

**IN THE HIGH COURT OF LESOTHO  
(HELD AT MASERU)**

**CIV/APN/389/2018**

**In the matter between:**

**PATU NICHOLAS TSÍTA**

**APPLICANT**

**AND**

**DIRECTOR GENERAL-NATIONAL SECURITY SERVICES 1<sup>ST</sup> RESPONDENT**

**NATIONAL SECURITY SERVICES 2<sup>ND</sup> RESPONDENT**

**MINISTER OF DEFENCE AND NATIONAL SECURITY 3<sup>RD</sup> RESPONDENT**

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

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**REASONS FOR JUDGMENT**

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**CORAM** : Honourable Justice Makara

**HEARD** : 7<sup>TH</sup> March. 2019

**DELIVERED** : 7<sup>TH</sup> March, 2019

**SUMMARY**

1<sup>st</sup> Respondent found to have acted ultra vires the enabling legislation by demoting the Applicant and to have violated his God given right to natural justice specifically its *audi alteram parterm* rule since reached the decision without first offering him a hearing.

**ANNOTATIONS**

**Cited Cases**

1. Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD 13
2. Mona v Lesotho Electricity Corporation(CIV/APN/465/03)(CIV/APN/465/03) [2004]
3. Monaheng Rakhoboso v Simon Rakhoboso LAC (1995-99) 331

4. Commissioner of Police and Another v Manamolela and Others (C of A (CIV) 40A/2014)

## **Statutes & Subsidiary legislation**

1. The 1993 Constitution of Lesotho
2. National Security Services Act No. 11 of 1998
3. High Court Rules 1980

## **MAKARA J**

### **Introduction**

[1] This is a review application in which the applicant has approached this court seeking for its intervention by ordering that:

- a) The 1<sup>st</sup> respondent be directed to dispatch, within fourteen (14) days of the receipt hereof, to the Registrar of this Court the record of proceedings in which the applicant's promotion was cancelled (per annexure "PNT 2") together with such reasons as he is required to give.
- b) The decision by the 1<sup>st</sup> respondent, to cancel the applicant's promotion (in terms of annexure "PNT2"), be reviewed and set aside as being unprocedural, irregular and illegal.
- c) the letter cancelling the applicant's promotion (annexure "PNT 2") be declared to be null and void with no force or effect.
- d) that applicant shall keep and maintain his position as the Higher Intelligence Officer in terms of annexure "PNT 1".
- e) the respondents be directed to pay costs hereof.
- f) the applicant be granted such further and/or alternative relief.

[2] The application is, in the understanding of the court, founded upon section 119 (1) of the Constitution<sup>1</sup> (Lesotho Constitution of 1993) which provides that:

There shall be a High Court which shall have unlimited original jurisdiction to hear and determine any civil and criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court-martial, tribunal, board or officer exercising judicial, quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law.

[3] The above constitutional powers entrusted upon this court are resonated under section 2 (1) of the High Court Act No. 5 of 1978. It accordingly directs:

The High Court for Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have-

- (a) unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho;
- (b) in its discretion and at the instance of any interested person, power to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination; and
- (c) such jurisdiction and powers as may be conferred on it by this Act or any other law.”

[4] And this is further resonated under rule 50 (1) (a) of the High Court Rules 1980 which It states:

Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any tribunal, board or officer or any person performing judicial, quasi-judicial or administrative functions shall be by way of notice directed and delivered by the party seeking to review such decision or proceedings of the magistrate, presiding officer or chairman of the tribunal or board or to the officer or person as the case may be, and to all other parties who may be affected by the decision or proceedings.

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

[5] The projected legislative scheme has basically reiterated the common law principles on review. *Ex facie* the papers before court the parties agree on the facts which have occasioned these proceedings. Their departure emanates from their differences in the conception of the applicable legislative provisions, especially in their interpretation. The common scenario to which they both subscribe, commences from their acknowledgment that the applicant is hitherto a member of the National Security Services (2<sup>nd</sup> respondent). The only controversy relates to the rank which he now holds. A material aspect of his history in the service is that he was enlisted therein in 2009 as Intelligence Officer Four. A development of significance for the purpose of these proceedings is that on the 1<sup>st</sup> of June 2017 he was promoted to a rank of Intelligence Officer One. This elevated status was instrumentalised through a letter wherein he was advised that he has been promoted to the office of Higher Intelligence Officer which commanded a Grade 13 remuneration. In conclusion the latter advised him that the appointment and its corresponding fiscal dimension were to operate from the 1<sup>st</sup> of May 2017. It is important to be noted that the letter was authored by the then Director General – National Security Services, T. Lekhooa.

[6] A subsequent development which immediately precipitated this litigation, is that on the 14<sup>th</sup> August 2017, the applicant received a letter authored by the incumbent Director General P.J. Ralenkoane in which he was informed about the cancellation and nullification of the earlier promotion. Its authorship was said to be

premised upon the provisions of section 10(2) of the National Security Services Act No. 11 of 1998. It was concluded with a word that the status quo ante in which he held a post of Intelligence Officer One is restored.

[7] The consequent issues germane from the stated historical narrative concerns the lawfulness or otherwise of the demotion and nullification of the promotion of the applicant to the status of Intelligence Officer One. The trajectory of this would be whether or not the 1<sup>st</sup> respondent commanded a legal authority to demote the applicant. Appreciably, this would lead to an interrogation of the respective powers of the Director and Minister under section 10 of the National Security Services Act 1998.

[8] Section 10 (1) and (2) represent key provisions for consideration in the determination of justice in this case. The section falls under a subheading, “**appointment, promotion, demotion, transfer and discharge of members**”. This, from the interpretative perspective, signifies a dedication of the section. In **Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics**<sup>2</sup> it was acknowledged that a heading indicates the intention of the Legislature. The learned De Villiers<sup>3</sup> CJ illustrated the point thus:

The heading of different portions of a statute may be referred to for the purpose of determining the sense of any doubtful expression in a section ranged under any particular heading.

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<sup>2</sup> 1911 AD 13

<sup>3</sup> *Ibid* at 24

[9] Section 10 (1) relates to the powers of the Minister in exercising the appointment, promotion, demotion, transfer and discharge of a member. It states so in these terms:

The Minister may, acting in accordance with the advice of the Director General appoint any person as a member or promote, demote, transfer or discharge a member in accordance with this Act.

[10] Section 10(2) circumscribes the powers of the Director in advising the Minister to execute the powers under section 10 (1) by detailing:

In his advice to the Minister concerning appointments, confirmations, promotions and demotions of members, the Director General shall consider the recommendations made by the Staff Board.

[11] In rhythm with section 10(1), the author of the letter of promotion has commenced his letter by accordingly recognizing that the powers to, *inter alia*, promote vest in the Minister. In the same vein, he recognizes that by operation of law he serves in the advisory capacity in that regard. This is demonstrative of the fact that the Minister is a repository of the powers.

[12] On the contrary, the author of the letter which cancels the promotion and annuls it is, from the onset couched as though he exercises the powers in his own right as a Director General. The impression is obviously *ultra vires* his powers under section 10 (2). In **Mona v Lesotho Electricity Corporation**<sup>4</sup> the court set aside the penalty and estimated consumption of the LEC by saying that:

It seems to me therefore that the LEC acted *ultra vires*, unreasonably and in a manner unauthorized by statute when the LEC imposed a penalty and a hefty estimated consumption charge in terms of its letter of 23rd October, 2003. Whatever might have

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<sup>4</sup> (CIV/APN/465/03)(CIV/APN/465/03) [2004] LSHC 51 para 69

been the merits of the disconnection of applicant's electricity supply - as applicant had allegedly committed a criminal offence applicant should have been charged of the offence under Section 42 (2) of the Electricity Act of 1969 so that he could defend himself like other alleged criminals before he is punished.

[13] Intricately, despite the contestation of the application by the respondents, they have conceded to the fact that the 1<sup>st</sup> respondent terminated the promotion of the applicant without having afforded him a natural right to be heard before such a dreadful decision was made against him. Our jurisprudence has for ages entrenched a legal principle that whenever the exercise of powers could impact adversely upon the rights or legitimate expectation of a person such person must be heard first. This salutary approach has been ascribed to biblical teachings and expressions by Gauntlett AJA in **Monaheng Rakhoboso v Simon Rakhoboso**<sup>5</sup> the following manner:

That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an 18<sup>th</sup> century judge to the events in the Garden of Eden.

[14] Moreover, there is a plethora of case law decisions in which the court has repeatedly over emphasized the indispensability of the *audi alteram partem* rule. It was stated in **Commissioner of Police and Another v Manamolela and Others**<sup>6</sup> that:

The legal principles underlying the approach in matters of this kind appear from the statement in this court by **Gauntlett JA** in Matebesi v Director of Immigration and Other<sup>7</sup>, the case of the dismissal of a public servant who had not been granted a prior

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<sup>5</sup> LAC (1995-99) 331

<sup>6</sup> (C of A (CIV) 40A/2014) [2014] LSCA 39 para 15

<sup>7</sup> LAC (1995-1999) 616 at 621 J-622 G

hearing. Although the appellant was unsuccessful on the facts, it was held that the *audi* rule applied in principle to the dismissal of a public servant.

[15] Thus, the acknowledged failure by the 1<sup>st</sup> respondent to have accorded the applicant *audi alteram partem* renders his decision to demote the applicant unlawful and of no legal force and effect.

[16] In the premises, the application is granted as prayed.

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**E.F.M. MAKARA**  
**JUDGE**

**For Applicant** : Adv. Tsénoli instructed by E.M. Sello Attorneys

**For respondents** : Adv. Mahao from Attorney General's Chambers