

IN THE COURT OF APPEAL OF LESOTHO

**HELD AT MASERU
/2021**

C of A (CIV) No.51

CIV/APN/

312/2021

In the matter between

**BOTHATA TSIKOANE
APPELLANT**

AND

**PRINCIPAL SECRETARY MINISTRY OF
FOREIGN AFFAIRS AND INTERNATIONAL RELATIONS
1ST RESPONDENT**

**ATTORNEY GENERAL
RESPONDENT**

2ND

CORAM: K E MOSITO P
P MUSONDA AJA
M N CHINHENGO AJA

HEARD: 20 APRIL 2022

DELIVERED: 13 MAY 2020

SUMMARY

Ambassador of Lesotho to Italy remaining in Rome for a month after his tour of duty and tenure came to an end; Ambassador claiming he was entitled to salary for the one month on grounds that he carried on duties as ambassador during that month; Ministry contesting that he performed any duty as

ambassador and his contract of engagement having come to an end he was not entitled to any salary; Ambassador failing to prove that he did any work and therefore entitled to salary; High Court having dismissed his application with costs, on appeal, Held appeal should be dismissed; On costs order of High Court set aside and substituted with one ordering each party to bear its own cost; Each party also ordered to bear its costs of appeal

JUDGMENT

CHINHENGO AJA

Introduction

[1] This appeal is one of many that come before this Court and heard without the benefit of the trial judge's reasons for the order he or she made. The trial judge dismissed with costs the appellant's claim for payment of one month's salary and benefits arising from his contract of employment with the Government as Ambassador of the Kingdom of Lesotho to Italy. This appeal is also one of many appeals in which one or other of counsel representing the parties applies for condonation for non-compliance with the rules of this Court and the other does not oppose. In almost all such cases, this Court has invariably proceeded to hear the appeal without the trial court's reasons for judgment and to grant condonation for non-compliance with rules of court.

[2] We agreed to hear the appeal and, with the consent appellant's counsel, we granted condonation for the respondents' failure to file heads of argument within the time provided by the rules. I think that this Court must more and more insist on compliance with its rules. Where no reasons for judgment are given, we have been constrained, without respite, to deal with matters as if we are a court of first instance. Yet again we have to do so in this appeal.

Background

[3] The appellant was appointed by the Government of the Kingdom of Lesotho as its Ambassador to Italy on 15 January 2020. His tour of duty was supposed to be for thirty-six months, but it came to an end much earlier. By letter dated 9 March 2021, the appellant was advised that his tour of duty was ending on 3 May 2021 and he had to report to Headquarters in Maseru by 7 May 2021.¹ He did not report to Headquarters on that date because he was asked to remain in Rome for a little while longer. On 18 May 2021 the 1st respondent wrote to him² advising of the extension of his tour of duty in the following terms:

"RE: TEMPORAY EXTENSION FOR TWO MONTHS

Kindly be advised that decision has been reached to extend your tenure of office until and including the

¹ Annexure 'BT5' to founding affidavit

² Annexure BT to founding affidavit

31st of July 2021. During this time, you are still expected to carry out full duties and responsibilities of the office of Ambassador, Grade K, and your other terms and conditions of service will in other respects remain the same.”

[4] The letter of 18 May 2021 not only advised of the termination of the tour of duty on 31 July 2021 but also, and more importantly, it advised of the termination of his contractual engagement as Ambassador on the same date, *vide* the reference to the extension “of your tenure of office”.

[5] The termination of the Ambassador’s tenure of office was acknowledged by the embassy in Rome in a savingram dated 3 August 2021³ to the following effect:

“EXPIRATION OF TEMPORARY EXTENSION OF
AMBASSADOR BOTHATHA TSIKOANE

This savingram bears reference to your letter dated 18th May 2021 of the reference FR/P/49725.

The above captioned letter temporarily extended the tenure of office of Ambassador Tsikoane up to and including the 31st May 2021. The extension has since expired and the Embassy had requested funds to facilitate the return of the Ambassador and his

³ Annexure ‘BT5’ to founding affidavit

personal effects back to Lesotho. To date, no information has been availed on this matter as well.

Guidance on the way forward is sought on the above matter with regard to Ambassador.”

[6] On 5 August 2021 the Counsellor at the embassy, Thato Nkhahle, sent a savingram⁴ to the 1st respondent stating:

“RE: END OF TOUR OF HIS EXCELLENCY MR BOTHATA
TSIKOANE

Reference is made to the Savingram from this Mission Ref. LR/FIN/33 dated 23rd April 2021. The mission hereby wishes to resubmit the Supplementary Recurrent Budget for 2021-2022 amounting to M10 023 723 (Maloti 10 million twenty-three thousand seven hundred twenty-three) as requested.

Further reference is also made to Savingram Ref. LR/P/49725 dated 3rd August 2021 regarding the expiration of the temporary extension of H.E. Tsikoane’s tenure of office.

The above two Savingrams are referred to in order to facilitate the return of Ambassador and his personal effects to Lesotho. The Supplementary Recurrent

⁴ Annexure ‘BT7’ to founding affidavit

Budget referred to above covers expenses under votes titled Freight Charges and Fares (International). Please find attached a copy of the supplementary Recurrent Budget 2021-2022 for ease of reference.”

[7] On 10 August 2021 the Counsellor sent yet another Savingram⁵ to 1st respondent expressing some frustration and desperation that the repatriation of the Ambassador was not progressing, and Headquarters was ignoring correspondence from the embassy:

“END OF TOUR OF HIS EXCELLENCY MR BOTHATA
TSIKOANE

This Savingram bears reference to the following Savingrams and their attachments from this Mission, Ref.LR/FIN/33 dated 23rd April 2021, Ref. LR/P/49725 dated 3rd August 2021 and Ref. LR/P/49725 dated 5th August 2021.

The above referenced Savingrams pertain to the end of tour of His Excellency Mr Tsikoane and the expiration of his temporary extension as Ambassador. The temporary extension ended on 31st July 2021. The Mission therefore seeks guidance on the way forward on this matter.

⁵ Annexure 'BT6' to founding affidavit

The reference Savingsgrams further address the pertinent issue of the budget with regards to the facilitation of returning of the Ambassador and his personal effects to Lesotho. The attachment of the Savingsgrams is the Supplementary Recurrent Budget for 2021-2022 which indicates the votes which the expenses of the return of the Ambassador will be covered (under highlighted in yellow). The said votes are the Freight Charges and Fares (International).

Attached for ease of reference are the above referenced Savingsgrams together with the said attachments.”

[8] The 1st respondent acknowledged and responded to the flurry of correspondence from the embassy on 20 August 2021⁶. He wrote:

“RE: AUTHORITY TO USE CONTIGENCY FUNDS TO
PURCHASE AIR TICKETS

The above matter bears reference.

The Ministry of Foreign Affairs and International Relations instructs the Mission to use the available balance from the Contingency Funds that was allocated to facilitate the smooth departure of his Excellency the Ambassador whose tour of duty has

⁶ Annexure BT1 to founding affidavit

ended. The Mission is also advised to use the same funds to cater for setting up allowance, subsistence local on arrival at duty station for newly appointed Ambassador.”

[9] It is to be noted that the correspondence to Headquarters was written by officers at the embassy in Rome, the understanding being that the Ambassador had ceased to exercise any authority because his tenure had expired.

[10] The genesis of this appeal is a letter by the appellant himself dated 27 August 2021 seeking payment of salary for August 2021. That letter⁷ reads:

“AUTHORITY FOR PAYMENT OF SALARY FOR THE
MONTH OF AUGUST 2021 IN RESPECT OF H.E.
AMBASSADOR MR BOTHATA TSIKOANE

This Savingram bears reference to the above captioned.

The extension of contract of his Excellency Ambassador Tsikoane ended on the 31st July 2021. Due to reasons that were beyond the control of the Embassy, arrangements were not made in time for the return of His Excellency back to Lesotho on or before the 31st July 2021 and thus the Ambassador continued with his

⁷ Annexure 'BT2' to founding affidavit

duties until a solution could be found to facilitate his return to Lesotho.

It is on this basis that authority is sought from your good office to pay the Ambassador Mr Tsikoane a salary for the month of August 2021.”

[11] I have set out the correspondence between the parties to highlight one common cause and critically important fact that the appellant’s tenure and tour of duty came to an end on 31 July 2021, and after that he could not immediately return to Lesotho. The appellant says that this was due to lack of necessary logistical arrangements including insufficient funds and, possibly, delay in the appointment of a replacement head of Mission.⁸ He thus remained in Rome during August 2021.

Appellant’s application to court

[12] Following upon his letter requesting payment of salary, and whilst he was still in Rome, the appellant, through his legal practitioners in Maseru, commenced legal proceedings against the respondents on 31 August 2021 seeking certain interim and final relief, couched in the following terms:

“2. A *rule nisi* be and it is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to

⁸ Para 10 of founding affidavit

show cause, if any, why an order in these terms shall not be made absolute.

(a) That the respondents be and are hereby interdicted from doing any act that shall have the effect of removing applicant from Italy without payment of his emoluments pending finalisation of this application.

(b) That the Government should pay the applicant's emoluments prior to his departure from Italy to Lesotho including salary for the month of August 2021.

(c) That it be declared that the respondents' act of withholding the applicant's salary is unlawful.

(d) That the applicant be granted costs of suit.

(e) That the applicant be granted further and alternative relief.

3. That prayers .. and 2(a) should operate immediately as interim relief."

[13] Interim relief sought in this manner must invariably be disallowed. It is as well that the judge *a quo* did not grant it. Previously, this Court has cautioned, with reference to what

Chatikobo J said in a Zimbabwean case *Kuvarega v Registrar-General & Anor*⁹ that it is procedurally wrong to seek final relief in the form of interim relief. The appellant sought interim relief under paragraph 2(a) of the *rule nisi* that pending the finalisation of the application, the 1st respondent in effect should pay his emoluments before removing him from Italy. The point is that if appellant were paid his emoluments there would be no point in him coming back to court on the return day: he would have been granted the relief he sought in the proceedings, more so on proof merely of a *prima facie* case, which is the standard of proof required to obtain interim relief. In *Kuvarega* the Zimbabwe court observed:¹⁰

“Before concluding this judgment I must deal with a procedural matter which, regrettably, seems to present difficulty to many practitioners. The applicant applied for the issue of a provisional order calling upon the respondents to show cause on the return day why the wearing of T-shirts within the prohibited distance of a polling booth should not be declared unlawful. In addition, the applicant prayed the court to issue an interim interdict prohibiting the use of such T-shirts. As already pointed out, the application was filed on the Friday immediately preceding the Monday on which the election commenced. If the interim relief had been granted, the applicant would have obtained the substantive relief claimed before

⁹ 1998 (1) ZLR 188 (H)

¹⁰ At 192F-193D

the return date and after the election she would not have had any reason to move for the confirmation of the order. There was nothing interim about the provisional relief sought. It would have provided the applicant with the relief she sought on the day of the election. The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. This, to my mind, is undesirable especially, as here, the applicant will have no interest in the outcome of the case on the return day. The point I am making will become clearer if I put it in another way. If, by way of interim relief, the applicant has asked for a postponement of the election pending the discharge or confirmation of the provisional order she would not in that event gain an advantage over the respondents, because the point she wanted decided would have been resolved before the election was held. But, if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case and the election would be conducted on the basis that it is unlawful to wear T-shirts emblazoned with party symbols and slogans.

Thereafter it would be fruitless for the respondents to establish their entitlements to wear such T-shirts. Care must be taken in framing interim relief sought as well as the final relief so as to obviate such incongruities.”

[14] Similarly, in the present case, if the appellant were paid his emoluments pursuant to the interim relief sought in paragraph 2(a) aforesaid, he would have obtained effective relief before he proved his case and he would also have no interest in the outcome of the case on the return day.

Dismissal of application and grounds of appeal

[15] The appellant’s application was dismissed with costs by the judge *a quo* by order dated 20 September 2021. He gave no reasons for his decision. Dissatisfied with the order the appellant appealed on the following grounds: the learned judge erred in dismissing the appeal without furnishing reasons for the order he made; he erred in dismissing the application when “on the law and the facts, the applicant had proved that he had worked for the month of August 2021 and he had not been paid his salary and as such he could not be recalled before he was paid”; he erred in dismissing the application and holding that “the applicant can sue the respondents for damages in a separate law suit, including his August 2021 salary.”

[16] The first so called ground of appeal cannot be the subject of an appeal. All that the appellant needed to do was to take necessary steps to ensure that the judge concerned produced his reasons for judgment. This Court has, times without number, deplored the failure by some judges of the High Court to give reasons for their orders. We have to make the same point in this appeal again.

[17] The second ground of appeal, that the appellant had worked during August 2021 and was accordingly entitled to his emoluments raises a question of fact whether in fact he worked. If he did not then, on appellant's own case, he must fail and it would not be necessary to consider other issues of fact or law, because his entitlement to emoluments, which include salary, derived from having worked during that month. The first question therefore is: Did the appellant perform any work during the month of August 2021? If not, that is the end of the matter. If he did, the next question would be: Is he entitled to his emoluments.

[18] The third ground of appeal is not a ground of appeal at all. At best it was in the nature of an *obiter dictum*, an expression of opinion not essential to the decision the judge had to make or to resolve the case that was before him. In the absence of reasons for judgment it is unclear what the source of applicant's contention that he based his decision on the findings alleged. As earlier stated, and often happens in this Court, we are constrained to decide this appeal and bring the

litigation to finality in the interest of justice acting as if we are a court of first instance by examining the affidavits and the submissions before us and coming to a conclusion.

Appellant's case

[19] The communication between the parties and the facts emerging therefrom, which I have related so far, are not disputed by the appellant. The substance of his case is that no preparations for his departure from Rome were in place when his tenure ended on 31 July 2021. This remained the situation until 20 August when the embassy was advised, per annexure 'BT1', to use the balance in the Contingency Fund to procure his repatriation to Lesotho. His complaint is that he remained in Italy for the month of August and "did not earn my salary, allowances and privileges which are of property in nature." His justification for claiming payment of emoluments appears at paragraphs 17 - 21 where he avers:

"17. I aver that amid these developments [lack of preparations for departure, insufficient funds and exchange of savings], I have spent a month in Italy. I have not earned my salary, allowances and privileges which are of property interest in nature. There is no communication whatsoever as to my fate.

18. I submit that my property rights are involved, which in terms of the law cannot be taken away without any form of hearing whatsoever.

19. I submit that I am willing to come back home in Lesotho. I accept that my tour has come to an end.

20. I submit that I have discharged the functions of the Ambassador and I still until I come back to Lesotho.

21. I submit that I should still earn my salary and privileges which have now been taken away without a hearing without any justification or cause for which I could be blamed.

22. I submit that the Ministry should not be allowed to act in the manner that it does.”

[20] In the replying affidavit the appellant draws attention to annexure ‘BT8’, a computer-generated payslip for the month of August which shows his monthly emoluments. He contends in relation to it that it shows that he had been paid but his emoluments were unlawfully withheld along the way.

1st respondent’s case

[21] The 1st respondent opposed the relief sought by the appellant. He explained that the extension of appellant's tenure was necessitated by delays that ordinarily attend upon the acceptance by the host country of a replacement ambassador. In this case it took from March 2021 to get the *agreement* from the government of Italy for the appointment of a new ambassador. He disputes that funds for repatriation were unavailable and says that the money allocated for the appellant's departure was provided in the supplementary recurring budget. He in effect blames the appellant for his predicament:

“Firstly, I must quickly [move] to challenge the applicant that that he had not (sic) authority to write an official document because his contract of service had lapsed on the 31st July 2021. Had he been reasonable he ought to have written the letter way ahead of the expiry date. Secondly while he was still in office, he ought to have made preparations himself because the funds are under his authority. However, on the 20th August I authorised the mission to use contingency funds to sponsor the outgoing Ambassador's trip back home. Annexure BT1 proves this point.”¹¹

[22] The 1st respondent opines that the appellant has no grievance at all because, as at the date of the application to the High Court, he had already made provision for the funds for

¹¹ Para 7 of answering affidavit

appellant's departure, "even if the allocated funds have not been disbursed in entirety yet." He avers that the appellant knew of the "termination date of the contract of service" well in advance. He disputes the basis upon which the appellant sought payment of his salary and allowances and avers that whatever the reasons that the appellant did not return to Lesotho on 1 August, they cannot create a contract that would entitle him to a salary. His contract ended on 31 July. In respect of performance of duties as averred by the appellant he says:

"It is unlawful for the applicant to be executing duties while he has no contract, and he has not even raised this issue with the Ministry. By operation of law, once the contract ends a reasonable person would cease to work unless otherwise agreed. There are no emoluments due to the applicant."¹²

[23] And at para 14:

"... The applicant is now in Rome illegally and he has lost all the diplomatic privileges because the hosting state has already been notified of his exit and acceptance of the new ambassador. There cannot be two ambassadors. An *agreement* has been received from the host country. I annex it and mark it A1."

Facts gleaned from affidavits

¹² Para 11 of answering affidavit

[24] The appellant, it seems obvious, was not a career diplomatic appointee who would, upon termination of his tour of duty, return to his position in the civil service, either in the Foreign service department or other department to which he might be deployed. He was a political appointee on contract for a specified period. His contract, as stated by the 1st respondent and admitted by him, came to an end on 31 July 2021 after one or two extensions. At that point he ceased to be ambassador and was due to return home. He did not return home immediately because no adequate preparations for that were in place. It cannot be denied that funds were not readily available for the purpose. He accordingly remained in Rome for most, if not the whole, of August 2021 awaiting repatriation back home. He claims that he continued to carry out duties as ambassador during that month. The 1st respondent disputes that vehemently. He says that the appellant's contract having come to an end he could not perform any duties: his accreditation to the host country had terminated. He was no longer on the Ministry's pay roll and no arrangement was entered with him to continue performing ambassadorial duties. Although a computer-generated payslip was produced, he was no longer entitled to payment of salary and allowances, hence salary was not paid.

[25] The question I paused earlier, whether the appellant performed any duties, is resolved on the basis of the 1st respondent's averments in the answering affidavit in reliance on *Plascon-Evans Paint v Van Riebeeck Paints*¹³, and resolved

¹³ 1984 (3) SA 623 (A) at 634E - 635C

in favour of the 1st respondent. Additionally, when challenged by 1st respondent's denial that he did any work or performed any duties, the appellant should have produced proof of what duties he actually carried out. A bare assertion does not suffice. He should also have been supported by affidavits deposed to by embassy staff showing that he continued to do some work beyond the terminal date of his engagement. His whole claim was predicated on the assertion that he worked during August and was entitled to his emoluments. If he could not establish that fact, then his case crumbled. I am satisfied that the facts that emerge from the evidence show that appellant failed to prove the assertion that formed the foundation stone for the relief he sought.

[26] The 1st respondent stated that the appellant has no legal basis for claiming salary and other benefits because his contract had come to an end and opined that “[appellant] may seek other remedies if he feels he has lost anything as a result of his failure to prepare for his departure.”¹⁴ First respondent was here hinting at some claim for damages if appellant considered it efficacious to do so. The appellant must have latched on that statement for the contention that the judge *a quo* erred in dismissing the application and holding that “the applicant can sue the respondents for damages [in] a separate lawsuit including his August 2021 salary.”

[27] From the foregoing it is observable that the appellant laid a premise from which he contended that his property, in the

¹⁴ Para 13 of answering affidavit.

form of salary and other benefits was unlawfully seized contrary to s 17 of the Constitution and without a hearing. Having done so he referred to *Muller v Chairman, Ministers Council, House of Representatives*¹⁵ which sets out the correct approach in applying the *audi alteram partem* rule:

“Now the correct approach to the question whether the *audi* rule applies in statutory context is this. When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectation, he has the right to be heard before the decision is taken unless the statute expressly or impliedly indicates to the contrary. *Transvaal and Others v Traub and Others* 1989 (4) SA 731 at 748G.”

[28] Counsel for the appellant also referred to *Matebesi v Director of Immigration and Others*¹⁶. Deviating from the foundation of appellant’s application, counsel submitted that “it defeats logic that appellant’s salary is released from the Government’s treasury, but it never reaches the bank account of the appellant.” This submission proceeds from a false premise that the appellant had earned or become entitled to his salary and benefits, yet this was precisely the bone of contention between the parties.

¹⁵ 1992 (2) SA 508 at 516 H-I

¹⁶ LAC (1995- 99) 616 at 621

[29] The appellant's heads of argument are not easy to understand arising mainly from the complexity of language used by counsel. Simpler diction would have done the trick and served his purpose better. It seems to me that counsel proceeds from an understanding of the appellant's case as being that there was a tacit extension of the contract of service covering the month of August and further that the appellant had a legitimate expectation to his salary and remuneration for the period that he remained in Rome.

[30] I think the first understanding is not quite reflective of appellant's case, which is simply that he continued to perform duties as ambassador beyond the termination date of his tenure as such. Even if respondent's counsel correctly understood appellant's case in the sense he adumbrated, the factual position does not support a tacit extension of the contract. As for legitimate expectation, counsel for the appellant did not rely on it in his papers. He must have realised the difficulty in meeting, on the facts of the case, the requirements for legitimate expectation as set out in the cases referred to by respondents' counsel - *National Director of Public Prosecutions v Phillips and Others*¹⁷ and *South African Veterinary Council v Symanski*¹⁸ - being that the representation underlying the expectation must be unambiguous and devoid of relevant qualifications; the expectation must be reasonable; the representation must have been induced by the decision maker; and the representation must be one which it was

¹⁷ 2002 (4) SA 60 (W)

¹⁸ 2003 (4) BCLR 378 (SCA)

competent and lawful for the decision maker to make, without which reliance thereon cannot be legitimate.

[31] The determination of this appeal, in my view, rests largely, if not entirely, on the facts I have set out at paragraph 24 and on the case brought by the appellant. He contended that he performed ambassadorial duties during the month of August 2021 but faced with a denial by the 1st respondent, he failed to prove his assertion. It is not surprising that the learned judge *a quo* dismissed the application. I come to the same conclusion.

[32] I think the appellant should not be burdened with the costs of appeal. He was constrained to lodge this appeal without reasons for judgment. Had such reasons been given, he may very well have seen the futility of his claim. Appellant did not act unreasonably in lodging this appeal against the order of the court *a quo* which was not supported by reasons for judgment.

[33] The other consideration is that this is basically an employer-employee dispute, in which the return home of the appellant after his tour of duty had ended was not handled in the best manner possible. The appellant was not repatriated due to lack of funds until a directive was given on 20 August 2021 to pay the costs of repatriation from the Contingency Fund. I think that it is fair that each party should bear its own the costs of appeal. For the same reasons, the costs order in the High Court should be set aside

[34] Accordingly, the order of this Court is -

- (a) The appeal is dismissed.
- (b) The order of the High Court is altered to read -

“The application is dismissed with no order as to costs.”

- (b) Each party shall bear its own costs of appeal.



M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



P MUSONDA

ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV L A MOLATI
FOR RESPONDENTS: ADV S MATETE