

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/105/2019

In the Matter Between:-

MOSHOESHOE MOLAPO

APPLICANT

AND

**PS MINISTRY OF COMMUNICATIONS
AND TECHNOLOGY**

1ST RESPONDENT

PS MINISTRY OF PUBLIC SERVICE

2ND RESPONDENT

PUBLIC SERVICE COMMISSION

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

CORAM

:

MOKHESI J

DATE OF HEARING

:

29TH October 2019

DATE OF JUDGMENT

:

12TH December 2019

CASE SUMMARY: *Applicant suing the respondents on the basis of discrimination when his colleagues were upgraded per Circular No. 7 of 2013, to his exclusion – The applicant’s case implicates the provisions of s. 18(2) of the Constitution of Lesotho- Held Applicant failed to prove personal characteristics similar or analogous to his colleagues who were upgraded to his exclusion.*

ANNOTATIONS:

STATUTES: *Constitution of Lesotho*

CASES : Local and South African

Prisloo v Van der Linde 1997 (3) SA 1012 (CC)

*Association of Professional Teachers and Another v
Minister of Education and Others (1995) 16 ILJ 1048 (IC)*

*Timothy Thahane and Others v Specified Offices Defined
Contribution Pension Fund C of a (CIV) NO. 4/2016 (dated
12/05/2017)*

European Union and United Kingdom:

*Carson v United Kingdom Application NO. 42184/05
[2010] ECHR 338*

*Religionsgemeinschaft der Jehovas v Austria Application
NO. 40825/98, (2008)*

*R (RJM) v Secretary of State for Work and Pensions [2008]
UKHL 63; [2009] 1 AC 311*

INSTRUMENT: *The European Convention for the Protection of Human
Rights and Fundamental Freedoms of 1950*

Per Mokhesi J

[1] Introduction

In this application the applicant is seeking relief in the following terms:

1. That it be declared that the exclusion of the Applicant from being upgraded to Grade I is discriminatory.
2. That it be declared that the decision by the 1st and or 2nd RESPONDENT to declare APPLICANT ineligible for upgrading in line with PUBLIC SERVICE CIRCULAR NO. 7 of 2013 is unlawful.
3. That the GRIEVANCE HEARING(S) conducted by the agents of the 1st and or 2nd RESPONDENT be reviewed corrected and or set aside for being irregular and in stark violation of PUBLIC SERVICE ACT read with CODES OF GOOD PRACTICE
4. Consequent upon the grant of PRAYERS 1, 2 and or 3* - APPLICANT be upgraded to GRADE I in terms of PUBLIC SERVICE CIRCULAR NO. 7 of 2013
5. Costs of suit be in the attorney and own client scale in the event of opposition hereof.
6. Granting and/or alternative.

[2] At the hearing of this matter, prayer 3 was abandoned by Attorney Rasekoai. This application is opposed. It is apposite to briefly sketch the factual background to this matter. The applicant is under the employ of the Ministry of Communications, Science and Technology as an Executive Producer of the Lesotho Television since May 2013. Due to anomaly in the grading structure which seemed to be endemic within the Public Service generally, the Principal Secretary for the Ministry of Public Service (PS – Public Service) published Circular Notice No. 7 of 2013. The purpose of this circular was to cure these anomalies. It is worth reproducing the said circular to shed light on its express purpose: (In relevant parts)

“RE: NORMALIZATION OF GRADING FOR POSITIONS FROM MANAGER TO GOVERNMENT SECRETARY LEVELS

It is notified for general information and appropriate action that there is anomaly on the Civil Servants grading structure from Grade H to J whereby some director positions are at grades H and I. In order to rectify this, a revised salary grading (attached) for the affected positions has been developed. The effective date for implementation of this normalization is 1st April 2013.

The affected positions are those at Director and Manager Levels which are currently at Grade I and H respectively. The change will only be effected whereby an incumbent is at head of department or deputy head of department. Ministries are advised to note that some positions have been omitted due to the need to change their nomenclature. In such cases Ministries are to prepare proposals accordingly for consideration by the Ministry of the Public Service.....”

[3] Consequent to the above circular, PS – Public Service on the 20th May issued a savingram specifically addressed to PS – Communications which was worded as follows (in relevant parts).

“VARIATION IN THE 2016/2017 ESTABLISHMENT LIST

Reference is made to your CM/P/28838 and CM/STF/1 dated 16th March and 20th April 2016 respectively.

Authority is granted to upgrade the following positions instead of normalization with effect from 1st April 2016.

Head	Cost Centre	Ref	Job title/grade	Est.	Remarks
10	03	5	Head of Programmes/H	1	Upgraded from grade H – I
		6	Head of News/H	1	Upgraded from grade H to I

44	Head of News /H	1	Upgraded from grade H-I
54	Head of News /H	1	Upgraded from grade H to I
50	Director of Languages and Culture/I	1	Upgraded from grade I to J
	Total	5	

[4] It is not clear why PS – Public Service’s directive to the Ministry of Communications was specifically to “upgrade.... Instead of normalization...”, the significance of this is not apparent to me, however what is clear is that the savingram was aimed at carrying out the curative directive of PS – Public Service, as regard the anomaly in the grading structure within the Ministry of Communications, and this is confirmed by the applicant in his founding affidavit (at para. 5.3) of his founding affidavit where he avers that:

“The Court will further observe a savingram attached to the circular which was an endeavor aimed at implementing the directive in the Ministry to which I am employed which is dated 20th May 2016 – more than three years after the directive understandably due to the fact that the implementation of this task is clearly a progressive venture.”

[5] It is common cause that as evidence of the anomaly adverted to in the circular, the applicant was graded similarly with his supervisor, one Ntsane Molemohi. What precipitated this application is that in implementing the directive of the circular, per savingram alluded to above, the colleagues of the applicant, inclusive of his supervisor, who were similarly graded as himself, were upgraded to higher grades than the applicant. His argument in relation to these upgrades is couched as follows (at para. 6.3 of his Founding Affidavit)

“6.3 Following the publication of the circular, the management of BROADCASTING then took all my colleagues in the said department who were supervised by DIRECTORS for recommendation of normalization to the 2nd RESPONDENT in line with the said circular. The said colleagues are KENEUOE PHITS’ANE, KABELO MOSOTHOANE, NTSANE MOLEMOHI and ‘MAPITSO TS’IU. All of the aforesaid colleagues were similarly graded as myself and even our functions were similarly structured. I then learnt I was not included in the list in spite of the fact that I am similarly graded and my functions were similarly structured as theirs. I hold and still hold the strong position that the circular was and is of equal application to me.”

[6] It is common cause further that the applicant had sought internal resolution to what he perceived to be a discriminatory treatment meted out on him by the corridors of power at Ministry of Communications. He even sought help of the Ombudsman, but to no avail, as the Ministry of Communications was steadfast in its position that the applicant did not qualify for an upgrade per the Circular.

[7] In reacting to the applicant’s averments above, PS – Communications deposed to the answering affidavit in terms of which she laid out the organogram at the National Broadcasting Services (LNBS), and explained why the individuals the applicant claims to be discriminated in relation to were considered for upgrading. This is how she puts it at para. 6 of her Answering Affidavit:

“AD PARA 6

5.1.....

5.1.1

It is worth of note that there are three sections under Lesotho National Broadcasting Services (LNBS) headed by the Head of sections who are Directors. The Directors are deputized by the Managers. Keneiloe Phitsane, Ntsane Molemohi and ‘Mapitso Tsiu are Managers of the respective sections. To be specific Keneiloe Phitsane is head of News Radio Lesotho, Ntsane Molemohi head of News Lesotho Television, whereas ‘Mapitso Tsiu is head

of News Ultimate Radio. They are answerable to directors who are head of sections.

5.1.2

Applicant is an Executive Producer and answerable to Head of News Lesotho Television who is Ntsane Molemohi.

5.1.3

It is also worth Noting that Kabelo Mosothoane is Head of Programmes Radio Lesotho and answerable to the Director like all other Heads.

5.2

Once again, I wish to explain to the Honourable Court that although Applicant was similarly graded with his above colleagues they were still the Heads of News and Programmes in different sections. Applicant knew and he confirms that he was answerable to Ntsane Molemohi who is his immediate supervisor but due to the anomaly were in the same grade. Ntsane Molemohi was upgraded to grade I on 01 April 2016 following normalization of Head of Department and deputies made pursuant to the Circular NO. 7, 2013.

5.2.1

Coming to the issue of Applicant's functions or work description I wish to state that what makes the difference between Applicant and his colleagues above is the level of expected performance."

[8] I now turn to consider whether the applicant has laid out a basis for unconstitutional discrimination. The starting point in this regard are the provisions of section 18 of the Constitution. Section 18 provides as follows:

"18 (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any other person acting by virtue of any written law *or in the performance of the functions of any public office or any public authority.*

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or **other status** whereby persons of one such description are subjected to disabilities or restraints to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*

(4) subsection (1) shall not apply to any law to the extent that the law makes provision-

(a) with respect to persons who are not citizens of Lesotho; or

(b) for the application, in the case of persons of any such description is as mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, dissolution of property on death or other like matters which is the personal law of persons of that description; or

(c) for the application of the customary law of Lesotho with respect to the matter in the case of persons who, under that law, are subject to that law; or

(d) for the appropriation of public revenues or other public funds; or

(e) whereby persons of any description as is mentioned in subsection (3) may be made subject to any disability or restriction or may be accorded privilege or advantage which, having regard to its nature and to special circumstances pertaining those persons or to persons of any such description, is reasonably justifiable in a democratic society.

Nothing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.

(5) nothing contained any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards of qualifications (not being standards of qualifications specifically relating to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes.

(6) subsection (2) shall not apply to anything which is expressly or by implication authorised to be done by any such provision of law as in referred to in subsection (4) or (5).

(7) No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect to access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) the provisions of this section shall be without prejudice to the generality of section 19 of this constitution.”(emphasis added)

[9] It will readily be observed that the applicant is not relying on discrimination which flows from the law, but rather on discriminatory treatment by his superiors “in the performance of the functions of any public office or any public authority” as provided under section 18 (2) of the Constitution. He is not challenging the unconstitutionality of Public Service Circular NO. 7 of 2013. Section 18 (3) the **Constitution** prohibits differentiation based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. In *casu*, the applicant is not relying on the enumerated proscribed differentiation, but rather on '**other status**' as provided for under s.18(3) of the Constitution. S.18 (3) proscribes, other than the enumerated instances, differentiating people based on 'other status' which calls for such people because of similarity of their circumstances be treated equally.

[10] It has to be mentioned that treating people differently and even more favourably is not *per se* unconstitutional as long as it is not based on the enumerated instances or for reasons attributable to status. There are plethora of legitimate reasons for differential treatment of people. In ***Prisloo v Van der linde 1997 (3) SA 1012 (CC) at para. 24.***

“It must be accepted that, in order to govern a modern country efficiently and to harmonize the interests of all its people for their common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation....”

[11] In the context of employment, various reasons may exist for differentiating between employees, such as where the inherent requirements of work demand so (***Association of Professional Teachers and Another v Minister of Education and Others (1995) 16 ILJ 1048 (IC) 1081 A – C.***

[12] Meaning of the phrase '**Other status**'

The resolution of this case turns on whether the applicant has proved the status on the basis of which it can be said that he was unconstitutionally differentiated. The phrase “other status” was interpreted in ***Timothy Thahane and Others v Specified***

Offices Defined Contribution Pension Fund C of A (CIV) NO. 4/2016 (dated 12/05/2017) at para. 22, thus:

“...Status itself is not a prohibited ground of discrimination and that in the context, ‘or other Status’ means an attribute related to status that is equivalent or analogous to, but not the same as the specific grounds mentioned. These might, for example, be marital status or sexual orientation.”

[13] In view of the fact that s.18 (3) is couched similarly as Article 14 of the **European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950**, interpretative jurisprudence developed around it is highly persuasive to this court. The said Article 14 provides that:

“The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*.”(emphasis provided)

[14] As can be seen, the prescription against discrimination in Article 14 (above) is the same as in section 18(3) of the Constitution. In Europe, the concept “*Other Status*” is said to relate to “personal characteristics” and not just any discrimination, thus, in **Carson v United Kingdom Application NO. 42184/05 [2010] ECHR 338** at para. 61, the following was said;

“61. The Court has established in its case – law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (citations omitted). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations” (citations omitted). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a reasonable relationship of proportionality between means employed and the aim sought to be realized...”

[15] Lord Walker's comments in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 at para. 5, likening personal characteristics implicated in the expression 'other status' to concentric circles, are enlightening;

"5. The other point on which I would comment is the expression 'personal characteristic' used by the European Court of Human Rights in *Kjeldsen, Busk, Madsen and Paderson v Denmark* (1976) 1 EHRR 711, and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality; gender, sexual orientation, pigmentation of skin, hair and eyes, religion and politics may be almost innate (depending on person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts), but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within Article 14 (Lord Neuberger instances Military Status, residence or domicile, and past employment in the KGB). Like him, I would include homeless as falling within that range, whether or not it is regarded as a matter of choice... The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify..."

[16] **Justification:**

Any distinction which is found *prima facie* to violate section 18 by subjecting persons of similar status to disabilities or restrictions or according privileges or advantages to which persons of another such description are subject, is tested

under the proportionality test which seeks to determine if an objective and reasonable justification exist for distinction, put differently, whether there is a reasonable relational connection between the means employed and the legitimate aim sought to be attained (*Relionsgemeinschaft der Jehovas v Austria Application NO. 40825/98, (2008), [87]*), see also *Carson* above at para. 61.

[17] Reverting back to the facts of this case it is no doubt that the applicant is a manager, and so is his supervisor and other individuals, such as Keneiloe Phitsane, 'Mapitso Tsiu, and Kabelo Mosothoana. It is also an undeniable fact that prior to the upgrading of the applicant's supervisor the latter occupied the same grade as the applicant. What stands for determination is whether the upgrading of the above-mentioned individuals to the exclusion of the applicant *prima facie* violate section 18 (3) of the Constitution. I have already determined that the applicant together with above-mentioned individuals occupied managerial positions, but did they occupy analogous or similar positions despite being graded similarly?, put differently, did the applicant prove personal characteristic which places him in the similarity bracket with his other colleagues whose upgrading he is aggrieved about? The answer to this question should be in the negative. As much as the applicant and the upgraded individuals were graded similarly, their positions were not analogous, because in terms of circular No. 7 of 2013 people who were eligible to benefit from upward adjustment were those who are "head of department level or deputise head of department...", and therefore, the personal characteristic which the applicant must establish is whether he heads a department or deputises the head of department. The applicant did not occupy any of these positions, and therefore, was ineligible for upgrading. For the applicant to argue for his upgrading simply because he was previously similarly graded with these other individuals who either deputised or headed department whilst himself, admittedly, held neither positions, is disingenuous.

[18] It is uncontroverted that Keneiloe Phitsane, 'Mapitso Ratsiu and Kabelo Mosothoane occupy positions senior to that of the applicant within various departments of the Lesotho National Broadcasting Service (LNBS) and do not fall

within the applicant's line of promotion. The applicant reports directly to one Ntsane Molemohi as his supervisor. The 1st respondent's justification for excluding the applicant for upgrade, is objective and reasonable; prior to upgrading, perhaps at a risk of being repetitious, the reason which necessitated Circular No. 7 of 2013 was an anomaly in terms of which managers who deputized head of department or headed departments were not graded properly. This much is admitted by the applicant. The applicant was graded similarly with his supervisor Ntsane Molemohi, and therefore, to remedy this anomaly, the applicant's supervisor had to be adjusted upward in terms of grading. It would be perpetuating the same anomaly for the applicant to be graded similarly as his supervisor. In my view there is a reasonable relational connection between the upward adjustment of other individuals to the exclusion of the applicant and the aim sought to be achieved. The act of excluding the applicant therefore, passes proportionality muster.

[19] In the result, the following order is made:

- a) The application is dismissed with costs.

MOKHESI J

FOR THE APPLICANT : ATTORNEY M. RASEKOAI FROM PHOOFOLO ASSOCIATES INC.

FOR THE RESPONDENTS: ADV. T. LEBAKENG FROM ATTORNEY GENERAL'S CHAMBERS

