

**IN THE HIGH COURT OF LESOTHO**

**CC/002/2020**

**HELD AT MASERU**

In the Matter Between:-

**LEBOHANG RAMOHLANKA**

**1<sup>ST</sup> APPLICANT**

**'MAPITSO PANYANE**

**2<sup>ND</sup> APPLICANT**

**MAJAKATHATA THAKHISI**

**3<sup>RD</sup> APPLICANT**

**'MAPASEKA KOLOTSANE**

**4<sup>TH</sup> APPLICANT**

**'MAPULUMO MOSISILI**

**5<sup>TH</sup> APPLICANT**

**LEBESA MALOI**

**6<sup>TH</sup> APPLICANT**

AND

**PRIME MINISTER**

**1<sup>ST</sup> RESPONDENT**

**MINISTER OF FINANCE**

**2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY OF FINANCE**

**3<sup>RD</sup> RESPONDENT**

**PRINCIPAL OFFICER OF SPECIFIED OFFICES**

**DEFINED CONTRIBUTION PENSION FUND**

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

**SPECIFIED OFFICES DEFINED PENSION**

**FUND**

**5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL**

**6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

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**CORAM** : **MONAPATHI J**  
**MOKHESI J**  
**BANYANE AJ**

**DATE OF HEARING** : **17<sup>th</sup> MARCH 2020**

**DATE OF JUDGMENT** : **2<sup>nd</sup> JULY 2020**

**Summary:** ***Constitutional law-** The applicants who are the former Government Secretary, and Principal Secretaries in various Government ministries are suing Government for discrimination, having been made to pay back their loans after similar-circumstanced parliamentarians were absolved from paying back theirs-Held, this constituted discrimination based on 'other status'.*

**Annotations** :

**CASES** :

*Lesotho National General Insurance v Nkuebe LAC (2000-2004)877*

*Prinsloo v Van der Linde and Another 1997 (3) SA 1012*

*Thahane and Others v Specified Offices Defined Contribution Pension Fund and Others (C of A (CIV) 4/2016) [2017] LSCA 10 (12 May 2017)*

*Shabe Tsela and Others v Principal Secretary Ministry of Justice and Others CIV/T/53/15 (unreported) dated 05<sup>th</sup> March 2020*

## **Mokhesi J (MONAPATHI and BANYANE JJ CONCURRING)**

**[1]** The applicants who are former senior state functionaries, had instituted these proceedings seeking relief in the following terms:

1.

a) Declaring as unconstitutional the decision of the Government of Lesotho, made through and by the 2<sup>nd</sup> respondent to recover from the applicants the amount of money it (Government) had paid to Lesotho Bank or Nedbank on behalf of the applicants, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

b) Declaring as unconstitutional the non-payment to the applicants of their gratuity by the Government of Lesotho as represented by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents through the agency of the 4<sup>th</sup> and 5<sup>th</sup> respondents having vacated office as respectively Government Secretary and Principal Secretaries.

c) Declaring as unconstitutional the utilization or diversion by the Government of Lesotho of the applicants' gratuity, through the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, including through the agency of the 4<sup>th</sup> and 5<sup>th</sup> respondents, for purpose of recovering from the applicants amount of money it (Government) had paid to Lesotho Bank or Nedbank Lesotho on behalf of the applicants, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

d) Reviewing and setting aside as Government of Lesotho, made through and by the 2<sup>nd</sup> respondent, to recover from the applicants the amount of money it (Government) had paid to Lesotho Bank or Nedbank

Lesotho on behalf of the applicants, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

e) Reviewing and setting aside as unconstitutional the non-payment to the applicants of their gratuity by the Government of Lesotho as represented by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents through the agency of the 4<sup>th</sup> and 5<sup>th</sup> respondents, consequent upon the respondents, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

f) Reviewing and setting aside as unconstitutional the utilization or diversion by the Government of Lesotho of the applicants' gratuity, through the 3<sup>rd</sup> and 4<sup>th</sup> respondents, including through the agency of the 4<sup>th</sup> and 5<sup>th</sup> respondents, for the purpose of recovering from the applicants the amount of money it (Government) had paid Lesotho on behalf of the applicants, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

g) Directing the 2<sup>nd</sup> respondent to provide funds, within thirty (30) days of the making of this order, for the purpose of payment to the applicants by the 4<sup>th</sup> and 5<sup>th</sup> respondents of the gratuity of the applicants, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

h) Directing the 3<sup>rd</sup> respondent to transfer to the 4<sup>th</sup> and 5<sup>th</sup> respondents, within seven (7) days of compliance with paragraph 1(g) of this Order, the funds provided pursuant to paragraph 1(g) of this Order.

- i) Costs of suit only in the event of opposition, jointly and severally, the one paying, the others to be absolved, such costs to be *de bonis propriis* at attorney and client scale against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**[2]** This application is unopposed. However, a brief factual background should suffice to shed light on what precipitated it. All applicants were engaged in terms of a local contract in 2015 durable for three years but with a further condition providing for its termination upon the life of Government coming to an end. In short, because they were political appointees, even though their contracts were provided to endure for three years, they terminate automatically when the political life of their appointing authority comes to an end. All the applicants' contracts contained standard terms which provided that;(for purposes of this case);

- a) The incumbent shall be eligible to take an interest free loan of up to M500,000.00 for which the Government of Lesotho will act as a guarantor.
- b) The contract of the person engaged (ie the applicants) shall automatically terminate before its expiry if the tenure of office of Government which appointed him or her came to an end
- c) That in the event Government came to an end before its five-year term, the applicants would be entitled to tax free gratuity at the rate of 25% at the end of every two years of service or prorated to the

time severed if she/he leave office as stipulated in the Specified Offices Defined Contribution Pension Fund Act 2011 as amended.

The applicants were not the only beneficiaries of the government-guaranteed loan facility, the parliamentarians were beneficiaries as well.

**[3]** As fate would have it the life of Government which appointed the applicants came to an end following the passing of a successful motion of no confidence in the Government of the then Prime Minister, Dr. Mosisili, in 2017. After the dissolution of Parliament, general elections were called and held, and in its wake as is always the case, there were casualties. Not only were the applicants some of the casualties of this premature termination of the Ninth Parliament life, but some Parliamentarians suffered the same fate as well, as the incoming Government was now comprised of parties which succeeded in constitutionally toppling Dr. Mosisili's government. So, naturally, the applicants together with former members of Parliament who could not be elected back into the National Assembly found themselves in a difficulty of having to keep up with making repayments on their loans, because they were without the means to do so as they were jobless.

**[4]** In the aftermath of premature end to the Ninth Parliament's life, the commercial banks which lent members of the National Assembly and senior political functionaries of Government, called on the guarantees, and as a result, the Government had to settle the outstanding balances on behalf of the applicants and members of the National Assembly. In respect of the applicants, the new incumbent of the office of the Principal Secretary, Ministry of Finance, wrote a letter to the Principal Officer, Public Officers' Defined Contributory Pension Fund, on 25<sup>th</sup> January 2018, couched as follows: (in relevant parts)

"Dear Sir

#### GUARANTEED LOANS TO FORMER PRINCIPAL SECRETARIES

The Government of Lesotho guaranteed personal loans for the former Principal Secretaries (PSs). The employment contracts of the PSs were terminated in September 2017. Standard Lesotho Bank and Nedbank Lesotho called the guarantees and government to settle the outstanding balances on behalf of PSs.

The government has decided that the amounts settled on behalf of PSs be recovered through their gratuities. You are therefore, kindly requested to transfer the gratuities of the former PSs as per attached schedule to the following bank details and please send proof of payment to the Ministry of Finance.

.....

.....

Yours faithfully,

SIGNED

Nthoateng Lebona (MS)

Principal Secretary "

**[5]** Consequent to this letter, the gratuities which were due to the applicants in terms of their contracts were dealt with as directed by the above letter. It must, however, be mentioned that unreturned *former* members of Parliament and the returned members of Parliament were treated differently by the government; as per the decision of the 2<sup>nd</sup> respondent (Minister of Finance) after their debts were settled a decision was made not to recover from these individuals the amount settled with the commercial banks on their behalf, and this conduct is what precipitated this application for the relief outlined in the beginning of this judgment. Basically, the gravamen of the applicants' dissatisfaction with the government's conduct is that it violates the provisions of section 18 of the Constitution as it unconstitutionally discriminates them as against current and former members of the National Assembly who are similarly circumstanced as themselves.

**[6] The law**

Proscription against discrimination is found under section 18 of the Constitution. It provides (in relevant parts);

"18(1) Subject to the provisions of subsection (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 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 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 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 "*(emphasis provided)*".

**[7]** When interpreting the Constitution, the courts are enjoined by constitutional jurisprudence to adopt a purposive interpretation aimed at protecting the values and interests which the Constitution meant protect (***Lesotho National General Insurance v Nkuebe LAC (2000 – 2004)877 at 882 H – I***). Section 18 (2) prohibits any person from treating in a discriminatory manner any person while acting in the performance of the functions of any public office or any public authority. It is the applicants' case that the 2<sup>nd</sup>

respondent's decision to recoup monies paid on behalf of the applicants to the banks while at the same time deciding not pursue former and current parliamentarians who benefitted from the same scheme, is a conduct which runs counter to section 18 of the Constitution. In short, the basis of the applicants' case is on the conduct of the public functionary as against the law.

**[8]** Under section 18 (3), it is without doubt that not every differentiation is per se discriminatory, put differently, the notion of differential treatment or distinction is not always antithetical to the constitutional injunction against discrimination. There are various reasons in a democratic society which necessitate treating people differently without falling foul of proscription against discrimination. This important observation was made by Didcott J (as he then was) in ***Prinsloo v Van der Linde and Another 1997 (3) SA 1012 at 1033 F – H***, where he said:

“Mere differentiation can never amount, in itself and on its own, to discrimination or unequal treatment in the constitutional sense. The law differentiates between categories of people on innumerable score which sound unobjectionable and may often be unavoidable. A few examples that spring to mind straight away are their levels of income at which the rate of tax assessed on that is fixed, their ages when or the length of their employment before pensions become payable to them, and the criteria for their entitlement to the benefit of social welfare. What surely counts at least in those and all other instances of differentiation is always

how rational in its basis, nature, scope and objectives the particular one appears to be, and sometimes how fair it looks in those respects....”

This reality is recognized under section 18 (5) of the Constitution where it provides that any differentiation in the law regarding the standard of qualification required for employment in the public service, disciplined forces, any office in the service of a local government authority or in any private setting established by law for public purpose, will not be regarded as discriminatory, unless the distinction or differentiation in qualifications relates to proscribed innumeration grounds under section 18 (3).

**[9]** What therefore, amounts to discrimination under section 18 (3) is differentiation in treatment of different people on the basis of their race, colour, sex, language, religion, political and 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. Any differentiation based on the tabulated proscriptions is *per se* discriminatory, however, the applicants’ case is not based on discrimination on the enumerated grounds, but rather on ‘*other status*’. It needs to be said from the onset that 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." (***Thahane and Others v Specified Offices Defined Contribution Pension Fund and Others (C of A (CIV) 4/2016) [2017] LSCA 10 para. 22 (12 May 2017)***).

[10] As to what the words 'other status' means, in ***Shabe Tsela and Others v Principal Secretary Ministry of Justice and Others CIV/T/53/15 (unreported) dated 05<sup>th</sup> March 2020***, I had a second occasion to interpret these words, and I alluded to the fact that due to the fact that s.18(3) is couched similarly as Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedom of 1950, an interpretative jurisprudence developed around these words is highly persuasive to the courts in this jurisdiction. At paras. 12 – 14 I made the following observations:

"[12] I am adverting to Article 14 because the explanation of the Apex Court in ***Thahane***, of what constitutes 'other status', at first blush, might give an impression that the concept was or should be so restrictively interpreted. I think the Court was merely giving an example of 'other status' rather than espousing a restrictive interpretation of same.

[13] Given what I said above, that section 18 is modelled on the Article 14, the purview of the phrase "other status" as it emerges from the

interpretative process of the European Court of Justice (ECJ) would seem to encompass almost any distinction, but of course with the qualification that the distinction or differentiation must be based on personal characteristics. ***Carson v United Kingdom, Application NO. 42184/05 [2010] ECHR*** 338 at para. 61.

'61. The court has established in its case law that only differences in treatment based on identifiable characteristic, or status, are capable of amounting to discrimination within the meaning of Article 14 (citation 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 (citation omitted). Such a difference in treatment is discriminatory if it has no objective and reasonable justification.....'

[14] A wide conception of 'personal characteristics' is therefore enjoined. Lord Walker, in ***R(RJM) v Secretary of State for Work and Pensions [2008] UKHL 63; [2009] 1 AC*** 311 at para. 5 provided a meaningful illustration as to what amounts to 'status' or 'personal characteristics' which should justify review under Article 14, said the following:

"'Personal characteristics' is not a precise expression and to my mind a binary approach to its meaning is unhelpful. 'Personal characteristics' are like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with individual's personality', gender, sexual or intention, 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 still come within Article 14 (Lord Neuberger instances military status, residence or domicile, and past employment on the KGB). Like him, I would include homeless as falling within that range, whether or not it is regarded as matter of choice... The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive where discrimination is particularly difficult to justify.' "

**[11]** It is common cause that members of Parliament belonged to Class A and Principal Secretaries together with Senior State functionaries, in Class B. The question that needs to be answered is whether despite this categorization, the individuals in both classes were similarly circumstanced. The answer to this question should be in the affirmative: Both members of Parliament and the applicants were beneficiaries of the government – guaranteed loan facility, but the applicants were not extended the same benefit as parliamentarians merely on the basis of their status as non-parliamentarians. This, in my considered view is the status this court should work on the basis thereof in seeking to answer the question whether there was an unconstitutional

differentiation on the basis of *status*. I turn now to determine whether having regard to the conduct of the Minister of Finance (2<sup>nd</sup> respondent) in absolving members of Parliament from paying back what the government had paid on their behalf, while at the same initiating and implementing measures to recoup the benefits which accrued to the applicants, offended section 18 (2) read with (3). It needs to be recalled that in this matter the court does not have the benefit of the respondents' response towards this application. Given this conundrum, the decision of this case will be based solely on the applicants' case as made out in their founding affidavit, the essence of which has already been captured when I narrated the factual background to this application. The manifestation of the 2<sup>nd</sup> respondent's conduct in treating similarly circumstanced persons was when through the agency of the 3<sup>rd</sup> respondent (PS Ministry of Finance) instructed the 4<sup>th</sup> respondent (Principal Officer Pension Fund) to transfer the gratuities which were due to the applicants, and instruction was actually effected. However, not the same fiscal prudence and zealousness was extended to affect former and current members of Parliament who were similarly circumstanced as the applicants, and to my mind, this conduct was unconstitutionally discriminatory as it was based on the status of the applicants as non-parliamentarians.

**[12]** In the result the following order is made:

1. a) It is declared that the decision of the Government of Lesotho, made through and by the 2<sup>nd</sup> respondent, to recover from the applicants the amount of money it (Government) had paid to Standard Lesotho Bank or Nedbank Lesotho on behalf of the applicants, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries, unconstitutional.

b) The 2<sup>nd</sup> respondent is directed to provide funds, within (30) days of the making of this order, for purpose of payment to the applicants by the 4<sup>th</sup> and 5<sup>th</sup> respondents of their gratuity, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

c) The 3<sup>rd</sup> respondent is directed to transfer to the 4<sup>th</sup> and 5<sup>th</sup> respondents, within seven (7) days of compliance with the above paragraph (1(b)) of this order, the funds provided pursuant to paragraph 1 (b) of this order.

d) The 4<sup>th</sup> and 5<sup>th</sup> respondents are directed to pay, within seven (7) days of compliance with paragraph (c) of this order, the gratuity of the applicants, consequent upon the applicants having vacated office as respectively Government Secretary and Principal Secretaries.

e) There is no order as to costs.

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**MOKHESI J**

I Concur

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**MONAPATHI J**

I Concur

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**BANYANE AJ**

**FOR APPLICANTS : MR. MAKHETHE**

**FOR RESPONDENTS: NO APPEARANCE**