' legitimate expectation, PS – MTEC's response to applicants' averment that a promise was made to them for absorption into MTEC, and that their position is borne out by various correspondences alluded above, he says (at para.8) of his answering affidavit:

4.9.3 & 4.10 Save to impress upon this honourable court that much as MTEC requested the consideration and approval from Ministry of Public Service, the MTEC could not validly promise that applicants would be absorbed as permanent and pensionable officers because such mandate falls entirely with the Ministry of Public Service which to date has not approved the establishment and creation of such positions. In those circumstances, there is absolutely nothing which binds MTEC to further engage applicants into another fixed term contracts ass their contracts duly terminated on the 30th March 2019."

In support of PS-MTEC, PS – Lesenya for the Ministry of Public Service, avers that the exercise of creating and grading positions could not be finalized "as the job description and grades were higher than those in the public service and as such made it impossible to absorb applicants." Although, PS – Lesenya would seem to suggest that creation and grading of positions as requested by MTEC is "impossible" as the grades submitted were higher than those in the public, this to me does not hold water. My considered view is that creation and grading exercise could not be brought to its logical end due to

carelessness, inefficiencies and lack of political will within the Ministries of Public Service and MTEC. The issue of mismatch of grades could have been ironed out a long time ago. It has always been the expressed desire of MTEC to absorb the applicants into its establishment list, and in furtherance of this desire, went as far as requesting the Ministry of Public Service to facilitate the process by creating and grading the positions. I do not see how the process can be characterized as 'impossible' as for the past ten years the applicants were paid in line with the Public Service salaries.

[25] ***Appropriate remedy***

I now turn to consider whether this court can:

(a) Direct and order the 2nd to 6th respondents, inclusive, to facilitate the engagement of the Applicants as permanent and pensionable public officers under the 3rd respondent Ministry.

Consideration of the above issue turns on whether the applicants have succeeded in establishing the requirements of substantive legitimate expectation doctrine. In *casu*, I am convinced that the applicants have discharged the burden of proof on their part that they had a reasonable expectation that they would be absorbed into MTEC as permanent and pensionable public officers; the applicants had placed all their cards on the table, in fact it is not the respondents' case that they are not following through on their promise because there was non-disclosure on the part of the applicants; The representation or promise made to the applicants was "pressing and focused", as it was intended to benefit people as few as fifty-two who were transferred from the LHDA to MTEC. Now that I have already said that the applicants have successfully discharged a burden of proof which

lay on their shoulders, I now turn to consider whether the respondents have succeeded in discharging the onus of justifying reneging or frustrating the applicants' legitimate expectations of being absorbed into MTEC permanently. This exercise, the court will undertake by weighing the overriding interests justifying frustration of legitimate expectation and the interests of the applicants in being absorbed permanently into MTEC as promised. It has to be stressed that the decision with which this court is concerned does not lie in the so-called "macro-political field, it is a simple administrative decision about creating and grading positions for the applicants as promised consequent to their being transferred from LHDA to MTEC, and therefore, this court's curial scrutiny has to be intense and lacking in deference.

[26] I deliberately quoted the responses of both Principal Secretaries above to further illustrate the point that no overriding interest on the part of the respondents not to see to it that the exercise of creating and grading positions for the applicants as promised and requested by MTEC, exists. The way I see it, the reason why the process was abandoned or not finalized, perhaps at risk of being repetitious, is due to carelessness, inefficiencies and lack of political will to see it through. I therefore find that the decision to frustrate or renege on the promise to absorb the applicants into MTEC as promised is so unfair and in my considered view, it amounts to abuse of power. I therefore find that the prayer that I should direct and order the 2nd to 6th respondents, inclusive, to facilitate the employment of applicants as permanent and pensionable working under MTEC is tenable.

[27] (ii) Reinstatement

It is the applicants' prayer that this court should order that they be "reinstated to their respective positions in the 3rd Respondent Ministry."

It is trite that reinstatement is a discretionary remedy, however, in this case it is my considered view that the remedy is inapplicable as the applicants had entered into fixed term contracts which came to an end by the effluxion of time. There is, therefore, no position into which the applicants can be reinstated into. The applicants' situation is worsened by the fact that MTEC has engaged other individuals on fixed term contracts. It is my considered view that this prayer is not tenable in the circumstances of this case.

[28] In the result the following order is made:

a) The decision by the 2nd respondent not to award the applicants new employment contracts with the 3rd respondent Ministry was irregular, procedurally unfair and unlawful.

b) The 2nd to 6th respondents (inclusive) are directed and ordered to finalize the process of creating and grading positions for the applicants within eight months from the date of this judgment, and that, upon finalizing the said process, to employ the applicants as permanent and pensionable public officers under the 3rd respondent Ministry.

(c) The applicants are awarded the costs of this application.

MOKHESI J

FOR APPLICANT: **ADV. NYABELA INTRUCTED BY DA SILVA MANYOKOLE ATTORNEYS**

FOR RESPOMDENTS: **ADV. MOSHOESHOE FROM ATTORNEY GENERAL'S CHAMBERS**