

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/0332/2023

In the matter between

‘MATHABO SUSAN MPHALE

APPLICANT

AND

PUBLIC SERVICE COMMISSION

1ST RESPONDENT

PRINCIPAL SECRETARY

MINISTRY OF PUBLIC SERVICE

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

‘Mathabo Susan Mphale v Public Service Commission 2 others LSHC [2024] Civ 233 (13 September 2024)

CORAM : BANYANE J

HEARD : 19/08/2024

DELIVERED : 13/09/2024

Summary

Employment law-normalisation of grading for positions of Directors and Managers in the civil service -applicant asserting that she ought to have been elevated to a higher grade- applicant seeking an order declaring her to hold a position non-existent in the establishment list-whether relief tenable- application dismissed.

ANNOTATIONS

Legislation

The Public service Act No.1 of 2005

Cited Cases:

1. Mpakanyane and 3 others v PS Ministry of Communications, Science and Technology and 3 others C of A (Civ) 01/2024
2. The Ministry of Public Service and another v Molefi Kome and others C of A (Civ) No. 44/2013
3. Mosito v Letsika C of A (Civ) 9 of 2018
4. The Principal Secretary of Public Service v Tsupane C of A (Civ); Const case 11 [2020] LSCA 25
5. Attorney General v Bolepo and others LAC (2000 – 2004) 522
6. Leshapha v Leshapha (Civ/APN/434/20) [2021] LSHC 70 (17 June 2021)

South Africa:

1. Cordiant Training CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA)
2. Letseng Diamond Ltd and others Trinity Asset Management (Pty) Ltd and others v Investec Bank Ltd and others 2007 (5) SA 564

JUDGMENT

BANYANE J

Introduction

[1] The applicant is a civil servant in the Ministry of Finance and Development Planning. She holds the position of Contracts Manager, Grade I since 16 March 2010. In 2013, the government revised the grading for positions of directors and managers across the civil service through circular No.7 of 2013. When the circular came into effect, the applicant's grading remained unchanged. These facts are common cause.

Relief Sought

[2] The applicant asserts that she ought to have been upgraded to J because she performs duties of directors. She has therefore approached the Court seeking reliefs couched as follows:

1. The respondents be directed to normalise and upgrade the applicant's position from Grade I to Grade J in line with other Directors in the Government of Lesotho pursuant to Ministry of Public Service circular notice No.7 of 2013.

2. The normalization of the applicant's position to grade J be applied retrospectively from 01st April 2013 when all other Directors of Government of Lesotho were upgraded and that she be given all benefits/money that she ought to have received had she been upgraded along with other officers at Director level.
3. It be declared that the applicant holds the position of the Director with effect from 01st April 2013 as such all her terminal and pension benefits shall be determined in line with Grade J of the government employment scale.
4. Payment of eight hundred and fifty-one thousand, six hundred and four Maloti (851 604 00) being arrear salaries due to the applicant.
5. Cost of suit on attorney and client scale.
6. Further and/or alternative relief.

[3] On 13 September 2024 I issued an order dismissing the applicant's claim. These are the reasons for this order.

Applicant's case

[4] The essence of the applicant's case is that she is the head of the department of Contracts Management in the Ministry because she is at the helm of this department with four officers under her supervision, namely a Senior Contracts officer and

three technical officers. She performs all duties and responsibilities of a director of a department; namely, she develops policies in relation to special contracts, manages fuel contracts, fleet, property and facility management contracts, provides advice to other service departments on contract issues, represents her department as its head in all management meetings, prepares the budget of the department, and receives benefits equal to those of directors, including cell phone, and airtime benefits.

[5] In addition, she works directly with the PS of the Ministry as her immediate supervisor, receives instructions from the PS and accountable or answerable to the PS.

[6] For these reasons, she ought to hold the position of Director of Contracts Management or elevated to the directors' grading (J) and remunerated accordingly.

[7] She further asserts that the government selectively implemented the normalization process leaving out some officers whose grading had to be adjusted. Her office and the Chief Legal officers heading the legal departments in different Ministries were victims of this disparate treatment. Resultantly, the legal cadre successfully challenged their exclusion in CIV/APN/409/2015 and CIV/APN/243/2020. A circular normalising their positions was thereafter issued on 31st March 2021.

The respondents case

[8] The application is strenuously opposed by the respondents. Although points of law were raised, they were abandoned at the hearing of this matter.

[9] The respondents deny that the applicant's position is akin to that of a Director just because she is the most senior official in her section. Her job description does not assign any directorship duties to her, so there was no anomaly to be rectified by the 2013 Circular. To their answering affidavit, they attached the job descriptions for Directors and the applicant's position to show that a manager ordinarily deputizes a director and reports to the director.

[10] The respondents further contend that the Contracts Management section and Financial Institutions Management section within the establishment list of the Ministry of Finance are not headed by Directors. Absent an existing position in those sections doesn't make the applicant a director. Moreover the fact that she reports to the PS, receives cell phone or airtime benefits do not make her a Director.

Submissions

[11] Advocate Kelepa for applicant advanced a two-pronged argument. The first leg concerns a proper construction of the 2013 circular. According to him, an officer who heads a department ought to be normalised and elevated to grade J.

[12] The second prong is that in determining whether an officer is a head of department, it is not the designation of the position that is decisive but the functions they perform. This submission is based on his interpretation of a legal advice penned by the Attorney General in 2013 and 2015 respectively. He cited the case of **Mpakanyane and 3 others v PS Ministry of Communications, Science and Technology and 3 others**¹ to submit that an officer must be remunerated according to functions and duties they perform.

[13] He further cited the cases of **The Ministry of Public Service and another v Molefi Kome and others**² and **Attorney General v Bolepo and others**³ to support the relief for payment of arrear salary.

¹ C of A (Civ) 01/2024

² C of A (Civ) No. 44/2013

³ LAC (2000 – 2004) 522

[14] For the declaratory reliefs sought he relied on section 2 of the High Court Act 1978 (as amended) as interpreted in **Leshapha v Leshapha**⁴ and South African decisions where similarly worded provisions were interpreted.⁵

[15] Advocate Nku for the respondents conversely argued that a declaratory relief lies solely in the discretion of the Court. He also cited authorities including **Mosito v Letsika**⁶ to submit that the applicant is not entitled to the relief sought.

[16] His second leg of argument is that the applicant's complaint is founded on discrimination, but she failed to prove same. He cited **the Principal Secretary of Public Service v Tsupane** and **PS – Ministry of Public Service Moshoeshe Molapo**⁷ to submit that the fact that the applicant is a senior officer in her section does not automatically place her in the category of employees to be normalized by the circular.

Issues for determination

⁴ (Civ/APN/434/20) [2020] LSHC 70

⁵ Cordiant Training CC v Daimler Chrysler Financial Services Pty Ltd 2005 (6) SA 205 (SCA) at 212 H, Letseng Diamond Ltd and others Trinity Asset Management (Pty) Ltd and others v Investee Bank Ltd and others 2007 (5) 564

⁶ C of A (Civ) 9 of 2018

⁷ C of A (Civ) 2 of 2020

[17] The main issue arising is, there was an anomaly with the grading of the applicant's position that ought to be corrected or rectified by the 2013 Circular.

Discussion

[18] The starting point of the inquiry is the Circular itself because the determination of the issue hinges on the proper interpretation of this Circular. It is useful to quote it extensively. It reads:

**MINISTRY OF THE PUBLIC SERVICE CIRCULAR
NOTICE NO.7 OF 2013**

**TO : ALL PRINCIPAL SECRETARIES
ALL HEADS OF DEPARTMENTS
ALL DISTRICT SECRETARIES**

**RE: NORMALISATION OF GRADING FOR POSITIONS
FROM MANAGER TO GOVERNMENT SECRETARY LEVELS**

It is notified for general information and appropriate action that there is anomaly on the Civil Servants grading structure from **Grade H to J** whereby some director positions are at Grade I and J, while managers are at grades H and I. In order to rectify this, a revised salary grading (attached) for the affected positions has been developed. The effective date for implementation of this normalization is 1st April 2013.

The affected positions are those at Director and Manager levels which are currently at Grade I and H respectively. The change will only be effected whereby an incumbent is at head of department level or deputise head of department. Ministries are advised to note that some positions have been omitted due to the need to change their nomenclature. In such cases ministries are to prepare proposals accordingly for consideration by the Ministry of the Public Service.

Other positions affected by the normalisation are the following:

Houseman (Interns): From Grade H to I

Senior Houseman: From Grade I to J

Registrar, Deputy Principal Secretary, Chief Executive Officers, Chief Education Officers: From Grade K to L

Principal Secretary, Director General, Specialist (Practicing Doctor in the public sector): From Grade K to L

Government Secretary, Political Advisor, Director General of Health Services and Consultants (Practicing Doctors in the public sector): From Grade L to M

Chief Accounting Officers are advised to note this change and take appropriate action.

M. LEMPHANE-LETSIE

PRINCIPAL SECRETARY

MINISTRY OF THE PUBLIC SERVICE

[19] The annexure to the circular enumerates various positions per Ministry, their current (as at 2013) and normalised grading. I focus only on the Ministry of Finance where the applicant works. In the Ministry of Finance, positions at director level are Director Internal audit, Director regional Integration, Director Public Debt Management, Director Procurement and Asset Management, Director Financial Sector policies, and Director Human Resource. All, except Director HR were graded J at the time so no change was effected. Change to grade J was effected only for Director HR.

[20] At Manager level are Pensions Manager, Financial Institutions Manager, Procurement Manager, Debt Manager, Contracts Manager, Chief Budget Officer, Deputy Director, Admin Manager, Training and Development Manager and HR Manager.

[21] From this list, the Deputy Director, Administration Manager, Training and Development Manager, Human Resource Manager were graded H in 2013 and were elevated to I. The rest of the managerial position holders were graded at I at the time so no change was effected.

[22] The question to be decided is whether the applicant ought to be elevated to J. The answer lies in the proper interpretation of the circular in the light of its purpose, scope, and background.

Background, purpose and scope of the circular

[23] The introductory part of the Circular highlights the background of the circular. It is that there was an anomaly on civil servants grading structure from Grade H – J whereby some director positions were at grade I and J, while managers were at grades H– I.

[24] Based on this brief background, the purpose of regularisation as spelled out in the circular was; a) to correct/rectify the existing discrepancy or anomaly in differential grading of managers and directors, b) to ensure that directors across the civil service are similarly graded at J and managers at I. This is why all the managers who were graded H were elevated to I and directors graded I were elevated to J.

[25] As to the scope of its application, Part II of the circular shows that the affected positions are those at director and manager levels which were at grade I and J respectively provided that the incumbent was the head of department or deputised head of department. In my understanding the circular applied only to a manager graded H and to a director Graded I at the time, provided the incumbent was a head of department or deputised a head of department.

[26] Based on this understanding, I proceed to address the second pillar of the applicant's case. It is that by virtue of being a head of her department, she ought to be treated the same as chief legal officers, who were elevated to grade J because of the functions they perform. The question to consider is whether her position is comparable to chief legal officers.

[27] In a claim for discriminatory treatment, a reasonably close resemblance of the facts and circumstances of the plaintiff's and comparator's cases is required, rather than a showing that both cases are identical. In other words, the comparator must be similarly situated to the plaintiff in all material respects.⁸

[28] To decide whether the two positions are comparable, it is perhaps necessary to highlight the facts surrounding the legal cadre's position(s) after the circular came into effect. It is this. The legal cadre across the civil service was headed by either Chief legal officers or Director Legal Affairs. Both were graded at I in 2013. After normalization, Director of Legal affairs was elevated to grade J but Chief Legal Officers remained at I because they were considered to be at managerial level.

28.1 A legal opinion of the attorney General was sought and obtained on 12 August 2013 regarding the differential grading of these two positions (this opinion is attached to the founding affidavit). In essence, the AG opined that although Chief Legal

⁸ Lesotho Police Staff Association and 2 others v the commissioner of Police, CC/14/2020, para 100

officers were not designated ‘Directors’ they were similarly situated or circumstanced as the Directors of Legal affairs because both are lawyers holding the same qualifications, heading the legal cadre in their respective ministries and performing similar duties and thus, the differentiation in grading based on designation of these two positions was unjustified.

[29] The second legal opinion by Deputy AG was penned in 2015 to the same effect that the determining factor for regrading where a position is not designated ‘director’ should be the level at which the position was and the duties performed. For example, chief of Protocol and senior houseman were elevated to grade J because they were at director level.

29.1 A legal suit was then filed by the Chief Legal Officers in 2015, presumably based on the advice of the AG. An amicable settlement was reached, and the Chief Legal Officers were regraded to J.

[30] Reverting to the facts of the present matter, the applicant alleges that her position is akin to chief legal officers because they both head their respective sections and report directly to the principal secretaries in their Ministries. Besides these two aspects, the applicant failed to establish that she is similarly situated as the Chief Legal Officers or Director Legal affairs in material respects.

[31] It seems to me that the legal opinion is quoted out of context, to compare the incomparable. The focus of the legal opinion was on the designation of the position of Chief legal officers and their functions compared to Directors of Legal Affairs. Since the only difference between the two is designation yet functions are the same, the AG opined that Chief Legal Officers ought to be on the same par as their colleagues in other ministries. In my view, the opinion is inapplicable to the applicant's situation nor does it advance her case.

[32] The third pillar of the applicant's case is that she ought to hold the position of Director Contracts Management because she is the most senior officer in the section. She seeks an order declaring her as Director in prayer 3. The question to be answered is whether this relief is tenable.

[33] It is my considered opinion that the applicant is indirectly asking the Court to appoint her as director because such position does not exist in the establishment list for the Ministry of Finance. This view finds support from the Civil Service Establishment list 2020/2021 attached to the founding affidavit. According to this Establishment list, the Ministry of Finance has various Departments. Under the Department of Private Sector Development Affairs, there are about seven (7) divisions or units; namely, Public Debt management, National Authorising Office, PPAD, Pensions, Contracts management, Private

Sector Development and Financial Affairs Unit; four of which are headed by Directors (Private sector Development, pensions, PPAD and Public Debt Management).

[34] Other divisions are headed by managers. These include Contracts Management (the applicant's section), Financial Affairs, and National Authorising office.

[35] Under section 6 of the **Public Service Act 2005** the power to appoint persons to hold or act in offices in the Public Service (including power to confirm appointments) and the power to terminate appointments of such persons, save the power to discipline and terminate appointment of such offices for disciplinary reasons, is vested in the Public Service Commission.

[36] Section 10 (1) of the same Act empowers the Minister of Public Service to do what in his opinion is necessary or expedient for giving effect to the objects of this Act. Section 10 (2) empowers the Minister to make provision for all or any of the matters there set out, including;

- a) Policy on the establishment or abolition of departments, sub-departments or offices, and transfer of functions and public officers from one Department to another.

b) Employment Policy and any other policy that relates to human resources, including but not limited to promotions, training and development, Public Officers' relations, retirements, control and organisation of Ministries and Departments.

Disposal

[37] For reasons set out in this judgement, I conclude that although the applicant headed the contracts management division when the normalisation circular was issued, her position was and still is managerial. It is not and never was at directorial level. Since the position was graded I from her appointment in 2010, there was no anomaly in her grading. Consequently no adjustment to her grade was nor is necessary. I further conclude that her position is not comparable to Chief Legal Officers.

[38] Finally this court has no authority to create a position for the applicant nor appoint her to that position. The creation of positions and recruitment of officers is in the realm of the Ministry of Public Service upon observance of the procedures set out in the relevant pieces of legislation. As stated earlier, there is no position of Director, Contracts Management in the organisational structure of the Ministry of Finance. I conclude that creation of positions and appointment of officers to such positions is outside the scope of authority of this Court.

[39] All things considered; I am not persuaded that the applicant made a case for the reliefs sought. The applicant's case must therefore fail.

Order

[40] As a result, the application is dismissed with no order of costs.

P. BANYANE
JUDGE

For applicant : Advocate Kelepa

For respondent : Advocate Nku