

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/374/2017

In the matter between:

KHOTSO PHALA

APPLICANT

AND

COMMISSIONER OF POLICE

1st RESPONDENT

COMPOL-HUMAN RESOURCE OFFICER

2nd RESPONDENT

MINISTER OF POLICE AND SECURITY

3rd RESPONDENT

ATTORNEY GENERAL

4th RESPONDENT

JUDGMENT

CORAM:

HON. J.T.M. MOILOA

DATE OF HEARING:

18th JUNE 2019

DATE OF JUDGMENT:

01st SEPTEMBER 2019

ANNOTATIONS

Legislation

1. Police Act No.7 of 1998
2. Lesotho Mounted Police Service Administration Regulations, 2003
3. Interpretation Act, 1977

Cases

1. Maan vs Sidney Hunt Motors (Pty) Ltd 1958(2) SA 102
2. Amler's Precedents of Pleadings 1993 (4th Edition by LTC Harms)

[1] Applicant is a member of the Lesotho Mounted Police Service (LMPS). His rank of Senior Inspector is in dispute. Respondents are his employers. Applicant seeks the following orders:

(a) An order directing Respondents to pay Applicant's salary for acting appointment from 31st January 2017 to 3rd March 2017.

(b) An order directing Respondents to pay Applicant the salary of the rank of Senior Inspector under grade 17-19 from the time he was recalled from the National Security Service (NSS) to the LMPS.

(c) An order declaring null and void the decision of 2nd Respondent in a letter dated 12th September 2017.

(d) An order reinstating Applicant to his position of Senior Inspector and being paid accordingly.

[2] **Orders granted in default**

The aforementioned prayers were granted by this court on 7th December 2017. On that day advocate N. B. Khampepe moved the application for Applicant. There was no appearance for Respondents despite the notice of set down for that day (7th December 2017) having been served upon Respondents and filed of record. Nor were there pleadings filed by the Respondents except for the notice of intention to oppose filed with this court's Civil Registry on 30th October 2017. Respondents never filed their answer and the prayers were granted to Applicant in the absence of Respondent's pleadings in opposition to the application.

[3] **The rescission of application**

Two weeks later on 20th December 2017 Advocate M. Mhlekwa appeared for the Respondents before a different court, and stated that the matter was opposed. It was ordered that the Respondents be served in the ordinary course. Adv. Mhlekwa was back before this court on 26th March 2018 seeking a date of hearing for a rescission application against the order I had granted in her absence on 7th December 2017. This time there was no appearance for Respondents. The rescission application was filed ex-parte. The rescission application was allocated 2nd May 2018 but was in fact heard on 18th May 2018. On 18 May 2018 both Advocate Mhlekwa for Applicants in the rescission application and Adv. Khampepe for the Respondent were before court. The rescission application was opposed by the Respondent (Applicant in the main application) and pleadings were filed. After argument by both counsel I decided to look at the broader justice of the case. In the end I granted the rescission and for Applicant to pay costs of Respondents to date. That order enabled the matter to be argued on merits and be determined to finality.

[4] **Merits**

On 6th January 2017 First Respondent (Commissioner of Police) wrote a memo to the Minister of Police and Security (3rd Respondent). The memo is annexure “SP1” to the founding Affidavit. In terms of “SP1” 1st Respondent sought the consent of 3rd Respondent in relation to collaboration arrangements of LMPS and National Security Services (NSS). The requested collaboration was intended to enhance service delivery and in issuing the memo 1st Respondent was relying on the provisions of **Section 72 of the Police Service Act No.7 of 1998** (the Act). The section reads that:

“if it appears to the Commissioner that any police functions can be more efficiently or effectively discharged by members of the Police Service acting jointly with some other body or bodies, either within or outside Lesotho, he may, with the consent of the Police Authority, enter into arrangements for the joint discharge of those functions.”

Although not annexed to the pleadings it is admitted by Respondents that the Minister gave the required consent on 11th January 2017.

[5] However, before that consent of 3rd Respondent, in fact on the same date of 6th January 2017 1st Respondent wrote another letter, this time to Applicant. So 2 letters were authored by 1st Respondent on 6th January 2017. One letter was written to 3rd Respondent as discussed above and another to Applicant. The letter to Applicant is annexure “SP2”. Through “SP2” 1st Respondent appointed Applicant to act in the rank of Senior Inspector Grade 17 – 18; in salary terms M16,673.00 – M18,873.00 with effect from 21st January 2017. This was done in terms of **Section 8(5) of the Act** read with **Regulation 8 of the Lesotho Mounted Police Service Administration Regulations of 2003**.

[6] **The Acting Appointment**

According to Applicant, a week or so after the effective date of 21st January 2019 1st Respondent issued out another letter dated 31st January 2017 confirming Applicant’s acting appointment. The letter is “SP3”. The reading of “SP3” does not relay the same message as is indicated by Applicant. The letter does not confirm his acting appointment in fact the letter is confusing. For one, “SP3” is titled “Secondment letter to National Security Services (NSS).” However, its content is NOT about secondment. Instead the letter is materially similar to “SP2” in that it also purports to appoint Applicant to act as Senior Inspector. Secondly, the effective date for Applicant to start the acting appointment is 21st January 2017, as

opposed to 31st January 2017 per “SP 2”. On 3rd March 2017 Applicant was confirmed on promotion to the rank of Senior Inspector. It is this period between his acting position and his promotion that Applicant claims payment for. In his Notice of Motion, Applicant claims payment of his salary for acting appointment from 31st January to 3rd March 2017. This is helpful. Applicant clarifies the confusion I referred to earlier.

[7] Respondents argue that Applicant is not entitled to salary of the acting appointment because he had not acted for over 28 days as provided for by the Act. The relevant Section here is **Section 8(5)**. In his correspondence 1st Respondent states that in appointing Applicant to the acting position he relies on provisions therein, read together with **Regulation 8. Section 8(5)** reads thus:

“The Commissioner may appoint a police officer to act in a rank senior to his substantive rank, and where the period of such acting appointment exceeds 28 days such officer shall, during such acting appointment, receive salary at the scale applicable to the senior rank....”

No meaning is given to “day” in the Act nor in the Regulations. One therefore has to look to **Section 50 of the Interpretation Act 1977**. It provides that:

“Where a number of days not expressed to be “clear days” is prescribed the same shall be reckoned exclusively of the first day and inclusively of the first day and inclusively of the last; where the days are expressed to be “clear days” or where the term “at least” is used both the first day and the last shall be excluded.”

In *casu* the period in question is from 31st January 2017 to 3rd March 2017. The Act qualifies an acting position holder to be paid a salary for same where their acting appointment exceeds 28 days. Based on the meaning given to “days” in the **Interpretation Act, 1977** I am satisfied that the

counting of days exceeds 28. It is on that basis that I find that Applicant is entitled to the salary for the acting appointment.

[8] **Secondment at NSS**

As already stated above on 3rd March 2017 1st Respondent appointed Applicant on promotion to the rank of Senior Inspector; annexure “SP4”. Four (4) days later, on 7th March 2017 1st Respondent transferred Applicant from LMPS to NSS on special appointment “for a period of 2 years commencing from 3rd March, 2017 to 1st April, 2019.” In effect Applicant was transferred to the NSS commencing on the same day that he was promoted to the rank of Senior Inspector, namely 3rd March 2017. During this special appointment at NSS Applicant had been earning his salary at Grade 15 being the last point in the NSS salary structure. That salary was M203,244.00 per annum and at point 86. I observe that this salary at NSS was higher than the M200,076.00 per annum which Applicant was supposed to earn at LMPS upon being promoted to the rank of Senior Inspector per SP4. I observe further that practically, Applicant did not at that stage earn the LMPS salary of Senior Inspector as he was immediately transferred to NSS. The Special appointment at NSS did not run the intended period of 2 years. Three months later, on 12th June 2017 1st Respondent wrote a letter to Applicant terminating the secondment at NSS with immediate effect; “SP6”. Applicant served on the special assignment for the months of March, April and May 2017 and earned the correct salary. Early June, on the 12th, “SP6” came into being, terminating the NSS secondment.

[9] **Salary back at LMPS from NSS**

Upon being recalled from the special appointment at NSS, Applicant reverted to the substantive rank of Senior Inspector he had been promoted

to four (4) days before the secondment. Applicant alleges that from the end of June when he was back at LMPS as Senior Inspector he was dismayed to receive a salary in accordance with the rank of Sub-Inspector and not the salary of the rank of Senior Inspector. He considers this a demotion and an interference with his salary by 1st and 2nd Respondents.

[10] In answer, the Respondents' contention is that Applicant could not be paid his promotion salary because that promotion was unlawful in that it did not follow the correct procedure. They correctly argue that the procedure is laid down in **Section 8 of the Act**. The section requires that a Police Appointment and Promotion Board be constituted in senior promotions such as Applicants: The Board is constituted by the Commissioner, a person nominated by the Police Authority and a person nominated by the Minister responsible for the Public Service. Respondents are using that alleged fact in defence to say that 1st Respondent acted ultra vires as he does not have the power to make senior promotions without the promotions board. Clearly Applicant is not privy to internal workings and proceedings followed by Commissioner before appointing Applicant.

[11] Although poorly drafted, Applicant reacts to this defence by raising Estoppel. This is discernible in his Replying Affidavit as he states that he relied on the validity of COMPOL's decision more so since he was never part of the decision making to have himself promoted. The decision in **Mann v Sidney Hunt Motors (Pty) Ltd 1958 (2) SA 102** illustrates that estoppel must be pleaded by Plaintiff (Applicant in this case) in reply to the Defendant's plea (Respondent's in *casu*) where reliance is placed upon true facts are admitted by Respondents in their own pleadings that the alleged erroneous ultra vires decision was made on their part. The true

facts are that Applicant relied on the truthfulness and correctness of the decision to have been promoted to the position of Senior Inspector.

- [12] With reference to a number of decided cases LTC Harms in his work **Amler's precedents of pleadings, 1993 (4th ed.) 137 – 138** identifies the essentials for estopped to be:

12.1 A representation by words or conduct of a factual position:

Through “SP4” the conduct of COMPOL in clear terms was to inform Applicant that he had been “appointed on promotion to the rank of Senior Inspector, grade 17 – 19 with effect from 3rd March 2017....” Applicant reasonably understood contents of “SP4” to be that he was promoted to the higher rank. He relied on the validity of COMPOL’s decision, without the onus or duty to ensure that COMPOL reached the decision together with a properly constituted Promotions’ Board. In fact at NSS where Applicant was seconded he was accepted and paid there on the grade of equivalent to that of Senior Inspector. NSS itself relied on Commissioner’s letter of promotion of Applicant to rank of Senior Inspector.

12.2 That the party acted upon the correctness of the facts as presented:

Applicant acted upon the correctness of First Respondent’s decision to promote him to Senior Inspector; hence his claim that he be paid salary in accordance with that rank. As far as he is concerned, at the time he launched this application he was the substantive holder of the position he was promoted to.

12.3 That the party so acted or failed to act to his detriment:

The detriment on Applicant acting on “SP4” is that now he is not being paid for the position of Senior Inspector. In fact his position of Senior Inspector is being challenged by First Respondent himself who now contends that he promoted Applicant unlawfully.

12.4 That the representation was made negligently

Surely First Respondent ought to have known the correct procedure to be followed in validly promoting Applicant to a higher rank. As a matter of fact the defence of unlawfulness in the procedure of promoting Applicant is raised by Respondents in answer to Applicant’s claim. They do so to try and protect themselves against a *bona fide* claim of Applicant who acted *bona fide* on the promotion made by the very First Respondent himself. It does not matter that First Respondent may have acted negligently in issuing the promotion letter. It is enough that it is not being alleged by Respondents that Applicant was complicit in the negligence of First Respondent. It is enough that Applicant accepted the promotion in good faith and acted on it.

[13] Respondents cannot now admit that the promotion did happen but also cry that the promotion was defective. They created the defect and I cannot allow them to use it to Applicant’s prejudice. I am satisfied on the pleaded facts that Estoppel is available to Applicant. Respondents are precluded from denying the correctness of their own representation made by them through “SP4” to Applicant and acted upon it in good faith by Applicant relying on “SP4” believing it to be true and correct. I therefore order that Respondents pay Applicant the salary of the rank of Senior Inspector from June 2017 when he was recalled from NSS to LMPS to date. Upon that

recall Applicant reverted to the substantive rank he had been promoted to. For purposes of clarity I order that Applicant be reinstated to his position of Senior Inspector with effect from 3rd March 2017 and be paid accordingly excluding the period of secondment of Applicant to NSS where he was paid at correct grade level.

[14] **Letter dated 12th (sic) September 2017**

This letter is annexure “SP8”. The letter talks about Applicant not qualifying for the acting allowance and that COMPOL had no power to promote Applicant to the rank of Senior Inspector. I have already dealt with both issues in this judgment. The decision of 2nd Respondent as appears in “SP8” is hereby declared null and void and of no force and effect.

The application succeeds with costs.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: ADV. M. B. KHAMPEPE

FOR RESPONDENTS: ADV. M. MHLEKWA