

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

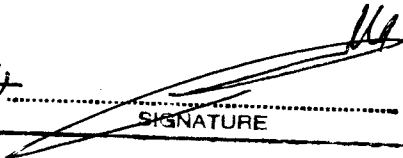
24/01/2013.

CASE No: 26396/2005

In the matter between:

MOHED RAFIQ ABDOOLHAQUE GANGAT PLAINTIFF

AND

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/ NO .	
(3) REVISED.	
2013-01-24	
DATE	SIGNATURE

MINISTER OF FOREIGN AFFAIRS OF

THE REPUBLIC OF SOUTH AFRICA

DEFENDANT

JUDGMENT

MAVUNDLA J;

[1] I find myself obliged to say "*Mea culpa! Mea culpa! Mea culpa!*"

The defendant's heads of argument, per order of 30 January 2012 made by agreement between the parties, were to be filed on or before 13 February 2012. The plaintiff's was to file replying heads within two weeks on or before 27 February 2012. The Court was to make a determination on the written argument. The matter was postponed sine die. The defendant was ordered to pay the plaintiff's wasted costs occasioned by the postponement.

[2] It needs mention that the 13 February 2012 has come and gone. I waited in vain, notwithstanding the assurance that the defendant's heads would be forthcoming. To date the defendant's heads of argument have not been filed.

[3] The plaintiff's heads of argument were long filed. I was requested by the plaintiff's attorneys to proceed to deliver the judgment, without the defendant's heads of argument. In retrospect, I should have proceeded to prepare the judgment much earlier, nonetheless, instead of waiting for the misplaced trust of the

undertaking on the part of defendant's counsel. I profusely apologize for the delay occasioned as the result.

[4] The plaintiff sued the defendant for payment of an amount of R2 638 036. 80 in respect of alleged damages he suffered consequent to the defendant's alleged repudiation of his employment agreement between the plaintiff and the defendant.

[5] It is common cause that the plaintiff has since 1986, been employed first by the defendant's predecessor, and thereafter, by the defendant as a foreign service officer. His appointment was subject to the provisions of the Public Service Act, 1957. The plaintiff received various promotions until reaching the rank of Deputy Director: Foreign Service (Second Leg) with effect from 1 March 1998, as advised per letter dated 21 January 1986 of his appointment in the Department of Foreign Affairs as a Foreign Affairs Officer.

- [6] It is common cause that the plaintiff was on or about 31 December 2002 appointed as Head of Mission: Palestine for a four year tour duty and posted for the duration of his four year tour at Ramallah where he commenced his duties as Head of Mission: Palestine in terms of his appointment.
- [7] It is common cause that on 16 April 2004, only some fifteen months into his four (4) year tour duty, Dr. Sooklal, the Deputy Director General: Asia and Middle East, informed him that a decision had been made by the Defendant to transfer him to South Africa.
- [8] The plaintiff contended that in terms of service agreement, the defendant was to give him six months' notice of any changes to his condition of service, which he failed to do. He further contended that the decision to have him recalled was initiated by Dr. Sooklal, who had no competency to make such decision and as such, the defendant unlawfully repudiated the employment agreement by recalling plaintiff to Pretoria.

[9] The plaintiff's case is, *inter alia*, essentially that his recall was unlawful because:

- 9.1 Dr. Sooklal did not have any authority to have him recalled to the Country, and the Minister has failed to take a decision to have him recalled, on a balance of probabilities the Minister did not make any decision but Dr.Sooklal did.
- 9.2 His performance contract was terminated without the defendant conciliating the dispute, without following the normal dispute resolution procedure and without it reviewing the plaintiff's performance on a quarterly and annual basis as provided for in clause 3 and 4 in Part 2 thereof.
- 9.3 The decision to have him recalled was an adjustment of the duration of the four year tour, taken without a valid and fair reason, was procedurally unfair and not in good faith because his performance contract was not taken into account.

[10] The plaintiff alleged that he was appointed as Head of Mission: Palestine for a four year tour duty. His foreign remuneration package would consist of the following:

- 10.1 RSA Salary of R18 314. 00 per month payable in USD;
- 10.2 Child Allowance of R1 305. 00 per month
- 10.3 Station allowance of USD 42 192 per month;
- 10.4 Representation Allowance of USD 12 252 per month;
- 10.5 Special Allowance of USD 4 824 per month;
- 10.6 Housing and Entertainment Allowance of USD 5000 per month.

[11] It was further submitted on behalf of the plaintiff that, *inter alia*, the defendant had to demonstrate that the transfer of the plaintiff from Ramallah was necessary; plaintiff had a proper and fair hearing, the defendant acted in good faith and rationally, from the evidence has failed demonstrate.

[12] The amount which the plaintiff was claiming is in respect of what he allegedly would have earned but for the defendant's repudiation of the agreement.

[13] The plaintiff's case is premised on his own evidence. He did not call any witness. The defendant's case is premised on the evidence of Dr. Sooklal and Dr. Ayanda Ntsaluba.

[14] The defendant's case was, *inter alia*, that the plaintiff was not dismissed but recalled to Pretoria and placed on the *Foreign Affairs Department on the Desk for Middle East, Central Asia*,¹ and that the final decision to recall the plaintiff was taken by the Minister²; and further that the plaintiff absented himself from work without permission and was therefore deemed to have been discharged from Public Service in terms of s17 (3)(a)(i) of the *Public Service Act 103 of 1994*.

[15] In the matter of *Masinga v Minister of Justice*³ the Appellate Court held that:

"There is authority that in a case of wrongful dismissal the *onus* is on the employee to prove the agreement and his subsequent dismissal, and the *onus* thereafter is on the employer to justify it." The employer must allege and prove the

¹ Page 50 lines 5-7, p53 lines 10-17.

² Vide page 2 lines 23-24, et exhibit G dated 27 August 2007(page 3).

³ 1995 (3) SA 214 (A) at 221.

facts justifying the dismissal. *In casu*, the defendant denied that it dismissed the plaintiff.

[16] In the matter of *Inter Maritime SA v Comanhia Portuguesa De Transportes EP*⁴ Friedman AJA dealt with the question of repudiation. The Court held that in deciding whether there was repudiation, the Court must look at the whole of the circumstances of the case.

[17] The person relying on an implied term bears the *onus* to prove “everything that was necessary to raise an implication, including the fact that there was nothing, whether in the shape of an express term or in the shape of a term to be inferred from conduct, that was inconsistent with the implication relied on...”; *vide Nel v Nelspruit Motors (EDMS.) BPK*.⁵

⁴ 1990 (4) SA 850 AD at 861G-862A..

⁵ 1961 (1) SA 582 (AD) at 584B.

[18] Dr. Ntsaluba testified that he was the Director General in the Department of Foreign Affairs from 1 September 2003 and during the period when the plaintiff was appointed and posted to Ramallah as Head of Mission not as an ambassador, because Palestine was not recognised as a separate State. Dr. Ntsaluba also confirmed that on 28 November 2008 he deposed to an affidavit which was handed in as exhibit G. Because of certain problems in, and particularly the dysfunction of the Ramallah Mission, and the recommendations by Dr. Sookla, he eventually arranged a meeting with the Minister, then Dr. Nksosazana Dlamini Zuma, whom he briefed about the recommendation by Dr. Sooklal, the Njosi and Mamela reports and the fact that he endorsed the recommendation to have the plaintiff recalled. The Minister accepted his recommendation and made the decision to have the plaintiff recalled⁶. He further disputed that the plaintiff's service of employment was terminated by the defendant. According to him the plaintiff was merely recalled to the Head Office in Pretoria and was expected to continue with his services. All his rights and benefits preceding his deployment to Ramallah would have continued. He further gave a lucid explanation as to

⁶ *Vide* pages 12-14 of the record.

why there was an impression that the decision was taken by the Director General, because people were not aware that it was in fact taken by the Minister⁷.

[19] In the matter of *Hlongwa v Minister of Justice, Kwa-Zulu Government*⁸ the Court found that an employer such as the respondent, therein, cannot in certain circumstances, be faulted for going ahead with a proposed transfer, despite the personal inconvenience, even hardship, to the employee to be transferred, provided however she has had the opportunity to have her say in the matter, so that what she has to say against the transfer may be fairly taken into account together with the pressing needs of the department. Where the changes are likely to have adverse effect to the employee, such as the drop of salary or allowances, then the employee must be consulted.

[20] It is apposite to remark that I found the plaintiff to be loquacious, argumentative and not an impressive witness. On the other hand I found both Dr. Sooklal and Dr. Ntsaluba to be impressive and

⁷ *Vide* p19 lines 25- p21.

⁸ 1992) 13 ILLJ 338 (D).

frank witness, whose evidence in my view can be relied upon, unlike that of the plaintiff.

[21] The defendant has a right in terms of the regulations of the Public Service to recall the plaintiff.⁹ In *Maqungo v Government of the Republic of Transkei and Others*¹⁰ it was held that a person posted as Commissioner of Foreign Affairs, or ambassador, can be transferred from one locality to another by his principal, without being heard, unless he has some interest or legitimate expectation. "If the official has a family or children attending school and the place to which he is being transferred has no school, it is proper to hear him...." It needs to be borne in mind that when the plaintiff was recalled to Head Office in Pretoria, his estranged wife and children were not staying with him in Ramallah but in the Republic of South Africa.

⁹ *Vide Department of Roads & Transport, Eastern Cape & Another v Giyose* [2008]

5 BLLR 4572 (E) page 9 of 13 para [30];.

¹⁰ 1995 (1) SA 412 (Tk AD) at 416G-417A.

[22] On the accepted evidence, as testified to by both Dr. Sooklal and Dr. Ntsaluba the Ramallal Mission was dysfunctional. There was an investigation that was set in place, in the form of Ms Njosi and followed up by Mr. Memela who presented their respective reports. A shorter version of the report was presented to the plaintiff.

[23] In as much as the plaintiff contended that he was not the cause of any problem that existed in Ramallah Mission, protesting that the defendant's employees stationed at Ramallah undermined his authority and connived behind his back, in my view, he indirectly conceded that the Mission was dysfunctional. The Memela and Njosi reports did not singularly and squarely put the blame of the plaintiff but on all the roll players. In my view, it is irrelevant who caused the dysfunction of the Mission, but the fact that the Mission was dysfunctional.

[24] I am of the view, that in as much as there was no specific conciliation, the plaintiff was afforded an opportunity to make out his case before the decision to have him recalled was taken. The

plaintiff's contention that he did not have a fair process before the adverse decision was taken, does not therefore hold water. In my view, a Foreign Mission is of importance to the country for various reasons. Where the Mission is dysfunctional, dictates of urgency require, in my view, that a prompt remedial action be taken, and formalism in the interest of the country must give way. I am therefore of the view that the defendant was within his rights to recall the plaintiff.

[25] I am further of the view that the plaintiff's contention that the decision to have him recalled was instigated and taken by Dr. Sooklal, in the light of Dr. Ntsaluba's evidence that the decision was taken by Dr. Nkosazana Zuma, must therefore be rejected, as I do.

[26] In the matter of *Singh v McCarthy Retail Ltd t/a Macintosh Motors*¹¹ it was stated that: "The test, whether the innocent party is entitled to cancel the contract because of the malperformance by the other, in the absence of a *lex commissoria*, entails value judgment by the Court. It is essentially, a balancing of competing interests--- that of innocent party claiming rescission and

¹¹ [2000] 4 ALL SA 487 A; 2000 (4) SA 795 (SCA) para 15.

that of the party who committed the breach. The ultimate criterion must be the one treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?"

[27] Where the objective conduct of a party manifestly show an intention not to proceed with the contract, the other party is entitled to conclude that the contract is repudiated by the party so conducting himself and accept such repudiation and cancel the contract, and is not obliged to follow the pre-dismissal procedure¹².

[28] According to Dr. Sooklal, the plaintiff was recalled to head offices, and not dismissed. There is much credence in the defendant's contention that the plaintiff stayed away from office and was therefore deemed to have been dismissed.¹³

¹² *Vide Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (AD) at 685A-F.

¹³ S17(3)(a) (i) of the Public Service Act, No 103 of 1994

[29] It needs mention that once the plaintiff was recalled to Head Office in Pretoria, he tendered his letter of resignation¹⁴, which was not accepted by the defendant, which was later purportedly withdrawn by his lawyers. In my view, the plaintiff was purely opportunistic and wanted to make capital gain out of the allowances paid to him in FOREX while based abroad, not satisfied with the salary he was going to receive in the country less the FOREX. His recall, in my view, did not vitiate the fundamentals of his employment contract because he was still going to occupy the senior position he always occupied prior to being posted to Ramallah, but merely changed his posting abroad. The contract of employment was not vitiated by the recall, as such, in my view, the plaintiff was not entitled to abscond from his employment, and consequently his claim must fail.¹⁵

[30] With regard to costs, it is trite that costs follow the event. Both parties engaged senior counsel, rightly so, with the defendant

¹⁴ Paginated page 138 fax dated 10 May 2004 addressed to Deputy Minister Aziz Pahad.

¹⁵ *Vide Swartz & Sons (Pty) Ltd v Wolmaranstad Town Council* 1960 (2) SA 1 (T) 4 approved in *Colverwell and another v Brown* 1990 1 SA 7 (A)14A, 24 I-J.

employing also a junior counsel. Regard being had to the amount claimed, and the fine points of law, I am of the view that the defendant was entitled to the services of two counsel. Consequently I hold that the defendant is liable to the defendant's taxed and allowed or agreed upon costs inclusive the costs of senior counsel and junior counsel.

[31] In the result, the plaintiff's claim is dismissed with costs, inclusive costs of two counsel.

A handwritten signature in black ink, appearing to read 'N.M. MAVUNDLA', is written over a horizontal line.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	: 24/01/2013
PLAINTIFFS' ATT	: SAVAGE JOOSTE & ADAMS INC
PLAINTIFFS' S ADV	: MR. BODA SC
DEFENDANTS' ATT	: STATE ATTORNEY
DEFENDANTS' ADV	: P. KENNEDY SC with ADV S MAHLAPE