

IN THE HIGH COURT OF LESOTHO

In the matter between:-

**LESOTHO CORRECTIONAL SERVICES
STAFF ASSOCIATION**

Applicant

AND

**ACTING COMMISSIONER OF LESOTHO
CORRECTIONAL SERVICES**

1st Respondent

**SENIOR ASSISTANT COMMISSIONER
K. MOENO**

2nd Respondent

**ACTING ASSISTANT COMMISSIONER
M. RAPHUTHING**

3rd Respondent

**ASSISTANT COMMISSIONER
T. MOTHEPU**

4th Respondent

**SENIOR SUPERINTENDENT
SELAHLA**

5th Respondent

SUPERINTENDENT NTS'ASA

6th Respondent

**ASSISTANT SUPERINTENDENT
BERENG**

7th Respondent

**ASSISTANT SUPERINTENDENT
RAMMASA**

8th Respondent

**ACTING DEPUTY COMMISSIONER
MATINGOE PHAMOTSE**

9th Respondent

ACCOUNTANT GENERAL

10th Respondent

ATTORNEY GENERAL

11th Respondent

JUDGMENT

Coram : **Hlajoane J**
Date of hearing : **31st October, 2017**
Date of Judgment : **14th June, 2018**

Summary

The Basutoland Prisons Proclamation of 1957 - The Lesotho Correctional Service Act 2016 which came into effect on 1st July 2016 replaces the 1957 Proclamation - The Proclamation regulated the organisation, administration and discipline within the Prison service (now the Lesotho Correctional Service) – The Law applicable to our case is the Prisons Proclamation 30 of 1957 as amended by Prisons (Amendment) Order 1970, Sections 2 and 3 thereof – The Applicant as a legally registered entity has locus standi to challenge the promotions.

Annotations

Statutes

Books

1. **Constitution Page 18 of the Record Annexure Const. 1**
2. **Public Service Act No.1 of 2005**
3. **Public Service Regulation Legal Notice No.78 of 2008**
4. **Societies Act No.20 of 1966**
5. **Section 149 of Lesotho Constitution 1993**
6. **Fifth Amendment to the Constitution Act No.8 of 2008**

Cases

1. **CIV/APN/486/1999 Molefi Leketa v The Acting Director of Prisons and Another**
2. **CIV/APN/19/2018 Lesotho Police Staff Association (LEPOSA) v The Commissioner of Police & Others**
3. **Khathang Tema Baitsokoli and Another v Maseru City Council and Others LAC (2005-2006) 85**

[1] The Application was filed on urgent basis but the Court ordered that it be treated as an ordinary Application. The prayers sought were the following:-

- (a) The promotion of the 2nd to the 9th Respondents shall not be declared null and void.

- (b) That the 2nd to the 9th Respondents shall not be interdicted from performing the duties of the offices they have been promoted to pending the final determination of this matter.
- (c) The 10th Respondent shall not be ordered to refrain from making any new and or further adjustments to the salaries of the 2nd to the 9th Respondents in terms of the promotions as announced in the Corrections Internal Circular Notice No. 15 of 2015 and No. 16 of 2015 respectively.
- (d) The 1st Respondent shall not be interdicted and ordered from making any further promotions to any officer within the Lesotho Correctional Service without following proper procedure pending the final determination of this matter.
- (e) The 10th Respondent should be ordered to deduct any payment made, if any, from the 2nd to the 9th Respondents pertaining to the promotions in Corrections Internal Circular Notice No. 15 and 16 of 2015. Costs of suit at attorney and client scale.

[2] Unlike the **Police Service Act 1998** which allows for the establishment of **Police Staff Association, under section 66 (3)**, the Applicant is a registered Association in terms of the Societies Act of 1966. This Association has its own **Constitution**¹ in terms

¹ Page 18 of the record Annexure Const. 1

of which it derives its powers and functions from. The Applicant has complained that the 1st Respondent's promotions to the 2nd to the 9th Respondents were not free and fair as the positions were not advertised in any manner and as such rendering them to be inconsistent with the provisions of the law, therefore irregular, unlawful and of no legal effect. Also that the said promotions were made in contravention of a promotion guide that is provided for within the **Lesotho Correctional Service**. That there has also been noncompliance with the provisions of the **Public Service Act**² and the **Public Service Regulations**³.

- [3] The Applicant has alleged in his papers that on or about the 30th April 2015, in what it calls a purported circular, was issued out which stated that the 2nd to the 9th Respondents had been promoted to the positions as shown against their names by the 1st Respondent. The Applicant has classified the promotions to have not been free and fair due to the fact that they were not advertised in any manner, thus rendering the promotions unfair, inconsistent with the provisions of the law, irregular, unlawful and of no legal effect as the promotion guide for the institution was not followed. The guide needed that there must have been a vacancy before the promotion.

² Act No.1 of 2005

³ Legal Notice No. 78 of 2008

There must have been an advertisement for the vacancy through an internal circular so as to make it known to members of staff.

The Principal Secretary will then be informed and he will be responsible for the approval of shortlisted candidates.

A panel would be set up clothed with the responsibility of facilitating the promotion process and notifying shortlisted candidates of interviews to be conducted and the venue for such.

The panel would then select three candidate who will have passed the interview out of the rest of other applicants.

The Commissioner of Correctional Service to then make recommendations to the Minister of Justice and Correctional Service to promote one of the three candidates.

It is only then that the Minister appoints a successful candidate and inform him in writing and subsequently such candidate will be announced.

- [4] It is the Applicant's case that the 1st Respondent has grossly ignored these guidelines by unilaterally effecting the promotions of the 2nd to the 9th Respondents. That in terms of **Section 6 of the Public Service Act 2005**, the power to appoint persons to hold or act in offices is vested in the **Commission, the Public Service Commission.**

- [5] The 1st Respondent has in the answering affidavit challenged the *locus standi in judicio* of the Applicant in that in terms of their constitution, its main object and mandate is to enable Correctional Officers to meet in order to consider and bring to the attention of the Commissioner matters affecting the service and not to institute the present proceedings as it has no legally enforceable right to challenge the promotions of the staff regard being had to the terms of its own constitution. Also that the guidelines which the Applicant seeks to rely on have no force of law and legislative effect as they were never published in any Gazette as required by law.
- [6] Counsel for the Respondents has correctly identified issues for determination by this Court. They are the following:
- (a) Whether the Applicant has the necessary *locus standi* to challenge the promotions of the 1st to the 9th Respondents in terms of its Constitution or not.
 - (b) Whether the **Public Service Act of 2005** and **Public Service Regulations of 2008** are applicable to the present case or not.
 - (c) Whether the 2nd to the 9th Respondents' promotions to their respective ranks were unlawful, null and void and of no legal force or not.

(d) Whether reliance can be put on the Promotion guidelines in effecting promotions.

[7] On *locus standi* it is the Respondents' case that the Applicant is a registered entity deriving its powers and functions from its own Constitution. It has not been disputed that the Applicant is an Association duly registered in terms of the **Societies Act of 1966**⁴. **Section 4 (1)** of Applicant's Constitution provides that the Association can sue and be sued in its name, thus giving it a legal status. **Section 5** provides for the powers of the Association. It provides as follows under **Section 5 (a)**:

“The Association may consider the general issues and principles governing appointments, promotions, transfers, matters of discipline and salaries within the service with the view of improving conditions within the service as a whole, but it shall not consider individual cases concerning these matters.”

The Societies Act under **Section 11 (1) (a)** provides that once a society is validly registered it can sue and be sued.

The Respondents are relying on the last part of Applicant's Constitution where it says, ‘but the Association shall not consider individual cases.’ The Respondents consider the case by the Applicant as an individual case. To that the Applicant responded

⁴ Act No. 20 of 1966

by showing that this case cannot be considered as an individual case as issues of promotions are issues that affect the whole institution. The case of **Molefi Leketa v The Acting Director of Prisons and Another**⁵, attached to the Respondents' heads is a clear case of an individual suing on his own as he was challenging his own individual dismissal, but our case is distinguishable from it as this case is dealing with promotions of different senior ranks in the institution. The promotions affected the institution itself and not individuals. I would not agree with him more on that in saying that the Applicant has *locus standi* to sue as a legally registered entity. My brother Peete J ably said so in a recent decision of **Lesotho Police Staff Association (LEPOSA) v The Commissioner of Police & Others**⁶, that , '*Locus standi of an association in a Public Service Institution must be interpreted purposively within the parameters of rule of law ,and of access to justice.*'

- [8] Coming now to the applicability of **Public Service Act 2005 and Public Service Regulations of 2008** to the present case. The **Prison Service** is established under **Section 149 of the Constitution**⁷ as amended by the **Fifth Amendment to the Constitution Act**⁸ in terms of which **Prison Service and**

⁵ CIV/APN/486/1999

⁶ CIV/APN/19/2018

⁷ Lesotho Constitution 1993

⁸ Act No 8 of 2008

Director of Prisons were deleted and substituted with **Lesotho Correctional Service and Commissioner of Correctional Service** respectively. **Sub section (2)** thereof puts the superintendence of the **Lesotho Correctional Service** to vest in the **Commissioner of Correctional Service**, subject to any direction of the Minister and that **the Commissioner** shall be responsible for the administration and discipline of the **Lesotho Correctional Service**. On the other hand **Section 137 (1) of the Constitution** is framed as follows:

“Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission

137 (3) (h) *‘The provisions of this section shall not apply in relation to the following offices, that is to say –*

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)

(g)

(h)

.....

....., *and the office of Director of Prisons and offices of members of the Prison Service.*”

The import of the above provision is to exclude the **Public Service Act** from governing the affairs of **the Lesotho Correctional Service**, even though its officers still fall under the Public Service.

- [9] It becomes clear therefore that the provisions of **Section 137 of the Lesotho Constitution** shall not apply to the office of **Commissioner of Correctional Service** and office of members of **Lesotho Correctional Service, Section 137 (3) (h)**. As was said in the case referred to by the Respondents, the case of **Leketa v Acting Director of Prisons and Another**, the removal and dismissal from office of a member of Lesotho Correctional Service is governed by a different legislation from the above section of the Constitution, which is none other than the **Prisons Proclamation 30 of 1957 as amended by the Prisons (amendment) Order 1970. Section 3** thereof is in the following words:

“The power to appoint a person to hold or act in an office of the rank of Senior Chief Officer or below (including the power to

confirm appointments and to appoint by way of promotion), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall be exercised by the Director of Prisons without consultation with the Public Service Commission.”

[10] Interestingly, **Section 2** of the same **Amendment Order of 1970** provides as follows:

“The power to appoint a person to hold or act in the office of Director Prisons, Superintendent or Assistant Superintendent (including the power to confirm appointments and to appoint by way of promotion), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office, shall be exercised by the Minister after consultation with the Public Service Commission in accordance with the provisions of the Public Service Order 1970.”

From submissions of counsel on both sides it is evident that the **Public Service Act 2005** and **Public Service Regulations 2008** are not directly applicable to deal with affairs of the **Lesotho Correctional Service** officers but the **Prisons Proclamation 30 of 1957** as amended by the **Prisons (Amendment) Order 1970**. The two relevant provisions of the **Proclamation** as amended have categorized as to who is entrusted with appointing,

promoting and exercising disciplinary control over positions from Senior Chief Officer or below and who to appoint from Director Prisons to Assistant Superintendent.

[11] It is the Respondents case that not only has the office of the 1st Respondent and members of the **Lesotho Correctional Service** been expressly excluded by the provisions of **the Constitution** as the supreme Law of the land, but also by the **Public Service Act 2005, Section 3** thereof. The Section is framed as follows:

“The Act does not apply to offices specified in Section 137 (3) (h) of the Constitution to the extent therein specified.”

The Section above does not only say the Act does not apply to offices in **Section 137 (3) (h) of the Constitution** and ends there. It goes further to say to the extent specified. This now takes us back to the applicable law in dealing with appointments, promotions and disciplining officers of the **Lesotho Correctional Service**. The applicable law, which is the **Proclamation as amended** has specified powers entrusted to certain officers in dealing with different ranks in the Lesotho Correctional Service when considering appointments, promotions and discipline. As shown earlier on, **Section 2 of the Amendment Order 1970** has entrusted the responsibility to appoint, promote and discipline Director Prisons, Superintendent and Assistant Superintendent to the Minister after consultation

with the Public Service Commission. **Section 3** of the same amendment Order entrusted the appointment, promotion and discipline of Chief Officer or below to the Director Prisons.

[12] In conclusion, the answers to the issues which this Court had to determine stand as follows:

On whether the Applicant has *locus standi* to challenge the promotions of the 2nd to the 9th Respondents, the answer is yes, Applicant has *locus standi* as a legally registered association to safeguard the interests of its members who are looking up to it for protection of their interests. The Courts, that is the High Court and the Court of Appeal, in the case of **Khatang Tema Baitsokoli and Another v Maseru City Council and Others**⁹, a registered association of street vendors decided that the street vendors were suited to vindicate the rights of its members who were being chased away from selling in the streets of Maseru.

[13] On the question of whether the **Public Service Act 2005** and the **Public Service Regulations 2008** are applicable to the present case, the answer is, no, they are not applicable. The offices of the 2nd to the 9th Respondents have been expressly excluded by the provisions of the **1993 Lesotho Constitution, Section 137 (3)**

⁹ LAC (2005 – 2006) 85

(h) and Section 3 of the Public Service Act 2005. The applicable law to Respondents' case is the **Prisons Proclamation 30 of 1957** as amended by the **Prisons (Amendment) Order 1970 Section 2** thereof.

On the question of whether the 2nd to the 9th Respondents' promotions to their respective ranks were unlawful, null and void and of no legal force or not, the answer is, yes they were and still are unlawful, null and void and of no legal force as the person who effected those promotions, the 1st Respondent, acted *ultra vires* the powers he possessed, **Section 2 of the Prisons (Amendment) Order 1970.**

[14] Regarding whether reliance can be put on the promotion guidelines in effecting promotions the answer is yes, provided that their provisions are not in contravention of the applicable legislation. The organisation could not have thought of designing such guidelines for sweet nothing. It was through some effort of its human resource personnel to have devoted time and energy in formulating the guidelines. The idea must have come from the management of the organisation and not just an idea from Applicant's members. The existence of such guidelines has not been denied and the fact that the guidelines had never before been put into effect is not reason enough to say they have no force of law as they must have been designed for a purpose, besides, it has

never been the Applicant's case that the issue of the guidelines has been the sole reason relied upon for the purposes of supporting their case.

[15] Having come to the conclusion that the Applicant has *locus standi* to have brought this application and that the 1st Respondent has acted *ultra vires* in effecting the promotions of the 2nd to the 9th Respondents, and that the applicable law is the **Basutoland Prisons Proclamation** as amended by the **Prisons (Amendment) Order 1970**, it follows therefore that such promotions were unlawful, null and void and of no legal force and effect.

The application thus succeeds with costs.

A. M. HLAJOANE
JUDGE

For Applicant : Adv Makara
For Respondents : Adv Setlojoane

