

**IN THE CONSTITUTIONAL COURT OF LESOTHO**  
**CONSTITUTIONAL CASE N0.12/2018**

In the matter between:

MAKHAPHLISO JULIA TSUPANE	1 <sup>ST</sup> APPLICANT
MASEKETSO LEOKAOKE	2 <sup>ND</sup> APPLICANT
‘MALEKHEMA MALAKIA	3 <sup>RD</sup> APPLICANT
‘MALEKOMOLA LEKOMOLA	4 <sup>TH</sup> APPLICANT
‘MASELIA MARABE	5 <sup>TH</sup> APPLICANT
‘MAKOENA MAKARA	6 <sup>TH</sup> APPLICANT
REBECCA LEQHAOE	7 <sup>TH</sup> APPLICANT
‘MALAHLIWE MOKOMA	8 <sup>TH</sup> APPLICANT
RETHABILE SEMATLANE	9 <sup>TH</sup> APPLICANT
‘MAJONASE MOKHAKALA	10 <sup>TH</sup> APPLICANT
‘MANAPO MPHUTLANE	11 <sup>TH</sup> APPLICANT
MOIPONE BULANE	12 <sup>TH</sup> APPLICANT
‘MALEBAKAE MALIEHE	13 <sup>TH</sup> APPLICANT
LISEMELO SEKONYELA	14 <sup>TH</sup> APPLICANT
‘MANTOA KABI	15 <sup>TH</sup> APPLICANT
MANAMANE NAMANE	16 <sup>TH</sup> APPLICANT

And

THE PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE	1 <sup>ST</sup> RESPONDENT
THE ACCOUNTANT GENERAL	2 <sup>ND</sup> RESPONDENT

**Coram:MAHASE A.C.J**

**NOMNGCONGO J.**

**MOKHESI J.**

**SUMMARY:**

HEARD : 13 December 2019

DELIVERED: 5 March 2020

**ANNOTATIONS**

The Constitution of Lesotho Section 18 (2) and (3) Subsection 3  
Public Service Circular N0.4 of 2007

**CITED CASES:**

Prinsloo v Vander Lunde 1997 (3) S.A. 1012

Tsoeu v Minister of Labour and Employment – 2007 LSHC 141

Molefi Kome & ORS v Ministry of Public Service CIV/APN/190/10 AND  
C of A (civ) N0.44/2013

**JUDGMENT**

Nomngcongo J.

[1] The applicants are employed by the Government of Lesotho as what are called Executive Secretaries. They are attached to the offices of the Attorney General and the Judges of the High Court and the Court of Appeal. Alongside the position of Executive Secretary there exists what

are called Ministerial Secretaries. These cadres shared the same grading in terms of salary and benefits. All that suddenly changed when on the 11<sup>th</sup> April 2007 the Ministry of Public Service (the 1<sup>st</sup> Respondent) issued a circular titled: RE: **Offices of the Ministers and Assistant Ministers Privileges or Personal Staff**. The upshot of this circular was to upgrade the position of Ministerial Secretaries. The Executive Secretaries were not included in the up-grading. They charge that their exclusion is unconstitutional as it violates the provisions of sections 18 and 19 of the Constitution of Lesotho. They seek a declaration to the effect. They want the 1<sup>st</sup> Respondent to forthwith upgrade their position to that equal to Ministerial Secretary with effect from 2<sup>nd</sup> March 2007 being the date when the ministerial secretaries upgrading came into force and that as I understand them, the difference be paid in arrear from that date. They allege that they are being discriminated against because the functions of Ministerial Secretaries are the same as those of the Executive Secretaries of the Judges, Attorney General and that the entry requirements are also the same.

- [2] The respondents opposed this application and an answering affidavit to their founding affidavit was deposed to by one Tseliso Lesenya who describes himself as the Principal Secretary (1<sup>st</sup> Respondent) of the Ministry of Public Service. He deposes that as such he is the authority

taking and implementing all decisions taken by the Ministry. He further note that applicants are Public Officers in terms of the Laws of Lesotho and that in particular the deponent, Makhahliso Julia Tsupane is attached to the office of the Attorney General and the rest of her co-applicants are attached to the offices of the High Court of Lesotho and of the Court of Appeal. Mr Lesenya says that he vehemently denies that Executive Secretaries perform the same duties as those of the Ministerial Secretaries. He says “there are main duties which spell out clearcut their duties and that is where there are main differences between duties of the Executive Secretaries and those of the Ministerial Secretaries. He attaches in that regards the Job description of both cadres. The job descriptions of each cadre according to the annexures can be classified as follows:

**As for Executive Secretaries:-** Main Duties : 1. Production and distribution of documents. 2. Mail processing and records management. 3. Office Administration. 4. Organization of Official Meetings and control, and Entertainment. 5. Arrangement of Official trips and visits. 6. Office Security. 7. Supervision of staff.

**As for Ministerial Secretaries:-** Main Duties: 1. Mail processing and Records management. 3. Organization of Official Meetings.  
4. Organization of Official trips and visas. 5. Office Security.

- [3] A glimpse at these duties shows that each is a prototype of the other except that Executive secretaries have added responsibility of supervision of staff which ministerial secretaries do not have, according to the respondents' own affidavit. There is no differences in the language used. To describe the functions of these secretaries. It is almost identical. There may be differences in detail only to reflect the different authorities that these secretaries are attached to and these are inconsequential.
- [4] Brought into issue by the deponent herself as indicating what he refers, to as among main differences is the question of entry qualifications into the cadres. He says “ **Executive Secretaries must have diploma (sic) in Secretarial Studies plus ten (10) years work experience while Ministerial Secretaries may show typing production and knowledge of Secretarial duties. They must be nominated by the Minister concerned.**” Presumably then they, don't even have to have the professional qualifications or the vast experience required of Executive Secretaries; they need only have knowledge of typing and secretarial duties. The deponent concludes on this issue by saying that “**The entry requirements are drastically different and the position cannot be said to be the same**”
- [5] In my view they may well be different but only to the extent that Executive Secretaries are required to have more rigorous entry qualifications than

Ministerial Secretaries who need only be nominated by the Minister with less qualification and not much by way of experience. How that inures to their benefit so as to entitle them to a higher grade than executive secretaries eludes me.

- [6] In the same breadth all the other duties and functions of the different cadres of secretaries under consideration are objectively, the same except that the Principal Secretary Mr Lesenya extols the functions of Ministerial Secretaries in the same measure that he trivializes those of Executive Secretaries. Examples abound. Such is his adulation for the former that he describes such mundane tasks as instructing messengers and dealing with Ministers' personal aids as **“wide ranging and very broad and dealing with multiple people.”** By way of a grotesque comparison he says almost dismissively that, Executive Secretaries only deal with judges and their scope is limited. Mr Lesenya alleges that key amongst the duties of the Ministerial Secretary is to use, and he places emphasis on this, his/her utmost exertions to promote the interest of the office of the Minister and the Public Service, a duty which to use his words ... ***“is not at all done by the Executive Secretaries.”*** If by this the Principal Secretary means that Executive Secretaries are not expected to put as much effort in the performance of their duties as Ministerial Secretaries, the statement only has to be said to show how untenable it is. It is a truism that every Public

Officer is required to put his shoulder to the wheel in equal measure. To suggest otherwise is bizarre especially coming from a Principal Secretary of the Public Service Ministry.

[7] I conclude that it is demonstrable that the functions of Executive and Ministerial Secretaries are the same and this is underscored by the fact that all along they received equal, treatment by the Ministry of Public Service until the advent of **Circular N0.4 of 2007**. How and when it suddenly dawned upon the Public Service Ministry that Ministerial Secretaries were required to use their “*utmost exertions*” unlike Executive Secretaries is incomprehensible.

[8] The respondents claim that this is not discrimination but mere differentiation which is permissible. They rely *inter alia* on the case of **Prinsloo v Van der Lunde** 1997 (3) S.A. 1012, which deals with differentiation and distinguishes between differentiation involving fair discrimination and differentiation involving unfair discrimination. In that the case it is stated at 1024

*“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences’ that serve no legitimate governmental*

*purpose, for that would be inconsistent with the rule of law and the fundamental premises of the State.”*

- [9] The Constitution of Lesotho of course proscribes discrimination by any person acting by virtue of any written law or in the performance of the functions of any public office or any authority (**Section 18(2)**). **Subsection (3)** thereof, describes the expression discriminatory as meaning

*“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 another 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”.*

- [10] I have underlined “other status” because it covers other descriptions beyond colour sex etc. It was held in **Tsoeu V Minister of Labour and Employment – 2007 LSHC 141** that “.....

...the definition itself contains the phrase *“other status which in my opinion, was meant to cover other criteria not listed therein [sec. 18(3)] or which might not have been*



*foreseeable at the time the definition was given*". Status is defined in the Concise Oxford English Dictionary as meaning relative standing or professional standing. The applicants and Ministerial Secretary share of the same status i.e. they are secretaries albeit attached to different offices. They perform the same functions not to mention that Executive secretaries have the additional responsibility of supervising subordinate staff, conducting induction courses for them, identifying their training as well as appraising their performance as shown in their job description annexed to the affidavit of **Mr Tseliso Lesenya**. Ministerial Secretaries have nevertheless been accorded the privilege and advantage of a higher grade than Executive secretaries. This is *prima facie* discriminatory and therefore breach of **sec. 18 (2) and (3) of the Constitution** which proscribe discrimination.

[11] The respondents then rather feebly plead that the applicants are on permanent contract as opposed to ministerial secretaries. That if is course irrelevant because what is remunerated is the service rendered and its quality and not the duration of the contract.

[12] Then we are told that this was mere differentiation and not discrimination. But to pass muster differentiation must satisfy the conditions set out on **Prinsloo v Van der Linden** (Supra), That the authority concerned must

act in a rational manner, it should not set in an arbitrary manner and must not manifest a naked preference that seeks no legitimate governmental purpose.

[13] In *casu* the applicants were remunerated the same as Ministerial Secretaries when out of the blue emerged **Circular N0.4 of 2007** which upgraded Ministerial Secretaries to the exclusion of Executive Secretaries. No reasons apparently were given for this volte-face. The spurious justifications for the action advanced by the principal secretary are nothing but a manifestation of a naked preference for things ministerial. This is compounded by the fact that this Court (per Monapathi J.) and the Court of Appeal have had occasion to visit Circular N0.4. The respondents were the same as the respondents of to-day. This court found that the Circular unfairly discriminated against those that it excluded and was in breach of their Constitutional rights not to be discriminated against and to be treated equally before the law. This was confirmed by the Court of Appeal and the successful applicants were given arrear salaries paid with retrospective effect (see **MOLEFI KOME & ORS V MINISTRY OF PUBLIC SERVICE CIV/APN/190/10 and C of A (CIV) N0.44/2013**).

[14] This application succeeds.

**Order:**

1. The Ministry of Public Service Circular N0.4 is declared to be unconstitutional and discriminatory of Applicants.

2. The 1<sup>st</sup> Respondent is ordered forthwith to up-grade the Applicants' position to Grade G and with effect from the 2<sup>nd</sup> March 2007.
3. The Respondents are ordered to pay Applicants' salary arrears within (3) months of the granting of this order.
4. Costs of suit.

---

**T.NOMNGCONGO J.**

**I agree**

---

**M. MAHASE A.C.J**

**Iagree**

---

**M. MOKHESI J.**

For Applicant : Adv Letompa

For Respondents :Adv Nthontho