

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/196/2020

In the Matter Between:-

MOLETSANE THEKO

APPLICANT

AND

THE COMMISSIONER OF POLICE

1ST RESPONDENT

HUMAN RESOURCE OFFICER LMPS

2ND REPENDENT

DISPOL MASERU URBAN (SSP SETSUMI)

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING :26th AUGUST 2020

DATE OF JUDGMENT :15TH OCTOBER 2020

SUMMARY

Administrative law- *The applicant is challenging being transferred without being afforded a pre-transfer hearing on*

account of exceptions to the general rule- Having found that the facts of the case do not justify invocation of the exceptions to the general rule, the application succeeds with costs.

Annotations :

CASES:

Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (AD)

MV Ais Mamas Seatrans Maritime and Owners, MV Ais Mamas and Another 2002 (6) SA 150

MOKHESI J

[1] Introduction

In this application the applicant is seeking a review of the decision to transfer him without the hearing. Although there is a dispute of facts on certain issues, my considered view is that they not material for determination of this case. The common cause facts are as follows: The applicant, who is a police officer based at Hooхло Police had an altercation with a Chinese businessman on the 24th June 2020. What instigated this altercation is disputed, but like I said that is not material for determination of this case. What happened between the 24th of June and the 1st July 2020 when he was transferred with immediate effect, is largely disputed, but as with other disputes those are not material for the determination of this matter. But what is not in dispute is that the Hooхло Police Post is situated in the same precinct with the business of the Chinese national with which the applicant had an altercation.

[2] FACTUAL BACKGROUND

For the purposes of resolving this case, I prefer the version of the 3rd respondent about what transpired from the 24th June to the 1st July 2020, as it cannot be rejected as false, untenable or far-fetched in certain respects. The 3rd respondent who is responsible for Maseru Urban Police (DISPOL Maseru Urban) averred in her supporting affidavit that on the 24th June 2020 she received a

message from Regipol Rampai (Officer in charge of the Region) informing her about the commotion which happened at Hoohlo police post involving the applicant and the Chinese men. She ordered the officers responsible for the post to defuse the situation and resolve it. She says she ordered Senior Inspector Sepere to report at her office on the 25th June 2020 together with the applicant. She says the applicant admitted to assaulting the Chinese man and apologized for it, but the applicant denies ever admitting to have assaulted the Chinese man.

[3] The applicant, according to 3rd respondent requested that he be referred to counselling as he suffered from a bout of stress which caused him to over-react. The first counselling session was scheduled for the 29th June 2020. The 3rd respondent avers that the applicant agreed to be transferred to a unit within the police which does not deal directly with the public. The applicant disputes these facts, however these factual disputes notwithstanding, they cannot debar this court from disposing of this case on the basis of the papers filed of record. The 3rd respondent avers that the applicant failed to attend the first counselling session as scheduled, but instead attended his normal duties at Hoohlo police post. It is on the basis of this that she transferred the applicant with immediate effect. At para. 5.7 of her supporting affidavit she puts it thus;

“On the 29th and 30th June 2020 the applicant however failed without just cause to attend sessions at counselling. He decided to attend a duty at Hoohlo police Post which was highly likely to aggravate a situation and make things worse. I then found it important to transfer him with immediate effect. I decided to transfer him within the urban area not far from where he had been working. I considered a unit in which he could not work directly with public. I then on the 1st July 2020 transferred him to radio room Maseru Central Charge Office. I had intended to give him a chance to make a written representation after transfer to state any inconvenience or prejudice he may suffer due to the transfer.”

[4] This is the factual matrix I consider germane for the determination of this case. The issue for determination is whether the applicant’s transfer is reviewable for failure to afford him a pre-transfer hearing. Whether the applicant was entitled to a pre-transfer hearing is not in contention, the parties are *ad idem* that, that should be the case with every transfer. However, the respondents’ opposition to this application rests on the different footing, they argue that the applicant’s case falls within the exceptions to the general rule.

[5] THE LAW

The rule that pre-transfer hearing should be adhered to is not cast in granite as it may be attenuated by the peculiarity of the facts of

each case or its application ensured to the full extent. However, it must be stated, this should be done in exceptional cases:

“Generally speaking, in my view, the *audi* principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken [citation omitted]. **Exceptionally**, however, the dictates of natural justice maybe satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken [citation omitted]. This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken....”(emphasis added) **(Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (AD) at 750 C – E)**

[6] Although it is disputed, I am going to assume in favour of the respondents that the applicant had agreed to attend counselling sessions but instead of honouring this undertaking, reported for duty in the compound which houses the same Chinese national he had an altercation with. This would seem to have been the basis of the 3rd respondent’s decision to immediately transfer the applicant as she felt he would not suffer any prejudice, as it was argued

before this court. This cannot be the reason not to afford the applicant pre-transfer hearing. As seen above, not affording an individual pre-transfer hearing is an exception which the administrator has to justify. This court has not been apprised of *exceptional circumstances* which justified a departure from the application of the general rule (***MV Ais Mamas Seatrans Maritime and Owners, MV Ais Mamas and Another 2002 (6) SA 150 at pp 156h-157C***). It needs to be recalled hearing in this instance does not mean judicial style hearing with all its attendant formalities. A formal letter requiring representation would suffice for these purposes. I do not see how a police officer who is based in the police post which is located in a compound he shares with a member of public(Chinese man in this case) he had an altercation with would create a situation of emergency, thereby justifying non-application of pre-transfer hearing rule. In my view, in this case, the 3rd respondent has failed to demonstrate that it was necessary to act with expedition to transfer the applicant, or that it was not feasible to give a pre-transfer hearing.

[7] In the result:

a) The application is granted as prayed with costs.

M. MOKHESI J

FOR THE APPLICANT:

**ADV. V. 'MONE INSTRUCTED BY
T. MAIEANE & CO. ATTORNEYS**

FOR THE RESPONDENTS:

**ADV. L.M. MOTIKOE FROM
ATTORNEY GENERAL CHAMBERS**