IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) N0.52/2018**

In the matter between:

PS MINISTRY OF FOREIGN AFFAIRS & INTERNATIONAL RELATIONS **1ST APPELLANT**
THE MINISTER OF FOREIGN AFFAIRS & INTERNATIONAL RELATIONS **2ND APPELLANT**
THE PRIME MINISTER **3RD APPELLANT**
THE ATTORNEY GENERAL **4THAPPELLANT**

AND

KELEBONE ALBERT MAOPE **1ST RESPONDENT**
JOHN NAAZI OLIPHANT **2NDRESPONDENT**

CORAM : DR. K. E. MOSITO P.
M. CHINHENGO AJA
N.T MTSHIYA AJA

HEARD : 16 MAY 2019
DELIVERED : 31 MAY 2019

SUMMARY

Court — Precedent and stare decisis — Departure from prior decision on law — When Court may depart from own decision — When judge may depart from decision of judge of same Court.
Foreign Service - Engagement Contract – Recall of Diplomat - non-compliance with termination Clause of Schedule to contract, read together with contract itself – conditions of termination clause not met-constituting unlawful termination – payment of benefits and salaries.
Contempt of court - Failure to comply with court order - Application for committal for contempt of High Court order - Standard of proof - Applicant for committal for contempt of court required to prove all elements of contempt beyond reasonable doubt.
Costs - Attorney and client costs - Award thereof in Court a quo – Setting aside of on appeal - But refusal of costs of appeal.
Costs of court to be awarded on party and party scale.

JUDGEMENT

DR MOSITO P:-

Background

[1] This matter comes before us as an appeal against the judgment of the High Court (Moiloa J).

[2] The first appellant in this matter is the Permanent Secretary of Foreign Affairs and International Relations, the second appellant is the Minister of Foreign Affairs and International Relations and the Prime Minister and the Attorney General are the third to fourth Appellants respectively. The first respondent is Mr Kelebone A. Maope, then Lesotho's Ambassador and Permanent Representative to the United Nations. The second respondent is Dr John Oliphant,

then Lesotho High Commissioner to the United Kingdom of Great Britain and Northern Ireland.

[3] The question before the High Court was whether or not the termination of what is termed an *engagement contract* between Respondents and the Government of Lesotho was in terms of the termination clause of the schedule to the engagement contract, read with the contract itself.

[4] The Court *a quo* concluded that the termination of the contract was not in accordance with the clauses and held in essence that the termination therefore unlawful.

Factual matrix

[5] The material facts which are common cause are that on 5 July 2016, the Government of Lesotho ("the government') and Mr Kelebone A. Maope ("first respondent") entered into a written contract of employment, in terms of which the respondent was appointed Lesotho's Ambassador and Permanent Representative to the United Nations, to be stationed in New York, in the United States of America.

[6] As for the second respondent, it does not appear *ex facie* the Form of Agreement for Officers Employed on Local Contract Terms, on which day the written agreement was entered into between the government and Mr John Oliphant ("second respondent").

[6] However, in both cases, the contracts were for a period of 36 months and subject to renewal or extention by notice before the completion of the contract term.

[7] Either party could terminate the contract on a written notice of three months. Important for the purposes of this matter is that in lieu of a written notice of three months government was entitled to pay three month's salary.

[8] By letter of dated 19 February 2018, the first respondent was instructed to travel to Italy for a meeting with the second Appellant on 27 February 2018. The agenda was the future of the first respondent as Lesotho's Ambassador and Permanent Representative to the United Nations. Upon arrival on 26 February 2018, the first respondent proceeded to the Hotel Beverly Hills, Rome, where he had been booked in. There he found Lesotho's Ambassador to China and later arrived Lesotho's representatives to London, Brussels and later Kuwait, for the same meeting. They had all been booked at the same hotel. On 27 February 2018, the first and second appellants were informed by the first appellant that the second appellant would like to meet them separately.

[9] The first respondent's meeting with the first and second appellants took place on 28 February 2018. It was in that meeting that he was informed that the Cabinet had decided to repatriate him and the purpose of the meeting was to give him an opportunity to make representations on why an early repatriation would or would not prejudice him. He was assured that any prejudicial

matter would be considered. He was informed that he would later be advised on his repatriation. The first respondent protested that a decision had already been made without his prior involvement and that he would challenge the decision in court. The first respondent avers that the first and second appellants left on the note that he should expect a communication from them.

[10] On 6 March 2018, he received a letter entitled, "Notice of Recall". The letter informed him that after carefully considering the representations he made at the meeting mentioned above, he was thereby informed that he was being recalled in terms of his contract read together with the relevant statutory provisions governing his appointment. The letter, *inter alia*, informed him that he would "be paid cash in lieu of notice for one (1) month" and that, on conclusion of the recall, he would be paid terminal benefits due in terms of his contract including salary for the remaining term of his contract. The letter also instructed him to had over to Mrs Nthabiseng Monoko, Counsellor, who would immediately assume the responsibility as the Charge d'Affaires *ad interim* until the arrival of a new ambassador. He was also informed that his recall had been done in terms of Regulation 127(1) of the Public Service Regulations 2008. On 16 March 2018, the first respondent filed an application in CIV/APN/87/2018 challenging his recall.

[11] As for the second respondent, it appears that on 29 March 2017,a letter was written to him by the first appellant informing him that he had been appointed Lesotho's High Commissioner to the United Kingdom and Northern Ireland. As mentioned above, it does not appear *ex facie* the Form of Agreement for Officers

Employed on Local Contract Terms, on which day the written agreement was entered into between the government and Dr John Oliphant ("second respondent"). However, the Letters of Credentials appear to have been signed on 18 April 2017 by His Majesty, King Letsie III. It can safely be assumed that he did assume duty as Lesotho's High Commissioner to the United Kingdom and Northern Ireland immediately thereafter.

[12] On 27 February 2018 in Rome the second respondent, as happened with the first respondent, was subjected to the same ritual and told to make representation in relation to the non-negotiable decision of Cabinet to recall him. He presented a litany of reasons why his recall would be prejudicial to him. He was however thereafter, informed that a communication from the appellants would follow.

[14] On 05 March 2018 he received a letter of recall identical in content to the one sent to the first respondent. Mrs Mosele Majoro was to hold fort as *charge d'Affaires*. On 19 March 2018, the second respondent filed an application in CIV/APN/89/2018 challenging his recall.

[15] The two applications were opposed by the first appellant. The essence of the opposition was that, first, the termination or recall of the respondents' contract was a contractual and not administrative action and that the termination was in terms of the said contract. Second, he contended that the meetings in Rome amounted to affording the diplomats an opportunity to make

representations before they could be recalled. Third, he argued that the diplomats were to be paid their dues as provided in their contracts as the contracts were terminated in terms thereof. He then averred that what was done was done in good faith. Fourth, he contended that the respondents were not career diplomats but political appointees, the objective of which was for them to serve the transient interests of the political victors in office. They can therefore be removed when the government changes. He also averred that in terms of the Public Service Regulations, 2008, diplomats can be removed with relative ease on account of the fact that their deployment is political. He also argued that deployment of diplomats abroad is pre-eminently a function of the executive branch of government in conducting Foreign Service.

[16] The first appellant contends that the meetings in Rome were about the recall of the diplomats not repatriation to Lesotho. He therefore avers that the engagement of the diplomats is not a contract of "employment" but "deployment." He avers that the concepts of "recall" and termination of employment cannot be used interchangeably. He avers that the government is terminating the contract and a recall is the consequence of the termination.

[17] On 26 March 2018, the two applications were consolidated and interim orders were granted by Moiloa J. One of the reliefs granted by the interim order of 26 March 2018 is an order interdicting the appellants from implementing the government's decision to recall the respondents from their respective diplomatic posts pending finalisation of the proceedings.

[18] On 27 April 2018, the first respondent filed a contempt application complaining that the appellants were proceeding to implement the government's decision to recall them contrary to the order of 26 March 2018. That application was opposed by the appellants. Their high watermark point of opposition was that before the interim order of 26 March 2018, the government's decision to recall the first respondent herein had already been taken on 5 March 2018 and communicated to the first respondent on 6 March 2018. He further avers that, upon receipt of the letter by Ms Monoko on the same date on which the first respondent received his, she assumed the duties of the ambassador in New York. The first appellant therefore avers that the appellants did not do anything after the order of 26 March 2018 to warrant their being cited for contempt.

Final decisions of the Court a *quo*

[20] On 6 August 2018, Moiloa J gave a final order in respect of both matters. First, he ordered that the appellants were guilty of blatant and wilful contempt of the court order issued on 23 March 2018. Second, he ordered that the appellants pay costs on attorney and client scale. Third, he ordered that:

> 'In view of the forced permanent return to Lesotho of the Applicant [first respondent] as a result of Respondents' contempt of the court's order dated 23rd March 2018 and the position of Respondents that they offer Applicant payment of benefits including his salaries for the remaining term of his contract no practical purpose would be served by granting Applicant prayers (6 a, b and c) of the notice of motion. Instead the court orders that the Respondents pay Applicant his terminal benefits

including but not limited to salary for the remaining term of his contract by no later than sixty days from today's date."

Lastly, he ordered that the appellants] should pay the respondents' costs of suit.' It is against the above orders that the appellants have now appealed to this Court.

In this Court

[21] The appellants raise six grounds of appeal namely -

(a) the leaned judge erred and/or misdirected by himself by not relying on the instructive decision of *Lebohang Ntšinyi v. The Minister of Foreign Affairs and 3 Others* CIV/APN/92/2018 in spite of that case being on all fours with the case in issue;

(b) the learned judge erred and/or misdirected himself by failing to draw a line of demarcation between the peculiar nature of a contract of deployment and a contract of employment in the context of the case;

(c) the learned judge erred and/or misdirected himself by concluding that the Appellants were guilty of contempt;

(d) the learned judge erred and/or misdirected himself by awarding costs at the attorney and client scale in respect of the contempt application;

(e) the learned judge erred and/or misdirected himself by fixing a time-frame within which the Appellants are to be paid the specified

salaries and terminal benefits when after all that was not the relief sought or canvassed before the court *a quo*; and

(f) the learned judge erred and/or misdirected himself by granting remedies for breach of contract when the case placed before him was a review application which falls under the province of public law.

Issues for determination by court

[22] There are six issues raised by this appeal. First, whether the High Court ought to have relied on the decision in *Lebohang Ntšinyi*. Second, whether there is a line of demarcation between a contract of deployment and a contract of employment. Third, whether the Court *a quo* was correct in awarding costs on the attorney and client scale. Forth, whether on the facts, Appellants were guilty of contempt. Fifth, whether the learned judge erred and/or misdirected himself by fixing a time frame within which the Appellants are to be paid the specified salaries and terminal benefits. Sixth, whether the learned judge erred and/or misdirected himself by granting remedies for breach of contract when the case placed before him was a review application, which falls under the province of public law.

The law

[23] The starting point in understanding the law of Lesotho is the Constitution. The Constitution is the supreme law of Lesotho and if any other law is inconsistent with the Constitution, that other law is, to the extent of the inconsistency, void.[1] The term "law"

[1] Section 2 of the Constitution of Lesotho.

includes: (i) any instrument having the force of law made in exercise of a power conferred by a law; and (ii) the customary law of Lesotho and any other unwritten rule of law.[2] This means that this also contemplates even the common law in all its branches. Section 155 (1) of the Constitution provides that, subject to the provisions of this Constitution, the existing laws must continue in force and effect on and after the coming into operation of the Constitution and shall have effect as if they had been made in pursuance of the Constitution, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution. Thus, the courts are enjoined to construe all laws, including contractual provisions, with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

[24] Section 155 (5) of the Constitution further provides that "existing law" means any law or instrument having force and effect as part of the law of Lesotho immediately before the coming into operation of this Constitution (and includes any such law or instrument made before that day and promulgated or otherwise coming into operation on or after that day), but does not include any such law or instrument which is repealed by the Constitution or otherwise, on the coming into operation of the Constitution.

[2] Section 154 (1) of the Constitution.

[25] In terms of 143(1) of the Constitution, the power to appoint persons to hold or act in offices to which this section applies and to remove from office persons holding or acting in such offices is vested in the King, acting in accordance with the advice of the Prime Minister. Before tendering advice for the purposes of this section in relation to any person who holds any office in the public service, other than an office to which this section applies (which includes the office of Ambassador), the Prime Minister must consult the Public Service Commission. In terms of section 143(3) of the Constitution, the offices to which this section applies are the offices of Ambassador, High Commissioner or other principal representative of Lesotho in any country.

[26] The other piece of legislation relevant to the resolution of this dispute is the Public Service Act 2005. There is also the Public Service Regulations 2008. The above constitutional and legislative framework must serve as the means of resolving this dispute. Should there be a violation of the above laws in relation to the offices of Ambassador or High Commissioner of Lesotho, these laws have to be invoked.

Evaluation of the appeal

[27] I now turn to consider the appeal before us. The first ground of appeal advanced by the appellants is that, the leaned judge erred by not "relying on the instructive decision" of *Lebohang Ntšinyi* in spite of being on all fours with the case in issue. My understanding of this ground is that the appellants are saying that

the court ought to have followed *Lebohang Ntšinyi* and come to the same decision. It is on that basis that I shall approach this matter.

[28] My understanding of this ground of appeal is that it is based on the *stare decisis* rule. The doctrine of *stare decisis* is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion,[3] to protect vested rights as well as to uphold the dignity of the court.[4] It serves to lend certainty to the law.[5]

[29] There can be no doubt that the *stare decisis* rule is a rule that has long been recognised by our courts. However, the extent to which it should be applied in the circumstances which have arisen in the present case must now be considered. We have adopted the rule from English law. Salmond *Jurisprudence* 3rd ed. at p. 160, says:

> 'The importance of judicial precedents has always been a distinguishing characteristic of English law . . . In practice, if not in theory, the common law in England has been created by the decisions of English Judges. Neither Roman law, however, nor any of those modern systems which are founded upon it, allows any such place or authority to precedent.'

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[3] *Commissioner for Inland Revenue v Estate Crewe* supra n6 at 680; Kahn 1955 SALJ 652.
[4] *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) (2002 (2) SACR 105; 2002 (7) BCLR 663; [2002] ZACC 6) at 646, paras 53 – 61; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) ([2002] 4 All SA 125) at 38F – 40F; *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) (2011 (2) BCLR 121; [2010] ZACC 19) para 28.
[5] *PATMAR EXPLORATIONS (PTY) LTD AND OTHERS v LIMPOPO DEVELOPMENT TRIBUNAL AND OTHERS* 2018 (4) SA 107 (SCA) at para 4.

[30] As Centlivres CJ correctly pointed out in *Fellner v Minister of The Interior*[6] the rule *stare decisis* has been applied with great rigidity in England, the reason probably being that English common law has been built up largely on decided cases: hence the reverence for judicial decisions. But with us the position is different: our common law rests on principles enunciated by the old writers on Roman Dutch law. Consequently there is no reason why we should apply the rule with the same rigidity as it is applied in England. The extreme rigidity of the application of the rule in England seems to be a modern development and there is no reason, in my opinion, why this Court, which applies the principles of Roman-Dutch law, should move in the same direction as the English Courts.[7] I agree with these remarks.

[31] The High Court was bound, unless it was satisfied that *Lebohang Ntšinyi* was wrongly decided, to follow that decision. It is well established in our law and, it binds the High Court and Court of Appeal, to each follow its earlier decisions unless it is satisfied that such decisions were wrong and, even if they are so satisfied, there may be reasons why they should not depart from their earlier decisions.

[32] In this case I am concerned only with the first requisite. The rule that a court is bound by a previous decision has reference

[6] *Fellner v Minister of The Interior* 1954 (4) SA 523 (A) at p.530.
[7] *Fellner v Minister of The Interior* 1954 (4) SA 523 (A) at p 532.

only to the *ratio decidendi* and not to the concrete result of that decision. In *Fellner* Greenberg JA refers to *Halsbury (Hailsham ed. vol. 19, p. 252*, note (i)) where it is said that: 'the concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law.' A passage in the *Law Quarterly Review (vol. 63, p. 461)* embodies the same idea as in the quotation above. It refers to 'the dual function of a decision' and continues: 'To the parties the order of Court is all-important; to the public, the profession and the tribunals bound or influenced by it, what matters is the *ratio decidendi* supporting the order.'

[33] There can be no doubt therefore that, it is well established that the High Court and the Court of Appeal of Lesotho should apply the principle of precedent in the form that it is bound by its own previous decision, unless it is satisfied that that decision was plainly wrong. In addition, the previous decision is qualifiedly and not absolutely binding. But whether the binding quality be absolute or qualified it is attributed only to the *ratio decidendi*. In addition, the High Court of Lesotho is bound by the decisions of this Court of Appeal.

[34] In the appeal before us, the appellants' complaint is that, the leaned judge erred 'by not relying on the instructive decision of Lebohang Ntšinyi v. The Minister of Foreign Affairs and 3 Others.' In my opinion, the success or failure of this ground depends on whether the judgment in *Lebohang Ntšinyi* was correct. The decision in the sense of the Court's order, by itself, only operates, of course, as between the parties; it can only state law in so far as

it discloses a rule. Even without expressed reasons a decision may establish the existence of a rule, to be inferred from the facts which must have been treated as material and from the order made. As Schreiner JA pointed out in *Fellner v Minister of The Interior*:[8]

> *Judges in the countries where stare decisis obtains ordinarily give their reasons and connect the facts treated as material with the order made by such a statement of legal principles as is thought to be necessary. This statement, constituting the legal grounds or reasons for the judgment, makes it unnecessary for other tribunals afterwards to deduce a minimal ratio decidendi from the material facts and the order alone. Where, however, even when reasons are given, it is not possible to discover a ratio decidendi from them, it becomes necessary to resort to the facts found to be material and to the order, as if no reasons had been given, so as to find what must have been treated by the Court as the law, if the order was to be justified. The matter may well be only a question of linguistic usage, but I am disposed to think that only in the circumstances that I have mentioned might it be justifiable to say that the decision is itself binding; and in such cases it seems preferable to treat the ratio decidendi as coming from the material facts and the decision rather than to treat the decision as binding, as distinct from the ratio decidendi.*

[35] In regard to the application of the rule of *stare decisis* in such situations it seems to be open to a court subsequently considering the case from the angle of *stare decisis* either to hold that there is no *ratio decidendi*.

[36] Another related point is that, in this constitutional era, regard being had to the terms of section 155(1) of the Constitution referred to above, if the High Court was of the opinion that such decision, taking constitutional values into account, did not reflect the *boni mores* or constitutional values, the High Court was entitled to depart from the decision. Such a departure would not

[8] Ibid at p542.

be in conflict with the principles of *stare decisis* as it had to be accepted that constitutional values are not static concepts.

[37] When the present case came to be argued in the High Court, there existed a judgment of the same court on the very point of the recall of ambassadors in the *Lebohang Ntšinyi* matter. On the basis of the *stare decisis* rule as expounded by the Appellate Division in *Harris and Others v Minister of the Interior and Another*,[9] the only basis upon which the court *a quo* was entitled to depart from *Lebohang Ntšinyi* was on the basis that it was clearly wrong (See: *Collett v Priest*[10]). The principles of *stare decisis* required the judge to follow that decision unless satisfied that it was clearly wrong. The High Court disregarded that principle. The judge was only entitled to depart from the earlier judgment if satisfied that it was clearly incorrect. The proper approach was to ask whether Mokhesi J's judgment in *Lebohang Ntšinyi* was a tenable interpretation of the. Moiloa J was obliged to follow his colleague's decision and should have done so. As Wallis JA pointed out in *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others*,[11] the test for departing from a judgment from one's own court is set high so that it is only done in few cases and then only after anxious consideration.

[9] *Harris and Others v Minister of the Interior and Another* 1952 (2) SA at 452 – 454.
[10] Collett v Priest 1931 AD at 297.
[11] Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others 2018 (4) SA 107 (SCA) at p112

[38] The next ground of appeal by the appellants is that, the learned judge erred in failing to draw a line of demarcation between the peculiar nature of a "contract of deployment" and a "contract of employment" in the context of the case. I must confess, I am not aware of a "contract of deployment" in our law. However, as pleaded by the appellants in their answering affidavit, their case is that the constitutional and statutory powers and functions vested in the executive to appoint and recall diplomats are not administrative in nature and so are not reviewable by the courts. In this vein, the appellants' case is that the executive's exercise of powers and functions in this regard, cannot be reviewed by the courts. I do not agree with this argument. I accept that a decision whether or not to deploy or recall a diplomat, is an aspect of foreign policy that is essentially the function of the executive. However, this does not mean that Lesotho courts have no jurisdiction to deal with issues concerned with the rights of the country's diplomatic personnel. The exercise of all public power is subject to constitutional and statutory control. Thus, even constitutional and statutory decisions by the executive to recall diplomats otherwise than in terms of their contracts of engagements, can be and have been challenged in our courts. In my opinion, executive's exercise of powers and functions can be reviewed on the basis of the principle of legality or rationality that stem from the rule of law. In my opinion therefore, there is no substance in this ground.

[40] The next ground of appeal by the appellants is that, the learned judge erred and/or misdirected himself by concluding that

the appellants were guilty of contempt. The finding of contempt cannot stand. I say so because even on the facts, there was a dispute of fact as to whether the appellants had done anything subsequent to the granting of the order on which the finding of contempt was based. As Cameron JA put it in *Fakie NO v CCII Systems (Pty) Ltd,*[12] on the accepted test for fact-finding in motion proceedings, it is impossible to reject the appellants' version as 'fictitious' or as clearly uncredited worthy. There is a real possibility that, if a court heard oral evidence on the factual disputes between the parties, it might accept the appellants' version, or at least find that there was reasonable doubt as to whether the alleged defiance of the court order took place before or after the order. This would then help the court to determine whether or not the failure to comply with the orders of Moiloa J was wilful and *mala fide*. In the contempt application the applicant therefore failed to prove that the default was wilful and *mala fide*. This ground of appeal should therefore be upheld. As Mokhesi AJA pointed out in *Rats'iu v Principal Secretary Ministry of Forestry*:[13]

> *[12] In the circumstances, bearing in mind that the application in the court a quo was a contempt application, it is difficult to see how it could be said that the appellant discharged the onus placed on his shoulders, of showing that indeed the 1st respondent was guilty of contempt beyond a reasonable doubt.*
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> *[13] The contemporary approach to applications for contempt of court was stated in the oft-quoted decision of Fakie No v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para. 42 wherein Cameron JA said*:*
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> > *"[42] 1. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*

[12] Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA at 64.
[13] *Rats'iu v Principal Secretary Ministry of Forestry* (C of A (CIV) 9 of 2017).

> *2. The respondent in such proceedings is not an accused person', but is entitled to analogous protections as are appropriate to motion proceedings*
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> *3. In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
>
> *4. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides; should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt."*

[41] The next ground of appeal by the appellants is that, the learned judge erred and/or misdirected himself by awarding costs at the attorney and client scale in respect of the contempt application. The fact that the appellants were mulcted in attorney and client costs by the judge in the court a *quo,* is certainly not an element in their favour. That was a discretionary decision with which this Court, in the absence of a misdirection, will be slow to interfere. As Holmes JA *Ward v Sulzer*[14] in general, the basic relevant principles in regard to costs may be summarised as follows:

1. In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides. See *Gelb v Hawkins*, 1960 (3) SA 687 (AD) at p. 694A; and *Graham v Odendaal*, 1972 (2) SA 611 (AD) at p. 616. Ethical considerations may also enter into the exercise of the discretion; see *Mahomed v Nagdee*, 1952 (1) SA 410 (AD) at p. 420 (in fin).

2. The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs; see *Nel v Waterberg Landbouers Ko-operatiewe*

[14] Ward v Sulzer 1973 (3) SA 701 (A)a pp. 706-707.

Vereniging, 1946 AD 597 at p. 607, second paragraph. Moreover, in such cases the Court's hand is not shortened in the visitation of its displeasure; see *Jewish Colonial Trust, Ltd. v Estate Nathan*, 1940 AD 163 at p. 184, lines 1 - 3.

3. In appeals against costs the question is whether there was an improper exercise of judicial discretion, i.e., whether the award is vitiated by irregularity or misdirection or is disquietingly inappropriate. The Court will not interfere merely because it might have taken a different view.

4. An unsuccessful appeal against an order involving costs on the basis of attorney and client does not necessarily entitle the respondent to the costs of appeal on the same basis. A Court of appeal must guard against inhibiting a legitimate right of appeal, and it requires the existence of very special circumstances before awarding costs of appeal on an attorney and client basis; see *Herold v Sinclair and Others*, 1954 (2) SA 531 (AD) at p. 537. The decision also indicated the undesirability, in that case, of elaborating on the generality of the expression 'very special circumstances'. Without seeking to limit it, I think it safe to say that relevant considerations could include, amongst others, the degree of reprehensibility of the appellant's conduct, the amount at stake, and his prospects of success in noting an appeal, whether against the main order or against the special award of costs with its censorious implications.

[42] In the case before us, the learned judge a *quo,* did not give reasons for his decisions. As Farlam, A.P.*Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd and Others*:[15]

> [18] This Court has on a number of occasions in the past criticised the failure by some judges in the High Court to provide written reasons for their judgments. See, for example, *Mosebo v Angel Diamonds Ltd* LAC (2011-2012) 302 at 303 F-I where the following was said:
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> *'This Court has on the numerous occasions in the past strongly deprecated the failure by judges of the High Court to give reasons for their decisions. See e.g Qhobela and Another v Basutoland Congress Party and Another LAC (2000-2004) 28 at 38C-D; Hlalele and Another v Director of Public Prosecutions and Another LAC (2000-2004) 233 at 237H-238A; R v Masike LAC*

[15] *Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd and Others* (C of A (CIV) NO. 44/2016) [2017] LSCA 4 (12 May 2017).

(2000-2004) 557 at 559G-560B, and Otubanjo v Director of Immigration and Another LAC (2005-2006) 336 at 343F-346C.

What was said by Friedman JA in Qhobela's case applies to this case also. The passage to which I refer reads as follows-

"It is necessary for the proper administration of justice that courts give reasons for judgment. A litigant has every right to know why a case has been won or lost. And a lower court is also obliged to furnish reasons so that a Court of Appeal will be properly informed as to what prompted the court a quo to arrive at its decision. In the present case no reasons are given by the learned judge a quo either for his order confirming the rule or for his subsequent 'ruling'. His conduct in this regard is to be deplored." '

[43] If a party considers that there are grounds upon which a Court should exercise its discretionary power to award costs on attorney and client scale, it is surely for him to raise the matter and to place the court in possession of the facts and circumstances which he contends support his request. It is then for the court to act thereon by evaluating the facts and circumstances upon which to decide objectively, whether they justify the granting of such an order. In the present case, the court a *quo* merely held that the present appellants were 'guilty of blatant and wilful contempt of court order issued on 23 March 2018.' No reasons were provided justifying such a pronouncement. The award of the costs on the scale as between attorney and client was clearly arbitrary. I say so because even on the facts, there was a dispute of fact as to whether the appellants had done anything subsequent to the granting of the order on which the finding of contempt was based. The order of costs on attorney and client scale must therefore be set aside.

[44] The next ground of appeal by the appellants is that, the learned judge erred and/or misdirected himself by fixing a time

frame within which the appellants are to be paid the specified salaries and terminal benefits when, after all, that was not the relief sought nor canvassed before the court *a quo*. As I understood the nature of the complaint in argument, the appellants are largely concerned with the fixing of a time frame without the parties having been given an opportunity to address the court thereon. This Court has on several occasions deprecated the practice in terms of which the courts grant orders that nobody has asked for. In several of its decisions the Court of Appeal has deprecated the practice of granting orders which are not sought for by the litigants.[16] See for example *Nkuebe v. Attorney General and Others* 2000 – 2004 LAC 295 at 301 B – D; *Mophato oa Morija v. Lesotho Evangelical Church* 2000 – 2004 LAC 354. In the latter case, this Court (per Grosskopf JA) said the following at page 360:-

> *The appellant's first ground of appeal was that the court a quo erred in making the above order when neither the appellant nor the respondent had asked for it. Counsel for the respondent, on the other hand, submitted that the court a quo was fully entitled to grant such an order since the notice of motion included a prayer for further and/or alternative relief.*
>
> *I do not agree. The relief which a court may grant a litigant in terms of such a prayer cannot in my view be extended to relief which he has never asked for and which is not even remotely related to what he has asked for. It is equally clear that the order was not granted at the request of the respondent and it does not appear on what grounds the court a quo could order the respondent.*

[45] As Scott AP put it in *Ministry of Public Works and Transport and Others v Lesotho Consolidated Civil Contractors (Pty) Ltd*[17]:

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[16] See for example *Nkuebe v. Attorney General and Others* 2000 – 2004 LAC 295 at 301 B – D; *Mophato oa Morija v. Lesotho Evangelical Church* 2000 – 2004 LAC 354. In the latter case the Court of Appeal of Lesotho (per Grosskopf JA) said the following at page 360:

[17] *Ministry of Public Works and Transport and Others v Lesotho Consolidated Civil Contractors (Pty) Ltd* (C of A (CIV) N0.9/14)

> There is nothing in the judgment to explain why these orders were made. They were not sought in the Notice of Motion and should not have been made. (see *Mophato oa Morija v Lesotho Evangelical Church* 2000-2004 LAC 356 at 361) There is also nothing in the judgment to indicate whether the Court gave due consideration to the granting of prayer 2 (e) which in effect is an order for specific performance.

[46] However, regard being had to the justice needs of this case, the time frames imposed without a hearing may be severed from the rest of the order without doing violence to the order itself.

[47] The last ground of appeal by the appellants is that, the learned judge erred and or misdirected himself by granting remedies for breach of contract when the case placed before him was a review application which falls under the province of public law. I do not think that the learned granted remedies for breach of contract. What the court a *quo* did was to direct the appellants to pay in accordance with their undertaking contained in the letter of recall. He did not order damages for breach of contract. This was the position of appellants that they offer the respondents payment of benefits including their salaries for the remaining term of their contracts. It was the appellants who, in their letter of recall, undertook to pay the respondents their terminal benefits including but not limited to salary for the remaining terms of his contracts.

[48] At the hearing of this appeal, the court asked counsel for the appellants why the appellants were not paying the respondents their dues as per the letter of recall. The answer was not forthcoming. In my opinion, the appellants must pay the respondents their dues in terms of their letters of recall. The

appellants must pay to the respondents their entitlements they undertook to pay forthwith. Lastly, there is no reason why the appellants should not be ordered to pay the respondents' costs in the High Court on party and party scale, which were occasioned by their failure to pay the respondents as undertaken by them in their letters of recall.

[49] Regarding costs of this appeal, three grounds of appeal succeeded while three failed. In my opinion, it is fair in the circumstances to make no order as to costs in this appeal.

Disposition

[50] In the circumstances, we make the following order:

1. The appeal is dismissed in respect of grounds 1,2 ,6 .
2. The appeal is upheld in respect of grounds 3 ,4 and 5 .In respect of ground 5 however, it is upheld only in respect of the fixing a time frames.
3. The respondents' costs in the High Court shall be on party and party scale.
4. There will be no order as to costs in this appeal.

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DR K.E.MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree

M.H. CHINHENGO

ACTING JUDGE OF APPEAL

I agree

N.T. MTSHIYA

ACTING JUDGE OF APPEAL

For the Appellant : Messrs K. Ndebele & M. Rasekoai

For the Respondent : Adv K.K. Mohau KC