

IN THE HIGH COURT OF LESOTHO

CIV/T/735/2010

In the matter between;

MOSUOE MOTEANE

PLAINTIFF

AND

MINISTRY OF FINANCE
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Coram : Hon K.J. Mafoso-Guni
Date of Hearing : 16 March 2012
Date of Judgment : 20th April 2012

Summary

*Claim of payment of terminal benefits
Entitlement in terms of Public Service Regulations 2008
Refusal to pay – claiming set off against an alleged debt of overpayment – was there an overpayment? Proof thereof.*

Plaintiff claims payment of his terminal benefits which are being withheld by the defendants on the ground that plaintiff has been overpaid during the period of service therefore such overpayment forms a debt owed by the plaintiff to the defendant. Defendant claims unspecified amount, there is no allegation and evidence of the amount claimed as a debt. The amount claimed as a set off is not sufficiently liquidated to be set off against the plaintiff's claim. Plaintiff denies that he was over paid during the service period and therefore denies that he owes any money to the defendants. Consequently, defendants are not entitled to withhold the payment of the terminal benefits to the plaintiff.

HELD:- *Where there is no proof of debt, there cannot be any claim of set off.*

ANNOTATIONS

CITED CASES:

- (1) Snyman v Theron 1952 (2) SA 353
- (2) Baskin and Barnett v Barnett 1928 CPD 58
- (3) Arie Kgosi v Aaron Moshethe 1921 TPD.

STATUTES:

- (1) Public Service Regulations 2008
- (2) Lesotho Ministry of Foreign Affairs, Manual on the Management of Mission Accounts April 2001
- (3) Savingram dated 26 June 2006

BOOKS:

- ‘Principles of Evidence’ PJ Schwikkard and S Van Der Merwe
2nd edition 2002 Juta: Lansdowne.

1 PARTICULARS OF THE PARTIES

Plaintiff is MOSUOE MOTEANE a Mosotho male adult of HA MATALA in the city of MASERU in MASERU District. The 1st Defendant is the Ministry of Finance with its Head Office at FINANCE HOUSE at the Government of LESOTHO Office Complex, in the city of MASERU, in MASERU district. It is the Ministry and/or the department of His Majesty’s Government responsible for the payment of salaries and the pensions to the serving and retired civil servants respectively.

The 2nd Defendant is the Attorney-General, whose office is at the Law Office, Government Complex, in the city of MASERU, Lesotho. The Attorney General is

His Majesty's Government's legal representative in all legal matters. All these parties are resident within the jurisdiction of this court.

2 - RELATIONSHIP OF THE PARTIES

Plaintiff was employed as a civil servant by His Majesty's Government of Lesotho. At first he was engaged by the Ministry of Education. Later on roundabout the beginning of the year 2001 he was seconded to the Ministry of Foreign Affairs and International Relations. Whilst so seconded in 2001 he was sent on tour of duty to Pretoria in The Republic of South Africa, where he represented His Majesty's Government. His accreditation extended to some of the SADC countries. His tour of duty came to an end around about the year 2008. That same year, on his arrival back into the country, he rejoined his former Ministry of Education. He then applied for and was granted an early retirement from the civil service in July 2009. He expected to be paid the terminal benefits which included the pension and gratuity. The relationship between these two parties can therefore be summed up as between the employer and employee. The employee rendered services for which he should be accordingly remunerated.

3 - PLAINTIFF'S CASE

It is the plaintiff's case that as a civil servant, he was entitled to a full salary during the period of employment. Plaintiff claims that during the period spreading from the year 2001 to 2008 he was under paid.

As a civil servant, plaintiff is entitled to the payment of a certain amount of gratuity and pension at his retirement. Plaintiff alleges that at his retirement the defendants failed to pay him his gratuity. He is therefore suing the defendants for

the payment of M112,630 as his gratuity and the payment of M961,672.97 for the under payment of his salary during the period of his service together with the interest thereon at the rate of 18.5% per annum, plus cost of this suit.

4 – DEFENDANTS’ CASE

It is the defendants’ case, that the plaintiff was never underpaid while he was still in the service of His Majesty’s Government during the period he served as the Kingdom of Lesotho’s High Commissioner in the Republic of South Africa, in the years 2001 to 2008. The cushioning of staff salaries against the declining loti/rand visa vis the U.S. dollar at an artificial rate of M1: 0.54 was used when converting salary/allowance figures into U.S. dollars. This cushioning did not apply to the salaries of staff in missions in the Republic of South Africa. It was only applied to their allowances. Their salaries were excluded. The reasoning behind that decision was that the living standards in the Republic of South Africa are the same as in this Kingdom

5 – UNDISPUTED FACTS

That the plaintiff was a civil servant and therefore entitled to the payment of full salary is the matter in the common cause.

That the plaintiff was deployed as the High Commissioner representing His Majesty’s Government in the Republic of South Africa, is an undisputed fact.

That there was a scheme designed and implemented in order to cushion the staff at **all** the missions of the Kingdom of Lesotho, against the adverse effects of the deteriorating value of the loti/rand against foreign currencies, particularly U.S. dollar is an established fact.

6 – ISSUES

The first question that falls for determination in this matter is whether or not the plaintiff was underpaid during the period he served His Majesty's government as the High Commissioner at Pretoria in the Republic of South Africa? The second question is so closely related to the first question that it sounds like its repetition. That question is whether or not the plaintiff was over paid and therefore justifying the withholding of the payment to him of his gratuity as a set off against the alleged debt of over-payment. The answer to both of these questions can be found after the determination of the issue of whether or not the scheme designed and implemented for the purpose of cushioning the mission staff against the adverse effects of the deterioration of the value of the loti/rand against the U.S. dollar, was applicable to and at all Lesotho missions.

7 – FINDINGS

The dissemination of the information regarding implementation of the decision to cushion the foreign service staff at all missions of the government of the Kingdom of Lesotho, from the adverse effects of the depreciation of the rand/loti against foreign currencies, was world wide; that is to say, that not a single mission was left out. That is to say, the Kingdom of Lesotho Missions in the Republic of South Africa were also provided with that same information regarding the cushioning of

staff salaries and allowances against the deterioration of the value of the rand/loti against US dollar.

The plaintiff has produced before this court a number of documents.

The first document is entitled “LESOTHO MINISTRY OF FOREIGN AFFAIRS, MANUAL ON THE MANAGEMENT OF MISSION ACCOUNTS APRIL 2001”

“To cushion mission staff salaries against the declining loti/rand vis a vis the US dollar, an artificial rate of M1:\$ 0.54 is used when converting salary/ allowances figures into U.S. dollars.

In this case only the net salary figures are converted. It should be noted that this conversion factor should be confined to the salaries of the diplomatic staff only”.

This manual was prepared, written and produced by the then resident Ambassador V.T. Ndobe – It is dated 04 April 2001.

It is entitled – Manual on Mission Accounts.

This manual as appears on the face of it, was intended to help the staff of the Ministry of Foreign Affairs in briefing officers that are being posted abroad on financial management of the Lesotho diplomatic missions. It is specifically set out that the subject should be of major interest to those appointed to the position of Head of Mission etc.

The plaintiff herein was the head of Mission in Pretoria. He may have been given this manual at his briefing before he departed on tour of duty to his mission. He may have found it at his office on arrival. It may have been sent to him after his departure on his tour. It is not really material how and when he did lay his hand on this manual. According to the defence witness the manual was not addressed to the plaintiff and he does not fall in the category of the officers to whom the manual is directed. It is plaintiff's evidence that he derived his authority and power to convert the salaries and allowances as he did, as set out in this manual supported by the savingram dated 26th June 2001.

The said SAVINGRAM was sent to all missions, without exception. It was addressed to all missions, without exception. There is nowhere in all these documents, where it is said that the staff in the missions in Republic of South Africa are excluded. Therefore when it reached Pretoria, this plaintiff implemented it. It is the defendants' argument, that he should not have done so. It is further alleged that it was wrong of him to implement that savingram or directives contained therein according to the defendants. These documents are addressed to and directed at all missions. In the list of missions made in the manual, Pretoria is included by name. There is nowhere it is shown as excluded. Departments of the Ministry and International Missions are called programmes and given numbers accordingly, Pretoria High Commission is programme 13 & 1.

There are three more savingrams. All three came from this plaintiff whilst stationed at The Kingdom of Lesotho's Mission in Pretoria. Plaintiff had found an anomaly at PRETORIA OFFICE on his arrival thereat. He wrote the savingram dated 21st September 2006, he requested a review of the anomaly which he must have found in existence. He brought to the attention of those to whom the

savingram was directed the previous correspondence regarding salaries of Lesotho diplomatic staff in the Republic of South Africa. It appears the parties were engaged in the discussion of the matter on a number of occasions, telephonically, and on few occasions verbally in meetings and by these savingrams labeled:- 2, 3, 4 and 5 plus that manual attached to the further particulars as supplied by the plaintiff.

The savingram labelled (1) sets out at its paragraph 3, the effective date as July 2006 on which salaries and allowances should be converted into local currencies at the bank ruling rates. This is the authority on which the plaintiff acted. Previously, the plaintiff had sent to the Principal Secretary Foreign Affairs a savingram labeled (3) copied to both Accountant and Auditor General. He had pointed out to them that the implementation of the directive in Savingram – dated 26th June 2006, needs additional budgetary provisions. Was he favoured with a reply? The answer is no. Was the provision made for additional budgetary provisions? We do not know. This court was not told where the money for the alleged overpayment came from. The directive was implemented. Hence the claim that the plaintiff had been over paid. Where was the money from? There is no answer.

It appears from the surrounding circumstances of this case that the plaintiff was not convinced that it is the position of the government to discriminate against the salaries of the staff in the missions in the Republic of South Africa. He appealed to the authorities at the time to be favoured with something in a form of a document/letters that sets out the discrimination officially. Plaintiff seems to have sought without success the authority in writing on which he should continue to discriminate against the salaries of the staff in the Kingdom of Lesotho's Missions

in the Republic of South Africa. Why was the cushioning applicable to the allowances only as regards the members of staff at the missions in The Republic of South Africa? There is nothing in writing which he could produce to support the discrimination that he was supposed to enforce. Here before this court there is nothing in writing on which the plaintiff could support his actions of going against the directives contained in the two documents in his possession that is to say: the manual and savingram dated 26th June 2006.

It is argued on behalf of the defendants that there was something in writing but it cannot be found and be produced before this court. Lesotho Missions are not too many. They are as many as the size of the country and possibly its people outside Lesotho who need consular services. But is it not stretching one's mind too far to suggest that there is written directive that authorizes the discriminatory practice of conversion of both salaries and allowances of the foreign service staff at all Lesotho missions except those in RSA. Where is that directive? How come it also cannot be found? Is it not because it does not exist? What authorizes the conversion of only the allowances? How come it also cannot be found? Is it not because it does not exist? The changing of the members of staff by itself demands that the instructions be given in writing. The treatment of the members of staff must also be regulated. The training and/or briefing of diplomatic staff must have been intended to provide the staff with information and skills so as to afford them some measure of uniformity, consistency and competence. Any Government office must be run in accordance with written rules, regulations directives and/or instructions etc. Not by telephone orders or verbal instructions. Where there is discrimination or departure from the norm there must be unequivocal directive in writing that must be followed. The written directive such as the manual and the savingram which the plaintiff had in his possession, must be superseded by another

written directive. The plaintiff was new at that post. He could not rely on his knowledge. He had to follow written instructions. Where there is a written instruction to be followed, it must be superseded or be removed from the line of authority by another written authority – not just by a word of mouth, particularly where there is a regular or routine change of officers such as outside the country missions. It is imperative to have written instructions so that the newly appointed officers can be guided by them. They must follow them. There can be an urgent message sent by telephone, but if it is to be made permanent, and be followed by successive officers, it must be confirmed in writing thereafter – almost immediately thereafter.

Here, the plaintiff is sent on a mission. Was he given instructions of how to carry out that mission? There seems to be only these documents; the manual and the savingrams produced by the plaintiff herein. There is nothing produced by the defendants to support their case. What instructions had the defendants given to the plaintiff? None. The mission accounts were to be managed in accordance with the Lesotho Ministry of Foreign Affairs Manual on the management of mission accounts. The standard of proof in civil cases is on the balance of probabilities. The final assessment of the weight of evidence indicates that it is probable that by implementation of the directives set out in the savingram dated 26th June 2006, the plaintiff was not over paid therefore he does not owe any money to His Majesty's Government. There is no specific amount claimed as set off. The law requires that there must be sufficiently liquidated amount to claim as a set off. **SNYMAN V THERON 1952 (2) SA 353.** There is no such an amount claimed by the defendant. There must also be evidence establishing the fact that the amount claimed as set off is due and payable. **ARIE KGOSI V AARON MOSHETHE 1921 TPD.** Where there is no proof of a debt, there cannot be a legitimate claim of

a set off. **BASKIN AND BARNETT V BARNETT 1928 CPD 58.** There was no other written instructions except the manual and the savingram that the plaintiff could follow. He did not break any rule or instructions. There is no evidence to that effect. He acted in accordance with written instructions in his possession. It would not be proper to ignore written directive where there was only a telephone or verbal directive against the written instruction. Who gave verbal instructions that the convection of rand/loti at that specified rate should be confined to allowances only as far as Republic of South Africa is concerned? Nobody appeared before this court to claim giving such an instruction. Therefore his gratuity cannot be withheld as a set off against the alleged overpayment which the defendant has failed to prove. There is no evidence that there was officially or unofficially a lawful discrimination against the salaries of the staff at the missions of the Kingdom of Lesotho in the Republic of South Africa. There is no set off. There is no counter claim that has been properly pleaded and established. Where there is no proof of a debt, there cannot be any legitimate claim of a set off.

If the defendants cannot produce the written directive, contradicting the written directive in the plaintiff's possession they cannot be heard to say that plaintiff should have ignored those written directives on the ground that they telephonically or verbally in the meetings told him to do so.

The plaintiff's action must therefore succeed as prayed with costs.

K.J. GUNI
JUDGE

For Plaintiff : Mr Matoane
For Defendant : Mr Motsioloa