REPORTABLE

LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CIV/APN/146/2021

In the matter between:

KHOTSO MABASO	**1ST APPLICANT**
DAVID NTHEOLA	**2ND APPLICANT**
THAKANE THENE	**3RD APPLICANT**
THATO 'MAPULENG MOKITIMI	**4TH APPLICANT**
'NYANE MOETI	**5TH APPLICANT**
LEBOHANG TLHORISO	**6TH APPLICANT**
NGAKA RAMOROKE	**7TH APPLICANT**

And

PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE	**1ST RESPONDENT**
THE ATTORNEY GENERAL	**2ND RESPONDENT**

CIV/APN/149/2021

In the matter between:

'MATHAPELO KANONO	**APPLICANT**

And

PRINCIPAL SECRETARY, MINISTRY OF FOREIGN AFFAIRS	**1ST RESPONDENT**
PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE	**2ND RESPONDENT**
MINISTRY OF FOREIGN AFFAIRS	**3RD RESPONDENT**
MINISTRY OF DEFENCE AND SECURITY	**4TH RESPONDENT**
MINISTRY OF PUBLIC SERVICE	**5TH RESPONDENT**
THE PUBLIC SERVICE COMMISSION	**6TH RESPONDENT**
THE ATTORNEY GENERAL	**7TH RESPONDENT**

CORAM: S.P. SAKOANE CJ

HEARD: 23 AUGUST 2021

DELIVERED: 20 SEPTEMBER 2021

Neutral Citation: Mabaso and others v. Principal Secretary of Public Service and another; Kanono v. Principal Secretary of Foreign Affairs and others [2021] LSHC 101 Civ (20 September 2021)

SUMMARY

Employment law – transfer of public servants – procedure and policy for transfer – failure to comply with the procedure and policy – whether *audi alteram partem* always applies – Public Service Act, 2005, section 13 (2) (e); Public Service Regulations, regulations 32, 102 and 126; Basic Conditions of Employment for Public Officers, 2011, section 11

ANNOTATIONS:

CASES CITED:

LESOTHO

Central Bank of Lesotho v. Phoofolo LAC (1985-89) 253

Commissioner of Police and Another v. Manamolela LAC (2013-2014) 310

Damane and Another v. The Prime Minister and Others CIV/APN/211/2020 (28August, 2010)

Director of Trade and Industry and Others v. Mosooane LAC (2013-2014) 324

Matebesi v. Director of Immigration and Others LAC (1995-99) 616

'Matšepo Mohale and Another v. Principal Secretary, Ministry of Health and Another (1991-1996) (1) LLR 632 (HC)

Pages Stores (Lesotho) (Pty) Ltd v. Lesotho Agricultural Development Bank and Others LAC (1990-1994) 51

President of the Court of Appeal v. The Prime Minister and Others LAC (2013-2014) 423

Rakhoboso v. Rakhoboso LAC (1995-99) 331

Sebophe And Another v. Commissioner of Police and Another [2019] LSCA 2

Sekoai v. Judicial Service Commission and Others [2019] LSHC 12

Selikane And Others v. Lesotho Telecommunications Corporation LAC (1995-99) 743

INDIA

B Varadha Rao v. State of Karnataka and Others (1986) 4 SCC 131

Seshrao Nagorao Umap v. State of Maharashtra and Others 1985 (1) BomCr 30

SOUTH AFRICA

Administrator, Natal v. Sibiya 1992 (4) SA (A) 538

National Director of Public Prosecutions v. Zuma (Mbeki and Another intervening) 2009 (4) BCLR 393 (SCA)

National Union of Mineworkers of South Africa v. Intervalve (Pty) Ltd and others 2015 (2) BCLR 182 (CC)

UNITED KINGDOM

Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 A11 ER 346 (PC)

Lloyd v. McMahon [1987] 2 W.L.R 821 (HL)

R v. Secretary of State for the Home Department, ex parte Khan [1985] 1 A11 ER 40 (CA)

STATUTES:
Public Service Act No.1 2005
Public Service Regulations, 2008

BOOKS:
Basic Conditions of Employment for Public Officers, 2011
Dussault, R and Borgeat, L. (1998) Administrative Law 2nd ed. Volume 2 (Toronto: Carswell)
Human Resources Management & Development Policy Manual, 2007

JUDGMENT

I. INTRODUCTION

[1] This judgment is of the two applications referenced CIV/APN/146/2021 and CIV/APN/149/2021. They were consolidated for one hearing because of the similarity of causes of action and commonality of the applicants who are public officers serving in the Ministry of Foreign Affairs and International Relations. The relief sought is the review and setting aside the decision of the Principal Secretary of the Ministry of the Public Service to transfer them to various ministries.

[2] The letters of transfer are all authored by the Principal Secretary of the Ministry of Public Service and bear the same date of 28 April, 2021. The content reads as follows, [and I omit the ministries to which they are transferred because they are dissimilar]:

> "**Ministerial Transfer**
> Kindly be informed that it has been decided to transfer you from the Ministry of Foreign Affairs and International Relations to [the relevant Ministry is mentioned] to assume full duties and responsibility of the [position and grade are mentioned] with effect from 03rd May 2021.
>
> Your other terms and conditions of service will in other respect (sic) remain the same.
>
> Yours faithfully,

M. KUMALO (MR)
PRINCIPAL SECRETARY
MINISTRY OF THE PUBLIC SERVICE

CC: AUDIT
ACGEN
PSC
PS [of relevant Ministry]"

II. MERITS

Cause of action

[3] The applicants impugn the decisions to transfer them contained in the above letters. Their cause of action rests on the following three pillars:

(a) They have been specially trained as career diplomats in the Ministry of Foreign Affairs and for this reason, they are not transferrable to other ministries.

(b) They should have been given an opportunity to be heard before the implementation of the decision to transfer them.

(c) The transfers were done without compliance with the procedure in regulation 32 (1) of the **Public Service Regulations, 2008** which obliges the Principal Secretary of Pubic Service to get the concurrence of the Minister of Public Service and to consult with the Heads of Department of the ministries to which they were being transferred.

Respondents' Answer

Preliminary objection

[4] The Principal Secretary of the Ministry of Public Service takes a preliminary point of non-joinder. He contends that when the applicants were transferred, there were simultaneous transfers of other public servants to take the positions of the applicants in the Ministry of Foreign Affairs. The simultaneously transferred public servants have not been joined in these proceedings. The relief being sought by the applicants affects them as they have a direct and substantial interest in the outcome of these proceedings.

Apropos the merits

[5] The Principal Secretary of Public Service contends that transfers in the public service are always for effective and efficient functioning of the public service and for no other reason. Therefore, absent proof of ulterior motive and bad faith, the transfers cannot be challenged.

[6] Entitlement to a pre-transfer hearing arises only in circumstances where a public officer stands to suffer prejudice. The applicants might be inconvenienced by their transfer, but this does not constitute prejudice. Given the frequency of the need for transfers from one ministry to another, it would be a mammoth task hampering the goal of efficiency in the public service to adhere to pre-transfer hearings in all cases.

[7] The applicants are not prejudiced in that their transfers are from one ministry to another in Maseru and not to the outer districts where a pre-transfer hearing might be necessary because of mid-term transfers impacting on the schooling of their children.

[8] The job descriptions of established positions remain the same throughout the public service. So does the salary. Therefore, the positions of the applicants are not affected by the transfers. Similarly, their career paths are not affected. There is nothing peculiar about the training they got while in Foreign Affairs or any post-graduate degrees they acquired. As long as a public officer retains the position and grading, he/she can be transferred to work anywhere within the public service.

[9] The procedure to be followed when effecting transfer is that the receiving Principal Secretary must be consulted and not that receiving ministry must concur. The relevant Principal Secretaries were duly consulted and the Minister concurred. The applicants make serious allegations about the receiving ministries, without citing them in the proceedings or getting any supporting affidavits from them.

III. DISCUSSION

The Law

[10] The power to transfer public officers is vested in the Principal Secretary in terms of section 13 (2) (e) of the **Public Service Act No.1 of 2005**. The section reads as follows:

> "13 (2) Without limiting the generality of sub-section (1), the Principal Secretary is responsible for –
>
> .....
>
> (e) transferring and rotating officers from one department to another, within, and reorganizing the Ministry under the Principal Secretary's supervision."

[11] The manner of exercising the power to transfer is delineated in regulation 32 (1) of the **Public Service Regulations, 2008** which provides that:

> "32 (1) The Principal Secretary may transfer a public officer to work anywhere within the public service with the concurrence of the Minister and in consultation with the Head of Department of the receiving Ministry, department or agency."

[12] Regulations governing deployment and transfers in the foreign service are regulations 102 and 126. They read thus:

> **"Service abroad**
>
> 102. (1) All public officers serving in diplomatic missions or consular posts abroad deployed in the Ministry of Foreign Affairs in Lesotho are fully interchangeable between posts abroad and posts in the Ministry of Foreign Affairs in Lesotho without distinction.
>
> (2) A public officer transferred to diplomatic or consular posts abroad shall on conclusion of his or her tour of duty return to his or her substantive post or similarly graded post in the public service.

(3) A member of the foreign service in a diplomatic mission or consular post abroad who was not a public officer before joining the foreign service shall, on conclusion of his or her tour of duty, cease to be a public officer, but may apply for any vacant post in the public service.

(4) While serving in posts abroad such public officers are posted temporarily to the foreign service but are not necessarily committed to serving always in such posts and may be posted to the Ministry of Foreign Affairs in Lesotho as may be required by the exigencies of the service as a whole.

Tour of duty

126. (1) A tour of duty at a mission shall normally be of 3 years duration and may be extended for a further period not exceeding 3 years.

(2) An officer may be transferred or recalled before the expiry of his or her tour of duty.

(3) Notwithstanding sub regulation (1), a tour may be extended as the exigencies of service demand.

(4) A tour shall commence from the date an officer arrives at his or her mission and shall end 3 years later or as stipulated in his or her letter of recall to Lesotho."

[13] Transfers are part of the basic conditions of appointment in the public service. This is stated in section 11 (1) of the **Basic Conditions of Employment for Public Officers, 2011** to be:

> "A public officer shall be liable to be transferred to any public office and from one service to another inside or outside Lesotho."

[14] Thus, transfers in the public service are the prerogative of Government. A transfer is made on the dictates of the needs of public administration. It is also a tool in human resource planning that enables a public servant to acquire varied experience while also enabling the efficient management.

Unlike promotion and demotion, a transfer is an adjustment which implies no career advancement or backstepping[1].

[15] Another purpose of a transfer is to eradicate sloth, nepotism, vested interest, empire building and corruption. A public servant cannot, therefore, claim a right not to be transferred without his or her consent. At best, a public servant is entitled to be treated fairly where there is an abuse of the power to transfers such as unscheduled and unreasonable transfers which uproot families, cause irreparable harm to a public servant, disrupt the education of children or cause unnecessary and avoidable hardship[2].

[16] Counsel for the applicants did not endeavour to grapple with the interpretation of Regulation 32 (1). They merely contended that there was a failure to follow its prescripts. It is only counsel for the respondents who made submissions on its interpretation. Mr. *Ratau* submitted that the regulation was couched in permissible and not peremptory terms because of the words "may transfer". He urged the court to compare and contrast the language in regulation 32 (1) with that in regulation 32 (4) which reads:

> "Where a Head of Department transfers a public officer to another ministry, department or agency he or she shall consult the Head of Department of the receiving ministry, department or agency and each shall seek the concurrence of the relevant Minister, and such transfer shall be authorised by the Principal Secretary."

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[1] Dussault R. and Borgeat L. (1988) Administrative Law 2nd ed. Volume 2 (Toronto: Carswell) pp. 83, 87 and 88

[2] Seshrao Nagorao Umap v. State of Maharashtra And Others 1985 (1) Bom Cr 30 (Bombay High Court)

[17] He put emphasis on the words "he or she shall consult" and "each shall seek the concurrence". He submitted that the use of the word "shall" in relation to "consultation" and "concurrence" under regulation 32 (4) and its absence in regulation 32 (2) is a strong indication that under the latter regulation, it is not mandatory for the Principal Secretary to seek concurrence and to consult in contrast to the mandatory obligation to do so under the former regulation.

[18] I take the view that the word "may" in regulation 32 (1) ordinarily conveys empowerment to perform a duty. The word should be understood in context. In context, the Principal Secretary bears the duty to obtain the concurrence of the Minister or to consult the Head of Department of the receiving Ministry when exercising the power to transfer. He has no discretion in the matter. Ministerial concurrence and departmental consultation are the jurisdictional facts for the proper exercise of the power to transfer.

[19] The purpose served by these two jurisdictional facts is to make the process of transfer smooth, coordinated and orderly. This is to avoid misunderstandings and friction between the Principal Secretary as the administrative head and the Minister as the political authority on the one

hand, and between the Principal Secretary and Heads of departments of receiving ministries on the other.

[20] Transferring "with the concurrence" and "in consultation" obliges all the three functionaries to engage in a meaningful dialogue to reach an agreement on the necessity to make transfers. The dialogue also constitutes a system of checks and balances of the power to transfer. As I said in **Damane and others v. Prime Minister and others**[3]:

> "[105] A helpful discussion of what consultation entails is found in **Hayes v. Minister of Housing Planning & Administration, Western Cape 1994 (4) SA (CPD).** After reviewing English and South African cases, **Van Zyl J.** said (at pp. 1242 H – 1243 A:
>
> > 'In ordinary legal parlance, a consultation would usually be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered. The parties or their representatives could be physically present at such meeting or conference, but not necessarily so. In these times of advanced communications technology, persons or parties can consult with one another in a variety of ways, such as by fax or e-mail or, in a somewhat less sophisticated way, by correspondence. Circumstances will dictate in what form the consultation should take place. As long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of consultation will usually not be of great import. One would, of course, expect the initiative to be taken by one or the other of the parties, without such party necessarily exercising a discretion in regard to the consultation procedure to be followed thereafter.'
>
> [106] In **R v. North and East Devon Health Authority, Ex p. Coughlan** [2000]2 W.L.R. 622 (C.A), it was held (at p.661) that:
>
> > 'To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient

[3] Damane and another v. The Prime Minister And Others CIV/APN/211/2020 (28/08/2020)

> reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken…'"

[21] Where the decision to transfer is non-compliant with the regulation 32 (1) procedure, there is no room for an argument that the exercise of the power is lawful. The exercise of a power contrary to the law is void *ab initio*. A letter of transfer issued thereby is *pro non scripto*. In my judgment, a public officer affected thereby is within his or her rights to challenge same.

[22] The reviewability of a failure to follow a statutory procedure is explained by *Lord Bridge* in **Lloyd v. McMahon**[4] as follows:

> "In particular, it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

[23] Per contra, where a decision to transfer is made in compliance with the stipulated procedure and is, thereby, proper and valid, it is not open to challenge it except on the bases of proof of *mala fides* and abuse of power. As said by the Supreme Court of India in **Varadha Rao**[5]:

> "5. It is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated. But it is one thing to say that an order of transfer which is not made in public interest but for collateral purposes and with

[4] [1987]2 WLR 821 at 878
[5] B. Varadha Rao v. State of Karnataka And Others (1986)4 SCC 131

> oblique motives is vitiated by abuse of powers, and an altogether different thing to say that such an order per se made in the exigencies of service varies any condition of service, express or implied to the disadvantage of the concerned Government servant.
>
> .....
>
> It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The Government is the best judge to decide how to distribute and utilize the services of its employees. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frequent transfers, without sufficient reasons to justify such transfers, cannot but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actions should be just and fair.
>
> 6. One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conductive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for definite period...."

[24] The deleterious effects of a transfer without proper notice to a public servant who is acting in a position senior to his or her substantive position are obviously serious. In holding an acting appointment, he or she enjoys the salary and benefits that go with the position and, thereby, acquires rights which are prejudiced if the transfer terminates the acting

appointment. The principle is enunciated by *Gauntlett* AJA (as he then was) in **Rakhoboso**[6]:

> "The analogy with the situation before us is compelling. The appellant may only hold a temporary office. That, however, nonetheless does not mean that as a consequence he has no rights. Some of these are obvious, and directly in issue. The appurtenances of office which have been taken from him, and remuneration. The exercise of the authority of his office also confers rights (as much as it imposes important duties upon him). To say that all this is temporary and, indeed precarious, is in my respectful view not the true inquiry. That these rights may in law be taken from him is not at issue. How they may be removed, is. The appellant is entitled to be treated fairly, and in particular, to have notice of the contemplated steps against him and an opportunity to be heard in that regard. None was accorded him."

Does the *audi* principle apply invariably to the exercise of the power to transfer?

[25] To this question, Mr. *Letsika* and Mr. *Setlojoane* for the applicants, submit that the answer is an emphatic "Yes". They advance the broad proposition that the *audi* principle is automatically triggered whenever and howsoever the power to transfer is invoked. It is submitted that there was an obligation on the part of the Principal Secretary of the Public Service to afford the applicants a hearing before writing the letters of transfer. What the submission amounts to is that the power to transfer is by definition prejudicial or potentially prejudicial to the rights or interests of the applicants. Therefore, the *audi* principle guards against the ever present prejudice. For this proposition, reliance is reposed on the following cases:

[6] Rakhoboso v. Rakhoboso LAC (1995-99) 331 @ 338E-H

1. **Selikane And Others v. Lesotho Telecommunications Corporation And Others** LAC (1995-99) 743

2. **Director of Trade And Others v. Mosooane** LAC (2013-2014) 324

3. **Sebophe And Another v. Commissioner of Police And Another** [2019] LSCA 2

4. **Mohale And Another v. Principal Secretary, Ministry of Health** (1991-1996) (1) LLR 634 (HC)

5. **Sekoai v. Judicial Service Commission And Others** [2019] LSHC 12

The evolving nature of the *audi* principle

[26] The *audi* principle (the right to be heard) is a twin with the *nemo judex* principle (the duty to act fairly and without prejudice). Both principles constitute the rules of natural justice. The *audi* principle was explained by *Mahomed* JA in **Central Bank of Lesotho**[7] as follows:

> "The *audi alteram partem* rule is a fundamental rule of natural justice, which applies in all civilised systems of law. It is applied whenever a Ministerial or administrative authority gives a decision affecting the property or liberty of an individual or affecting his rights or involving legal consequences to him. (*R v Ngwevela*, 1954 (1) SA 123, at 127; *Minister of the Interior v Bechler and Others* 1948 (3) SA 409 (A).)
> In more recent times it has been extended to circumstances in which the affected individual could be said to have a 'legitimate expectation' of being heard, although no right is being taken away. *Attorney-General of Hong Kong v Ng Yuen Shiu*, [1983] 2 A11 ER 346 (PC), at 349H-J; *O'Rielly v Mackman* [1982] 3 WLR 1096 (HL), at 1100-1101); *Schmidt v Secretary of State for Home Affairs* [1969] 1 A11 ER, 904 at 909F); *Everett v Minister of the Interior*, 1981 (2) SA 453 (C) at 456.
>
> The *audi alteram partem* rule is presumed to be of application, unless the statute 'expressly, or by necessary implication, indicates to the contrary' – (*R v Ngwevela, supra*, at 127), or 'unless the clear intention of Parliament negatives and excludes the implication'. (*Publications*

[7] Central Bank of Lesotho v. Phoofolo LAC (1985-89) 253 at 257I-258C

Control Board v Central News Agency Ltd 1970 (3) SA, 479 (A) at 489)."

[27] In **Pages Stores**[8] *Aaron* JA added by saying that:

"The right to be heard is generally referred to by means of the maxim *audi alteram partem*; and the law regarding this right has recently been reviewed by Corbett CJ in the case of *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A). At p. 748 he stated:

> 'The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle states that, when a statute empowers a public official or body to give a decision prejudicing an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some cases, thereafter...) unless the statute expressly or by implication indicates the contrary.'

The principle of justice referred to is as much part of the law of Lesotho as of South Africa, and the formulation referred to above has frequently been applied here."

[28] In **Matebesi**[9], *Gauntlett* JA eruditely expatiated on the *audi* principle as follows:

"(1) Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statue expressly or by implication indicates the contrary, that person is entitled to the application of the *audi alteram partem* principle (*Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 661 A-B; *SA Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10J-11B; *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231 C-D).

(2) The right to be heard (henceforth "the *audi* principle") is a very important one, rooted in the common law, not only of Lesotho but of many other jurisdictions (see generally De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5 ed 1995) 378-379; Schwarze, *European Administrative Law* (1992) 1358-1370; Joseph, *Constitutional and Administrative Law in New Zealand* (1993) 717 *et seq*; Hotop, *Principles of Australian Administrative Law* (6 ed 1985) 168 *et seq*). The *audi* principle has ancient origins, moreoever, traced back

[8] Pages Stores (Lesotho) (Pty) Ltd v. Lesotho Agricultural Development Bank And Others LAC (1990-94) 51 at 63B-E

[9] Matebesi v. Director of Immigration And Others LAC (1995-99) 616 at 621I-626C

to Seneca, Hammurabi and even what have been described as the events in the Garden of Eden (see further *Rakhoboso v Rakhoboso* LAC (1995-99) 331. It has traditionally been described as constituting (together with the rule against bias, or the *nemo iudex in re sua* principle) the principles of natural justice, that 'stereotyped expression which is used to describe [the] fundamental principles of fairness (see *Minister of Interior v Bechler; Beier v Minister of the Interior 1948* (3) SA 409 (A) at 451). More recently this has mutated to an acceptance of a more supple and encompassing duty to act fairly (significantly derived from Lord Reid's speech in *Ridge v Baldwin* [1964] AC 40 (HL), particularly in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) and more recently, *Du Preez v Truth and Reconciliation Commission, supra*, and *Doody v Secretary of State for the Home Department* [1993] 3 A11 ER 92 (HL) at 106D-H).

(3) In Lesotho that right is also made applicable to private employment relationships by s 66(4) of the Labour Code Order, 1992. As regards public sector employment, there is the same express statutory protection, at least in instances of the termination of employment ("... he or she shall be entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made unless, in light [sic] of the circumstances and reason [sic] for dismissal, the employer cannot reasonably be expected to provide this opportunity": s 66(4)). The Code applies to all Lesotho public servants, save those in a disciplined force as defined (s 1 (2)(a) and (b)), or such other public servants as the Minister responsible for administration of the Code may specify.

(4) The *audi* principle is underpinned by two important considerations of legal policy. The first relates to a recognition of the subject's dignity and sense of worth. As the leading United States constitutional writer Lawrence Tribe, *Constitutional Law* (2 ed 1988) at 666, explains:

> 'the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome: these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one'.

Or, as Donaldson LJ put it in *Cheall v Association of Professional, Executive, Clerical and Computer Staff* [1983] QB 126 (CA) at 144B,

> 'natural justice is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'.

Secondly, there is the pragmatic consideration that the application of the *audi* principle is inherently conducive to better administration. As Milne JA summarised both considerations in *SA Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 13B-C:

> 'the *audi* principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has **a two-fold effect**. It satisfies the individual's desire to be heard before he is adversely affected, and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power (emphasis supplied).'

See also *Administrator, Natal, and Another v Sibiya and Another* 1992 (4) SA 532 (A) at 539 C-D and *Minister of Education and Training and Others v Ndlovu* 1993 (1) SA 89 (A) at 106 (C).

(5) Because **both** these considerations underpin the *audi* rule, the so-called 'no difference argument' (i.e. that a hearing would have made no difference to the result) is now generally regarded as legal anathema. This argument is nonetheless one advanced on behalf of the respondents, reliant on *Glynn v Keele University* [1971] 2 A11 ER 89 (Ch D) and *Cinnamond v British Airports Authority* [1980] 2 A11 ER 368 (CA) at 374-5, to which may be added *Beukes v Director-General, Department of Manpower, and Others* 1993 (1) SA 19 (C) at 27C and 28J-29C. It is accordingly necessary to consider it here.

Why courts resist accepting that there is no right to a hearing when it is unlikely to affect the correctness of the outcome was elucidated in *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 at 37C-F where Hoexter JA said:

> 'It is trite ... that the fact an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade, *Administrative Law* (6 ed) puts the matter thus at 533-4:
>
> > 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'
>
> The learned author goes on to cite the well known *dictum* of Megarry J in *John v Rees* [1970] Ch 345 at 402:
>
> > 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change'.

The 'no difference' argument has also been rejected in *Friedland and Others v The Master and Others* 1992 (2) SA 370 (W) at 378A-C; *Muller and Others v. Chairman, Ministers' Council, House of Representatives, and Other* 1992 (2) SA 508 (C) at 514F-G; *Yates v University of Bophuthatswana and Others* 1994 (3) SA 815 (BGD) at 838A-E; *Fraser v Children's Court, Pretoria North and Others* 1997 (2) 218 (T) at 231H-233B; *Yuen v Minister of Home Affairs and Another* 1998 (1) SA 958 (C) at 969J-970G.

The earlier approach in *Glynn and Cinnamond, supra*, has, it may be noted, also been the subject of criticism in the United Kingdom (see particularly the analysis by Professor Jowell QC in Jowell and McAuslan (eds), *Lord Denning: The Judge and the Law* (1984) 228-231. It was implicitly repudiated by Lord Morris of Both-y-Gest in *Ridge v Baldwin* [1964] AC 40 (HL) at 127. *R v Chief Constable of the Thames Valley Police Force, ex parte Cotton* [1990] IRLC 344 is now '[r]ecent authority [which] has come out strongly against the reviewing court taking into account whether the hearing would have made any difference, and this decision is to be welcomed'. Craig, *Administrative Law* (3 ed 1994) 301; and see also De Smith, Woolf and Jowell, *op cit* 498-502.

.....

(6) The *audi* rule applies to employment rights, where the employer is a public authority (see (3) above, and further *Zenzile, supra* and *Sibiya, supra*) Recently this court has held that it also applies even in the context of temporary employment, for rights, however temporary, not only exist but are in principle important to those to whom they accrue (see *Rakhoboso v Rakhoboso, supra*; and see too now *Ntshotsho v Umtata Municipality* 1998 (3) SA 102 (Tk); and *Muller and Others v Chairman, Ministers' Council* 1992 (2) SA 508 (C)). Two observations need to be made, however. As already noted, it is a right to be heard before dismissal, not transfer, which the appellant asserts on the papers, and it is a contended breach of that right which the appellant says vitiates her dismissal. The second aspect is that in any event the appellant was heard by the Principal Secretary, 'the administrator' and the Minister himself, before the transfer was due to be implemented.

(7) The right to *audi* is, however, infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation (*Blom, supra*, at 662H-I and Baxter, *Administrative Law* (1984) 569-570). (Thus, in appropriate instances, fairness may require only the submission and consideration of written representations; the right to be heard is not necessarily to be equated with an entitlement of judicial-type proceedings, with their full attributes). Or while a statute may not *per se* exclude the operation of the rule, it may confer an administrative discretion which permits that result. Or the operation of the rule may be

ousted or attenuated by a particular set of facts, where it cannot practicably be implemented, at all or to its fullest extent, respectively. As is apparent from (3) above, s 66(4) of the Labour Code 1992 provides this expressly."

[29] The proposition that the *audi* principle operates flexibly and in the context of fairness was endorsed by *Brand* AJA in **President Of The Court Of Appeal**[10]:

> "[19] As explained by *Gauntlett* JA in his earlier quoted *dictum* from *Matebesi*, the requirements of fair procedure, which includes the *audi* principle, have 'more recently mutated to an acceptance of a more supple and encompassing duty to act fairly'. The same sentiments appear from the statement by *Hoexter* under the rubric '*audi alteram partem*' (at 363) -
>
> > 'From the late 1980s ... our courts have steadily retreated from the old formalistic and narrow approach to "natural justice" and towards a broad and flexible duty to act fairly in all cases.'
>
> And in the same vein (at 362) –
>
> > '[P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'
>
> [20] The principle that procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and that the one-size-fits-all approach is inappropriate, has been explicitly recognized by the highest Courts in England (see e.g. *Doody v Secretary of State for the House Department and Other Appeals* [1993] 3 A11 ER 92 (HL) 106 d-h) and in South Africa (see e.g. *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 231-3; *Minister of Health and Another NO v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 152). This means, as I see it, that the strict rules of the *audi* principle are not immutable. Where they are not strictly complied with, as in this case, the question as to whether in

[10] President Of The Court Of Appeal v. Prime Minister And Others LAC (2013-2014) 423

> all the circumstances of the case the procedure that preceded the impugned decision was unfair remains. I am mindful of the fact that the Prime Minister's case from the outset was not that the procedure preceding his request to the King was fair. On the contrary, his case was that the requirement of fair procedure did not apply. But notwithstanding the Prime Minister's stance, as I see it, the appellant must still persuade us that in all the circumstances the treatment meted out to him was unfair."

Audi principle in decisions to transfer

[30] As earlier said, it is contended on behalf of the applicants that the *audi* principle applies by rote whenever the power to transfer is exercised. The first authority relied on for this contention is **Selikane** (supra). At page 748F-I, *Browde* JA said:

> "The cases referred to above do not all deal with transfers; and a transfer (for example on promotion) may well be inconvenient rather than classifiable as 'prejudicial,' (or may even be extremely beneficial). Suspension and dismissal are *prima facie* punitive.
>
> I should mention that it has been debated whether employees have a right to be heard at all before they are transferred as opposed to being dismissed – see, for example, *Ngema v Minister of Justice, Kwazulu and Another*, 1992 (4) SA 349 (N). **I do not propose to analyse the arguments for and against the proposition nor do I express any opinion in regard thereto. I am prepared, for the purposes of this case only, to assume without deciding that the *audi* principle generally would apply to cases in which employees are transferred (where this is prejudicial or potentially prejudicial to them), but without stating that to be an inflexible rule. The facts of each particular case must determine this.**"
> [Emphasis added]

[31] It is indubitable that the learned Judge of Appeal studiously avoided expressing an opinion on "whether employees have a right to be heard at all before they are transferred as opposed to being dismissed". *Browde* JA merely made an assumption that the *audi* principle generally would apply

"where this is prejudicial or potentially prejudicial to them but without stating that to be an inflexible rule". The critically important point being made here is his assumption that a pre-transfer hearing would be necessary if the decision is prejudicial or potentially prejudicial. In other words, prejudice or its potentiality is the jurisdictional fact that would attract the application of the *audi* principle.

[32] **Selikane** was decided on 15 October 1999. Six years down the line on 7 April 2004 the question of pre-transfer hearings in the public service arose squarely in **Morokole**[11]. The Court of Appeal, per *Plewman* JA, held that the only limitation to the general power of the Minister to redeploy public servants in terms of section 9(2) of the then **Public Service Act No.13 of 1995** was the need to afford a public servant a hearing where prejudice arose. Section 13 (1) and 2 (e) of the current **Public Service Act, 2005** is similarly worded. On the facts of that case, it was found that the transferred public servant had not shown any prejudice occasioned by the transfer. In those circumstances, he was not entitled to a pre-transfer hearing. Thus, by parity of reasoning, a pre-transfer hearing is only warranted where prejudice would arise.

[11] Morokole v. Attorney-General And Others LAC (2000-2004) 850

[33] In my judgment, these two judgments establish the principle that the *audi* principle applies where a transfer prejudices or potentially prejudices a public servant. It is a question of fact in each case whether there is prejudice.

[34] The *audi* principle and its application is not a one-size-fits-all approach. The onus is on the public servant to raise and prove that the transfer prejudices or potentially prejudices his/her "liberty or property or existing rights" as stated in **Pages Store** (supra). I, therefore, take the view that **Selikane** is not an authority for the proposition that the *audi* principle applies as a rule and not an exception.

[35] The second authority relied on is **Mosooane** (supra). In that case, *Cleaver* AJA said:

> "[18] ..... In *Selikane and Others v Lesotho Telecommunications and Others* LAC (1995-1999) 739 the Court was concerned with the right of an employee to a hearing before being transferred. In the course of his judgment *Browde* JA expressed himself as follows (at 744D-E) –
>
> > 'The rule is rather that the right to a hearing in relation to a potentially prejudicial decision applies unless excluded either expressly or by necessary implication (see *Matebesi's* case ...).'
>
> The rule is not a hard and fast one for, as recognized in *Matebesi's* case at 626 B-C, it may be ousted or attenuated by a particular set of facts, where it cannot practicably be implemented at all or to its fullest extent, respectively. As to the situation where a hearing is afforded after the prejudicial decision has been taken, it is important to remember that this should occur only in exceptional cases. See *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 750 C-E.

> [19] In her application the respondent submitted that the transfer was highly prejudicial to her because she had been given an "extremely short notice and/or none at all". The judge *a quo* considered that, in the circumstances of the case, the issue of notice to her was irrelevant, and that since she retained her status and salary, she was not entitled to a hearing as the transfer did not prejudicially affect her. I regret that I do not share this view. The mere fact that the respondent, who was in charge of the office at Mohale's Hoek, was to be moved to Maseru office on less than twenty four hours' notice without any indication as to what her position at the Maseru office would be, cried out for her to be heard before being moved. No indication was given as to the reason for the transfer. If there was reason to act with such expedition, she was not apprised of it. Although the Court *a quo* found that she was not entitled to a hearing, the case for appellants was that she was to be afforded one after the transfer. That was certainty not conveyed to her. I accordingly conclude that the respondent was entitled to a hearing before being transferred, and the finding of the Court *a quo* that she was not entitled to a hearing is overturned."

[36] On the facts in **Mosooane**, the 24 hours' notice given to the public servant to relocate from Mohale's Hoek to Maseru, without an indication of what the position of the public servant would be and no reasons provided for the short notice, constituted prejudice which "cried out" for a hearing. It is my respectful view, that this case does not support the broad proposition that a pre-transfer hearing is the rule rather than an exception. I understand the dictum to lay down the principle that the transferring authority is duty-bound to give an employee reasons for an abrupt transfer and to afford him/her reasonable time to relocate to the new duty-station. I say this because a transfer is an incident of employment which every public servant must be aware of. But that is not to say that when the time arrives to be transferred, the transfer should be done in a manner that negates a reasonable time within which to comply with the decision to be transferred.

[37] Another case which is relevant, but is not one of the arrows in the applicants' quiver, is **Manamolela**[12]. This case was concerned with the application of the *audi* principle in transfers in the police service. *Cleaver* AJA said:

> "[16] As appears from the contents of the letters written by the respondents pursuant the announcement of their transfers, the Commissioner's decisions to transfer the respondents to the particular stations were all, at least potentially, prejudicial to the respondents. (*see Selikane and Others v Lesotho Telecommunications and Others* LAC (1995-1999) 739 at 744D and 748 H-I).
>
> [17] The fact that the respondents were offered a hearing of sorts at the stations to which they had been transferred after the decisions were made, did not on the facts of this case constitute a fair procedure. In *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 750C-E Corbett, CJ said -
>
> > '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 ...Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision has been taken ...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.'
>
> [18] It was not suggested on behalf of the Commissioner that this is a case where he needed to act with expedition or where it was for some other reason not feasible to give a prior hearing. The impression is very strong that the respondents were not given a prior hearing because the Commissioner was of the view that as members of the police they were not entitled to be heard at all before a decision to transfer them to specific stations was taken."

[12] Commissioner of Police And Another v. Manamolela And Another LAC (2013-2014) 310

[38] The last judgment prayed in aid is **Sebophe**[13]. *Musonda* AJA commented as follows in relation to pre-transfer hearings in the police service:

> [30] During oral argument, the respondents conceded that given the common cause fact that the appellants were not afforded a hearing prior to their transfer, they respondents' case stands or falls on whether they made out that there were exceptional circumstances to justify a post facto hearing. It is unquestionably clear that the respondents do not dispute that the appellants were entitled to be heard before the decision to transfer them was made. **And that that is what should be done ordinarily as said earlier they graciously cited authorities that espouse that proposition of the law.** In any event the second appellant in her founding affidavit said that in the past she was afforded a hearing before transfer.
>
> .....
>
> [33] **The law in this jurisdiction and South Africa support the conclusion that there must be a pre-transfer hearing**: *Commissioner of Police and Another v. Manamolela and Others, Selikane (sic) and Others V Lesotho Telecommunications and Others, and Administrator Transvaal and Others v. Traub and Others (Supra).* The rationale is that a decision has to be made when the decision-maker has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken. As *Baxter* observes.
>
> *"When he says as a general rule, therefore, a failure to observe natural justice before the decision is taken will lead to invalidity"*
>
> .....
>
> [39] **At the time of making the decision the Commissioner's mind was coloured with the fact that he had no obligation to avail the appellants the *audi* principle and that they so legitimately expected to be given that opportunity relying on the jurisprudence in this country and beyond**, which he appears to have been oblivious of, which his counsel was alive to when arguing the appeal.
>
> [40] It is this court's view, that there existed no exceptional circumstances to deny the appellants *audi* and the post-decision hearing after his mind is coloured, cannot amount to a hearing, and it cannot be so credibly argued. **All what would have been done is that the decisional letter should have been characterised as the letter of intent to transfer, and that would have been compliant with the *audi* principle.**

[13] Sebophe and another v. Commissioner of Police and another C of A (Civ) No.06/2019 (31 May 2019)

> [41] There could exist 'exceptional circumstances' where Commissioner of Police had to deploy officers to go and suppress an instantaneous breakdown of law and order or he had to react instantaneously in any part of the Kingdom dithering on the brink of disorder. The concept of 'exceptional circumstances' will be validated by the courts as if there are legitimate reasons for overriding the *audi* before the decision is made. This court is mindful not to make decision that will ill-serve effective policing of this country." [Emphasis added]

[39] Both **Manamolela** and **Sebophe** make the proposition that barring exceptional circumstances, the *audi* principle applies as a rule rather than an exception in transfers in the police service. The moving spirit behind this proposition is the *dictum* in **Selikane**.

[40] With great respect to the apex court, the proposition rests on an assumption and not a legal rock. I earlier pointed out that in the cited passage from **Selikane**, *Browde* AJA did not lay down any rule for the remorseless application of the *audi* principle in transfers. In **Morokole**, *Plewman* JA made it clear that the only limitation to the statutory power to transfer is the need to afford a hearing where prejudice arises. It follows that where there is no prejudice, *cadit quaestio*. The suggestion that the *audi* principle always applies unless exceptional circumstances makes it inoperable, runs counter to the firmly established principle that *audi* is flexible and fact-

sensitive. Its application abjures a one-size-fits-all approach as explained in **Matebesi** and **President Of The Court Of Appeal** (supra).

[41] The inquiry as to the applicability or otherwise of the *audi* principle must start with the identification of the rights of a public servant adversely affected by transfer as a basic term of employment. The test is referenced in **Rakhoboso** where the Court of Appeal accepted the following dictum in **Sibiya**[14]:

> "As I understand the argument it amounts to the following. It is said that a public employee whose contract of service is terminable on notice has no legal right, after such notice has been duly given, to remain in his employment beyond the expiration of the period; and that from this it follows that here no existing right of such employee has been affected. In my opinion this argument is untenable, and it was rightly rejected (at 593I-J) by Didcott J. The argument misconceives the requirements of the *audi* rule. **The rule does not require that the decision of the public body should, when viewed from the angle of the law of contract, involve actual legal infraction of the individual's existing rights. It requires simply that the decision should adversely affect such a right. No more has to be demonstrated than that an existing right is, as a matter of fact, impaired or injuriously influenced.**" [Emphasis added]

[42] Once it is accepted, as it must, that a public servant cannot assert a right not to be transferred, the nature of existing rights that may be adversely affected must be related to loss of office, status as well as economic loss. These entail loss of salary, grade, diminution of responsibilities and

[14] Administrator, Natal v. Sibiya 1992 (4) SA (A) at 538 E-G

deprivation of other appurtenances that go with the exercise of the authority of office. In **Sekoai** (supra), *Moahloli* J elaborated on these matters thus:

> "[29] I do not agree with the approach Teele KC proposes I should take. It has been Sekoai's complaint from the onset that her transfer was unfair because it had adverse effects on her. Even if this court accepts the JSC's contention that Sekoai's transfer, at the time it was effected, was a lateral transfer without a reduction in pay grade (i.e. from one Grade K position to another Grade K position) this is not the end of the enquiry into its fairness. Whether or not the transfer entailed a demotion is not the sole criterion for its fairness. An otherwise lateral transfer will qualify as an adverse employment action if, for instance, it is objectively worse than the employee's former position based on factors such as changed employee benefits, duties and responsibilities. Examples of purely lateral transfer which would not *per se* qualify as adverse employment actions in our judiciary are transfers of Magistrates or Clerks of Court or Interpreters from one Magistrate's Court to another. Also transfers of Interpreters, Court Recorders, Assistant Registrars or Judge's Clerks from one posting to another. But to say that the transfer of a Registrar to the position of a Chief Magistrate is a purely lateral transfer which does not qualify as an adverse employment action is in my view really stretching the legal envelope beyond permissible extents. I say this because such a transfer entails a dramatic change in benefits, duties, responsibilities, status, prestige etc. What, colloquially speaking, adds insult to injury, is where this is done without even affording the affected employee an opportunity to make representations before the decision is taken.
>
> [30] In ***Czekalski v Peter*** [D.C. Cir. No.05-5221 (2/02/07)] the U.S. Court of Appeals for the District of Columbia held that a lateral transfer could constitute an adverse employment action even though the plaintiff did not experience a loss of salary, grade or benefits, if it entailed withdrawing the employee's supervisory duties or a reassignment with significantly different responsibilities. This was the case *in casu.* The common denominators, in these two US cases is that although the lateral transfers were without any loss in pay, the changes in the employees' duties and responsibilities were "materially adverse consequences" affecting their terms, conditions or privileges of employment.
>
> .....
>
> [32] As I see it, in the circumstances of the present case the decision to transfer Sekoai without affording her the opportunity to state her case was grossly unfair because it had an immediate adverse effect on her tenure as Registrar and her reputation and dignity. It also entailed a significant narrowing of her supervisory duties and a reassignment with significantly different responsibilities. It therefore qualified as an adverse employment action.

> [33] On the issue of demotion, I would like to mention *en passant* that, contrary to the view expressed in Mokeke's opposing affidavit, under the common law demotion involves a variation or amendment of an employee's terms of employment to the extent that he/she is required to fill a different position or to fulfill different functions to that which he/she normally holds or fulfils, coupled with a reduction in status. This is exactly what happened to Sekoai. Further, at common law, the employer is not entitled to lower the employee's status unilaterally, even if it does not involve any loss of benefits, unless it is permitted by statute, the contract of employment itself, or by a subsequent agreement. Unlawful demotion or lowering of status constitutes a repudiation of the contract by the employer entitling the employee to, *inter alia*, hold the employer to the agreed terms."

[43] These dicta provide a sensible and pragmatic application of the *audi* principle by delineating areas that constitute red flags for existence of prejudice or potential prejudice. *Audi* will, therefore, apply in cases where a transfer alters, to the prejudice of a public servant, his or her grade, salary, benefits currently enjoyed and diminishes responsibilities. The personal circumstances of the employee may also warrant its application, for example, in circumstances of public servants who are caregivers of the sickly, disabled family members and in instances where the education of children would be disrupted by abrupt transfers that leave no room for suitable alternative educational arrangements.

[44] I, therefore, agree with *Monapathi* J in **Mohale**[15] (supra) where he said:

[15] At page 637

> "In speaking of prejudice to the Applicants one must necessarily speak of the individual circumstances on case to case basis. The applicants are being removed from one corner of the country to another. This in itself has an element of disruption and an obvious psychologic (sic) impact. They have to relocate to a new place and premise. They live with spouses and children or sometimes without. If there is a husband he has to relocate or is left behind. If Applicants are accompanied by school going children they have to make necessary changes. So that the effect of any transfer is rarely ever or very negligible. It is against the obviousness and the inevitability of these consequences that the Respondent replied that in law they are entitled to transfer the Applicants without giving them a hearing. But can they completely ignore giving the Respondents a hearing? Yes, they can if the time within which the public officer is intended to transfer is a reasonable one. If it is not, such as in the instant matter, they ought to have given the Applicants a hearing.
>
> The grant of a reasonable time will in no way suggest that the individual circumstances of the Respondents are ignored. It is a way of acting fairly. This still brings the question as to what a reasonable period is, the absence of which the principles of natural justice shall apply. It depends on each individual case. In my reckoning any period of time that is less than thirty days or one calendar month, (the ordinary period) is a (sic) generally too short and unreasonable. It is upon such a lesser time that a public officer must be heard. This is no way a derogation from the right of the Respondents to transfer the Applicants. I have already stated that while it is difficult to lay a general rule, except as to what I consider to be a reasonable period, I took the view that the Applicants should have been heard or called in accordance with the tenets of natural justice, where the period of notice was too short."

[45] Thus, the power to transfer must be exercised fairly and reasonably. Reasonable notice must be given and not a show-cause letter as to why the power should not be exercised. Should the public servant seek an opportunity to make representations in regard to perceived adverse effects of the exercise of the exercise of the power, the transferring authority must consider the request and address its mind on it.

Non-Joinder

[46] The Principal Secretary contends that there is non-joinder of public servants who have since been transferred to take applicants' positions in the Ministry of Foreign Affairs. He contends that those public servants, whose names he withholds, will be adversely affected by the orders being sought. But the applicants are not seeking to nullify the transfer of other public servants to the Ministry of Foreign Affairs. They seek to reverse their own transfers to other ministries. Public servants do not have a right to remain in positions to which they are wrongly transferred. Therefore, the public servants whose joinder is sought are not in jeopardy of losing their jobs if the applications succeed.

[47] A party has the right to ask that someone be joined as a party if such a person shares a joint proprietary interest with one or either of the parties to the proceedings or has a direct and substantial interest in the court's order[16].

[48] Where a public servant is caused to revert back to a position because of the reversal of an unlawful decision to transfer, the setting aside of the said transfer as invalid in law means that the public servant was never transferred in the first place. There cannot then be any argument that it will be impossible for the applicants to revert back to their positions because

[16] National Union of Mineworkers of South Africa v. Intervalve (Pty) Ltd and others 2015 (2) BCLR 182 (CC)

other public servants have since occupied their positions. There is no clash of rights or legal interests deserving the joinder of persons whom the Principal Secretary should not have transferred in substitution.

[49] I, therefore, do not accept that the applicants should have joined those other public servants because they do not have any direct and substantial interest in the outcome of these proceedings. Those public servants might be interested in the outcome of the proceedings, but the outcome will not adversely affect them because they have no right not to be re-transferred to give space to the applicants.

[50] The Principal Secretary of Public Service suggests an impossibility of compliance with the court's order that will favour the applicants. Such a plea does not avail him because he is the source of any impossibility that may arise from the reversal of his unlawful conduct. A favourable court order would be putting right what he got wrong. No impossibility can stand up to what the law puts right. The preliminary point does not have merit and falls to be dismissed.

The Facts

[51] The applicants impugn their transfers on three grounds:

1. Non-compliance with Regulation 32 (2).

2. Immunity from transfer because of their being in foreign service.

3. Assignment of duties and responsibilities incompatible with their training as trained career diplomats.

Non-compliance with Regulation 32 (2)

[52] The version of the applicants is that after receipt of their letters of transfer, they reported at their respective receiving Ministries. But upon reporting, they were told that they were not expected as no consultations had been made by the transferring authority about their transfers.

[53] The Principal Secretary of the Public Service Ministry, as the transferring authority, disputes the version of the applicants. He contends that "Principal Secretaries of all receiving ministries were duly consulted, and the Minister has duly concurred."

[54] In reply, the applicants annex a copy of the letter of the Principal Secretary of the Ministry of Tourism to one of the applicants (*'Nyane Moeti*) to buttress their point that there were no consultations with the receiving ministries. The letter is dated 4 May 2021 and reads as follows:

"Mr. 'Nyane Moeti
Legal Officer
Ministry of Foreign Affairs
And International Relations

Dear Sir,

RE: TRANSFER OF MR. NYANE MOETI TO MINISTRY OF TOURISM, ENVIRONMENT AND CULTURE

We note that you availed yourself at our office today on the 4th of May 2021, as per your letter of transfer from the office of the Principal Secretary Public Service.

We would like to bring to your attention that we still have to engage in further consultations with Ministry of Public Service and other relevant authorities, pertaining to this matter.

In the meantime, we advise you to await further communication from us and to kindly notify your Ministry.

Yours faithfully,

_____

Mrs Moliehi Moejane
Principal Secretary
Ministry of Tourism
Environment and Culture

[55] These being motions proceedings in which a final relief is sought, the dispute of fact on whether the necessary consultations were made has to be resolved in accordance with the common cause facts together with the disputed facts of the transferring authority that are not bald or uncreditworthy denials, raise fictitious dispute of facts or are palpably impossible[16].

[16] National Director of Public Prosecutions v. Zuma (Mbeki and another intervening) 2009 (4) BCLR 393 (SCA)

[56] The Principal Secretary of the Ministry of Public Service has not chosen to file a further affidavit to contradict the letter of her counterpart in Tourism informing *Moeti* that "we still have to engage in further consultations with Ministry of the Public Service". This is proof, at least, that the Principal Secretary of Tourism was not consulted in the decision to transfer *Moeti*. I, therefore, find that there was indeed non-compliance with Regulations 32 (2).

[57] As regards the other applicants, they have not annexed any written proof of failure to consult by the transferring authority. They content themselves with saying that the Principal Secretary of Public Service "ought to provide clear evidence that the principal secretaries in the receiving ministries were consulted but he did not do so." This disputed fact on consultation must be resolved in favour of these applicants. The reason is that the Principal Secretary could easily have produced evidence of the consultative process he engaged in once the applicants challenged his averments. Failure to do so, coupled with the undisputed letter from the Principal Secretary of Tourism, raises an inference that "Principal Secretaries of all receiving ministries were duly consulted". As to when and how the consultations were made, the court is none the wiser. This statement does not inspire confidence in me that the receiving ministries were consulted.

[58] The applicants have made good their cause of action of non-compliance with regulation 32 (2). On the authority of **Lloyd** (supra), the transfers of the applicants stand to be reviewed and set aside.

Non-transferability of applicants

[59] The applicants contend further that their transfers are incompatible with their status and responsibilities in the Ministry of Foreign Affairs. Their argument is that they have acquired special training which has prepared them for posting in the foreign service as career diplomats. For this reason, they so argue, they are not fit to serve in any other ministry or department. Their arguments rest on a fallacy.

[60] Transfers in the public service are a basic condition of service provided for in the **Public Service Act, 2005, the Public Service Regulations, 2008** and the **Basic Conditions of Employment for Public Officers, 2011**. Section 13 (2)(e) of the Act provides for transfer and rotation of public officers. Transfer is, therefore, a statutory condition of employment in the public service. Regulations 102 and 126 of the Pubic Service Regulations provide that public officers in foreign service serve on a three-year tour of

duty and return home. Once back home, they can be transferred to other ministries like other public servants. There are, therefore, no special rules for public servants in the foreign service.

[61] The time limit to serve in foreign service proves that there are no career diplomats in Lesotho. There cannot then be any issue of whether or not public servants in the Ministry of Foreign Affairs are career diplomats that serve on a permanent and non-transferable basis. At the end of tour of duty, a public officer returns to his or her substantive post or a similarly graded post in the public service.

Non-observance of a transfer policy

[62] Be that as it may, the transfer of the applicants was not done in observance of the transfer policy as contained in the **Human Resources & Development Policy Manual** approved by Cabinet on 1 November 2007. This Manual stipulates that a public officer must be given three months' notice unless operational requirements dictate an immediate transfer. The applicants' letters of transfer are dated 28 April 2021 and directed them to be at their respective receiving ministries on 3 May. They only had two

weekdays and a weekend to move. No reasons are given in the letter for the immediate transfers.

[63] The Principal Secretary of the Public Service got it wrong by not observing the dictates of the stipulations of the transfer policy. In **Ng Yuen Shiu**[17] the Privy Council held that:

> "... when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.
>
> In the opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the government of Hong Kong to the respondent, along with other illegal immigrants from Macau, in the announcement outside Government House on 28 October 1980, that each would be considered on its merits."

[64] This dictum was followed in **Secretary of State for the Home Department *ex parte* Khan**[18] where at issue was a circular setting out procedural steps for making an application for adoption of a child from abroad. The Secretary of State adopted a procedure different from that outlined in the circular. It was held that the Secretary of State could only

[17] Attorney-General of Hong Kong v. Ng Yuen Shiu [1983]2 A11 ER 346 (PC) at 351g-i
[18] R v. Secretary of State for the Home Department, ex parte Khan [1985]1 A11 ER 40 (CA)

apply a different procedure if he had given the recipient of the circular a full opportunity of making representations why in the recipient's case, the procedure different from that set out in the circular ought not to be followed. In the circumstances, the Secretary was found to have acted unfairly and unreasonably. His decision was quashed.

[65] In my judgment, the *dicta* are relevant and applicable *in casu*. The applicants should have been given a reason for the departure from the transfer policy and been provided with an opportunity to make representations why there should not be a departure. This is the proper basis for their contentions for *audi* and legitimate expectation - although legitimate expectation was abandoned by Mr. *Letsika* during oral submissions: **Central Bank of Lesotho** (supra).

[66] All of the applicants, barring the applicant in CIV/APN/146 who is *Kanono*, do not complain about the transfers having any changes to their grades, salaries or benefits. Their only gripe is that they have new and different responsibilities. Absent any diminution of responsibilities, I do not see how these new responsibilities constitute prejudice to their rights or interests. A transfer may entail change in responsibilities. (See

Morokole (supra). What matters is that an employee should be capacitated to competently discharge the new and different responsibility. Hence proper and sufficient consultations with Heads of Department in the receiving Ministries to prepare and provide public servants with the wherewithal to deliver. The fact that the applicants were providing legal advice or driving in the Ministry of Foreign Affairs and are transferred to perform similar jobs in other ministries hardly constitutes a radical change from their erstwhile responsibilities.

[67] *Kanono's* transfer puts her in a far worse position than the other applicants in that she was acting in a grade higher than her substantive one. She had been appointed to act in the vacant position of Director Legal Affairs until the position is substantively filled. Her contention is that at the time of transfer, the Public Service Commission had not revoked her acting appointment nor the position been substantively filled. The Principal Secretary of the Public Service does not grapple with her complaint. Instead, he gives an irrelevant response that the acting appointment did not give an implication that she cannot be transferred.

[68] The legal principles applicable to *Kanono's* circumstances are stated in **Rakhoboso** (supra). The rights of an employee in office on acting appointment are less protected than those of a substantive office holder. This applicant's rights constitute the salary, exercise of authority of office and its appurtenances. She was entitled to be treated lawfully and fairly by giving her a notice of a transfer which adversely prejudiced her acting appointment. More importantly, the Public Service Commission, as the appointing authority, has not terminated the acting appointment nor the position been substantively filled. The transfer of this applicant wears the badge of illegality on its forehead.

IV. CONCLUSION

[69] The power to transfer public servants serves the public interest of ensuring that adequate and competent human resources are deployed for effective delivery of services. This public interest overrides the interests of individual public servants. The power to transfer, like any public power, is hedged around with restrictions such as the principle of legality. This ensures that the power is exercised for lawful purpose and for the advancement of sound administration.

[70] The exercise of the power to transfer should also be sensitive to the individual circumstances of public servants. They must be treated fairly at all times. This is attainable if public officers in top administration like Principal Secretaries know and understand the laws and policies governing transfers. This case is a clear demonstration of lack of knowledge of the laws, procedures and policies by the transferring authority. The abrupt manner in which the applicants were purportedly transferred without adequate notice and with no reasons for the hasty decision to transfer is a testament to the jeopardy in which public servants find themselves at the hands of some Principal Secretaries.

[71] The applicants have succeeded in persuading me that their purported transfers are contrary to the law and should be reviewed and set aside, as I hereby do.

Order

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

1. The applications are granted.

2. The transfers of the applicants per the letters of the Principal Secretary of Public Service dated 28 April, 2021 are reviewed and set aside.

3. The respondents must pay the costs.

S.P. SAKOANE
CHIEF JUSTICE

For the Applicants: Q. Letsika and R.J. Setlojoane

For the Respondents: S. Ratau with L. Letompa