

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/666/16

In the matter between

MAJANE NTŠALA

PLAINTIFF

AND

**MINISTRY OF FOREIGN AFFAIRS
THE ATTORNEY GENERAL**

**1st DEFENDANT
2nd DEFENDANT**

JUDGMENT

CORAM: HON. J. T. M. MOILOA

DATE OF HEARING: 25 MAY 2019

DATE OF JUDGMENT: 01 SEPTEMBER 2019

ANNOTATIONS

Legislation

1. Public Service Act 2005
2. Lesotho Constitution 1993
3. Public Service Regulations 2008

Cases

1. Xing Long Enterprise Pty Ltd vs Shong Sing (Pty) Ltd
2. Attorney-General vs Bolepo & another 2000/2004 LAC 522
3. Lesotho Marketing Enterprises (Pty) Ltd vs Minister of Commerce C of A (CIV) 27/1999

- [1] Originally, this matter was defended. But when it came up to trial only Plaintiff led her evidence while Defendant contended itself with cross-examination of Plaintiff's evidence only, electing to lead no evidence itself.

As to liability of Defendants

- [2] In her evidence Plaintiff testified that she is an employee of the Government of Lesotho presently deployed at the Ministry of Works. She was in that sense "a public officer" within the meaning of **Public Service Act, 2005 and Section 137 of the Lesotho Constitution 1993**. She testified that at all material times to the present dispute she was deployed by Lesotho Government in the Ministry of Foreign Affairs as Third Secretary at Lesotho High Commission Office in Pretoria from April 2009 up to September 2009 when she was transferred to Lesotho Embassy in Washington. She worked at the Lesotho Embassy from September 2009 up to March 2016. She spent 8 years at that duty station in Washington D.C.
- [3] What is about to unfold below is a bizarre ill-treatment of Plaintiff that is both cruel, costly and inhuman at the hands of officials of the Ministry of Foreign Affairs.

[4] **Transfer of Plaintiff from Pretoria to Washington D.C.**

4.1 Plaintiff was transferred from Pretoria High Commission as Third Secretary to Lesotho Embassy in Washington D.C. in September 2009. She was given 3 weeks' notice to be in Washington D.C. She left with 2 children from Pretoria while a 3rd child (Mpolokeng) remained behind to finish her school term in December 2009 at a school for disabled children. Plaintiff testified that upon transfer from one duty station to another as a public officer it is the

responsibility of Defendants to bear the costs form such movement for herself, children and belongings. She further testified that it is the same when she was transferred from duty station abroad back home to Lesotho, that Government of Lesotho bears responsibility for attendant costs thereof.

4.2 When it was time for Plaintiff's 3rd child to travel to Washington D.C. Plaintiff requested air tickets for her from Defendants as it is standard procedure. Plaintiff did so per letter dated 15th December 2009. First Defendant per letter dated 17th December acknowledged responsibility but pleaded poverty. Plaintiff paid for child's travel cost personally so that the child could join the rest of the family in Washington D.C. Plaintiff testified that these costs amounted to M12,423.00. By letter dated 25 March 2010 Plaintiff addressed letter to Defendant requesting re-imbusement of the child's air ticket from Johannesburg to Washington D.C. Plaintiff also requested Defendant payment of the child's 2 days disturbance allowance being travel days from Johannesburg to Washington D.C. In this respect Plaintiff testified that she relied on Regulation 113 in respect of herself and Regulation 114 in respect of her children. This is **Chapter VII – of Public Service Regulations, 2008. Chapter VII** applies specifically to Foreign Service public officers. **Regulation 113 and 114** read as follows:

“Travel and Subsistence Allowance

113(1) where a public officer, with prior approval of the Head of Mission, travels on duty he or she shall be entitled to subsistence allowance at an applicable rate.

(2) the allowance shall be payable with effect from the date of departure from the country where the public officer is stationed up to the date of return to that country.

(3) -----

(4) -----

114 ALLOWANCE FOR SPOUSE OR CHILD

Where a spouse or a child of a public officer is eligible for subsistence allowance, the subsistence allowance applicable to the public officer shall also apply to the spouse or child, except that half the normal rate shall be paid in respect of a child under the age of 4.”

In relation to this claim and topic I bear in mind the contents of **Exhibits 1, 2, 3, 4, 5, 6, 7 and 8** read with **Regulations 113 and 114** which proof that Defendants had an obligation to meet the costs of Plaintiff’s transfer to Washington D. C.

[5] Plaintiff’s testimony was that when she transferred from Pretoria to Washington D.C. in September 2009 she decided that part of her baggage would be better taken back to Maseru. Plaintiff in her evidence tendered **Exhibits 9 and 10**. She therefore made arrangements that a portion of this baggage should remain locked up in the garage ready to be released to her husband who was studying in Pretoria but who was due to return home in a short time.

[6] The other portion was to be shipped back to Maseru with Mrs. Kumi’s baggage when Mrs. Kumi returns to Lesotho in December 2009. However, a Counsellor in the Pretoria Embassy air-freighted this first portion of Plaintiff baggage left behind in the garage in Pretoria to Washington D.C. on C.O.D. It was air-freighted this way to Washington D.C. not at Plaintiff’s request. Plaintiff’s instruction had been that this portion of her baggage was to be locked up in the garage to await collection by her husband who would take it to Maseru. Plaintiff’s husband did not find the property as it had been all shipped to Washington D.C. So, on or around

24 September 2009 Plaintiff received a telephone call from Security International, shipping agents in Washington D.C. advising her that her baggage had arrived at the airport for collection. The shipping agents also advised her that she needed to act fast as any delay would attract storage charges. She did. Indeed it had attracted some storage charges of US\$ 130. She paid US\$ 130 which translated to M1,950.00 in terms of the then ruling Dollar/Loti rate of one Dollar = R15.00. Plaintiff hurriedly paid a total of M21,550.00 for this baggage assisted by her relatives. Plaintiff tendered **Exhibit 13** in support of her claim, being a receipt dated 30th September 2009 paid to Elliots International in the amount of R19,600.00. Plaintiff's summons and evidence in court contended that liability for costs of this baggage are for the account of Defendants. This evidence was not rebutted at trial by Defendants. I accordingly accept that Defendants are liable for these costs.

[7] Another portion of Plaintiff's baggage which she had decided to return to Maseru was left with a colleague (Mrs. Kumi) in Pretoria who was due to return to Lesotho in December 2009 from the Pretoria High Commission. This arrangement had been agreed beforehand by Plaintiff, Mrs. Kumi and First Defendant. However, when Mrs. Kumi was ready to ship the property she was instructed by the High Commissioner not to take Plaintiff's baggage along alleging that it had been stolen. So Kumi left without Plaintiff's property and Plaintiff was forced to make alternative private arrangements for her property to be fetched from Pretoria.

[8] Plaintiff testified that on 4 January 2012 she phoned Mr. Metsing, Principal Secretary for Foreign Affairs requesting release of her property left in Mrs. Kumi's house in Pretoria. Metsing had responded that she should fetch her property. Accordingly Plaintiff hired Nkholise Transport to fetch her

property from Lesotho Embassy in Pretoria. She paid Nkholise Transport R3,000.00 for this task. She tendered in evidence **Exhibit 12** being Nkholise's invoice that she paid. However when Nkholise got to Pretoria Deputy P. S. Lekhela instructed that Embassy staff should not release property to Nkholise Transport as Plaintiff's property was stolen. Plaintiff only learned of this twist in the previously agreed arrangements with Metsing when Nkholise Transport was refused release of Plaintiff's baggage while already in Pretoria to fetch it. Plaintiff's testimony was that nobody in Government had ever suggested to her that any part of her property was stolen property. Indeed up to now – more than 10 years later no criminal charges have been levelled against her in regard to this property. Not even police inquiries have been addressed to her concerning this property. The first time that Plaintiff heard of this allegation concerning her property was when she was in Washington D.C. when she enquired why her property had been abandoned in Pretoria. This property remained in Defendants custody for no justifiable reason until released much later following Plaintiff's litigation to have it released. Plaintiff's evidence in regard to costs of repatriation of this baggage was that it was for the account of Defendants. This evidence was not challenged at trial. I therefore accept Plaintiff's evidence that Defendants are liable for these costs too.

- [9] Plaintiff testified she returned to Lesotho from Washington D.C. in March 2016. She reported herself to Head Office Foreign Affairs in Maseru as usual. She also raised the issue of her property in Defendant's possession in Pretoria. She wrote one more letter to P. S. Foreign Affairs on 5th April 2016 demanding release of her property still held by them in Pretoria. This time Foreign Affairs responded and as a result she met P. S. Foreign Affairs who claimed he was not aware of the problem and undertook to resolve it.

Nothing happened following this promise. Plaintiff then instituted **CIV/APN/142/2016** in which she claimed release of her property in the unlawful possession of Defendants. It was now 8 years since Plaintiff's property was in the hands of Defendants. **CIV/APN/142/2016** was settled out of Court the Defendants having agreed to release property of Plaintiff to her. In this regard Plaintiff tendered **Exhibits 15, 17 and 18** in support of her evidence.

[10] On 18th May 2016 Defendants wrote to Plaintiff appointing the next day (19th May 2016) as the date on which both parties were to present themselves in Pretoria to release Plaintiff's property. Fortunately good sense prevailed and Defendants provided transport for both their officials and Plaintiff in their vehicle. The party found Plaintiff's property stored in a servant's quarters in the residence of Defendant's Third Secretary in Pretoria. Inventory was taken of the property as well as its condition. Both were recorded down by the parties. The list showed items found and their condition. It also showed items found to be missing. When this was completed Plaintiff requested that both parties sign for the list as recorded by the parties. But to her horror Defendants' officials refused. Plaintiff testified that the sudden negative attitude of Defendants was strange because the reason that she and the Ministry's officials travelled together to Pretoria was to list the items of property together and sign for them.

[11] Plaintiff testified that they finished computation of the list late. Defendants' officials insisted they were returning to Maseru same evening. They left her behind. Plaintiff remained in the care of Third Secretary to await completion of arrangements for shipment of her baggage back to Lesotho. The Embassy called for 3 quotes which was standard practice. The quotes came from different freight companies. These quotes came at

different times. The Embassy was in a position to make a decision on a quote they would take only on Friday of the following week. Only after that decision would the chosen freight company arrive to pack her belongings. The selected freight company completed the packing of Plaintiff's property late on Friday. The Embassy then arranged transport to take Plaintiff to the airport in Johannesburg where she slept overnight in order to catch the early morning flight which was the only one on which she found a seat available to her on Saturday. She personally purchased an air ticket for herself at the Airport for R3,441.23. Plaintiff tendered a receipt in proof of payment of her ticket which was marked exhibit 18. Plaintiff testified that it was the obligation of Defendants to pay for her return journey back to Lesotho as she was on a mission for which they bore responsibility. A trip from Maseru to Pretoria and back was official in that its purpose was to facilitate repatriation of her belonging which had been impounded by Defendants unlawfully in Pretoria for 6 years. She paid for her upkeep for the duration of her stay in Pretoria on this mission until Saturday when she was able to return home. Plaintiff testified that for the duration of this trip to Pretoria until her return to Maseru she was entitled to subsistence allowance. This testimony of Plaintiff was not contradicted.

[12] I find that the evidence of Plaintiff has established the liability of Defendants to her claims. As I said earlier Defendants did not lead any evidence to contradict Plaintiff's evidence. Such cross-examination as Defendants' Counsel addressed to Plaintiff was limited to liability of Defendants for the trip to Pretoria. It shall be remembered that this trip was undertaken by the parties primarily at the behest of Defendants following **CIV/APN/142/16** to retrieve Plaintiff's belongings impounded unjustifiably and unlawfully in Pretoria by Defendants for 6 years. This cross-examination was to the effect that **Regulations 113 and 114** did not

apply to Plaintiff in relation to this trip as at the time it was undertaken she had been transferred by Government to the Ministry of Works. Plaintiff in my view disposed of this argument of Defendants satisfactorily when she pointed out that the whole trip fell within the ambit of 1st Defendant in particular who had impounded her belongings in Pretoria in the first place on the occasion when she was transferred to Washington D.C. thereby scuppering the arrangement made and approved earlier that this portion of her baggage that she did not need in Washington D.C. should be freighted to Maseru together with Mrs. Kumi's belongings. Authority had been given for this arrangement by Defendants, Mrs. Manong in her capacity as Senior Administrative Officer. See annexure "MN2" to **Exhibit 17**. Mrs. Kumi was returning home in December 2009 which was roughly three months down the line. Plaintiff's testimony in answer to Defendants' Counsel's probe on this aspect of her case was that the whole purpose of this Pretoria trip was to resolve the repatriation of Plaintiff's belongings which had been left behind in Pretoria as a result of Defendants unilateral change of attitude premised on the baseless allegation of Defendants that Plaintiff's property was "stolen property". I find accordingly that Defendants' treatment of Plaintiff was unjustified, mean, cruel and unlawful and that the Pretoria – Maseru trip some 6 years later to retrieve Plaintiff's belongings was indeed an official trip of Defendants to undo their wrong of the past which they had committed against the Plaintiff. It was indeed the Defendants' obligation to repatriate Plaintiff's property at the end of her tour of Foreign Service in Pretoria. It was in any case the actions of Lesotho Government through its department of Foreign Affairs (and its officials) that caused Plaintiff's loss. This, Defendants Counsel over looks. Defendants are liable to Plaintiff for her claim in relation to this trip in terms of **Regulation 113 (1) and (2)**

As to Quantum claimed by Plaintiff

[13] Liability of Defendants has already been found to have been established by Plaintiff in relation to her claims. I now turn to consider whether in my view Plaintiff has established the quantum of her claims to the satisfaction of the Court.

[14] **Claim 1: Items seized by Defendant in Pretoria but never returned – Exhibit 20**

In relation to this claim Plaintiff testified that some of her belongings which were seized some were never returned to her. Their fair and reasonable value amounted to M31,129.00. Plaintiff's evidence in this regard was never contested. I have no reason to find differently. I accordingly award Plaintiff her claim of M31,129.00 as claimed by her.

[15] **Claim 2: Plaintiff's damaged property in Pretoria – Exhibit 20**

This claim relates to Plaintiff's property found to have been damaged while in the possession of Defendants in Pretoria following Defendant's claim that Plaintiff's property was stolen and should not be freighted home to Maseru together with Mrs. Kumi's belongings. Evidence was that a fair and reasonable value of these damaged belongings amounted to M80,701.20. Plaintiff's testimony in that regard is uncontested. I accordingly find for Plaintiff on this claim and award her damages in the amount of M80,701.20 under this claim.

[16] **Claim 3: NKholise Transport Expenses – Exhibit 12**

Claim 3 of Plaintiff related to transport expenses paid to Nkholise Transport for the charges that he made to Plaintiff in relation to his trip to Pretoria to fetch Plaintiff's belonging which Defendants refused to release to Nkholise Transport on the baseless grounds as we have seen that

Plaintiff's belongings were stolen property. The evidence of Plaintiff in regard to payment of M3,000.00 transport charges to Nkholise Transport was not contested at the trial of this matter. See Nkholise Transport invoice/receipt dated 26/01/2012 which Plaintiff tendered in her evidence and was marked **Exhibit 12**. I accordingly find that Plaintiff has established her third claim. I award her M3,000.00 in satisfaction of her claim 3 accordingly.

[17] **Claim 4: Re-Imbursement to Air ticket Johannesburg – Maseru – Exhibit 18**

Claim 4 of Plaintiff's Summons is M3,441.23 being claim for reimbursement of her air ticket when she flew from Johannesburg to Maseru following her attendance in Pretoria with officers of Defendants. Plaintiff's evidence regarding this claim was unconvincingly contested on the grounds that the trip had been for herself not Defendants. I have already said in my analysis of evidence relating to liability that this trip was official and for the account of Defendants as it had been undertaken by both parties to rectify a wrong that Defendants had committed in 2009 when they reneged on their obligation to repatriate Plaintiff's belongings to Maseru at the end of her tour of service in Pretoria. Plaintiff tendered in her evidence air ticket receipt from SAA amounting R3,441.23 which was marked **Exhibit 18**. I accordingly find that Plaintiff has indeed established her claim to be reimbursed M3,441.23 in respect of her air ticket from Johannesburg to Maseru. I award Plaintiff her claim 4.

[18] **Claim 5: Subsistence Allowance:- 19th – 28th May 2016**

Plaintiff's claim under this head relates to the 10 days subsistence allowance which she spend in Pretoria with Defendants officials attending to repatriation of her belongings from Pretoria to Maseru. Plaintiff testified

that the calculation of this amount was done adopting the formula applicable then in relation to Foreign Affairs trips which was as follows:-

Arrival in Pretoria from Maseru:	Thursday 19 th
Departure from Pretoria to Maseru:	Saturday 28 th
	<hr/>
	10 days

Applicable rate = M305.00 day calculated

On the Exchange Rate of M13.50

Loti/Dollar at the time

Accordingly subsistence allowance = 10 days X 13.50 X M305

= M41,175.00

This formula and its calculation was not contested during trial. Therefore accept the formula and its calculation by Plaintiff is established. I award M41,175.00 to Plaintiff as claimed in claim 5.

[19] **Claim 6: Reimbursement of Mpolokeng's Air ticket Johannesburg – Washington D.C. Exhibits 4, 5, 6 and 7**

This expense claim is reimbursement of air ticket of Plaintiff's daughter from Johannesburg to Washington D.C. to join her mother who had been transferred from Pretoria to Washington D.C. See air ticket receipt for R12,423.00 for Mpolokeng Ntšala dated 06/02/2010. It is **Exhibit 4**. See also Plaintiff's letter dated 25/0/2010 to High Commission in Pretoria requesting reimbursement of same. This correspondence is covered in **Exhibits 6 and 7**. Again testimony in relation to this claim was not contested. The claim itself was supported by receipts. I find as a fact that Plaintiff incurred this expense in circumstances where her daughter ought

to have been paid for by Defendants. I accordingly allow this claim for Plaintiff.

[20] **Claim 7: Plaintiff's subsistence and disturbance allowance upon transfer from Pretoria to Washington D.C. Exhibit 8**

Plaintiff's evidence was that upon being transferred from Pretoria to Washington D.C. it was Defendants' obligation to pay her subsistence and disturbance allowance. In this instance the evidence was that Plaintiff had 3 children at the Pretoria Mission. One of these children (Mpolokeng) remained at school when Plaintiff left on 22 September 2009 with her two siblings. Plaintiff's testimony was that her subsistence and disturbance allowance in the amount of M49,991.31 to which she was entitled for self and her family which Defendants had obligation to pay her was not paid.

Plaintiff gave the formula for the calculation of this amount as follows:-

$$\begin{array}{r} 4 \times 2 \text{ days} \times \text{Exchange Rate} \times \text{Country Rate} \\ = \text{M}41,688.00 \\ \text{Plus disturbance allowance} \quad = \text{M} \quad 8,303.31 \\ \hline \text{M}49,991.31 \\ \hline \hline \end{array}$$

This formula for the calculation of disturbance allowance aforesaid is not disputed. This testimony was not contested in any form or shape by Defendants. I accordingly find for Plaintiff on this claim. I allow Plaintiff's claim in the amount of M49,991.31.

[21] **Claim 8: Plaintiff's Freight Expenses in Respect of Plaintiff's Property sent to Washington D.C. instead of Maseru Exhibits 13, 14 and 14(a)**

Plaintiff tendered in her evidence **Exhibits 13, 14(a)** in support of this claim. Plaintiff's testimony was to the effect that in or about September 2009 she received a call from Security International of Washington D.C. advising her that she had a shipment of freight from Pretoria send to them C.O.D and that the amount was M21,550.00 plus storage charges of US\$130. See Elliot's tax invoice for M19,600.00 dated 30/09/2009. See also Security International receipt in respect of Plaintiff's payment US\$130 dated 12/12/2009. She was shocked as she did not expect this consignment to follow her to Washington D.C. These goods were supposed to have been released to her husband when he returned to Lesotho from his studies in Pretoria. It was send to USA unilaterally by Defendants without her authorisation. As a result of this inexplicable cruel conduct of Defendants, Plaintiff had to scramble for funds that she had not planned for to meet the freight bill of her baggage which had been sent to her in Washington instead being released to Mr. Ntšala. Plaintiff testified that she paid a total of M21,550 in respect of this unexpected freight expenses of her.

[21] **Interest rate**

Plaintiff in her summons claimed interest at the rate of 18.50% a *tempore morae*. However, there is no statutory fixed interest rate in Lesotho. See **Attorney General vs Bolepo & another 2000/2004 LAC 522; Lesotho Marketing vs Minister of Commerce**. Interest rates in Lesotho fluctuate in accordance with fluctuation of interest rates offered by commercial banks operating in the country. In turn these commercial banks interest rates are influenced by the Repo Rate which is fixed from time to time by the Central Bank of Lesotho (CBL). See **Xing Long Enterprise (Pty) Ltd vs Zong Sing & another C of A (CIV) 61/2016**. The CBL fixes its Repo

Rate quarterly. In the circumstances of this case I think an award of 10.50% is justified on the basis that prevailing best investment rates in the country were about at that level. I accordingly decline to award 18.50% on amount claimed by Plaintiff. Instead I award 10.50% to Plaintiff.

[22] **Costs**

I follow the cardinal principle that costs follow the result. As Plaintiff has succeeded in her claims I accordingly award her costs on the ordinary scale.

[23] **Conclusion**

As indicated above Defendants did not contest Plaintiff's case. Plaintiff's testimony clearly established Defendants liability to compensate Plaintiff for her losses and expenses she paid when in fact the obligation to pay lay with Defendants. I am satisfied that liability of Defendants was fully established.

The quantum of compensation/reimbursement of expenses due to Plaintiff by Defendants was equally fully established with supporting receipts and other documents. In many instances they were acknowledged to be due by Defendants. Such amounts were hardly disputed by Defendants. No evidence whatsoever was tendered by Defendants to deny the various claim amounts due to Plaintiff. In the circumstances I award a total of M240,411.24 in terms of prayers 1, 2, 3, 4, 5, 6, 7 and 8 of Plaintiff's summons.

[24] In summary then, I award Plaintiff as follows:

1. A total of M240,411.24 as quantum of her claims against Defendants jointly and severally, the one paying the other absolved.

2. Interest on M240,411.00.24 at the rate of 10.50% *a tempora morae*
3. Costs of suit on ordinary scale.

J. T. M. MOILOA
JUDGE

FOR PLAINTIFF: **ADV. S. PHAFANE KC**

FOR DEFENDANTS: **ADV. M. E. TŠOEUNYANE**