IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CIV) No 14/2012**

In the matter between:

MINISTRY OF FINANCE 1st Appellant

ATTORNEY GENERAL 2nd Appellant

And

MOSUOE MOTEANE Respondent

CORAM: RAMODIBEDI P

MELUNSKY JA

HOWIE JA

Heard : 12 OCTOBER 2012

Delivered : 19 OCTOBER 2012

SUMMARY

Respondent was successful in the court a quo in claiming alleged underpayments of his salary as High Commissioner in South Africa and payment of his gratuity as a member of the public service. His claim for salary underpayment was based on a manual and a savingram which, he alleged, authorised his salary to be subject to a favourable conversion rate. The existing practice, however, excluded Lesotho Diplomats in South Africa from being entitled to any conversion rate in respect of salaries. The Manual and the savingram had to be interpreted against this background. Held on appeal, that the claim for the underpayments could not succeed as they were not authorized by the documents relied upon by the respondent. Held, further that an unauthorized salary increase of M180,629.28 entitled the first appellant to deduct this amount from his gratuity.

JUDGMENT

Melunsky JA

[1] This is an appeal against an order granted by Guni J in the High Court in favour of the respondent, the plaintiff in the action. He was initially employed as a public servant in the Ministry of Education. In January 2001 he was seconded to the Ministry of Foreign Affairs in the capacity of Lesotho High Commissioner in Pretoria, South Africa. He retired in July 2009. In the court *a quo* he claimed payment of his gratuity (M112,630) and an amount of M961,671.97 representing the alleged underpayment of his salary during the period 2001 to 2008, while serving as an ambassador in the Republic of South Africa. The first appellant denied liability on grounds to be mentioned later but the court *a quo* upheld the respondent's claims together with interest and costs.

[2] According to the respondent's further particulars, his claim for underpayment of salary was based on the contents of a document called "Manual on Mission

Accounts" (the Manual). This was also confirmed in his evidence in the court *a quo*. The part of the Manual specifically relied upon by the respondent appears under the heading "Payment of salaries and allowances".

It reads:

> "To cushion mission staff salaries against the declining loti/rand vis-à-vis the US dollar, an artificial rate of M1:$0.54 is used when converting salary/allowances figures into US dollars.
>
> In this case only the net salary figures are converted. It should be noted that this conversion factor should be confined to the salaries of the diplomatic staff only. Locally recruited staff are paid in local currencies and in accordance with their contracts."

Mr. Lekhela, the Deputy Principal Secretary of Foreign Affairs, amplified the effect of what was to occur after using the M1:$0.54 conversion rate. He explained that a further conversion was then necessary – from the current US dollar rate into the local currency. The overall effect was to increase significantly the actual amount payable to mission

staff in respect of both foreign service allowances and salaries.

[3] A second document relied upon by the respondent is a savingram dated 26 June 2006 sent by Mr Lekhela on behalf of Foreign Affairs. It is addressed to all missions and under the heading "Conversion rates for salaries and Foreign Service Allowances" the following appears in the third paragraph:

> "However, effective July 2006 salaries and allowances should be converted into your respective local currencies at the bank ruling rates in accordance with the recommendations of the Auditor General."

[4] The respondent's case is based on his interpretations of the above-quoted passage from the manual and that of the third paragraph of the savingram of 26 June. Before the date of the Manual (4 April 2001), staff members of missions in South Africa, including the respondent, were entitled to have only their foreign service allowances

converted in terms of the Manual method but not their salaries. That this was known to the respondent appears clearly from his written witness statement and also from his evidence under cross-examination. The reason why the conversion rate was not applied to the salaries of staff in South African Missions was, it was contended by the appellants, due to the fact that South Africa and Lesotho were in the same monetary area. Whether this was sufficient ground for the exclusion is not necessary to decide: the fact is that that was the status quo to the knowledge of the respondent who even accepted that he was not entitled to apply the conversion rate for the first three months of 2001. He contended, however, that the conversion rate should have been applied to his salary from 4 April 2001 according to the method detailed in the Manual and from July 2006 at the bank ruling rate in terms of the June 2006 savingram. This was not done, apart from payments totaling M180,629.28 allocated by the respondent to himself during 2006 to 2007, leaving an alleged balance of M961,671.97.

[5] What has to be considered, therefore, is whether the respondent's interpretation of the two documents is correct. It is clear that the language of a written contract must be considered in its contextual setting and with regard to the background circumstances under which it was concluded. For the words of a contract cannot be viewed in isolation, divorced from the matrix of facts in which they are set, if the intention of the parties is to be ascertained. (See, for instance, ***Van Rensburg v Taute 1975 (1) SA 279 (A) at 303 and Swart v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at 202)***. The two documents under consideration are, of course, not contracts. But, in my opinion, it would be wholly artificial to apply to them any interpretation disassociated from the background facts where these are known both to the author and to the recipient.

[6] What is undisputed is the fact that when the Manual was produced it was common knowledge in the Department of Foreign Affairs that the conversion rate of the rand did not apply to the salaries of diplomats in the South African Missions. This, as I have pointed out, was even known to

the respondent when he commenced his engagement as High Commissioner at the beginning of 2001. The Manual was received by the respondent in 2006. Why there was this delay in sending it to him has not been explained but as its heading proclaims it is a "Manual on the Management of Mission Accounts." Its author, Ambassador V. T. Ndobe, Addressed it to the "Principal Secretary, all directors and Senior Managers" and stated that it was:

> "…. intended to help the staff of the Ministry of Foreign Affairs in briefing officers that are being posted abroad on financial management of the Lesotho Diplomatic Missions."

Clearly Ambassador Ndobe intended to do nothing more than explain how the existing financial management of Lesotho missions operated. There is nothing in the Manual that indicated that the Ambassador intended to alter the current position regarding the conversion rate of salaries for diplomats posted to South Africa, nor was he authorized to do so. The respondent admitted that a decision by the Ministry of Foreign Affairs would be communicated to him by means of a savingram and not through the Manual. He

also conceded that a decision to apply the conversion rate to the salaries of diplomatic officials in Pretoria would have been conveyed to him by the Principal Secretary on behalf of the Department. I add that it would have been sent to him directly in clear and unequivocal terms and would not have been set out in the oblique manner reflected in the Manual.

[7] Nothing contained in the Manual could reasonably be regarded as support for the respondent's interpretation of this document. The passage under heading "Payment of salaries and allowances" does nothing more than reflect the existing situation: it does not alter the status quo nor was it intended to do so. It also follows that the learned Judge *a quo* erred in assuming that the first appellant ought to have given the respondent explicit information to the effect that the conversion rate did not apply to the salaries of South African Diplomats: there was no need for the Department to repeat what was common knowledge.

[8] Nor does the savingram of 26 June assist the respondent. The heading to that document and its contents demonstrate beyond question that it alters only the rate of conversion from the fixed rate of M1: $0.54 to the ruling bank rate. But it applies only to those persons who were eligible to have their salaries converted before its introduction: it does not apply the new rate to a new category of persons or to new situations. The respondent latched on to the fact that the savingram was directed to "all missions". This was not unusual: in fact it was necessary even in the case of the South African Missions to ensure that they applied the new conversion rate to the foreign service allowances of those who were entitled to them. It is fanciful to suggest that the savingram, by some unexplained process, amended the existing practice whereby Lesotho diplomats in South Africa were excluded from being entitled to apply the conversion rate to their salaries. Nothing of the kind occurred.

[9[In my view there is no doubt that on a proper construction of the savingram it left untouched the salaries of the diplomatic corps in South Africa. The fallacy

of the learned Judge was her assumption to which I have already alluded, that at all relevant times the conversion rates had in fact applied to salaries as well as to allowances. This, she said, was the norm from which not a single Lesotho Mission, including those in South Africa, was excluded. In reaching this conclusion she could not have been aware of the background circumstances against which the Manual and the savingram had to be interpreted. Nor could she have had regard to the evidence of Mr Lekhela and that of the respondent himself, to whose testimony I have referred in paragraph [4] above. It also needs to be emphasized that it was only after the respondent received the Manual in 2006 that he applied the conversion rate to salary, retrospectively to April 2001, which is evident from the schedule of money allegedly due to him as underpayment of salary.

[10] It follows, therefore, that neither the Manual nor the savingram gave the respondent greater rights in relation to the conversion of his salary than those which he had previously enjoyed. But what he and apparently other officers in South African Missions did was to apply the

rates (apparently the M1: $ 0.54 rate) to salaries as well as to allowances. Moreover, as Mr Lekhela pointed, out they paid themselves retrospectively from July 2006. Mr Lekhela wrote to the missions explaining that the savingram did not permit this but his objections were ignored. Further directives, including a letter addressed to the respondent and the consuls general, instructing them to cease the conversion of their salaries, also had no effect. Eventually two meetings were called in Maseru in September 2007, the first by the Principal Secretary and the second by the Minister of Foreign Affairs. At both meetings the respondent and other diplomats were instructed by the officials to stop the overpayments and to refund the amounts thereof to the government and at both they promised to comply. The respondent's total unauthorised overpayments to himself during 2006 and 2007 amount to M180,624.28. No portion of this amount has been refunded but it can be assumed that after the meeting with the Minister he at least ceased the practice of making further overpayments. The learned Judge did not deal with the respondent's undertakings to make the refunds. She was probably so convinced that there was no

need to make any refund that these were simply overlooked.

[11] In summary: at no time was the respondent authorized or entitled to apply any conversion rate to his salary. Therefore his claim for alleged underpayments of his salary has no legal basis and must fail. It is apparent from the respondent's own schedule that he received amounts totalling in all M180,629.28 based on the unilateral but unauthorized application of the conversion rate to his salary during 2006 to 2007. Despite having given undertakings to both the Principal Secretary and the Minister of Foreign Affairs to refund the said amount, the respondent failed to do so. It follows that he owes the first appellant the amount in question and the first appellant was entitled to deduct the overpayment from the amount claimed as a gratuity. The result is that the following order is made:

1. The appeal is allowed with costs;
2. The order of the court a quo is set aside and is replaced with the following:

"The plaintiffs' claims are dismissed with costs."

L. S. MELUNSKY
Justice of Appeal

I agree **M. M. RAMODIBEDI**
President

I agree **C. T. HOWIE**
Judge of Appeal

For the Appellant : Adv R. Motsieloa
For the Respondent : Adv KK Mohau KC and Adv LL Ramokanate