

**IN THE HIGH COURT OF LESOTHO
HELD AT MASERU**

CIV/APN/304/2021

In the matter between:

RABUKA CHALATSE

APPLICANT

and

MINISTER OF PUBLIC SERVICE

1st RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY
OF PUBLIC SERVICE**

2nd RESPONDENT

REGISTRAR OF THE HIGH COURT

3rd RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF
FINANCE**

4th RESPONDENT

ATTORNEY GENERAL

5th RESPONDENT

Neutral citation : Rabuka Chalitse v Minister of Public Service & 4 Others
[2022] LSHC 214 Civ (31st August, 2022)

CORAM : **F.M. KHABO J.,**
HEARD : **17th AUGUST, 2022**
DELIVERED : **31st AUGUST, 2022**

SUMMARY

Organisational restructuring - Applicant seeking to have his salary upgraded from grade 'J' to 'K' in accordance with the revised approved structure of the Judiciary - And further claiming salary arrears from the date of his appointment to the position - In reaction, Respondents arguing that the claim is misconceived as the new structure of the Judiciary is not yet operational because it has only been 'approved' but not yet 'implemented' - The revised structure having been approved the court is of the view that Applicant ought to have been paid in accordance with it from the onset of his appointment and orders that he be paid accordingly with arrears as a result of the shortfall in his salary.

ANNOTATIONS

Statutes and regulations cited

Administration of the Judiciary Act, 2011

Public Service Act, 2005

Cases cited

Attorney General and Others v Bolepo and Others LAC (2004 - 2005), 522

Attorney General and Others v Makesi and 85 Others (C of A (CIV) No. 3 of 2000

The Ministry of Public Service and Another v Molefi Kome and Others (C of A (CIV) No. 44 of 2013

Books

The Concise Oxford Dictionary, Oxford, 8th ed., 1992

Thompson C., - "Bargaining, Business Restructuring and the Operational Requirements Dismissal" (1999) 20 ILJ, 755

JUDGMENT

KHABO J.,

Background

[1] The Applicant is engaged in the Judiciary as a Senior Judicial Commissioner at salary grade J, a position he has held since 23rd April, 2018. The Judiciary had prior to his appointment carried out a restructuring exercise which culminated in a new structure which was approved on 22nd February, 2017. This is common cause. In terms of this new structure the position of Senior Judicial Commissioner was upgraded and placed at grade K. When Applicant applied for the position, the advertisement had placed the position at grade J, and his letter of appointment duly placed him at that grade. The Applicant is before court to seek that he be remunerated at grade K in terms of the approved structure.

Relief sought:

[2] On the day the matter was heard, Advocate Tlapana for the Applicant, intimated to the court that he was abandoning prayer 1 in the Notice of Motion, which was for a ***“declarator that the Applicant is entitled to have the position of Senior Judicial Commissioner equated with and treated similar to that of the Registrar of the High Court in terms of remuneration and other benefits, that Applicant’s said position be upgraded from grade J, K to L.”*** Having been abandoned, this prayer is now immaterial for purposes of what remains to be determined. Counsel indicated that Applicant was pursuing the following prayers:

- (a) Directing the 1st to 3rd Respondents to upgrade his salary from grade J to grade K in accordance with the revised approved structure for the Judiciary with effect from April, 2018;

- (b) Directing the 4th Respondent to pay or cause to be paid to him salary arrears, retrospectively, with effect from April, 2018;
- (c) Costs of suit in the event of opposition; and that
- (d) Applicant be granted such further and/or alternative relief as the Honourable Court shall deem fit.

Issue for determination

[3] The issue for determination is very straightforward, but not necessarily simple, namely, that applicant's salary be upgraded, retrospectively, from grade J to grade K in accordance with the revised approved structure of the Judiciary. It is common cause that the revised structure has been approved.

Applicant's case:

[4] Applicant's case is brief. It is that he is still being remunerated at grade J, contrary to the approved structure that puts him at grade K and he finds this a violation of his right to be treated fairly and to be afforded equal protection of the law. Applicant's case is in a nutshell, that the position that he holds is not graded properly.

Respondents' case:

That Applicant was employed in terms of the old structure

[5] In their defence, Respondents plead that the Applicant was employed in terms of the old structure which places him at grade J and not at K. Respondents refer this court to annexure "**RH1**" in this regard. This is the advertisement in terms of which Applicant applied for the position and was subsequently appointed. "**RH1**" was later amended by "**RC3**," authored by the Principal Secretary, Ministry of Public Service on 14th March, 2017 shortly after the approval of the new structure for the Judiciary.

[6] “RC3” is a corrigendum, to the effect, among others, that the “*Senior Judicial Commissioner reports to the Chief Justice and not to the Registrar of the High Court as stated in the new approved structure* (emphasis added).” It is interesting to note that the Principal Secretary invoked the new structure in respect of reporting lines but not in respect of the salary.

[7] In my considered view, Respondents’ defence and reliance on the old structure does not receive the favour of this court. The corrigendum aside, the advertisement (“RH1”) was issued out by Respondents on 1st December 2017, months after the approval of the structure in issue. We are not told why the advertisement was issued in terms of the old structure when there was a new one in place and due to be implemented. It has been established as a fact that Applicant assumed the position of Senior Judicial Commissioner post after the coming into effect of the revised structure, not before.

That the structure has been approved but not yet implemented

[8] Respondents further raise a defence that the approval of the new structure does not automatically mean the structure is implemented, so the position remains at grade J. Respondents’ contention is that implementation is an administrative function of the Ministry responsible for the Public Service through its Principal Secretary and to this effect refers the court to Section 13 (2) (c) of *the Public Service Act, 2005* which reads:

The Principal Secretary is responsible for -

assisting in the initiation, formulation and implementation of the policies of the Ministry or Department under the Principal Secretary’s supervision.

Respondents’ Counsel argues that although the structure was approved, the Principal Secretary had not implemented it or given direction for the

position of Senior Judicial Commissioner to be graded at K, hence the Applicant cannot be graded thereat.

[9] Respondents argue further that in order for the Judiciary to implement/ or not implement the approved structure, the Judiciary would have to follow the establishment processes for implementation which may result in recreation of new positions, re - designation or upgrading¹ such that the Applicant may, together with other candidates, have to submit applications to be considered for positions in the new structure.

[10] I would have thought that such establishment processes were considered in motivating the approval of the revised structure. This argument beats logic. In terms of “RC 2,” the approved structure, Applicant’s position is graded at K. If as argued by the Respondents, in order for the structure to be implemented, a lot of factors had to be considered, this begs the question, what informed the position of Senior Judicial Commissioner to be graded at K? For me that would include subjecting the proposed (not approved) structure to such processes as job evaluation, job analysis, costing to determine the financial viability of the structure, so on, and so forth.

[11] The restructuring exercise is also common cause. The Concise Oxford Dictionary² defines restructure as giving “**a new structure to; rebuild; rearrange.**” The learned author, Clive Thompson in his article “Bargaining, Business Restructuring and the Operational Requirements Dismissal”³ underscores the rationale behind restructuring as being “**to improve - or save - the competitive position of the business in its product or services market,**”⁴ and that in undertaking this exercise, “**an employer**

¹ Para 5 of the Answering Affidavit

² The Concise Oxford Dictionary, Oxford, 8th ed., 1992

³ (1999) 20 ILJ, 755

⁴ Supra at p. 761

*may wish to work differently, [which] may entail changes to conditions of service or work practices or both.”*⁵

[12] On the basis of the foregoing analysis, the court appreciates that there are factors to be considered in the restructuring process, but the issue is: at what stage, Is it at the approval or the implementation stage? For me, logic dictates that the process starts with the proposal of a structure by the relevant Ministry, Department, or Sector, as the case may be, which we could refer to as an “organisational dream;” then the assessment of its viability/sustainability, costing, job evaluation, job analysis and other considerations which Respondents’ Counsel alluded to. These would inform, among others, specifications for a particular job and salaries to be attached to positions. If specifications for the position are changed this could call for the re - advertising of the position as suggested by Respondents’ Counsel. Coming to the question: at what stage of the process? It is my considered opinion that these factors have to be considered prior to the approval of the structure, otherwise it would lead to absurdities.

[13] On consideration of the organisation’s proposed structure, specifications of the job might change to meet changing needs, and the pay structure may change too. It is only prudent that the implications of the structure are considered before ‘approval.’ Respondents’ argument seems to put the cart before the horse by approving the structure before considering such factors as **“the establishment processes for implementation which may result in recreation of new positions, re - designation or upgrading”**⁶ as she put it. The approval renders the proposed structure, a reality, not a dream anymore.

⁵ Supra at p. 762

⁶ Para 5 of the Answering Affidavit, ibid

[14] For me considerations that Respondent's Counsel refer to ideally have to come before approval, then be followed by the implementation which entails putting the approved structure into force. Immediately upon approval the structure becomes legally enforceable and binding. Hence, the Applicant having been appointed subsequent to the approval of the revised structure, ought to have been graded in accordance with it. Fairness so dictates.

[15] In *Attorney General and Others v Makesi and 85 Others*⁷ the Respondents had expressed a dissatisfaction at Government's failure to implement their upgrading following Cabinet's approval that their salaries be upgraded. The Court of Appeal found that the power to implement the Cabinet's decision was *intra vires* the Minister of Public Service and that his/her failure to carry out that decision was unlawful. In the same breath, 2nd and 3rd Respondents are to liaise in ensuring implementation of the approved structure in issue, which include the proper grading of the Senior Judicial Commissioner.

[16] Even if we were to go by the argument, without acceding, that the implementation requires processes enunciated by Respondents' Counsel, we are not informed why it has not been done to this point, the case is not about a new position. Applicant is complaining about a position that already exists in the structure. The argument goes further that the 3rd Respondent does not have the power to implement, and has to motivate why a position should be upgraded.

[17] As already stated earlier, the position has been upgraded as can readily be seen from "RC2," (the approved structure). The challenge is with its implementation. Respondents refer to Section 13 (2) (c) of the *Public Service Act, 2005* and argue that the powers of implementation lie with the

⁷ C of A (CIV) No. 3 of 2000

2nd Respondent and not the 3rd Respondent. I am not sure where this argument takes us because both 2nd and 3rd Respondents are Government officials who are represented by the same office of the Attorney General. It really takes the case nowhere to shift responsibility from one office to the other.

[18] There is correlation between the Principal Secretary responsible for the public service and the office of the Registrar of the High Court as can be gleaned from Section 6 (4) of the *Administration of the Judiciary Act, 2011* to the effect that “*on matters of policy implementation, the Registrar shall liaise and coordinate with the Principal Secretaries and Heads of Departments.*” “RC 3” is indicative of such coordination between the two officials.

[19] Counsel for Respondents also made an argument I found rather baffling, that the Applicant cannot be remunerated against a position that he is not in. She is arguing in essence, that the Applicant is not entitled to the relief he seeks because he does not occupy the position at K. In her own words, Counsel for Respondents pointed out that it is not in dispute that the structure in question has been approved. This is the structure that puts the Applicant’s position at grade K. The Applicant in fact holds the said position. It cannot be correct that the position has not been upgraded as Respondents aver when it has been so upgraded in the revised structure.

Payment of salary arrears:

[20] A further prayer pursued by the Applicant is for the 4th Respondent to pay or cause to be paid to him salary arrears, retrospectively, with effect from 23rd April, 2018. The success of this prayer is dependent on prayer 2 deliberated above. Respondents argue, in turn, that Applicant is not entitled

to salary arrears because his position has never been upgraded at K. My considered view is that it has.

[21] The court, notes with displeasure that the prayer on salary arrears is not motivated in the Founding Affidavit. This is poor draftsman ship. The basis of the prayer for salary arrears is annexure “RC2,” the approved structure. The court has established that the Applicant is entitled to be graded at K, it being a grade that was already attached to the position when the Applicant was promoted to it. Prayer 1 having been established as I find that it has, it follows that arrear salaries are due to Applicant. It is a consequential relief in the circumstances of this case.

[22] This is on the strength of the Court of Appeal decision of *The Ministry of Public Service and Another v Molefi Kome and Others*,⁸ in which the Court of Appeal confirmed an order of this court for payment of salary arrears to Respondents who had sought to be upgraded from grade D to F. Respondents were Chauffeurs of Judges of the High Court. They claimed that they be paid salaries equal to those of Honourable Ministers and Honourable Assistant Ministers’ chauffeurs. In a comparable case of *Attorney General and Others v Bolepo and Others*⁹ the apex court also confirmed the decision of this court in terms of which salary arrears were ordered to be paid, retrospectively, from when the decision to upgrade nurses was made.

Conclusion

[23] The revised judicial structure having been approved when the Applicant was appointed to his position, the court finds that he was rightfully and lawfully entitled to be paid at grade K. Salary arrears have vested as he

⁸ C of A (CIV) No. 44 of 2013

⁹ LAC (2004 - 2005) 522

ought to have been paid at grade K from his appointment on 23rd April, 2018.

Order

[24] The order of this Court is that:

- (a) The application succeeds;
- (b) Applicant's salary be upgraded from grade J to K;
- (c) That he be paid his salary arrears, retrospectively, from 23rd April, 2018 up to the enforcement of this Order; and
- (d) Costs shall follow the event.

**F.M. KHABO
JUDGE**

For Applicant : Adv., M.P. Tlapana
For Respondents : Adv., R. Kanetsi