IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.: 14/2018**
CIV/APN/92/2018

In the matter between:

LEBOHANG NTSINYI **APPELLANT**

AND

PRINCIPAL SECRETARY MINISTRY OF FOREIGN SERVICE AND INTERNATIONAL RELATIONS **1ST RESPONDENT**
MINISTER OF FOREIGN SERVICE AND INTERNATIONAL RELATIONS **2ND RESPONDENT**
MINISTER OF PUBLIC SERVICE **3RD RESPONDENT**
ATTORNEY GENERAL **4TH RESPONDENT**

CORAM: DAMASEB AJA
VAN DER WESTHUIZEN AJA
MTSHIYA AJA

HEARD: 21 OCTOBER 2019
DELIVERED: 1 NOVEMBER 2019

SUMMARY

Appeal – Against order confirming termination of contract of engagement of an ambassador – Appellant's contract as ambassador to Beijing terminated by incumbent government on the basis that it has no confidence in her that she would confidently carry out its foreign policy because she belongs to the opposition party of ousted government – termination challenged on administrative review grounds because allegedly in breach of contractual termination clauses. Application dismissed a quo.

Court on appeal holding that termination clause in contract to be used only for lawful purpose and had to be rational; that on facts the appellant accepted termination if certain conditions met; court holding that such conditions met and therefore appellant had no valid basis to challenge termination.

Appeal dismissed with costs.

ORDER

The appeal is dismissed, with costs.

JUDGEMENT

P T Damaseb AJA

Introduction

[1] This appeal follows an order by Mokhesi AJ dismissing an application to review the decision of the respondents to recall the appellant (an ambassador) from Lesotho's Foreign Service.

[2] The first respondent is the Principal Secretary of the Ministry of Foreign Affairs and International Relations. The second respondent is the Minister of Foreign Affairs and International Relations. The third the Minister of Public Service and the fourth respondent the Attorney-General. All respondents have been sued and cited in their official capacities and have opposed as such. I will henceforth refer to them as the 'Government" unless the context requires otherwise.

Common cause facts

[3] The appellant served the Kingdom as ambassador to Beijing, China, from 16 May 2016 until she was recalled in March 2017. In terms of her written contract of employment with the Government, her 'engagement' was to terminate on 16 May 2019 after serving 36 months. In terms of the contract, the appellant would act, in all respects, according to the instructions and directions of the

Government of Lesotho and was to use her 'utmost exertions to promote the interest of the Government'.

[4] The schedule to her employment contract with the Government of Lesotho in clause 6 (1) provides as follows:

> *(1) 'If the person engaged shall at any time after the signing hereof neglect or refuse or from any cause (other than ill health not caused by his or her own misconduct or negligence, as provided for in clause 5) become unable to perform any of his/her duties or to comply with any order, or shall disclose any information of the affairs of the Government to the unauthorized person, or shall in any manner misconduct himself/herself, the Government may terminate his/her engagement or dismiss him/her from the service after due process of the law and thereupon all rights and advantages reserved to him/her by this contract shall cease.'*

[5] Clause 6 (2) provides as follows:

> *(2) The Government may at any time terminate the engagement of the person by giving his/her three months' notice in writing or on paying him/her three months' salary in lieu of notice.*

How the appellant was appointed

[6] It is common cause that the appellant was appointed as an ambassador in 2014 when the erstwhile coalition government took over the reins of power. She was a senior political leader of a political party called Lesotho Congress for Democracy (LCD) which was part

of a coalition government which lost power in June 2017 to the present government. It is common cause that she is not a career diplomat. It is further common cause that the collation government of which she was part was ousted by the current government in 2017 and that this change in government precipitated the termination of her engagement.

The termination of her engagement

[7] The appellant was invited[1] to meet the first and second respondents in Rome, Italy on 27 February 2018. The meeting however took place on the 28 February 2018. At the meeting, the Minister communicated to the appellant that the new government had decided to recall her from her posting as Ambassador to Beijing. The Minister further informed her that the Constitution of Lesotho gave him the power to recall her at any time on behalf of Government. The Minister then invited the appellant to state any prejudice she is likely to suffer if recalled earlier than the termination date.

Salient allegations in her affidavit

[8] In reply to the Minister, according to the appellant, she informed the first and second respondents that her premature recall will be highly prejudicial to her family life, in that it will disrupt the educational calendar of her children then living with her abroad. The

[1] By letter dated 20 February 2018 from the first respondent.

appellant further indicated that she would also suffer financial prejudice in terms of earning capacity for the remaining year of the contract. Therefore, the appellant proposed that she be paid out for the remaining tenure of her engagement and all attendant benefits and that if that happened, she would accede to the termination of her service.

[9] On 6 March 2018, the appellant received a letter confirming her recall with immediate effect. The recall letter further stated thus in part:

> *'(c) In order to meet the stipulated three (3) months' notice, you will be paid cash in lieu of notice for one month.*
>
> *(d) On conclusion of this recall, you will be paid terminal benefits due in terms of your contract including, but not limited to salary for the remaining term of your contract.'*

[10] The appellant alleges that the termination of her service is unlawful and without any legal basis, in that termination on the basis that the appellant is not part of the coalition government was not a legitimate ground on which her service could be terminated. It is further alleged that the decision was irrational, unreasonable and without any justification. The appellant alleges that the recall was made without a proper hearing and without any reasons, in the absence of any disciplinary grounds, making the decision arbitrary, capricious and null and void. The appellant further alleged that the recall was improper because it was done without the involvement of

the third respondent (Minister of Public Service) as there is no indication that the Public Service Commission authorised the recall.

[11] The appellant sought a declarator to have the termination of service, recall and or re-assignment declared null and void *ab initio*. Additionally, the she sought to have the decision to terminate her service reviewed, corrected and set aside. The relief sought was premised on the allegation that the appellant had acquired a right to remain as ambassador to China until the end of the period of her contract and that the illegality and unlawfulness of the recall violated the rules to natural justice.

[12] The appellant further sought the production of the record of proceedings of consultations in Rome in terms of rule 50 of the rules of the High Court. She alleged that if produced, the record will demonstrate that she put forward to the first and second respondents the circumstances of her children as a relevant factor they should have regard to in not recalling her and that such factor was ignored when the decision to recall her was taken.

Opposition to the application

[13] The Government opposed the granting of the relief sought and filed opposing papers.

[14] The first respondent deposed to the affidavit on behalf of the Government. The deponent justified the appellant's recall on the basis of the power enjoyed by the Executive under s 143 of the Constitution. That provision vests the power to appoint and remove principal representatives of Lesotho in the King, on the advice of the Prime Minister. According to the deponent, this prerogative power is subject only to administrative review in narrow circumstances and that no exceptional circumstances are present in this case to warrant judicial interference.

[15] The first respondent outlined the core functions of an ambassador and equated it to that of a cabinet minister whose position involved dealing with highly classified or top secret communications. Likewise, an ambassador handles confidential communication between the host country and Lesotho. Thus approached, the Government must have complete trust and confidence in its foreign representative in the conduct of diplomacy with the foreign host country.

[16] It is common cause that the appellant is a prominent member of a political party, Lesotho Congress for Democracy (LCD) which belonged to the ousted coalition government. According to the respondents, the decision by the current Government to terminate the appellant's foreign service posting was premised on the reasonable understanding that being a political appointee as opposed to a career diplomat, she cannot reasonably be expected to execute

the foreign policy of the incumbent Government to which her political party is a political competitor. Accordingly, the Government had no trust and confidence that the appellant would faithfully execute its foreign policy.

[17] It is therefore disputed that the recall decision was unlawful; irrational or unreasonable as the reason for the termination was given to the appellant during the meeting in Rome. It is further denied that the Minister for the Public Service ought to have been involved in the termination of the appellant's service.

[18] It is the respondents' case that before the recall, the appellant was given an opportunity to be heard and that the representations she made were duly considered in the advice given to the Monarch.

[19] The respondents do not dispute that the appellant had a legitimate expectation to serve until May 2019. It was for that reason, it is said, that she was offered payment of her terminal benefits, inclusive of her salary, for the remaining term of the contract. As regards the issue of her children's education, the first respondent stated that it was raised for the first time in her application and therefore was not had regard to in the recall decision.

Judgment of the High Court

[20] Mokhesi AJ (as he then was) had to determine two issues: whether the decision of the respondents was liable to be reviewed and set aside and whether the appellant was entitled to the declaratory relief she sought.

[21] Relying on Article 143 of the Constitution, Mokhesi AJ observed that the Executive has wide discretionary power to conduct and control the nation's foreign policy through the appointment and recall of ambassadors as an instrument of foreign policy. To be able to effectively conduct foreign policy, the judge reasoned, the Executive ought to enjoy room to maneuver through appointment and recall of ambassadors. The judge a *quo* found that flexibility in regulation 127(2) of the Public Service Regulations which gives the Executive power to recall ambassadors at any time before the expiration of their tenure.

[22] The learned judge a *quo* held that although the court cannot prescribe to the Executive how it should conduct its foreign policy, its decisions are susceptible to judicial review on grounds of illegality and rationality. Relying on *Democratic Alliance v President of South Africa and Others*,[2] the court a *quo* acknowledged that courts will be slow to interfere with the performance of an executive function unless the decision has no relational connection to the powers conferred on the Executive. The court was satisfied that the process followed in the present case was rationally related to the powers of the Executive

[2] (CCT 122/11)[2012] ZACC 24, para 34.

to formulate and to control its foreign policy objectives and the declaratory relief sought consequently failed.

[23] As regards the production of the record of proceedings, the court *a quo* condoned the non-compliance with rule 50 and emphasised that although the record of proceedings could be relevant in assessing the lawfulness and rationality of the decision, its production would depend on its relevance to the decision sought to be reviewed.[3] The court held that the record of what transpired in Rome was irrelevant as the reasons for the termination of the appellant's service was common cause between the parties.

[24] The application was consequently dismissed with costs.

The appeal

[25] Dissatisfied with the judgment of the court *a quo*, the appellant appealed to this court alleging that Mokhesi AJ erred and misdirected himself in the following respects:

(a) Condoning the failure to produce the record in terms of rule 50 of the High Court Rules and holding that it was not relevant;

[3] The court relied on *Turnhbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC); *Helen Suzman Foundation v Judicial Service Commission* 2017 (1) SA 367 (SCA);

(b) By failing to consider the Court of Appeal decision of Minister of *Foreign Affairs and others v Mohafa* (C OF A (CIV) 70/2014 dealing with notice periods for termination of contract.
(c) By deciding that the termination was rational;
(d) By ignoring the prejudice caused to the appellant's children's education being brought to an abrupt end.

Concession on appeal

[26] It became apparent when the appeal was called that the Government was prepared to implement the undertaking given to the appellant in its 6 March letter of recall: In other words, a tender was made to pay to the appellant all the benefits due to her for the unexpired portion of her contract. That tender was accepted and it was for that reason that, by agreement between the parties, we issued the following consent order on the date of the appeal hearing:

> *'(a) the respondents shall pay the appellants in cash on or before March 2020, all terminal benefits due in terms of the contract, including but not limited to salary for the remaining term of her contract, calculated from the date of her recall in terms of the respondent's 'Notice of recall' dated 05 March 2018.*
>
> *(b) Each party shall bear its own costs.'*

[27] The consent order did however not dispose of the appeal because the parties could not reach amicable resolution on the issue

of the costs order which the Government obtained a *quo* and proceeded to execute against the appellant as the noting of the appeal did not suspend execution. The appellant could only be entitled to the recovery of the loss suffered as a result of the execution if the merits of the appeal are decided in her favour. It is for that reason that we proceed to determine the appeal.

Arguments on appeal

[28] The appellant was represented by Mr M.A Molise while the Government was represented by Mr T.D Thejane.

[29] On behalf of the appellant, Mr Molise argued that the court a *quo*'s refusal to compel the production of the record of the Rome meeting was a misdirection which should have the effect that the court should conclude that, indeed, the appellant did raise the issue of her children as a relevant factor; that it was not considered in her recall decision and that the failure to do so should vitiate the recall decision.

[30] Next, counsel submitted that the recall decision was liable to be reviewed and set aside, because in terms of the terms of the appellant's contract of engagement, she could only be terminated for misconduct or inability to perform after having been afforded a fair hearing. In that respect, the argument went, the court a quo failed to follow the decision of *Foreign Affairs and others v Mohafa* (C OF A

(CIV) 70/2014 which on their version supports the appellant's position that the power given under the letter of engagement must be invoked only on proof of misconduct or unbecoming conduct after due process.

Brief facts of Foreign Affairs and others v Mohafa and ratio

[31] In *Mohafa,* the Minister of Foreign Affairs appealed on behalf of the Government against an order by Makara J who ruled that the termination of an extended tacit engagement contract between the Government and Mr Mohafa as ambassador to Libya was not in compliance with clause 7(1)[4] of the contract. Mr Mohafa requested a renewal to his original contract for another 36 months in terms of clause 11 of the eEXECUngagement contract. After the expiry of the first engagement term of 36 months, he continued to serve in his position as ambassador, enjoying all previous benefits for 8 months after the expiry of his initial contract. He received no response to his request for an, only to be served with the letter of recall in the 8th month of the extended period.

[32] The letter communicating the termination of the contract was silent as to compliance with clause 7 (1) upon recall which required a 3 months and in lieu thereof payment of the salary- equivalent of 3 months. The High Court had held that the termination letter was not compliant with clause 7(1) of the contract. On appeal, the court of

[4] Clause 7(1) is identical to clause 6(2) in the present appeal.

Appeal confirmed that finding stating that it was necessary that the recall complied with clause 7(1). To the extent it failed to do so it was held to be unlawful.

[33] The facts of *Mohafa* are distinguishable from the present case. Mr Mohafa had, firstly, not relied on the clause terminating the contract on the basis of misconduct as the appellant before us has done. Secondly, the court in *Mohafa* ruled that the termination was not in compliance with clause 7(1), which reads identical to clause 6 (2) in *casu*, because of the failure to identify and inform Mr Mohafa of his terminal benefits, including his salary in terms of the contract. In the present matter, that is not the appellant's case and it is common cause that the letter of recall clearly stated that the appellant would be paid her full salary, as she demanded.

[34] For the respondents, Mr Thejane supported the judgment and order of the High Court and in the view that I take that the appeal must fail, it is unnecessary to regurgitate the submissions for the the Government.

Analysis

[35] According to counsel for the appellant, the Government was required by the terms of the contract to only recall (or terminate) the appellants' posting to Beijing for misconduct or inability to perform her duties. In other words, that paragraphs 6(1) and 6 (2) of the

contract are not separate (stand-alone) grounds for termination. The result urged for by this line of reasoning produces the following circular results:

(a) If an ambassador is accused of the kind of improper and unbecoming conduct contemplated in para 6(1), and the affected ambassador is actually guilty of such conduct, her services can only be terminated in terms of paragraph 6(2).

(b) For the government to invoke the power to recall in terms of para 6(1), it must establish that the ambassador is guilty of the improper or unbecoming conduct listed in 6(1).

[36] The first huddle in the way of the above reasoning is the qualifying language employed in sub-para (1) of para 6. It states that once the misconduct has been established ("after due process of the law" which clearly implies *audi*) the government may terminate his /her engagement or dismiss him/her from the service, and (most crucially) 'thereupon all rights and advantages reserved to him/her by this contract shall cease'.

[37] The view I take of the provision read in its totality is that it is unrelated to the rights and power enjoyed by the parties under sub-para (2). In the first place, sub-para (2) is not made subject to sub-para (1). Secondly, sub-para (2) is to be read together with sub-para

(3). If one does that, it becomes apparent that sub-para (2) and (3) vest reciprocal rights and obligations on the contracting parties which are different in content from those arising under sub-para (1).

[38] Sub-para (3) reads as follows:

> *'the person engaged may at any time after the expiration of three months from the commencement of any service, terminate his/her engagement on giving the government three months' notice in writing or paying to the government three months' salary in lieu of such notice.'*

[39] The conclusion I come to, therefore, is that the power to terminate under sub-para (2) is unrelated to misconduct or other unbecoming conduct contemplated under sub-para (1).

[40] Having said that, it needs to be made clear that the power vested in the Government under sub-para (2) cannot be exercised for an unlawful purpose, or irrationally. The question arises whether the absence of trust between the Executive and its ambassador in a foreign country passes the rationality standard.

[41] The common cause facts are as follows: The appellant is not a career diplomat. She is a senior leader of a political party which was replaced by the ruling party. The government formed by the ruling party has taken the view that it has no confidence that the appellant will faithfully execute its foreign policy objectives given her political

background. Can it be said that the approach taken by the incumbent Government is irrational?

[42] The conduct of foreign affairs is pre-eminently in the heartland of executive action. Diplomacy, at its very core, is a matter of high policy. That there should be trust between the government of the day and the agents (ambassadors) through whom foreign policy is pursued admits of no doubt.

[43] In a not entirely dissimilar matter (in the sense that it involved a relationship of trust between the head of State and the former Director-General of the National Intelligence Agency (NIA), the South African Constitutional Court in *Masetlha v The President of the Republic of South Africa and Another*[5], was called upon to decide whether two decisions taken by the President, one to suspend and the other to terminate Mr Masetlha's employment as head of the NIA, passed constitutional muster. The termination of employment was accompanied by an offer to pay Mr Masetlha his full monthly salary, allowances and benefits for the unexpired period of his term, including moneys due to an incumbent at the expiry of a term of office.

[44] Mr Masetlha had sought a *declarator* that the President lacked the power to suspend him from his post or to alter unilaterally his terms of employment. Mr Masetlha impugned the decisions as

[5] 2008 (5) SA 31 (CC)

constitutionally impermissible. He had declined the financial pay-out and instead pressed on with the claim to be re-instated in his post.

[45] The Constitutional Court was unanimous that there was an irreparable breakdown of trust between the President and Mr Masetlha and that trust was fundamental to their relationship. The Court held that given the loss of trust that lay at the heart of the specific constitutionally defined relationship, the termination was not unlawful.

[46] Moseneke DCJ held that the President's power to appoint and dismiss was not exclusively located in the provisions of the Public Service Act, which provides for the manner and form of the service contract, but must be read in conjunction with the prevailing constitutional and legislative scheme, which implicitly conferred on the President such power. According to the deputy chief justice, although the President had the power to terminate the employment of the applicant under section 209 of the Constitution read with section 3 of the Intelligence Services Act, such decisions amount to executive action and not administrative action, and are clearly not susceptible to administrative review under the tenets of PAJA even if they otherwise constitute administrative action.[6] The Constitutional

[6] The national powers and functions specifically excluded from the definition of PAJA are listed in section 1 with reference to relevant constitutional provisions. The President's powers under section 85(2), particularly those included in section 85(2)(e) of the Constitution, are expressly excluded in section 1(i)(aa) of PAJA. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at paras 141-143 *(SARFU),* this Court distinguished between executive and administrative action.

Court pointed out that the power to appoint and to dismiss a head of an intelligence Agency are conferred specially upon the President for the effective business of government and in order to provide room for the President to fulfil executive functions and, most importantly, in this particular case, for the effective pursuit of national security. The court however cautioned that the authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution.[7]

[47] The Constitutional Court confirmed the approach of the High Court that the termination based on loss of trust on the facts of the case was not arbitrary or irrational. The approach of the CC was justified on the following grounds:

> *'It cannot be forgotten that the duties of the applicant are to head, exercise command over and control the Agency.*[8] *The functions of the Agency itself include the duty to gather, evaluate and analyse domestic intelligence in order to identify any threat or potential threat to the security of the Republic or its*

It held that the power in question was conferred upon the President and that it was an original power, derived directly from the Constitution. Hoexter above n 35 at 212 argues that the meaning of "executive" in section 1(i)(aa) of PAJA has the effect of excluding "only distinctively political decisions and not characteristically administrative tasks such as implementing legislation." See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 78; and *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 27.

[7] See *Pharmaceutical Manufacturers* above n 39 at para 85 and *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

[8] Section 10(1) of ISA states:

> "The Director-General concerned or the Chief Executive Officer must, subject to the directions of the Minister and this Act, exercise command and control of the Intelligence Services or the Academy, as the case may be."

people. This duty extends to national counter intelligence responsibilities, which includes gathering and co-ordinating counter intelligence, in order to identify any threat or potential threat to the Republic or its people. And importantly, the Agency bears the responsibility to inform the President of any such threat. It follows that in order to fulfil his duty in relation to national security, the President must subjectively trust the head of the intelligence services. Once the President had apprised himself of the facts from the Minister; the report of the Inspector-General; the various reports of the applicant himself; the meetings he had with the applicant; the attacks on his integrity and accusations of falsehoods contained in the papers on suspension proceedings, the President concluded that he had lost trust in the applicant and that it was in the national interest to terminate his appointment as head of the Agency. In my view, that break-down of the relationship of trust constitutes a rational basis for dismissing the applicant from his post as Director-General of the Agency.[9]

[48] The court ruled that it was not appropriate to re-instate Mr Masetlha in his former position but ordered that he be put in the same financial position he would have been in but for the premature termination of his services.

[49] On the facts before us, I am satisfied that sub-paragraph (2) of para 6 of the appellant's contract can form a legitimate basis for an incoming government to recall an ambassador who is not a career diplomat and whom the government, for good reason, believes will not be able to faithfully execute its foreign policy objectives.

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[9] Para 86.

[50] In any event, this case falls to be determined on the appellant's own version of what she was prepared to accept in return for her recall and whether the Government agreed to those terms. As I will show presently, if the matter is approached in that way, it becomes irrelevant whether the Government did not give due consideration to her concerns about her children's schooling being disrupted if she were recalled.

[51] The appellant alleged in her founding affidavit that when she met with the first and second respondents in Rome, the latter advised her that due to issues of trust, the cabinet had taken a decision to recall her. She was not entirely happy with the proposed action but informed the representatives of the Government as follows:

> *'12.6 I proposed that I should be paid my money for the remaining period in the contract and all attendant benefits. And only in that event, I can accede to termination of my services.*
> *12.7 I was informed that I will be notified of the outcome in writing.*
> *12.8 The outcome was the service upon me of a letter of recall on the 6th March 2018.'*

[52] The letter of recall dated 5 March 2018 records the following:

> *(a) 'In order to meet the stipulated three (3) months' notice, you will be paid cash in lieu of notice for one (1) month.*
>
> *(b) On conclusion of this recall you will be paid terminal benefits due in terms of your contract including, but not limited to salary for the remaining term of your contract.'*

[53] Naturally, given what the appellant herself stated she was willing to accept in return for her recall, the question arises if the government met those conditions. During oral argument, we invited her counsel to point out the respects in which the letter of recall fell short of what his client's demands were. Counsel's reply was that he could not and that he could not take the matter any further. That concession was properly made.

[54] The Government's letter of recall effectively met all the conditions put forward by the appellant in return for her recall. These are conditions she herself put forward fully aware that she had children who were attending school. She must have been fully aware that if she left on the terms she proposed, the children would have been in no different a position than if she were made to leave her position contrary to her wishes. The issue about her children's schooling is therefore of no moment if viewed in the context of what she demanded and was complied with by the Government.

[55] That conclusion makes it unnecessary for me to decide whether the High Court improperly refused to order the production of the rule 50 record and what inferences would properly have been drawn if found that the issue of the children was in fact raised at the Rome meeting between the parties.

[56] The inevitable result that I come to therefore is that the appellant had not made out the case for the relief she sought and that it was properly denied by the High Court.

The order

[57] In the result,

The appeal is dismissed, with costs.

PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree

J VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

I agree

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M MTSHIYA

ACTING JUSTICE OF APPEAL

For the Appellants: Adv. M.A Molise

For the Respondent: Adv. T.D Thejane