

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/129/2020

In the Matter Between:-

HALEEO LELUMA

APPLICANT

AND

**THE COMMISSIONER OF POLICE
HUMAN RESOURCE OFFICER, LMPS
DCP – ADMIN (SMSS) LMPS
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 11th JUNE 2020

DATE OF JUDGMENT : 26TH JUNE 2020

Summary:

Employment law- Applicant challenging his transfer from Maseru to Mokhotlong on the basis that it was both unreasonable and arbitrary- Application dismissed with costs.

Annotations:

CASES:

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

Koatsa v National University of Lesotho LAC (1985 – 1989) 335

Brigadier Mareka and Others v Commander Lesotho Defence Force and Others C of A (CIV) NO. 52/2016

Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (PTY) Ltd 1984 (3) SA 623

Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Mokhesi J

[1] Introduction.

The applicant is a police officer. In this application he is challenging his transfer from Maseru to Mokhotlong. This matter was heard on an urgent basis. In the Notice of Motion, he sought the following reliefs:

1. Dispensing with the ordinary rules pertaining to the modes and periods of service
2. A Rule nisi be and it is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:
 - a) The decision of the 1st to 3rd Respondents to transfer the applicant to Mokhotlong district shall not be stayed pending the final determination of the application.
 - b) The decision of the 1st to 3rd Respondents to transfer the applicant shall not be reviewed, corrected or set aside.

c) The 1st to 3rd Respondents shall not be ordered to dispatch to this Honourable Court within 14 days the record of proceedings which led to the decision to transfer the applicant to Maseru district.

3. Costs of suit in the event of opposition.

[2] Factual Background.

As already said, the applicant is a police officer and a member of the Lesotho Police Staff Association (LEPOSA). He is not an officer-bearer of LEPOSA, but a member of the sub-committee responsible for bargaining. In terms of the long-standing practice, LEPOSA office-bearers are not eligible for transfer as they should be based in Maseru. It would seem there is a history of an aborted transfer involving the same applicant in the year 2018. An attempt to transfer the applicant in 2018 was aborted consequent to him instituting CIV/APN/129/19 challenging same. The 1st respondent faced with this challenge, withdrew the said transfer.

[3] The applicant is challenging his current transfer on the basis that is unreasonable and irrational. He cites the issues related to his arthritis and asthma; the fact that he had lodged a complaint about the 1st respondent with the Ombudsman; the fact that he is the Secretary of LEPOSA bargaining committee, and the demand

for costs he made consequent to the withdrawal of his transfer to Qacha's Nek, as the reasons why he could not be transferred to Mokhotlong. The applicant's case is that the decision by the 1st respondent to transfer him is irrational and unreasonable given that he suffers from an ailment which does not require him to be exposed to cold conditions, high altitude and poorly ventilated areas, and further that he is a member of bargaining committee of LEPOSA which is dealing with issues pertaining to police officers' pensions. On the other hand, the respondents' case is that there is a need for senior officers in Mokhotlong, and that, the applicant is the one who requested to be transferred thereto.

[4] Issues for determination and applicable law.

- a) Whether the 1st respondent's decision to transfer the applicant is irrational and unreasonable.

In this jurisdiction review of administrative decision –making (such as the one in question) is based on what is commonly known as **Wednesbury** unreasonableness, taken from the decision in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223** where the court in dismissing the appeal summarized the principle in the following manner (Per Lord Greene MR)

“The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not

to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere. The power of the Court to interfere in each is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see contravened the law by acting in excess of the powers which Parliament has confided in them."

From the above excerpt, curial scrutiny of administrative decision-making is justified in the following three incidences:

- a) If the decision-maker took into account factors it ought not have taken into account.
- b) If the decision-maker failed to take into consideration, matters it ought to have taken into account; or
- c) The decision was so unreasonable that no reasonable authority could ever have come to it.

[5] The above exposition continued as a standard of review for administrative decision-making for more than three decades until

the decision in ***Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (GCHQ case)***, which added a new dimension to judicial review of administrative decisions. The ***GCHQ*** case equated ***Wednesbury*** unreasonableness with irrationality. Lord Diplock stated three grounds on which administrative decision-making can be impugned, namely: a) illegality, (b) Irrationality and (c) Procedural impropriety.

By what is meant by “irrationality”, Lord Diplock, said:

“By irrationality I mean what can now be succinctly referred to as “***Wednesbury’s*** unreasonableness” ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

This standard has been embraced in this jurisdiction in the decisions of ***Koatsa v National University of Lesotho LAC (1985 – 1989) 335 at 339 E – F***, and ***Brigadier Mareka and Others v Commander Lesotho Defence Force and Others C of A (CIV) NO. 52/2016 at paras. 20 – 22***.

[6] Applying Law to the facts:

In the year 2018, when the applicant was requested to make representations in relation to the aborted transfer to Qacha's Nek, he said (in relevant parts);

"Sir, I humbly request your office to reconsider and set aside my transfer on account of the following grounds:

1. Ill-health: My feeble health condition does not permit me to working in extremely cold and rural areas because of acute arthritis and other ailments. I have to attend to regular fortnight check-ups at Leribe and RSA. So the net effect of such a transfer would augment and compound my financial woes (Sir bokuli ha se lehlohonolo ebile ha bo apolaeloe, ke ka hona ke bonoang ke hlotsa, ke qhiletsa ke serame) perhaps I should mention that my medical bills have ballooned to a point where I have taken a decision to retire before my compulsory retirement and the earliest possible date is two hundred days before 01st October 2020 if my leave days are well audited.
2. ILO Convention on workers with family responsibility 156 of 1981 which Lesotho has ratified. Circumstances of not my own making have presented to me an unfortunate situation of having to take care of my widowed 82 year old mother who is a fragment customer of health institutions, she cannot use public transport and I am a sole caretaker transport wise to commute her to clinics. She is in Mokhotlong and I have a home in Botha Bothe. Mokhotlong and Qacha are like East and West geographically. It is only a person totally devoid of humanity and empathy who cannot comprehend that faced with a problem of poor health and that of my mother. I may not go to Qacha and perform optimally under these conditions of having to come every fortnight for medical check-ups. It does not take rocket scientist to compute financial implications that could be involved. I am also of the view that the transfer is with due respect,

contrary to HR policies under review which stipulate that persons should be transferred to their respective regions. I had settled for a compromise to be in Maseru urban as I felt it was closer to my medical doctors.” (sic)

[7] The relevance of this letter will become clearer in due course. In his founding papers, the applicant annexed the certificate of a doctor from Likotsi Filter Clinic, which is to the following effects (in relevant respects).

“To whom it may concern

RE: LELUMA HALIEO

This serves to certify that the above mentioned name..., case number 1003194171 was seen on a regular basis in our facility for medical follow ups concerning a chronic medical condition.

This patient should not be expose to some risk factors of the sickness such as cold exposure, high altitude, poor ventilated area. “(sic)

[8] In this application, the applicant avers that the 1st respondent was aware of this certificate when he decided to transfer him to Mokhtlong. However, the 1st respondent denies any knowledge of this certificate as he says it was not submitted when the applicant resisted transfer to Qacha’s Nek. The 1st respondent avers that as proof that it was not submitted, the certificate does not bear the date stamp of the police evincing receipt as per the standard practice. In his reply the applicant does not deny that there is a standing practice that documents submitted to the police

authorities should bear police date stamp to evince receipt thereof, instead he alleges that the said letter is suspiciously missing or was scrupulously removed from his file. This being a dispute of fact the version of the 1st respondent that the said certificate was never filed, and as a result, unknown to police authorities is to be preferred (***Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (PTY) Ltd 1984 (3) SA 623 at 634***).

[9] The relevance of this certificate stems from the fact that in his representation as to why he could not be transferred to Mokhotlong, the applicant alluded to the fact that it was known to the respondents that doctors have recommended that he should not be exposed to cold weather, high altitude and poorly ventilated spaces. Notwithstanding the fact that on the submission of the medical certificate to police authorities is disputed, and as already said, the version of the respondents should be preferred, I am going to assume in favour of the applicant that the said certificate was served upon the police authorities. However, as will be observed the certificate does not mention the applicant's ailment nor does it say what it means that he should not be exposed to cold weather, high altitude and poor ventilation. I consider this to be material in informing the police authorities' decision to transfer. The materiality of this becomes more glaring given that the applicant, in his own letter of representation in respect of the aborted transfer to Qacha's Nek mentioned that he frequently goes

to Mokhotlong to ferry his ailing mother to attend her medical check-ups. He states that he is his mother's sole caregiver. In short, the applicant, who hails from Mokhotlong, travels there frequently exposing himself to cold conditions and high-altitude contrary to what the doctor has recommended. The question then to be asked is whether in view of all these, the decision to transfer the applicant is both irrational and unreasonable?; It is common cause that the applicant has his home in Botha Bothe, although the exact place is not mentioned; the applicant is not LEPOSA office-bearer, but a member of the its sub-committee. It is not difficult to understand why there is a standing practice to allow only office-bearers of the association to be based in Maseru; the office-bearers should at all times keep the blood running through the veins of the association at all times, in the manner of things, and that cannot happen if they scattered all over the country. But, with members of sub-committees, I consider that different considerations apply; they are not the heartbeat of the association. It cannot be said that, in the case of the applicant, bargaining happens all the time with the necessity that members of such a bargaining committee be present in Maseru at all times; they can discharge their functions by coming to Maseru as and when they are needed. In my considered view the decision to transfer the applicant was both rational and reasonable.

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

a) The application is dismissed with costs.

MOKHESI J

**FOR THE APPLICANT: MR. 'MONE INSTRUCTED BY T.
MAIEANE & CO ATTORNEYS**

**FOR THE RESPONDENTS: MR. M. MOSHOESHOE FROM THE
ATTORNEY GENERAL'S CHAMBERS**