

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A571/13


In the matter between:

8/12/2016

MOHAMAD RAFIQ ABDOOLHAQUE GANGAT

Appellant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	01/12/16 DATE	 SIGNATURE

MINISTER OF FOREIGN AFFAIRS

Respondent

JUDGMENT

Tuchten J:

- 1 This is an appeal from a decision of Mavundla J, dismissing the appellant's action for damages against the respondent. The appellant claimed payment of certain remuneration and allowances arising from a diplomatic posting to the Palestine Authority at Ramallah in the West Bank. The appellant refers to the geographical area to which he was posted as Palestine and I shall merely for convenience use that term as well.

- 2 The appellant was at the time of his posting a foreign service officer in the Department of Foreign Affairs (DFA). At the time of his posting, he had reached the rank of deputy director: foreign service (second leg).
- 3 It is important to note that the plaintiff grounded his action exclusively in contract. In his particulars of claim, he alleged that he concluded a contract of employment with the respondent on about 1 February 1996. The respondent admitted this allegation.
- 4 The appellant was, in a letter dated 17 February 2001, appointed by the then Minister of Foreign Affairs as "South Africa's Representative to the Palestinian National Authority". The appellant pleaded that the actual appointment was made on 31 December 2002 and that his title was Head of Mission: Palestine. None of the documents before us indicate that the appellant was accorded that title but it is admitted by the respondent that the appellant while in Ramallah carried out the functions of a head of mission.
- 5 It is further common cause that a written performance agreement was concluded between the DFA and the appellant on about 1 April 2003. The purpose of the performance agreement was to assist the appellant to define his responsibilities, duties and priorities, to provide

for dispute resolution, to encourage the appellant by providing appropriate support and to encourage and improve communication between the appellant and his manager. The service agreement provided that disputes between the appellant and the DMR should be conciliated between the appellant and his manager within the DMR. The service agreement goes on to say:

Should the result not be satisfactory and there is a disagreement, the normal dispute resolution procedure must be followed.

- 6 The appellant went on, however, to plead that a further contract of employment was concluded between the parties. This contract, the plaintiff alleged, arose from an undated letter written by the Director-General of the DFA to the appellant informing him of his transfer to Ramallah with effect from 31 December 2002. I shall refer to this letter as the transfer letter. The respondent denied that the transfer letter constituted a new or further employment contract between the parties and asserted that it was in fact a letter of transfer which regulated the appellant's terms and conditions of service during his term of duty in Ramallah.

7 In my view, the transfer letter did not have contractual effect in the sense for which the appellant contends. It included an invitation to the appellant to state by signing the letter that he agreed with its contents. But the purpose of the transfer letter was not to conclude a new contract; its purpose was to inform the appellant that he had been transferred to Ramallah and to record the fact that its author had calculated the benefits which were to accrue to the appellant *in accordance with those applicable to DFA officers in the position of the appellant* and to invite the appellant to agree that such benefits had been correctly calculated. The transfer letter must be read in conjunction with and subject to the other prescriptions which had a bearing on the contractual relationship between the appellant and the Minister. These prescriptions included, as the transfer letter makes clear, the Public Service Act, the Public Service Regulations the Public Service Staff Code and the Administrative Code for Foreign Service.

8 As with any other document, in interpreting the provisions of the transfer letter which are in issue, the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the

preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.¹

- 9 The first issue relates to the period of the appellant's posting to Ramallah. The transfer letter reads:

In terms of our current policy, it is the intention that the posting abroad will be for a period of four years. The Department, however, retains the right to adjust this period should this be necessary. In the case of a transfer, a maximum of three months notice will be given.²

- 10 The transfer letter also reads:

The Labour Relations Act no. 66 of 1995, as amended, has brought about a new labour dispensation for the Public Service. Service conditions, including the foreign service remuneration system, are subject to negotiation and may result in adjustments, either upwards or downwards. Your transfer conditions, including remuneration and allowances, are therefore subject to such changes as may be brought about by legally prescribed negotiation processes. Your

¹ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16 with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 18 and 25-26

² My emphasis

transfer is also based on the understanding that the conditions contained in this letter cannot be guaranteed for the full duration of your tour of duty.

In the event of any changes to your conditions of service as may be determined by negotiations, you will receive written notice thereof six months prior to it taking effect.

...

Your transfer is furthermore subject to the gradings of missions and post levels which are subject to periodic review in order to ensure that the interests of the State are being properly upheld. Such reviews may also be necessitated by factors outside the Department's control. This implies that the grading of missions and post levels as a whole, as well as allowances associated with such gradings and post levels, may be adjusted upwards or downwards.

If any adjustment in the grading should occur in respect of the post level on which the abovementioned allowances are based, the difference will not exceed one post level. Should such changes become necessary, you will be given six months prior notice in writing, after which you will be required to indicate - within three months - whether the change is acceptable. If you find the adjustment of your allowances unacceptable, a suitable date of your transfer to Head Office will be negotiated, which will take effect within the abovementioned six months notice period.

- 11 The appellant interprets this to mean that he had a contractual right to remain in his post in Ramallah for four years subject only to the respondent's right to effect an adjustment to this arrangement if it were objectively necessary to do so. And then the appellant contends, firstly, that he had an absolute right to remain in his post pending the

resolution of all and any disputes arising between the appellant and the DMR in accordance with the normal dispute resolution procedure and, secondly, that he was entitled to receive six months notice of the DFA's intention to transfer him.

- 12 I do not think that this is correct. As to the duration of the posting, the passage in question says no more than that it was then the policy of the DFA to retain officers who are posted abroad in their posts for four years. At the level of language, in my view, it did not create a contractual entitlement on the part of the appellant to remain in that post for four years or any other period. This view is fortified by the purpose of the posting and the circumstances in which it was made.
- 13 Those circumstances which I see as important for present purposes are the following: Firstly, the posting was of a diplomatic nature. It was designed, as all such diplomatic postings are, to advance and represent the interests of the Republic of South Africa, as interpreted by the executive from time to time. In this context, changes may need to be made at a moment's notice. An individual who holds a particular diplomatic posting may be seen not to advance or represent those interests for reasons personal to that individual. Secondly, the posting to Ramallah was to a region of particular tension and sectarian and ethnic conflict. Perceptions are of great significance in this region.

Thirdly, the posting of the appellant to Ramallah was as *de facto* head of mission. The appellant was in effect the public representative of the Republic.

- 14 For these reasons, it might be necessary to transfer an officer such as the appellant away from Ramallah. Such a transfer might be perceived by the officer subjectively as a promotion or a demotion but it would in fact be neither, provided the officer retained his or her rank within the DFA and was not required to do work inconsistent with that rank.
- 15 It is in this light that the statement in the transfer letter, that the period of the posting might be adjusted, should this be necessary, must be read. It expressed the obvious: the posting of the appellant was to promote the interests of the Republic; but while as a general proposition, the appellant might expect to remain in his post in Ramallah for four years, this could be curtailed if the interests of the South African state, as interpreted by the executive, so required.
- 16 Finally on this topic, the provision in the transfer letter relevant to transfers for necessity provided for a *maximum* of three months notice. The references to six months notice did not relate to transfers for necessity.

- 17 A dispute arose between the appellant and the DMR. The South African mission at Ramallah, became, under the appellant's leadership, dysfunctional. The dysfunctionality arose because of conflict between the appellant on the one hand and two officers of the DMR stationed at the Ramallah mission and some locally recruited personnel on the other. The DMR obtained guidance through two reports, described in the court below as the Nojozi and Memela reports. Ms Nojozi was the Director: Human Rights at the DMR. Mr Memela was the Chief Director: East Africa at the DMR. Mr Memela conducted an investigation following that of Ms Nojozi. The Memela report found that the appellant had failed to provide sound leadership to the mission at Ramallah and recommended that the appellant be recalled.
- 18 The appellant testified that he was not the cause of the dysfunctionality; but this in my opinion cannot avail the appellant. He was the *de facto* head of mission. It was his duty to ensure that a properly functional mission operated in Ramallah. The dysfunctionality of a South African mission to this volatile and potentially violent part of the world could give rise to a diplomatic crisis. The DMR was quite right to view the situation as serious and to recommend urgent remedial action to the Minister. This is what the DMR did.

- 19 Counsel for the appellant submitted that the DFA was contractually obliged under the circumstances I have described to provide the appellant with support to enable the appellant to overcome the dysfunctionality. I do not agree. Perhaps on the level of labour or administrative law, this submission might have substance. I express no opinion on this aspect. But in the realm of contract, in my view, the DFA was fully entitled to take the view that the personality of the appellant was such that swift intervention was required. It was therefore necessary that the appellant be redeployed.
- 20 There is a further factor which, objectively and on its own, justifies the appellant's immediate redeployment. It emerged, and was admitted by the appellant, that the appellant had, knowingly smuggled simcards into the Gaza Strip. He did so under the cover of his diplomatic status and used a motor vehicle assigned to the mission at Ramallah for this purpose. He justified his action on the basis that the citizens of Gaza had the right freely to communicate. It is hardly necessary to state how serious a breach of the appellant's duties this was. It could very seriously have compromised the Republic's stated intention of acting to bring peace to this troubled region.

- 21 It cannot avail the appellant that this serious misconduct on the part of the appellant was not known to the DFA when the appellant was recalled. At the level of contract, the determination of necessity in this context is objective. A contracting party is entitled to rely on any facts to justify his conduct in cancelling an agreement, whether or not such facts were known to him at the time the cancellation was effected.³
- 22 The remedial action recommended by the DMR to the Minister was that the respondent be recalled and another official put in his place to act as *de facto* head of mission. The Minister accepted the recommendation. Accordingly, in a letter dated 14 April 2004, Dr Sooklal, the Deputy Director-General: Asia and Middle East at the DMR informed the appellant that a decision had been made to transfer him to South Africa with effect from 1 June 2004.
- 23 Prior to the decision, the DMR informed the appellant of the case for dysfunctionality of the mission at Ramallah and the recommendation that he be transferred back to South Africa. The appellant was also provided with certain material in the Memela report. The appellant was invited to respond to the case against him which he did, submitting his response to the DMR on 17 March 2004.

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See eg *Stewart Wrightson (pty) Ltd v Thorpe* 1977 3 SA 943 A 953G

- 24 In the letter recalling the appellant to South Africa, the DMR recorded that the appellant had failed to provide the DMR with any new information or evidence that materially affected the findings and recommendations in the report and that the explanations given by the appellant had not constituted a satisfactory justification for his conduct. The DMR expressed the view that the comments made by the appellant in response to the report had not substantially affected the findings and recommendations contained in the report.
- 25 The appellant did not challenge the validity of the administrative decision to terminate his posting to Ramallah. Instead, the reaction of the appellant was to tender his resignation from the DMR in a letter dated 10 May 2004. The appellant's resignation was not accepted. The appellant was assigned a new post at the DMR's head office in South Africa. The appellant remained in his position as deputy director and was assigned work consistent with that position.
- 26 By letter dated 29 June 2004, the appellant, through his attorney, purported to cancel the contract the appellant claimed regulated his posting to Ramallah on the ground of repudiation by the respondent. It became clear when the appellant gave evidence that he claimed, consistently with the way his case was pleaded, that, in addition to the performance agreement with the DFA which I have mentioned, there

were two contracts between the respondent and the appellant: his general contract of employment and the contract he claimed was evidenced by the transfer letter. I have already said that I do not accept that the transfer letter constituted an independent contract. But I shall deal with the appellant's own allegations regarding the alleged repudiation.

- 27 A repudiation is constituted by the conduct of a party which, fairly interpreted, exhibits a deliberate and unequivocal intention no longer to be bound by a contract and when a party refuses to give effect to an important term of an agreement.⁴
- 28 Firstly, the appellant says, he was removed by an officer of the DFA when only the Minister had the authority to remove him. At the level of contract, if the officer in question did not have the authority so to act, then the appellant's removal could not be said to be that of the Minister. Actions in the contractual context could only have consequences for the Minister if they were the actions of the Minister himself or his authorised representatives.

⁴ *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 A 844-846

29 Secondly, the appellant claims that he was not given six months notice as the transfer letter states. I have dealt above with this point. I do not think that the appellant was contractually entitled to six months notice.

30 Thirdly, the appellant claims that due process was not followed in relation to the dispute he had with the DFA. In this regard the appellant says that there was no compliance with the conciliation process contemplated in the performance agreement. But the appellant did not ask for conciliation procedures to be followed. And if they had, such conciliation procedures would clearly have been unsuccessful. In any event, the failure to follow agreed conciliation procedures is not a repudiation as I have described that concept.

31 Fourthly, the appellant says that the post to which he was transferred was a demotion. But it was not. In the eyes of the appellant, the instruction to return to head office diminished his status but he retained the rank of deputy director. He does not suggest that the work he was assigned was inappropriate for a person holding his rank. At the level of contract there was no demotion.

- 32 Fifthly, the appellant questions the reliance by the DFA on the Memela report and asserts that he was only given portions of that report. The evidence produced on behalf of the respondent, which was accepted by the court below, was that the appellant did not ask for the full report. But even if the appellant is correct on this score, the reliance by the DFA on the Memela report cannot constitute a repudiation of his contract with the respondent.
- 33 For these reasons, in my view, the appellant failed to prove that the respondent repudiated the contract with the appellant. The learned judge in the court below correctly came to the same conclusion.
- 34 There is a further reason why, in my view, the appellant cannot succeed, even if it is accepted, against my findings, that the transfer letter constituted a contract and that the contract so hypothetically concluded was repudiated by the respondent.
- 35 The appellant claims that the remuneration to be paid to him while he was at his post in Ramallah was made up of two components: his salary as deputy director and his allowances as an officer of the DFA posted away from South Africa.

- 36 But the salary was due to the appellant in terms of the general contract of employment, not the contract the appellant claims was constituted by the transfer letter. In coming to this conclusion, I have not overlooked that the transfer letter sets out the remuneration the DFA intended paying the appellant while he was at his post in Ramallah. It could not have been the intention of the parties that the appellant's general contract of employment would be suspended while the appellant was serving outside the Republic and, indeed, this was not pleaded or suggested by the appellant.
- 37 The other component of the appellant's remuneration was the allowances due to him as an officer of the DFA serving outside the Republic. Those allowances were paid to him as compensation for the inconvenience of serving outside the Republic and in my view were not recoverable once he ceased so to serve, for whatever reason. This was the conclusion to which the Labour Court came in *Nehawu obo Gift Lebethe v Minister of International Relations and Cooperation*.⁵
- 38 And even if the appellant was originally entitled to his remuneration and allowances pursuant to a contract constituted by the transfer letter, this changed when his general contract of employment was

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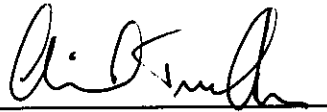
Labour Court case no. J1436/2013, decided on 26 July 2013 at para 26.

amended pursuant to the very legally prescribed negotiation processes referred to in the transfer letter and which I have quoted above.

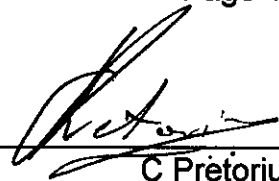
39 So the termination of the hypothesised agreement constituted by the transfer letter did not give rise to any damages on the part of the appellant. He continued as an deputy director within the DFA to receive his salary as adjusted pursuant to the negotiation processes which I have mentioned. Once the appellant was no longer stationed in Ramallah, he was no longer entitled to the allowances.

40 The appeal must therefore fail and costs must follow the result. I propose that the following order be made:

The appeal is dismissed with costs. Such costs will include the costs consequent upon the employment of both senior and junior counsel, where two counsel were so employed.

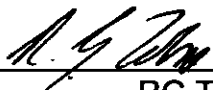

NB Tuchten
Judge of the High Court
1 December 2016

I agree. An order is made
as set out in paragraph 40 above.



C Pretorius
Judge of the High Court
1 December 2016

I agree



RG Tolmay
Judge of the High Court
1 December 2016