

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/T/457B/2005**

*In the matter between:-*

**‘MATEBOHO MOKUENA**

**Applicant**

**And**

**JUDICIAL SERVICE COMMISSION**

**1<sup>st</sup> Respondent**

**ATTORNEY GENERAL**

**2<sup>nd</sup> Respondent**

**Neutral** Citation: ‘Mateboho Mokoena v Judicial Service Commission [2023]  
LSHC 73 CIV(4 April 2023)

**JUDGEMENT**

**Coram** : **Hon. Mr. Justice T. E. Monapathi**

**Hearing** : **27<sup>th</sup> April 2015**

**Date of Delivery** : **4<sup>th</sup> April 2023**

## SUMMARY

*Administrative policies may change with changing circumstances including changes in the political complexion of government. The liberty to make such changes is something that is in here in our form of constitutional government. When a change in administrative policy takes place and is communicated in a department circular, only reasonable expectations that may have been aroused by a previous circular are destroyed. But freedom to change policy is not absolute. It must be weighed with the public interest sought to be safe by change of the policy. There ought to be a justification and this change must be communicated to those who might have the expectations or used by previous policy to ensure fairness and guarantee procedural legitimate expectation of these who may be affected Plaintiff would not benefit in those circumstances”.*

- [1] Plaintiff held Diploma in Law from the National University of Lesotho. She held position of 1<sup>st</sup> Class Magistrate when she retired. She avers in her Declaration that the Judicial Service Commission “failed to so promote her even when there were positions, she could be promoted to. As a result of failure to promote her, Plaintiff suffered loss of salary to the positions she was supposed to be promoted to.” As a result, Plaintiff claims damages in the amount of M400, 000.00, which is made up as follows: from the Defendants,
- (i) M320, 000.00 salary loss to non-promotion
  - (ii) M75, 000.00 general damages for humiliation before junior staff
  - (iii) M5, 000.00 compound interest on salary loss, calculated from 1990 to date of issue of summons.

- [2] Plaintiff led evidence and stated that she had a legitimate expectation to be promoted to a more senior position in the Magistracy. She testified that the Ministry of Justice had a practice of promoting Magistrates who did not hold LLB Degrees/Law Degrees through the ranks from third class, second class, first class and then Resident Magistrate.
- [3] Plaintiff stated further that in August 1987 at a Magistrate`s conference a resolution that Magistrate be at a higher salary scale was reached and adopted as government policy and implemented. Another resolution was that Diploma holders would no longer be engaged. This was also implemented. Diploma holders would be gradually phased out by promoting them through the ranks. According to Plaintiff JSC failed to promote her through the ranks but promoted those juniors to her who held LLB degrees. This she said was in violation of Public Service Rules Part 3 Section 5 which states “Appointment by promotion would be based on merit, qualification, experience and skill.”
- [4] Plaintiff says “Defendants out of ignoring the set professions and this resolution were hurtful and humiliating to me as I had merit, experience and skills.” She further that during her service she demonstrate experience and skill and handle family cases and solve them, did bending over matters among others. Regardless, she states, “Defendant did not promote me but anyone I had trained on the job to be my superior and because of their ranks they were allocated direct telephone lines and secretaries”
- [5] In June 2004 she wrote to the JSC requesting to be considered for promotion to the position of resident magistrate and later senior resident magistrate. The JSC reply “the minimum qualifications required in order for a magistrate to rise up through the ranks are on LLB degree.” She states she was not aware or made aware that the practise of promoting

magistrates on merit, experience and skill was no longer applicable, and that the only creation was on LLP degree. She stated that she had legitimately expected that the new policy would apply to the new people and that the JSC would apply these new policies after diploma magistrate had been phased out.

- [6] On the 11<sup>th</sup> October 2002 the Chief Magistrate informed them that the Judicial Service Commission had decided to consider them for promotion because they did not hold the required qualifications for promotion - that is they did not hold LLB Degrees. The position of the JSC was recreated by the letter of 2004
- [7] Plaintiff retired from the bench in 2005. At the time she was a first-class magistrate she was never considered for promotion. She held this position for a period of 18 years.
- [8] The issue for consideration is whether Defendants are liable to pay Plaintiff:
- (a) M320,000.00 Salary due to non-promotion
  - (b) M75,000.00 general damages for humiliation by junior staff
  - (c) Payment of M5,000.00 compound interest on salary loss calculated from 1990 to date of issue of summons.
- [9] Plaintiff's claim is essentially premised upon legitimate expectation. According to her there was a long-standing practise that magistrate diploma holders at the time moved up to the ranks and were promoted to positions of Resident and Senior Resident Magistrate. Secondly that at a Judges and magistrate conference held in 1987 at CTC that Magistrates holding a diploma in law certificate be promoted through the ranks until diploma qualification phased out.

[10] According to the testimony led by and on behalf of Plaintiff one Mr Monathi who held Diploma in law was promoted to the position of Senior Resident Magistrate and later appointed Chief Magistrate. Mr Monathi obtained his diploma in law in 1980. He was .....(Record is not very clear on this point. May his lordship check handwriting notes on the promotion of Mr Monathi, ie the year and date)

### **The Legal Matrix**

[11] Legitimate expectations are protected by law. A litigant/plaintiff or applicant who relies on a promise undertaking or representations made by a public authority that it would do something or would take a particular course of action may have such expectation protected.<sup>1</sup> Similarly, a litigant/ Applicant who legitimately relies on some past practise of a public authority may also his or her expectation protected by law.<sup>2</sup> This is so even where a person claiming such benefit has no legal right to it.<sup>3</sup>

[12] In this case unlike many cases brought before this court based on procedural legitimate expectations, Plaintiff's claim is not based on procedural legitimate expectations as it would seem. It is not based on expectation of hearing or consultation before a decision not to promote her was made. She is not challenging that. She claims a benefit that due to her had she been promoted. That is the crux of her case and her claim as appears in the summons.

[13] According to Plaintiff there was a long-standing policy of promoting Magistrate based on seniority. Also, a conference held at CTC a promise

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<sup>1</sup> . Walele vs City of Cape Town & others 2008 (ii) BCLR 2008 (ii)

<sup>2</sup> . The Government of the Kingdom of Lesotho and others vs Matela and Others C of A 85/19.

<sup>3</sup> . Council of Civil Service you know and others vs Minister for Civil Service.

was made that Magistrate holding certificate in law would be phased out by being promoted to position of Resident and Senior Resident Magistrate. Therefore, she says she had a legitimate expectation to be promoted.

[14] As stated earlier legitimate expectation may arise from an express promise given by public authority or from the existence of a regular practise which reasonably expect to continue. It is important to determine whether Plaintiff had reasonable legitimate expectation and whether her expectations were summarily disappointed.

[15] In 1978 National University of Lesotho introduce a programme diploma in law. A two-year programme. Thereafter, holders of this law certificates would be appointed as Magistrates by the Ministry of Justice to serve in different parts of the country. They would be promoted over time to save in different ranks of Magistrate; third class to second, first class, Resident Senior Resident. And in some instance to be Chief Magistrates. Plaintiff was appointed third class Magistrate in 1981 after she completed her diploma in law. In 1984 she was promoted to the rank of second-class magistrate. In 1986 she was promoted to the rank of first-class Magistrate.<sup>4</sup>

[16] The programme of Diploma in law was discontinued by National University of Lestho. Seemingly a resolution was passed that holders of diploma in law would no longer be recruited as Magistrates. However, those Magistrates with certificates remained in office. Their status and benefits remain the same. She alludes to that on undertaking was also made by Judges at a conference that they would continue be promoted to ranks of Resident and Senior Resident Magistrate.

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<sup>4</sup> . council of civil service union and others vs Minister for civil service (1984) 3 All ER 935 (HC)

- [17] Any public body or person who purports to make a promise and undertaking to make a certain decision must possess the authority to do so. Otherwise, such a representation is ultravires. It cannot bind administrative authority. Judges cannot make a resolution that would confer legitimate expectation on any matters related to the employment in terms of employment in purely administrative matters. An expectation based on what the Judges said in a conference cannot be protected. **See Walele vs City of Cape Town 2008(ii) BCLR para 41**
- [18] Plaintiff was disappointed in 2002. She and a colleague were informed by the Chief Magistrate that the Judicial Service Commission could not consider them for promotion because they did not hold LLB degrees. ( May his lordship check on his notes whether a savingram, Memo or any notice was made and published/circulated on this issue, whether at any point before October 2002 plaintiff was aware that any person holding LLB degree were eligible for promotion).
- [19] Policy shift is necessary to confirm with adaptability to change, retain continuity and expand to meet the new needs of a change in society. However, there would always be conflict between ensuring certainty inflexibility and expectations of those who relied on the policy. **In Hughes Vs Department of Health and Social Security.** *“It was held administrative policies may change with changing circumstances including changes in the political complexion of government. The liberty to make such changes is something that is in here in our form of constitutional government. When a change in administrative policy takes place and is communicated in a department circular, only reasonable expectations that may have been aroused by a previous circular are destroyed. But freedom to change policy is not absolute. It must be weighed with the public interest sought to be safe by change of the policy.*

*There ought to be a justification and this change must be communicated to those who might have the expectations or used by previous policy to ensure fairness and guarantee procedural legitimate expectation of these who may be affected”.*

[20] Plaintiff did address her frustration and disappointment to the Judicial Service Commission. The JSC through responded, “I am directed to inform you that it is a matter of policy that promotion of Magistrate is considered on merit and qualifications.

The minimum qualification referred to for a Magistrate to rise up through the ranks are an LLB Degree.

Since the inception of the policy the Judicial Service Commission has not deviated from it nor has it entertained.

Individual applications contrary to that policy.

It is regrettable therefore that if you don't currently have minimum qualifications required for progression and promotion you do not as a matter of course qualify for that promotion.

Best regards,

L. Chaka-Makhooane

(Secretary- Judicial service Commission)

[21] Plaintiff has not asked the court to impugned review and set aside the policy. It is not her case that the JSC or the administrative authority in changing policy or introducing a policy acted arbitrarily or unfairly. She claims for an award of damages in circumstances where the decision of the administrative authority in passing policy and promotion has not been set aside as irregular, arbitrary, or unfair or unlawful.



[22] Plaintiff did not give evidence to the effect that someone junior to her with a similar qualification that is diploma in law was promoted. All promotions she refers to in her testimony of her witness show that promotion took place before inception of the policy and those promoted were senior to her at the time.

[23] In any event plaintiff's legitimate/reasonable expectation that she would be promoted was disappointed when she was informed by the JSC that she fell short in requirements to qualify for promotion. The rationality/reasonableness of the policy upon which the JSC had relied upon in reaching that decision has not be impugned. It would be remiss for this court to award damages in circumstances where repository of power and decision maker for reasons shown could not promote.

[24] Therefore plaintiffs claim is dismissed. I make no order as to costs.

**T. E. MONAPHATHI J**

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**JUDGE**

For Applicant : Adv. Motsieloa

For Respondent : Adv. Tau