

IN THE HIGH COURT OF LESOTHO

Held in Maseru

CIV/APN/233/21

In the matter between:

THEBE TIHELI

APPLICANT

AND

MOKONE LEEMISA

1ST RESPONDENT

PUBLIC SERVICE COMMISSION

2ND RESPONDENT

PRINCIPAL SECRETARY –

MINISTRY OF EDUCATION AND TRAINING

3RD RESPONDENT

MINISTRY OF PUBLIC SERVICE

4TH RESPONDENT

MINISTRY OF EDUCATION & TRAINING

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

JUDGMENT

Neutral Citation: Tiheli vs Leemisa & Others [2021] LSHC 40 Civ (13 March 2024)

CORAM : Hon. Justice Keketso L. Moahloli

HEARD : 17 May 2022

EX TEMPORE : 11 August 2023

WRITTEN REASONS: 13 March 2024

SUMMARY

Administrative Law –Review – Administrative function – Failure to promote applicant – Public Service Commission not acting in conformity with prescript of Section 8(1) of Public Service Act that advancement within the public service shall be based on merit, after a fair and open competition and equal opportunity – Public Service Commission’s decision relating to promotion of 1st respondent rather than applicant irrational, grossly unreasonable, arbitrary and capricious – Applicant’s non-promotion shows that PSC did not apply their – Decisions reviewed and set aside

Practice and procedure – Respondent’s answering affidavit must deal issuably with the allegations in applicant’s affidavits and set out its version of the relevant facts

ANNOTATIONS

CASES

Apollo Tyres South Africa (Pty) Ltd v CCMA & Others [2013]5 BLLR 434 (LAC)
Manana v Department of Labour and Others, [2010] BLLR 664 (LC)
South African Police Service v Safety and Security Sectoral Bargaining Council & Others [2016] JOL 35883 (LC)
Transnet SOC Ltd v UNTU obo Coetzee (2021) 42 ILJ 2478 (LC)

STATUTES

Constitution of Lesotho 1993
Public Service Act 2005

BOOKS

C. Hoexter & G. Penfold, Administrative Law in South Africa, 3rd ed, 2021 (Juta Claremont)
C. Theophilopoulos et al, Fundamental Principles of Civil Procedure, 4th ed, 2020 (Lexis Nexis South Africa)
D. Du Toit et al, Labour Relations Law: A Comprehensive Guide, 7th ed, 2023 (LexisNexis South Africa)
M. Wiechers, Administrative Law. 1985 (Butterworths Durban)
S. Petè et al, Civil Procedure: A Practical Guide, 2nd ed, 2011 (Oxford University Press Southern Africa)

MOAHLOLI, J

INTRODUCTION

[1] In this matter Mr Thebe Tiheli (“Tiheli”) is applying for the following final reliefs:

- “4. *An order calling upon the 2nd Respondent [the Public Service Commission “PSC”] to show cause why its decision dated the 17th June 2021 declaring the Applicant’s application for the position of a Director Education Facilities Unit unsuccessful shall not be reviewed and corrected or set aside.*
- 5.
- 6. *An order reviewing, correcting and setting aside the decision of the 2nd Respondent declaring and/or appointing the 1st Respondent (Mr Mokone Leemisa) as a successful applicant for a position of a Director Education Facilities Unit and declaring that the Applicant’s application for a position of a Director Education Facilities Unit as unsuccessful; and irregular, invalid and unfair.*
- 7.
- 8. *Costs of suit in the event of opposition.*
- 9. *Further and/or alternative relief.”¹*

[2] The application is opposed. Mr Mokone Leemisa (“Leemisa”) has filed an answering affidavit, so has Tseleng Mokhehle on behalf of the PSC. Tiheli has replied to both answering affidavits. The PSC has also filed its record/docket of interview proceedings.

¹ Record of proceedings [“Record”], pages 4-5

FACTUAL BACKGROUND

- [3] It is common cause that Tiheli was employed by the Ministry of Public Service sometime in 2000 on a permanent and pensionable basis. In 2013, he was appointed as a Principal Quantity Surveyor, the position he held at the institution of these proceedings. During the period 2014 to 2016, he was appointed Acting Director Education Facilities Unit. He was re-appointed to this position in March 2020 until the events leading to this dispute.
- [4] On the 13th March 2020, the Ministry of Education and Training issued an external circular in which it invited applications for the position of Director Education Facilities Unit. This is the same position which Tiheli was still acting in. He applied and was subsequently called for a virtual interview that was supposed to proceed on the 15th June 2021.
- [5] Tiheli duly attended his interview on the appointed day at the premises of his employer, the Ministry of Education and Training. It was conducted virtually. He alleges that a short while after the commencement of the interview, he encountered network and/or internet problems that caused a lot of interruption of his interview. As a result of the internet problem, he says the PSC directed him to relocate to another office falling under the Ministry of Public Service to continue with the interview. This he says was done in an attempt to avoid the aforementioned network problem. He alleges however that the problem persisted resulting in very detrimental consequences for him as will be explained in more detail below.

Unfortunately the PSC does not provide satisfactory answers to these grave allegations, as will be shown below. Following the interviews, Mr Leemisa

was appointed to the position, and Mr Tiheli was unsuccessful. It is this decision that Tiheli is challenging in this case.

DISCUSSION

Review: Applicable Principles

- [6] Section 119(1) of our Constitution² is the *fons et origio* of judicial review of administrative functions in our jurisdiction. It bestows the High Court with the power to review the decisions or proceedings of, inter alia, any board or officer exercising judicial, quasi-judicial or public administrative functions under any law. What these reviewable administrative functions are or entail or mean is not fleshed out in the Constitution itself. But in practice, administrative acts are often referred to as administrative functions³. According to *Hoexter* and *Penfold*, an administrative act is probably best described as one that implements or gives effect to a policy, piece of legislation or an adjudicative decision. They “include every conceivable aspect of government activity – granting a licence, promoting an employee, stamping a passport, arresting a suspect, or paying out a pension.”⁴ [my underlining]. So in *casu*, the administrative acts of the PSC relating to the non-promotion of Tiheli are undoubtedly reviewable under Section 119(1).

Review of the non-promotion of Applicant

² The Constitution of Lesotho 1993

³ M. Wiechers, *Administrative Law*. 1985 (Butterworths Durban) 87

⁴ C. Hoexter & G. Penfold, *Administrative Law in South Africa*, 3rd ed, 2021 (Juta Claremont)73

[7] Tiheli is asking the court to review and set aside the PSC’s decision that his application for the position of Director Education Facilities Unit is not successful. Firstly, he contends that the PSC’s refusal to reschedule his virtual interview, which was interrupted by numerous network/internet problems, amounted to a reviewable irregularity because he was denied a fair opportunity to compete for the post. This is because he was the only interviewee who faced this kind of challenge, as the interviews of his competitors (including Leemisa, who was ultimately selected for appointment) proceeded smoothly without any glitches. The failure to reschedule his interview gave his fellow interviewees an unfair advantage over him.

[8] Tiheli alleges that the internet connection problems he was experiencing during his interview were not resolved by his being relocated to another office and computer. They persisted. He avers that:

“9.1 *The internet problems negatively affected and impacted on my interview such that I ended up being confused and I could see that even the 2nd Respondent [PSC] was being impatient such that I believe that some of the answers and responses I gave out were not heard and noted by the 2nd Respondent.*

.....

9.4 *The Court will realise that according to [the circular advertising the post], one of the required skills and abilities was computer literacy and I believe that the fact that I encountered computer network challenges, made the [PSC] to conclude that I do not have good computer literacy skills.*

9.5 *I, therefore, verily aver that, in the light of the above, the [PSC] ought to have rescheduled my interview and not continue with my interview on that day; failure*

to have done that, amounts to irregularity which I submit is reviewable by this Court.”⁵

- [9] Surprisingly, the PSC in its answering affidavits does not issuably and specifically answer these damning allegations made by Applicant. It merely avers that:

“AD PARA 9:

Contents herein are noted save to indicate that the Respondents do challenge the notion that the requirements and skills originating from the [circular advertising the post] was the primary metric or criteria laying out the technical requirements of interview competency.”⁶

- [10] This type of answer goes against the basic principles of pleading in our law. It is trite that in its answering affidavit, a respondent must deal paragraph by paragraph with the allegations and evidence contained in the applicant’s affidavits, and state which of the allegations it admits and which it denies, and set out any additional facts that will make up the respondent’s defence - i.e. set out its version of the relevant facts.⁷ And generally, allegations that are not specifically denied or otherwise contested must be accepted as correct. If no real dispute of fact has arisen on the papers, and the applicant’s papers set out a valid cause of action, supported by the evidence needed to prove the cause of action, the court will simply grant the order as prayed in the notice of motion.⁸

⁵ Record, pages 11-12

⁶ Record, page 205

⁷ S. Petè et al, Civil Procedure: A Practical Guide, 2nd ed, 2011 (Oxford University Press Southern Africa) 131 paragraph 6; and C. Theophilopoulos et al, Fundamental Principles of Civil Procedure, 4th ed, 2020 (Lexis Nexis South Africa) 168.

⁸ S. Petè, op cit, p. 133

[11] Tiheli contends as a result of the PSC’s refusal to reschedule, his interview was not in conformity with the prescripts of section 8(1) of the Public Service Act, which mandates that “advancement within the public service shall be based on merit, namely: ability, qualifications, knowledge, skill and aptitude after a fair and open competition which assures that all citizens of Lesotho receive equal opportunity” [My underlining]. In his view the refusal to reschedule, under the adverse conditions he was in, resulted in unfair competition and he did not receive equal opportunity to contest for the job. In colloquial speak, the dice were loaded against him.

[12] Leemisa, in his answering affidavit retorts, on this point, that after the interviewees were relocated so the PSC’s offices, “Tiheli’s interview... commenced and was finalised without any connection problems... Clearly he was faking connection problems because he was not prepared and ready for the interviews. He wanted a postponement after hearing some questions so that he could go back and prepare.” [Record, page 58 para 8]. In my view, Leemisa’s version on this aspect amounts to a bare denial. He does not make a real attempt to grapple with Tiheli’s version. He does not even explain how he came to know that Tiheli’s interview, after the relocation, proceeded without problems, when he was there focusing on and pre-occupied with his own interview. In my view Leemisa has not, in his answering affidavit, seriously and unambiguously addressed the fact said to be disputed. He has laid no proper basis for disputing the veracity or accuracy of Tiheli’s allegation. He has not provided any countervailing evidence of their untruthfulness.

[13] It is well-established law that failure to promote can be challenged on the basis of the right to be given a fair opportunity to compete for a post. For the public service, this right is enshrined in section 8(1) of the Public Service Act referred to in paragraph 11. To succeed, an applicant must show that the employer's conduct in relation to the promotion was unfair, in the sense that it denied the applicant a fair opportunity to compete for the post.⁹ In this case Tiheli's account of what transpired at his interview was not rebutted by the PSC or the employing Ministry. He must therefore be given the benefit of the doubt. The employer, by unreasonably declining to reschedule the interview denied Tiheli a fair opportunity to compete for the post.

[14] Tiheli's second reason for challenging the employer's decision not to promote him is that the PSC "dismally failed to apply its mind on the interview processes and... its decision that [his] application has not been successful is irrational and unfair and may have been arbitrarily arrived at".¹⁰

[15] Applicant asserts that his reasons for saying so are that:-

15.1 If the PSC had properly applied its mind to the competitors' qualifications it would have realised that Tiheli, was more qualified and had more relevant experience than the Leemisa;

15.2 Leemisa did not have the minimum length of managerial experience required in the job advertisement circular;

⁹ Apollo Tyres South Africa (Pty) Ltd v CCMA & Ors [2013]5 BLLR 434 (LAC) para51; South African Police Service v Safety and Security Sectoral Bargaining Council & Ors [2016] JOL 35883(LC) para 41.1 - 41.3; Transnet SOC Ltd v UNTU obo Coetzee (2021) 42 ILJ 2478 (LC) para 3-4

¹⁰ Record, page 20 paragraph 16.4

15.3 the PSC failed to furnish him (Tiheli) with reasons for its decision when he requested them;

15.4 the PSC appointed Leemisa to the position despite the serious misconduct he committed in 2011 and/or 2012 when he was employed by the Ministry of Education & Training as a Senior Quantity Surveyor, which led to his being interdicted from work for the period 2012 to 2014, and to his apologizing to the Public Accounts Committee of Parliament in 2018 for mishandling and mismanaging the monies meant for that project.¹¹

[16] The nub of Tiheli’s second argument is that the PSC acted irregularly and illegally by appointing a candidate with Leemisa’s disqualifications. For instance the Commissioners failed to properly apply their minds when it was very clear that Leemisa did not qualify, amongst other things, to supervise the construction of schools and monitor same since he failed to do so previously.¹² Also that by not taking cognisance of Leemisa’s successes and failures as documented in his personal file(s), the PSC clearly failed to reasonably apply its mind. “It failed to base its decision on the abilities, qualifications, knowledge, skill and aptitude of the applicants contrary to the enabling law... Had it duly applied its mind as required, it could have reached a different decision altogether”.¹³ For instance, it is trite law that appointing a candidate who did not meet the advertised requirements for a post constitutes unfair conduct.¹⁴ Also, whereas an acting incumbent does not have an automatic right to be promoted to that position when it becomes

¹¹ Record, page 21 para 17.4 and 17.5

¹² Record, page 21, para 17.6

¹³ Record, page 22, para 17.8 to 17.10

¹⁴ *Manana v Department of Labour and Others*, [2010] BLLR 664 (LC)

available, where an employee who has been acting satisfactorily in a position is refused promotion but nevertheless continues to act in that position but instead opt for a candidate with significant shortcomings and impediments.¹⁵

[17] Unfortunately the PSC’s reaction to these very serious allegation of its incompetence, irrationality and unfairness in the selection process is, once more, totally inadequate and does not assist this Court. Its Secretary just curtly states:

“AD PARA 17:

Contents herein are denied, save to indicate that the [PSC] is independent of [Leemisa]. The Respondents are of the firm conviction that neither [Leemisa] nor the [PSC] can only be held to scrutiny for effecting proper compliance with the Public Service Act No. 4 of 2005.

Save to emphasize that Act 4 of 2005 ought to be read alongside the Public Service Commission Rules of 1970 and the Public Service Commission Regulations of 2008 stipulated regulations and standards on recruitment selection and appointment.”¹⁶

[18] I really do not understand how a constitutional body like the PSC, which plays such a pivotal role in public service employment matters, can respond to very serious challenges of this nature in such a non-committal, disinterested and lackadaisical manner.

[19] It is also very disturbing that the concerned Ministry [through 3rd and 5th Respondents] did not file any affidavits to answer applicant’s damning

¹⁵ D. Du Toit et al, Labour Relations Law: A Comprehensive Guide, 7th ed, 2023 (LexisNexis South Africa) at p. 642-3 para 3.1 (a) (vi)

¹⁶ Record, at page 208

allegations. I am surprised that they chose not to assist the court as to whose version of these events was correct, Tiheli's or Leemisa's. What are they withholding? Why did the Attorney General not ensure that those government officials who could throw some light on this matter placed the necessary affidavits before the court? Surely it was the responsibility of the Attorney General to inform the court who between Tiheli and Leemisa is telling the truth. If at all Tiheli's allegations were fabrication, why did the employing Ministry and the PSC not set the record straight.

[20] In the absence of proper rebuttal by the PSC and the employing Ministry, Tiheli must be given the benefit of the doubt. His version must once again be accepted as correct.

[21] I must point out that courts are reluctant to interfere with an employer's decision to promote or to refuse promotion. There is no right or entitlement to promotion in the ordinary course, only a right to be given a fair opportunity to compete for a post. In general, the employer has the right to appoint or promote employees whom it considers to be the most suitable. An adjudicator may only interfere with the employer's decision regarding promotion where it can be shown that the employer did not apply its mind, acted in bad faith, had an ulterior motive, acted arbitrarily and capriciously, was grossly unreasonable, or where there is no rational relationship between the decision not to promote, the purpose of the promotion and the information upon which the impugned decision is based.¹⁷

¹⁷ D. Du Toit et al, op.cit at p. 638 (and cases cited therein).

[22] In the present case, this court is entitled to interfere with the employer's decision to promote Leemisa and not promote Tiheli, because Tiheli has established, on a balance of probabilities, that the PSC did not apply its mind, acted arbitrarily and capriciously, was grossly unreasonable, and there was no rational relationship between its decision not to promote Tiheli and the information upon which the decision to promote Leemisa instead is based.

[23] It is for the above reasons that, on 11 August 2023, I granted prayers 4, 6 and 8 in the Notice of Motion.

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KEKETSO L. MOAHLOLI
JUDGE OF THE HIGH COURT

Appearances:

Adv T.A Lesaoana for the Applicant
Adv S. Shale for 1st for Respondent
Adv S. Matete for 2nd to 6th Respondents