

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO.19/2020

In the matter between:

HOME AFFAIRS EX WORKERS

APPLICANTS

And

**THE PRINCIPAL SECRETARY
MINISTRY OF HOME AFFAIRS AND OTHERS**

RESPONDENTS

Neutral citation: Home Affairs Ex-Workers And Others v. The Principal Secretary of Home Affairs And Others [2021] LSHC Cons 7 (11 February 2021)

CORAM: S.P. SAKOANE CJ.
T.E. MONAPATHI J.
K.L. MOAHLOLI J.

HEARD: 9 DECEMBER, 2020

DECIDED: 11 FEBRUARY, 2021

SUMMARY

Constitutional law – claim for renewal of fixed term contracts or alternatively, declarator that failure to renew contracts violates rights to property in the form of salary – fixed term contracts having expired automatically – clauses in contracts stipulating that resolution of disputes thereof to be made in accordance with the Labour Code – whether the claims implicate violation of

the Bill of Rights – reliance on section 12 (8) and doctrine of legitimate expectation – no basis found to have been established for exercise of constitutional jurisdiction and reliance on doctrine of legitimate expectation – Constitution 1993, section 12 (8); Government Proceedings and Contracts Act, 1965 section 5; Public Service Act, 2005 section 7; Public Service Regulations, 2008 regulation 20.

ANNOTATIONS:

CITED CASES:

LESOTHO:

Chief Justice And Others v. Law Society of Lesotho LAC (2011-2012) 255

Matela And 12 Others v. The Government Of The Kingdom of Lesotho And Others CIV/APN/197/2019 (14 November 2019)

INDIA:

Yadlapati v. State of A.P. [1992] Supp. (1) S.C.C. 74

UNITED KINGDOM:

Paponette & Ors v. Attorney General of Trinidad and Tobago (Trinidad and Tobago) [2010] UKPC 32 (13 December 2010)

STATUTES:

Codes of Good Practice (Legal Notice No.194) 2008

Constitutional Litigation Rules, 2000

Government Proceedings and Contracts Act No.4 of 1965

High Court Rules, 1980

Labour Code Act, 1992

Public Service Act No.1 of 2005

Public Service Regulations, 2008

JUDGMENT

I. INTRODUCTION

[1] On 9 December 2020, we heard argument on this matter. At the end, we gave an *ex tempore* judgment in which we dismissed the application. Today we give the full reasons.

[2] The applicants, who are 178 in number, describe themselves as “a group of persons who are ex-employees of the government of Lesotho under the Ministry of Home Affairs”. They were employed on fixed term contracts of three years in October/November 2017. The said contracts automatically expired in September/November 2020.

[3] On 24 October 2020, their attorneys wrote to the Principal Secretary of the Ministry of Home Affairs to say:

“(2) ... Clients informed us that the fixed terms (sic) had come and/would come to an end on 30th September and 1st November, 2020. That their contracts were and/or are not renewed. That they had a legitimate expectation to have their contracts renewed since:

- (i) their respective contract (sic) as duly supplemented and complemented by statutes and common law give a possibility of renewal;
- (ii) they performed well, they have experience and they are duly qualified for the positions they have been holding;
- (iii) the legitimate acting period and/or the probation period had long expired, hence they ought to have been employed by the government of Lesotho on permanent basis.

- (3) As a corollary, the government's failure to employ them by failure to renew their contracts and/or otherwise amounted in law to an unfair dismissal. Consequently, they are entitled to be employed on permanent basis on old terms and/or less favourable terms. And/or they be entitled to be reinstated to their initial positions. Alternatively, they are entitled to their terminal benefits calculable at gratuity and not the severance rate since there (sic) are public servants."

[4] On 1 December, these "ex-employees" brought this constitutional motion in terms of Rule 8 (22) of the **High Court Rules 1980** alleging that it was urgent in that failure by the Principal Secretary to renew their contracts constitutes a violation of their "fundamental right (sic) in the property i.e. salary/terminal benefits which (sic) an indivisible right to livelihood". They also alleged that the failure to renew the contracts violated their legitimate expectation to be hired on permanent terms and also constitutes an unfair dismissal.

Relief

[5] They seek the following reliefs:

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- (a) *An order dispensing with the Rules of Court relating to service and time frames in relation thereto on account of urgency hereof, and/or;*

- (b) *This Honourable Court to issue directions for the matter to be dealt with at such time and in such manner and in accordance with such procedure as to promote expeditious and cheap hearing of the matter.*
- (c) *A **declarator** that the Respondents' failure to renew Applicants' employment contract in the facts and circumstances of this case amounts to "unfair dismissal."*
- (d) *That all Applicants be "**instated**" to their erstwhile employment positions, on the same and/or less favourable employment terms, forthwith.*
- (e) *That the Respondents be "**interdicted**" from employing any person/s to the erstwhile positions of the Applicants and/or that the persons so employed to the erstwhile positions of the Applicants be substituted with the Applicants.*
- (f) *A **declarator** that section 5 of the **Government Proceedings and Contracts Act No.4 of 1965** is*

unconstitutional for violation and/or imposing a threat of violation to the private judgment creditor's right to "appropriate and effective remedy" to protect and enforce judgment sounding in money.

- (g) *That "structural interdict" be issued aimed at the Courts' exercise of supervisory jurisdiction following the issuance of the order sought herein in order to monitor and ensure compliance herewith whether by: parties' reporting back to Court on extent of compliance, arrest and/or imprisonment, attachment/execution of property and/or in any manner whatsoever until remedies to be granted herein are fulfilled.*

ALTERNATIVELY:

- (h) *That Applicants be paid Constitutional Damages (all salaries plus benefits) Applicants were to be entitled to the period of three (3) years, but for the Respondents' unlawful conduct.*

ALTERNATIVELY:

- (i) *That Respondents be directed to pay Applicants' terminal benefits at the gratuity and not severance pay rate inclusive of the 3% and 5% increments paid to Public Servants in 2017 and 2020 plus Mountain or Hardship Allowance.*
- (j) *That Applicants be granted further and/or alternative "appropriate and effective relief".*
- (k) *That Respondents should jointly and/or severally pay costs of this Application.*

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That prayers 1 (a), (b) and (e) operate with immediate effect as interim reliefs."

Non-compliance with Rules

[6] The applicants' moved this Court to entertain the motion relying on Rule 8 (22) of the **High Court Rules**. This Rule governs ordinary civil applications and not constitutional motions. The latter are governed by the **Constitutional Litigation Rules, 2000**. The applicants have, thereby, wrongly invoked Rules which do not apply in this Court when exercising

constitutional jurisdiction. The matter was, therefore, wrongly enrolled in this Court to exercise its constitutional jurisdiction. For this reason alone, the application falls to be dismissed: **Chief Justice And Others v. Law Society of Lesotho** LAC (2011-2012) 255.

II. MERITS

- [7] The first reason for the dismissal of the application on the merits is that all the reliefs, except 1 (f), are based on fixed term contracts which have automatically expired. It is contended that by failing to renew the contracts and/or not re-hiring the applicants on permanent and pensionable terms, the Ministry of Home Affairs is guilty of unfair dismissals and in violation of legitimate expectations.
- [8] The contracts on the basis of which the applicants were/or are employed are fixed term contracts. It is accepted that the contracts have expired. This being the case, all these applicants whose contracts have expired rightly refer to themselves as ex-employees. Therefore, any claim for payment of outstanding salaries or gratuity cannot constitute violations of the Bill of Rights (Chapter II rights).
- [9] Clauses 16 and 17 of the expired contracts provide that disputes arising or related to the contracts shall be settled in accordance with the **Labour**

Code, 1992. By this, the applicants chose the law and the forum for settling their complaints. They should not be allowed to turn their backs on these clauses. They are non-suited on this ground as well.

Right to a fair hearing

[10] Faced with this insurmountable hurdle, Mr. *Sehapi* for the applicants, made a valiant attempt to invoke this Court's jurisdiction by submitting that the Chapter II right that the applicants rely on is the right to a fair hearing under section 12 (8) of the Constitution. This section reads:

“Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time.”

[11] When asked who he contended had denied the applicants a fair hearing, he answered that it was the employer who did so by failing to reply to the attorneys' letter of 24 October. This complaint and reliance on section 12 (8) are contrived. Firstly, the employer is neither a court nor adjudicating authority as envisaged by the constitutional provision. Secondly, the letter from the attorneys to the employer is a letter of demand and not an assertion of a right to be afforded a hearing. The submission is without merit and is rejected.

Legitimate expectation

[12] Another proposition advanced by Mr. *Sehapi* was that the applicants have a legitimate expectation to be re-hired on permanent and pensionable terms on the expiration of their contracts. A thorough search for an express or implied term of the contract to this effect yielded negative results. As did a thorough search for a renewal of the contract on the suggested basis.

[13] What the proposition of legitimate expectation to be re-hired on permanent and pensionable terms amounts to is that the applicants' contracts constitute a probation period for purposes of being confirmed as permanent and pensionable public officers in terms of section 7 (1) (a) of the **Public Service Act No.1 of 2005** which reads:

“(1) Appointment to the public service shall be on –
(a) permanent and pensionable terms;”

[14] This should be read with sub-section (1) (b) which provides for appointments on “contract terms” in terms of which the applicants were hired.

[15] Now, it is trite law that a legitimate expectation arises in circumstances where a public body has by express representation or conduct clearly, unambiguously, and devoid of any relevant qualification, induced or led

the applicant to reasonably expect a certain conduct on its part. To make his/her claim good, the applicant must satisfy the following conditions:

- (a) Prove that the statement or representation made by the public authority was unequivocal and unqualified:
 - (i) if the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted;
 - (ii) the presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.
- (b) Prove that the statement or representation was made by someone with actual or ostensible authority on behalf of the public authority.
- (c) Prove that the statement or representation was made to him or to a class of persons which is neither general nor diverse, to which he clearly belongs.

- (d) Prove that it was reasonable for him to rely on the statement or representation in circumstances of his case:
 - (i) if the applicant knew that the statement or representation was made in error and chose to capitalize on the error, he will not be entitled to any relief;
 - (ii) similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief;
 - (iii) if there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.
- (e) Prove that he did rely on the statement or representation and that he suffered a detriment or prejudice as a result.
- (f) But even if all the above requirements are met, the court will not grant relief if:

- (i) giving effect to the statement or representation will result in a breach of the law or the Government's international obligations;
- (ii) giving effect to the statement or representation will infringe the accrued rights of some member of the public;
- (iii) the public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

[16] On its part, the public authority must satisfy the following conditions:

- (a) It is for the public authority to identify any overriding national or public interest that justifies the frustration of the expectation.
- (b) If the public authority does not place material before the court to justify the frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public or national interest and that, in consequence, its conduct is so unfair as to amount to an abuse of power.

- (c) The public authority must provide details of the public interest so that the court can decide how to strike a balance of fairness between the expectation of the applicant and the overriding interest relied upon by the public authority: **Matela And Others v. The Government of The Kingdom of Lesotho** CIV/APN/197/2019 (14 November 2019); **Paponette & Ors v. Attorney General of Trinidad and Tobago (Trinidad and Tobago)** [2010] UKPC 32 (13 December 2010).

[17] The applicants contend that in the past years of 2012 to 2020, “several persons have got their contracts renewed since 2012 after expiry of every three (3) years contract term”. On this account, they have a legitimate expectation that their own expired contracts would be similarly renewed or be given an opportunity to reapply. Reliance is reposed on Regulation 20 of the **Public Service Regulations, 2008** which reads thus:

- “(1) A contract of appointment shall be for a period not exceeding 3 years and shall only be made if the position has unique occupational terms and conditions or the position is associated with projects that have a specific ending date.
- (2) Notwithstanding sub-regulation (1), where the Minister considers it necessary to award a contract of more than 3 years term, the Minister shall make a proposal to the Commission.”

[18] The founding affidavit lacks specificity and examples of the identity of the “several persons” whose contracts were renewed upon expiry during the years of 2012-2020. Neither is there any of such persons who has deposed to an affidavit in support of the contention. I then do not find any proof of a clear and unqualified statement or representation by conduct from the Ministry of Home Affairs to the applicants or others in their class that their contracts would be or were automatically renewed upon expiry.

[19] Moreover, reliance on Regulation 20 is also misplaced. The Regulation governs duration of appointments on contract under section 7 (1) (b) of the **Public Service Act, 2005**. The maximum period is three (3) years and a contract of a duration exceeding three years may be granted only if the Minister considers it necessary and his proposal in that regard is accepted by the Public Service Commission. The Regulation does not support the contention for legitimate expectation for renewal of expired contracts *ex lege*. Therefore, any expectation that the respondents were legally bound to renew the applicants’ expired contract on its basis is illegitimate and not legitimate. The applicants’ contentions are legally baseless.

Alleged unconstitutionality of section 5 of the Government Proceedings and Contracts Act No.4 of 1965

[20] The applicants attack section 5 on the **Government Proceedings and Contracts Act, 1965** on the basis that it:

“violates Applicants’ rights to ‘appropriate and effective remedy’ in so far as judgment sounding in money is concerned by denying enforcement of such judgment by attachment and/or execution of the government property to satisfy the debt of the private judgment creditor”.

[21] The section provides that:

“No execution or attachment or process in the nature thereof shall be issued against the nominal defendant or respondent in any action or other proceedings against Her Majesty in Her Government of Basutoland or against any property of Her Majesty; but the nominal defendant or respondent may cause to be paid out of the revenues of Basutoland such money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner (as the case may be).”

[22] The applicants are patently not judgment creditors nor is the Ministry of Home Affairs their judgment debtor. They are not armed with any judgment/order for payment of money by the Government. It is unfathomable why then they attack the section in the first place and secondly, how it violates a so-called “right to an appropriate and effective remedy”. There is no such a right in the Constitution. Where there is no right, it follows, as day follows night, that there is nothing to remedy. This attack is misconceived and seems to have been pleaded opportunistically

to invoke the Court's jurisdiction for complaints which there exists equally effective remedies available in the chosen law of resolution of dispute being the **Labour Code Act, 1992**.

[23] Without showing any right and absent pleading facts in what manner or respect the impugned section violates the alleged right, the applicants' complaint fails to meet the necessary threshold requirement of adequate pleading to invoke the jurisdiction of this Court. Because of this failure, the question of constitutionality of section 5 cannot be entertained: **Yadlapati v. State of A.P.** [1992] Supp. (1) S.C.C. 74.

III. DISPOSITION

[24] This application ought not to have been brought before this Court, let alone on an urgent basis. It is without merit and falls to be dismissed as we hereby do. The applicants will have to pay their own costs.

Order

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

1. The application is dismissed.
2. The applicants must pay their own costs.

S.P. SAKOANE
CHIEF JUSTICE

I concur:

T.S. MONAPATHI
JUDGE

I concur:

K.L. MOAHLOLI
JUDGE

For the Applicants: F. Sehapi

For the Respondents: L. Tau