

## **IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/324/2020**

In the matter between:

**SUB-INSPECTOR TEBELO SEEISO**

**APPLICANT**

**AND**

**OFFICER COMMANDING MAFETENG  
POLICE STATION**

(Senior Inspector Phatela)

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

**MAFETENG DISTRICT POLICE  
COMMISSIONER**

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

**ATTORNEY GENERAL**

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

**Neutral Citation:** Sub-Inspector Tebelo Seeiso v Officer Commanding Mafeteng Police Station & 2 Others (CIV/APN/ 324/2020) [2021] LSHC 76 (17 JUNE 2021)

### **JUDGMENT**

**CORAM:**

**MOKHESI J**

**DATE OF HEARING:**

**02 JUNE 2021**

**DATE OF JUDGMENT:**

**17 JUNE 2021**

## **SUMMARY:**

**ADMINISTRATIVE LAW:** *Applicant challenging his transfer on the basis that he was not afforded pre-decision notice and hearing- Held, the applicant should have been given pre-decision notice of the intended course of action and an opportunity to make representations, there being no exceptionalities justifying non-compliance with the requirement, application granted as prayed.*

## **ANNOTATIONS:**

### **Books:**

Lawrence Baxter, **Administrative Law (1984)**

### **Cases:**

Commissioner of Police and Another v Manamolela and Others (C of A (CIV) 40A/2014 [2014] LSCA 39 (24 October 2014)).

Swissborough Diamond Mines (Pty) Ltd and others v Government of R.S.A. and Others 1999 (2) SA 279 (TPD)

National Director of Public Prosecutions v Zuma 2009 (4) BCLR 393 (SCA); [2009] 2 ALL SA 243 (SCA)

Administrator, Transvaal and Others v Traub and others. 1989 (4) SA 731 (A)

## **Introduction**

- [1] This is an application for review of the decision which was supposedly taken by the 1<sup>st</sup> respondent to transfer the applicant from Van Rooyen's Gate Police Post to Mafeteng Police Station, Charge Office (Shift). The decision to transfer the applicant is contained in a wireless message marked as "TS1," dated 21<sup>st</sup> September 2020. This application is opposed.

## **Factual background**

- [2] The background facts to this case are uncomplicated: the applicant is a police officer holding a rank of Sub-Inspector. He was posted at Van Rooyen's Gate Police Post in the year 2016 to date. On the 19<sup>th</sup> September 2020 he received a call which instructed him to attend a meeting at District Police Commissioner's Office (DISPOL), on Monday the 21<sup>st</sup> September 2020. The instruction further said he must bring along with him Sergeant Marake and Police Constable Moalosi, who are both stationed at the same police post. As to whether they were informed about the purpose of the meeting is in contention or were given an opportunity to make representations, will be dealt with in due course. The three officers did attend the meeting as directed on the 21<sup>st</sup> September 2020 at 0800 hours. The invitation to attend the meeting was made by the 1<sup>st</sup> respondent as the DISPOL had gone on an annual leave, and in his stead, holding fort, was the 1<sup>st</sup> respondent. After the said meeting, a decision was made under 1<sup>st</sup> respondent's hand to transfer the applicant and the two officers mentioned above, hence the present challenge by the applicant.

## [3] **Issues for Determination**

- (i) Whether applicant was treated fairly.

[4] **Parties' Respective cases and Discussion**

The applicant had raised an issue regarding the authority of the 1<sup>st</sup> respondent to transfer the applicant. In my view, the determination of this case does not turn on that issue, but instead on the issue of compliance with procedural fairness.

[5] The applicant contends that when the 1<sup>st</sup> respondent invited him to DISPOL's office, the latter did not inform him of the purpose of the meeting. He was only shocked and surprised when the 1<sup>st</sup> respondent "declared that he had transferred us from our post to Mafeteng Police Station with immediate effect." Upon him protesting, and demanding reasons for the decision the 1<sup>st</sup> respondent said he would furnish them in due course. Upon his return to Van Rooyen's Gate Post, he was served with a wireless message from the 1<sup>st</sup> respondent confirming what had transpired during their encounter with the 1<sup>st</sup> respondent. The wireless message was to the effect that he together with two colleagues had been transferred to Mafeteng with immediate effect. He contends further that he was not given a pre-decision hearing; that the decision to transfer him was taken by the 1<sup>st</sup> respondent who was unqualified to do so.

[6] On the one hand, the respondents argue that the decision to transfer was duly compliant with procedural requirements. In response, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' averments leave a lot to be desired, and in my considered view, that version should be rejected as false and palpably implausible. When reacting to the pointed averments by the applicant that he was ambushed and not informed about the purpose of the meeting nor was he given an opportunity to make representations, the 1<sup>st</sup> respondent, variously, says:

At para. 5 of the Senior Inspector Phatela:

*“AD PARA 4*

*4.1 Contents herein are noted.*

*4.2 Contents herein are denied. The Applicant together with Sergeant Marake and Police Constable were indeed invited to a meeting before Officer Commanding Mafeteng Police Station, Senior Inspector Phatela who informed them of the intention of the Commissioner of Police to transfer them from Van Rooyen Police Post to Mafeteng Police Station because they are being investigated for the crime of Extortion which is alleged to have occurred at Van Rooyen Border...”*

[7] At para 4.2.2.1:

*“4.2.2.1 Contents herein are denied. The decision to transfer the Applicant had to be rushed because the district administration felt that the continued in the presence of the Applicant and his co-accused would compromise the investigations which were on-going....”*

[8] Startlingly, and perhaps, a game-changer for the respondents’ version, are averments made by DISPOL in his supporting affidavit:

*“... I left Senior Inspector Phatela in charge of the district while I proceeded on my annual leave, however I kept on instructing him telephonically on many issues including the one under scrutiny which the decision to transfer the Applicant from Van Rooyen Police Post to Mafeteng Police Station. I wish to support contents contained in the Respondents answering affidavit to the extent that all decisions taken*

*by Senior Inspector Phatela were done under my orders as the District Commissioner for the district of Mafeteng.”*

- [9] There are a few things which are apparent from these excerpts:
- (a) The 1<sup>st</sup> respondent does not provide prove that he informed the applicant of the purpose of the meeting, he only wants this court to rely merely on his say-so that he did so. There has got to be evidence that this was done, and these being motion proceedings, that prove ought to have been provided on affidavit. (On the role and purpose of affidavits in motion proceedings, see: **Swissborough Diamond Mines (Pty) Ltd and others v Government of R.S.A. and Others 1999 (2) SA 279 (TPD) at 323 F**).
  - (b) What is clear, further, is that the decision to transfer the applicant, as can be gleaned from the supporting affidavit of DISPOL, was made by the 1<sup>st</sup> respondent on instructions by DISPOL, even though the latter was not the person to whom representations were made, assuming the applicant was given an opportunity to make representations.
  - (c) The decision to transfer the applicant was rushed as the respondents felt his presence at Van Rooyen’s Gate would compromise investigations into his alleged involvement in criminality, to be precise, extortion.
- [10] The averment that the decision to transfer was made by a person who did not hear applicant’s representations, assuming he was allowed to make them, kills the respondents’ version that the applicant was given opportunity to make representations. The 1<sup>st</sup> respondent’ version that he made the decision to transfer the applicant, is clearly this is untrue, as the

decision to transfer was made by DISPOL. DISPOL, it should be recalled, did not hear applicant's representations. On this score, in my considered view, the version of the applicant is to be preferred. This conclusion is based on the trite principle of our law that where in motion proceedings disputes of fact arise, a final order in favour of the applicant can only be issued where the averments made by him/her are admitted by the respondent, and those taken together with the averments of the latter (respondent) justify the order. This will, however, not be the approach where the version of the respondents:

*“Consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpable implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers ....”*  
**(National Director of Public Prosecutions v Zuma 2009 (4) BCLR 393 (SCA); [2009] 2 ALL SA 243 (SCA) at para. 26).**

- [11] The shortcomings in the respondents' version, highlighted above, leads to one conclusion that the version of the applicant that he was not informed of the purpose of the meeting, and that, he was transferred unheard, is the preferred one. The respondents' version is rejected on papers for being clearly palpably implausible and untrue. Clearly of the decision to transfer the application was made by DISPOL (2<sup>nd</sup> respondent) without hearing the applicant.
- [12] The respondents' decision to transfer the applicant is assailable based on breach by the administrators of a duty to act fairly. Fair hearing is based on two important considerations. An administrative decision-maker is obliged (i) to inform the individual who will be the subject of the decision, of the intended course of action, and (ii) to give that individual, an opportunity to be heard (**Lawrence Baxter, Administrative Law (1984) at pp. 543 –**

**546).** It is trite that the requirement to act fairly is not cast in granite, it is flexible taking into account the facts of each case. But, as a general principle, the *audi* requires that a hearing precede the decision, unless there exist exceptional circumstances which militate against doing so (**Administrator, Transvaal and Others v Traub and others. 1989 (4) SA 731 (A)**): On the need for a pre-transfer hearing see: **Commissioner of Police and Another v Manamolela and Others (C of A (CIV) 40A/2014 [2014] LSCA 39 (24 October 2014))**.

[13] In the present matter, the fact that the applicant was being investigated for commission of crime, does not detract from strict adherence to the requirement to be put on notice of the intended decision and to be heard before the decision is made against him. Put differently, the fact that the applicant is being investigated for commission of crime, does not constitute an exceptionality cognisable in law justifying non-compliance with a duty to hear and to inform the subject of the intended adverse decision, before that decision is made against it. I have read the respondents' affidavits and have not seen anywhere where it is stated against whom the crime was committed; if the crime was allegedly committed against member of the public, I do not see how the applicant's presence at his workplace would compromise investigations, so as to justify fast-tracking his transfer without observing the principles of procedural fairness.

[14] In the result the following order is made:

(i) The application succeeds with costs.



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**MOKHESI J**

**For the Applicant:**

**ADV. Z. MDA instructed by T. Mahlakeng &  
Co. Attorneys**

**For the Respondents:**

**ADV. N. C. Sehloho from Attorney General's  
Chambers**