

**IN THE APPEAL COURT OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) 28/2021**

In the matter between:

**RETHABILE MAHLOMPHO MOKAEANE**

**APPELLANT**

AND

**PRINCIPAL SECRETARY MINISTRY OF  
FOREIGN AFFAIRS AND INTERNATIONAL  
RELATIONS**

**1<sup>ST</sup> RESPONDENT**

**MINISTRY OF FOREIGN AFFAIRS AND  
INTERNATIONAL RELATIONS**

**2<sup>ND</sup> RESPONDENT**

**MINISTRY OF PUBLIC SERVICE  
ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**CORAM** : K. E. MOSITO, P  
P.T. DAMASEB, AJA  
. P MUSONDA, AJA

**DATE OF HEARING** : 14 OCTOBER 2021

**DATE OF JUDGMENT** : 12 NOVEMBER 2021

## **Summary**

*The Government of Lesotho's admitted failure to honour payment of its foreign service employee's children's school fees in terms of Public Service Regulation 2008, not a good ground for excusing it from its statutory obligations. High Court's failure to order the Government to honour its commitments in strict compliance with the relevant regulation held to be a misdirection.*

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## **JUDGMENT**

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**PT Damaseb AJA:**

### **Background**

[1] This is an appeal against an order handed down without reasons by Makara J in an application instituted by the appellant against the Government of Lesotho (GoL) for the latter to honor her service benefits as a foreign service employee.

[2] The appellant was appointed as a diplomat of Lesotho to the United Kingdom and is based in London. In that capacity, the appellant is entitled to payment by the GoL of her children's school fees. Regulation 110(1) and (2) of the Public Service Regulations 2008 (the school fees regulation) provides:

*'(a) The Government shall pay full education expenses for the children and residing with a member of staff of the mission, from when they are at the age of three (3) and are at preschool up to high school. Such expenses shall include school fees and tuition.*

*(b) The children shall be enrolled in schools approved by the Head of Mission after consultation with the Principal Secretary.'*

[3] It is common cause that in 2020 under CIV/APN/381, the appellant sued the GoL on account of its admitted failure to meet its obligations to the appellant arising from Reg 110(1) and (2). The parties then concluded a deed of settlement which in relevant part recorded that:

*'Payment of the school fees for the Applicant's children shall always be effected only within the scope of the allocated and current quarterly budgetary ceiling, and available funds, as remitted under the school fees vote. The 2<sup>nd</sup> Respondent shall effect allocated funds evenly among all staff members whose children qualify to benefit from Government. Where the total school fees exceed the amount allocated for this purpose the 2<sup>nd</sup> Respondent shall distribute the allocated funds on a pro rata basis.'*

[4] The deed of settlement is dated 10 November 2020 and related to CIV/APN/381/2020.

[5] On 31 December 2020 under CIV/APN/462/2020, the appellant brought an urgent application against the GoL, citing the above respondents and seeking the following substantive relief:

*'(a) That the respondents be ordered and directed to pay the applicant's employment benefits in terms of regulation [110(1) and (2)] by making*

*immediate payment of applicant's children's school fees within five (5) days of the order herein in respect of school fees due and payable from 5<sup>th</sup> January 2021.*

*In the event that the respondents fail to pay following granting of the final court order, the applicant be granted leave to approach courts on the same papers or supplemented wherever necessary to seek enforcement of the order on such terms as the court may deem fit.'*

[6] In her founding affidavit the appellant alleges that her children's schools in the U.K will resume on 5 January 2021; that the children's school fees had not been paid from the first term of the academic year, and remain unpaid.

[7] The GoL entered appearance to oppose the urgent application. The first respondent deposed to an answering affidavit on behalf of the respondents. In it she states that the applicant's children's school fees are always beyond the ministry's budget allocated in respect of school fees under the regulation. The deponent does not deny the GoL's obligation to comply with the school fees regulation.

[8] The witness asserts that the fact that the school fees of the appellant's children were not paid was because the appellant failed to implement the settlement agreement reached between the parties under CIV/APN/381/2020. Therefore, according to the first respondent, the appellant is the author of her own misfortune.

[9] In reply the applicant avers that the settlement agreement in CIV/APN/381/2020 is of no relevance to her present suit because the GoL failed to comply with its terms as she was only authorized to pay £10 556.01 in respect of her children's school fees when the actual indebtedness was £14 836.32, resulting in the children being excluded from school; and that she had previously paid the school fees herself and has not yet been refunded and has no money to pay the fees herself. To buttress the irrelevance of the settlement agreement previously reached, she states:

*'I am now a new case in respect of what is happening now in 2021 starting from 5<sup>th</sup> January 2021. I am not bound by the settlement agreement in respect of my new case. The settlement agreement related to the case that is completed. I am claiming a benefit due to me in terms of the law. I am suing because my children are sitting at home. They are not attending school with effect from the 5<sup>th</sup> January 2021. The reason is because the benefit due to me by law has not been paid. I deny that the school fees have been paid. There has not been payment which covers the period from 5<sup>th</sup> January 2021.... the school fees is paid in advance. The reference to November 2020 is irrelevant...my children are out of school from January 2021... sitting at home. [I]n the last quarter my children went to school because I am the one who paid personally.'*

[10] After hearing argument, the court *a quo* made an order reflecting the settlement agreement entered into between the parties in CIV/APN/381/2020. It ordered that:

*'Payment of the school fees for the applicant's children shall always be effected only within the scope of the allocated and current quarterly budgetary ceiling, and available funds, as remitted under school fees vote. The 2<sup>nd</sup> respondent shall effect allocated funds evenly among all*

*staff members whose children qualify to benefit from Government. Where the total school fees exceed the amount allocated for this purpose the 2<sup>nd</sup> respondent shall distribute the allocated funds on a pro rata basis.'*

[11] The present appeal is against that order. According to the appellant, the court *a quo* 'erred in granting an order that was not sought by either party before it'. It bears mention that the GoL had in opposing the application asked that it be dismissed, presumably because of its stance that the applicant was bound by the terms of the settlement agreement.

### **Issues for determination**

[12] The question that arises in this appeal is whether it was competent for the court *a quo* to grant an order, not in the terms sought by the appellant, but based on the terms of a settlement agreement that related to another case between the same parties and which had in any event not been complied with by the one party. Additionally, we have to consider whether the GoL can escape liability for its statutory obligations to its employee on the ground that it was unable to afford it.

### **Submissions**

[13] On behalf of the appellant Advocate Molati submitted that the order granted by the court *a quo* was not asked for by either party. Counsel argued that it was impermissible for the High Court to find that the appellant had made out a case for the relief it approached court for on the strength of the school fees regulation

but then to grant an order which was inconsistent with that regulation. Counsel stressed that the appellant had not approached court to enforce the previous settlement agreement but to enforce her entitlement under the school fees regulation. Mr Mohloti concluded by submitting that the benefit was granted under a valid regulation and could not be waived.

[14] Advocate Tau for the respondent supported the judgment of the High Court. According to counsel, the court *a quo* was entitled to rely on the settlement agreement because it related to the same subject matter of the appellants' children's school fees. To the extent that the appellant agreed previously on how the benefits were to be paid, the GoL was entitled to pay her according to the terms of the settlement agreement.

### **Discussion**

[15] The reliance on the settlement agreement by the *court a quo* and the government is untenable. That is because, firstly, the appellant makes clear that it related to a completed case and in respect of which the GoL had not honored its commitments.

[16] Firstly, it remains uncontested that despite the settlement agreement, the applicants' children remain out of school and she had in the past paid the school fees out of her own pocket to keep her children in school without being refunded by her employer. Secondly, it is admitted that the GoL is unable to meet its obligations in respect of the school fees regulation in full due to

financial constraints. Thirdly, the applicant could not be held to have waived rights that are due to her in terms of the school fees regulation which is intended for all foreign service employees such as herself.

[17] The effect of the settlement agreement, and the order made by the High court, is to reduce the appellant's benefit under the school fees regulation from payment of all of the school fees to only that which the government is able to pay. Besides, it raises the real prospect that since only she is privy to the settlement agreement, other employees in a similar position as her could be paid their benefits in full while she receives reduced benefits because of the settlement agreement she entered into in the course of litigation. That would be against public policy. It also has the real potential that government will use it as a precedent for not fully meeting its statutory obligations to employees.

[18] As Cachalia AJA observed in *Bafana Finance Mabopane v Makwakwa and Another*:<sup>1</sup>

*'[10] An agreement whereby a party purports to waive the benefits conferred upon him or her by statute will be contra bones mores, and therefore not enforceable, if it can be shown that such agreement would deprive the party of protection which the legislature considered should, as a matter of policy, be afforded by law.'*

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<sup>1</sup> *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) at p585 par [10]

[19] It is rather obvious that the GoL's intent with the school fees regulation is to ensure that diplomatic staff posted abroad (often in countries where an employee's buying power is eroded by the vagaries of unfavorable exchange rates) are able to send their children to school. Thus, it is a benefit that should, as long as it exists, operate to the benefit of all that are entitled to it.

[20] Considering that it is common cause that the GoL had failed to meet its obligations to the appellant in terms of the school fees regulation, it was a misdirection for the High court not to grant the relief that was sought in the notice of motion. The GoL's inability to pay is no valid defence to a claim by its employees to honour its statutory obligations to employees. The appeal must succeed.

## **Order**

[21] It is accordingly ordered that:

- (i) The appeal succeeds and the order of the High court is set aside and replaced by the following:

*'(a) The application succeeds;*

*(b) The respondents are ordered and directed to pay the applicant's employment benefits in terms of Regulation 110 (1) and (2) of the Public Service Regulations 2008, by making immediate payment of applicants' children's school fees within five (5) days of this order in respect of school fees due and payable from 5th January 2021.*

*(c) In the event that the respondents fail to pay following the granting of this order, the applicant is granted leave to approach court on the same papers or supplemented wherever necessary to seek enforcement of the order on such terms as the court may deem fit.*

*(d)The applicant is granted costs of suit.'*

- (ii) The appellant is granted costs in the appeal.



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**P.T. DAMASEB**  
**ACTING JUSTICE OF APPEAL**

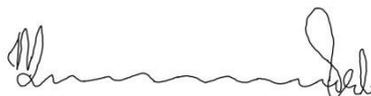
I agree:



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**K.E. MOSITO**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:



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**P MUSONDA**  
**ACTING JUSTICE OF APPEAL**

**For Appellant:** MUKHAWANA ATTORNEYS  
APPLICANT'S ATTORNEYS  
TRADORRETE COMPLEX  
KINGSWAY, MASERU  
INSTRUCTING: ADV. LA MOLATI

**For Respondent:** ADV. L. TAU  
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