IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A108/22

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....

DATE SIGNATURE

In the matter between:

DIRECTOR-GENERAL, DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION **FIRST APPELLANT**

MINISTER, DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION **SECOND APPELLANT**

DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION **THIRD APPELLANT**

and

AZWIANESWI DAVID MBEDZI **RESPONDENT**

JUDGMENT

MOTHA J,

Introduction

[1] Before this full court is an appeal against the judgment handed down on 14 September 2020. In terms of the judgment, the appellants (respondents) were ordered to:

> 1. "Respondents must upgrade applicant's position in the foreign applicants mission office at Lagos Nigeria from vice consul to first secretary/consul political within 90 (ninety) days of this order.
> 2. Respondents must pay applicant the difference in cost of living allowance (COLA) within 90 (ninety) days of this order from the time it became applicable. Starting with the position first secretary/consul political from the 3rd July 2014 to the end of applicant's foreign posting.
> 3. Respondents to pay costs on attorney and client scale"[1]

[2] Dissatisfied with the judgment, the appellants sought leave to appeal. Having failed to obtain leave to appeal from the court *a quo*, they approached the Supreme Court of Appeal, which granted them leave to appeal, on 7 April 2022. In brief, the appeal is based on the grounds mentioned *infra:*

> "***First ground of appeal:***
> His Lordship, with respect, erred in finding that it is common cause that if the respondent was posted with the rank of assistant director, foreign service, his rank would have been first secretary/consul political in embassies and consul political in consulate. This was not common cause…
>
> ***Second ground of appeal***
> His Lordship erred in finding that:

[1] Judgment at page 8.

The argument advanced by the department in refusing to adjust the respondent's COLA when he was posted outside the country is not supported by any legislation or case law;…

Third ground of appeal

His Lordship, with respect, erred in finding that the Public Protector's remedial actions in regard to the respondent's case had already been implemented by the third appellant and there is no logic in refusing to do the same in as far as the respondent's COLA is concerned…

Fourth ground of appeal

His Lordship erred in:

Finding that it was unnecessary for department to engage in protracted litigation with the respondent even when the Public Protector has ruled that the respondent must be put in a position in which he would have been in had the prejudice not happened and that the respondent is therefore entitled to a punitive costs order…

Fifth ground of appeal

In paragraph 6 of the Judgment his Lordship states that the respondent was posted to the South African Embassy in Nigeria until December 2020...

If regard is heard to the first to third grounds of appeal, his Lordship erred in concluding with an order that the department must upgrade the respondent's position in the foreign mission office at Lagos Nigeria from vice consul to first secretary, *especially under circumstances where the respondent is no longer posted there and under circumstances where such relief was abandoned by the respondent."*[2]

The parties

[3] For the sake of consistency, I will refer to the applicant as the respondent and respondents as appellants.

[4] The respondent is a major male person duly employed by the Department of International Relations and Cooperation (DIRCO).

[2] Notice of Appeal CaseLines 039-1-18.

[5] The first appellant is the Director General of DIRCO. He is cited in his capacity as the Head of Administration and as an Accounting Officer of DIRCO.

[6] The second appellant is the Minister of DIRCO. She is cited in her capacity as the Political Head of DIRCO.

[7] The third appellant is the Department of International Relations and Cooperation (DIRCO).

The factual background

[8] In 2008, the respondent joined DIRCO, after applying for a position as an Assistant Director Foreign Affairs. At the time of his application, DIRCO had several vacancies for the position of Assistant Director Foreign Affairs. Having succeeded in the interview for that position, he was, however, appointed to a lower rank of Senior Foreign Service Officer. Needless to say, he received a lower salary and employment benefits than he would have enjoyed had he been appointed to the position he had applied for.

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[9] Together with seven other fellow employees, who had also applied for the position of Assistant Director Foreign Service and got appointed as Senior Foreign Service Officers, he lodged a grievance with the third appellant. Upon the receipt of the grievance, the Deputy Minister of the department requested Cheadle Thompson Attorneys (CTA) "to conduct an independent investigation into certain allegations leveled against the management of DIRCO by the National Education, Health, and Allied Workers Union ("NEHAWU").[3] NEHAWU represented the aggrieved parties, including the respondent.

[10] The gravamen of NEHAWU's complaint was "that there is a practice in the Department of advertising posts at certain specific levels but offering successful candidates positions lower than those advertised and for which the candidates were interviewed. The cases in point relate to employees who included the following:
Mr. David Mbedzi…"[4]That is the respondent.

[3] CTA report para 1
[4] Supra para 192

[11] On 17 May 2011, the CTA report recommended "that management should review the position of the affected employees in this case and determine whether or not they ought not to be upgraded to the next level of Assistant Director. This could conceivably be done by evaluating their posts to determine whether the actual work that these employees perform is not suitably weighed at the level of Assistant Director... Whatever the department chooses to do, it is imperative that the positions of SFSO in the department be properly evaluated and job descriptions developed. If not, the underlying complaint will remain unresolved."[5] Indeed, unresolved the complaint remained.

[12] On 24 June 2013, a complaint was submitted to the Public Protector. At paragraph 7.2 of the report, the Public Protector states the following:

> "Flouting of Public Service Regulations: A fair process for the identified officials should immediately be undertaken to place them in a position that they should have been had the prejudice not have happened."

[13] As a result of the Public Protector's findings, on 1 July 2020, the third appellant addressed the respondent and the seven others as follows:

> "SALARY POSITION
> Kindly be informed that as a first phase of the remedial action as directed by the Public Protector your salary position has been amended as follows:
> Effective date: 1 April 2019
> Job Title: Assistant Director Foreign Service"

[14] Having sought legal advice and corrected the positions of the respondent and the seven others, the appellants (DIRCO) agreed:

> "…to pay all of them the salary of an Assistant Director Foreign Service backdated to the date and year they were successfully interviewed for the position, Assistant Director Foreign Services, i.e., 2008."

[5] Supra paras 202 & 203.

[15] On 3 July 2014, long before the release of the Public Protector's report, the respondent applied for a post in Tehran, Iran, as a Second Secretary/Vise-Consul: Political. He stayed in Tehran until 29 June 2016. From late June 2016, he moved to a Consulate in Lagos, Nigeria, as a Second Secretary/Vise-Consul: Political. It bears mentioning that both these foreign postings happened before the backdating of the respondent's salary. Of importance is that he was ranked as a Second Secretary Vice Consul, Political in both Tehran, Iran and Lagos, Nigeria. As it will be demonstrated soon, the differentiation in ranks at a foreign mission is important since it determines the costs of living allowance (COLA) for the official posted in a foreign mission. He returned to South Africa in November 2020.

The law governing foreign posting

[16] To fully comprehend the contestation, of necessity, one must, *inter alia,* be familiar with the Placement Policy and Foreign Service Dispensation (FSD) documents.

[17] On the one hand, the Placement Policy refers to the placement of a designated employee at an RSA mission abroad and at Head Office. This policy applies to all employees of the Department except for a few such as Heads of Mission, Ministers Plenipotentiary, amongst others. The purpose of the policy is to provide a framework for the inbound and outbound placement between Head Office and missions abroad.[6]

[18] The following principles inform the placement process, just to mention a few:

- "Fairness: Actions and decisions must be objective, consistent, equitable and without prejudice.
- Representation: All selection process shall be aligned with the employment equity objectives of the Department.
- Transparency: All human resources management practices shall be open and subject to public scrutiny within reasonable limits as guided by applicable prescripts.

[6] Placement Policy Document paras 1.1-1.5.

- Accountability: Responsibilities shall be clearly defined and individuals shall be held accountable for discharging their responsibilities conscientiously and with probity and integrity.
- Efficiency: All processes shall have desirable features/outcomes.
- Consistency: Processes/actions shall be non-contradictory..."[7]

[19] In determining placement of employees on missions abroad, the Department is guided by the determination of mission designate which is mentioned here under:

"2.4.5. Determination of Mission Designation(s)

Second/Third Secretary/Vice-Consul: Political

- Foreign Service Officers (SR 7) going out on posting shall be posted as Third Secretary/Vice-Consul: Political.
- Senior Foreign Service Officers (SR 8) shall be posted as Second Secretary/Vise-Consul: Political.

First Secretary/Consul: Political.

- Assistant Directors: FS (SR 9/10) shall be posted as First Secretary/Consul: Political.

Counsellor: Political

- Deputy Directors: FS (SR 11/12) shall be posted as Counsellor: Political.

Counsellor: Administration

- Deputy Directors: Administration (SR 11/12) shall be posted as Counsellor: Administration, subject to availability of posts. However, should Deputy Directors wish to apply for First Secretary: Administration posts and be successful, they shall be posted as such for the duration of their tour of duty.

First Secretary/Consul: Administration

- Assistant Directors: Administration (SR 9/10) shall be posted as First Secretary/Consul: Administration."[8]

[7] Supra para 1.7.
[8] Supra paras 2.4.5.

[20] Due to the use of the modal verb shall, from July 2014 to 2019 the respondent was ranked as a Senior Foreign Service Officer (SR 8), *ipso facto*, he had to be posted as a Second Secretary/Vice-Consul: Political abroad. *A fortiore,* if he was ranked as an Assistant Director:FS (SR 9/10) he would have been posted as a First Secretary/Consul:Political.

[21] On the other hand, the FSD focuses on remunerations including calculation and rules for payment. The relevant part for our purposes is the Cost of Living Allowance (COLA). It states that:

> "Employees designated for deployment in the foreign service abroad shall be eligible for receiving Cost of Living Allowance (COLA).
> The purpose of COLA is to compensate a designated employee stationed abroad in COL expenses based on the principle that it is expected of designated RSA employees stationed abroad to maintain a standard of living, commensurate with the representational standard determined by the RSA government."[9]

Dispute

[22] The *raison d'etre* for this matter, as I see it, is the Department's (appellants') refusal to backdate the respondent's COLA allowance to match the rate of First Secretary/Consul: Political, following the Public Protector's remedial action. However, the appellants maintained that the crux of this appeal is that the respondent received his compensation, backdated to 1 April 2019, and his position was rectified. The appellants further submitted that Prayer (1) one was abandoned and should not have been granted. Therefore, they continued, the granting of Prayer one was a judicial overreach. The judgment came nine months after the respondent's return, the appellants said. Prayer 2 included the allowance for Difficult Post Allowance Cost Allowance (DPACA) which was abandoned. However, this submission is incorrect because the court *a quo* never made such an order.

Submissions by the appellants' counsel

[9] Determination and Directive on the Foreign Service Dispensation (FSD) paras 8.3.1-8.3.2.

[23] Counsel for the appellants' submissions can be broadly compressed into the following rubrics: FSD Ministerial discretion, Contract, and Review.

FSD Ministerial discretion

[24] He submitted that both the CTA and Public Protector's reports dealt with domestic affairs; and the court *a quo* misdirected itself in relying solely on these documents when dealing with posts abroad. The court *a quo* ignored the Policy document and legislative framework and reasoned that because you made a mistake domestically it is automatically applicable abroad, he submitted. Referring the court to *Natal Joint Municipal Pension v Endumeni Municipality,*[10] he argued that the Court *a quo* should have looked at the documents as a whole and focused on the word "shall". It should have looked at the language the context and the purpose of the documents, so goes the argument. Confronted with the fact that the court *a quo* referred to the Policy document, he beat a hasty retreat and submitted that the court *a quo* was fixated on the Policy document and did not have regard to the FSD.

[25] Placing reliance on paragraph 8.3.6 of the FSD, appellants' counsel submitted that the Minister, or the DG, has the discretion to give a lower COLA allowance and referred to the said paragraph, which reads:

> "(a) In cases where a designated employee serving abroad is not on a standard Public Service grading system level or pay scale or where a designated employee is on a grade level or pay scale clearly higher than that justified by her/his representational role, the MIRCO may decide that such employee be paid the COLA rate applicable to an appropriate lower grade level. The MIRCO may delegate such power to the DIRCO."

[26] This submission is unsustainable because, firstly, the respondent was on a standard Public Service grading system level. Secondly, it was neither before us nor in the papers that MICRCO or DIRCO, if delegated the power, decided that the respondent be paid the COLA rate applicable to a lower grade level. Finally, the

[10] 2012 all SA 262.

respondent's submission that this clause applies to employees in administration and not to political employees was not challenged.

Contract

[27] Counsel submitted that when the respondent applied, on 13 March 2014, for the position of Second Secretary/Vice-Consul: Political in Tehran, Iran, he signed the contract voluntarily. The same is true for his application for Second Secretary/Vice Consul: Political to Lagos, Nigeria, and the extension, counsel submitted. Therefore, he continued, the court *a quo* failed to have regard to the contractual agreement, hence, it was a judicial overreach to order that the respondent's COLA allowance be backdated to 3 July 2014. It is counsel' submission that the respondent was bound by the COLA allowance rates of Second Secretary/Vice-Consul: Political.

[28] This submission is without merit because the respondent's employment contract altered when he was upgraded to the position of Assistant Director. There is neither rhyme nor reason advanced in support of the incongruous submission that the upgrade domestically does not affect the position abroad, especially in the face of the Placement Policy document. The court *a quo* cannot be faulted for attending to the discrepancy, by backdating the respondent's COLA allowance to match the rate of First Secretary/Consul: Political.

Review

[29] He further submitted that the respondent should have brought a review to deal with the COLA allowance challenge; and would probably have succeeded. Absent a review, the respondent had no way of getting paid the COLA allowance rate at First Secretary/Consul: Political, he argued.

[30] Notwithstanding that the review submission was neither raised in the appellants' papers nor in their heads of argument, the absence of a review application is not fatal. Dealing with a similar argument of failure to take the matter on review, the court in *Forestry South Africa v Minister of Human Settlements, Water*

and Sanitation and Others (777/2022) and Minister of Human Settlements, Water and Sanitation and
Others v Forestry South Africa[11] held:

> **"The absence of review proceedings**
> [26] Closely connected to the objection just considered, the Statutory Authorities complain that the members of Forestry SA were required to bring review proceedings to set aside those administrative actions to which they were made subject. …Such a requirement would be burdensome. More importantly, as I have explained, once an authoritative interpretation is given by the courts, many reviews, if they must be brought at all, would be decided with little difficulty, and, if reason prevails, without opposition. This objection must also fail."

[31] With the respondent's position of an Assistant Director affirmed, the review application would have served no useful purpose. As was argued by the respondent's counsel the review would have been time-barred in any way. It is the view of this court that the present cause of action is merited.

Submissions by Respondent's Counsel

[32] Responding to the appellants' counsel, the respondent's counsel submitted that it is fallacious to argue that the court *a quo* fixated itself on the Placement policy and failed to take a broader view which included the FSD. The Placement policy determines the placement of government employees abroad, she argued. She submitted that the FSD deals with the remuneration; however, a rank must be allotted to person before the remuneration.

[33] Turning her attention to the submissions about the contract, she submitted that the respondent was channeled by the Placement policy to apply for the post of Second Secretary/Vice-Consul: Political, since he was employed as a Senior Foreign Service Officer. This submission finds resonance with this court, the respondent had no option but to apply in terms of the Placement policy. Furthermore, the corollary is,

[11] 824/2022) [2023] ZASCA 153 (15 November 2023)

DIRCO, appellants had no choice but to post the respondent as a First Secretary/Consul: Political, after his elevation to the position of an Assistant Director.

[34] On the review submission, she submitted that it was made up today. Moreover, she continued, review was not a viable route for two reasons, namely: the respondent would be time-barred. Secondly, with the Public Protector's remedial action complied with, she questioned the wisdom of a review. She submitted that there should not be a difference between the local and foreign position, as a person is first an employee of the Department before the posting abroad. This court finds these submissions to accord with common sense. Equity and fairness are some of the foundational principles of the Department's Policy and that call for actions and decisions which are objective, consistent equitable and without prejudice.

Law on appeal

[35] As a court of appeal, this court must take heed of the words of Moseneke DCJ, quoted in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another,*[12] that: "an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."[13]

[36] Before this court can interfere with the decision of the court a quo, it must find a misdirection when examining the grounds of appeal, which I now turn to.

[37] Dealing with the first ground of appeal, this court holds the same view that the Placement policy document determines the rank at which a person will be posted abroad. It cannot be clearer than that a Senior Foreign Service Officer shall be posted abroad as Third Secretary/Vice Consul: Political. Consequently, an Assistant Director shall be posted as First Secretary/Consul: Political. This court does not find any misdirection in this regard. Therefore, this ground stands to be dismissed for lack of substance.

[12] 2015 (5) SA 245 (CC)
[13] Id para 89

[38] The second and third grounds of appeal relate to the refusal to adjust the COLA allowance following the Public Protector's remedial action. This involves the backdating of the COLA allowance in Iran and subsequently Nigeria. To insist on referring to the FSD without locating it within the Placement policy leads to a misguided view of the facts, which results in the failure to upgrade the respondent's position abroad to be concomitant with the respondent's position locally. This makes a mockery of the Public Protector's remedial action, which appellants accepted and never took on review. As an organ of state, the appellants must comply with the Constitution of this country. The principles of fairness, transparency, accountability and consistency are not in harmony with the applicants' submission. This court cannot find any misdirection in this regard.

[39] The fourth ground is the order of punitive costs on an attorney and client scale. Having referred to the *Trencon* case supra, this court's ability to interfere with the court *a quo's* decision on costs is circumscribed. In making a costs order, the court *a quo* was exercising a narrow form of discretion, sometimes called true discretion. This court is of the opinion that it was not permissible for the appellants to engage in a protracted battle around the issue of COLA allowance. Consequently, this order cannot be disturbed.

[40] The final ground of appeal is about the impossibility of enforcing the court's order, since the respondent had already left his post at Lagos, Nigeria when the judgment was handed down. Thus, the judgment was overtaken by events due to the effluxion of time. Even so, the order remains plausible to the extent that it allows the respondent to be compensated retrospectively, *qua* Assistant Director. The practical effect of this order is only limited to that extent. Accordingly, it would not make any logical sense to insist on this order except for the purpose already stated.

[41] Having looked at all the grounds of appeal, the inescapable conclusion that this court arrives at is that all the grounds of appeal, save for the last one (the fifth ground of appeal), stand to be rejected.

Costs

[42] Since the appellant has secured limited success with regard to paragraph one of the court *a quo's* order, this court is of the view that each party should pay its own costs.

[43] In the light of the above-mentioned reasons, I propose to make the following order:

ORDER

1. The appeal is dismissed.

2. Paragraph one of the court *a quo's* order is set aside and substituted with the following:

   To enable payment to the applicant of COLA allowance at a rate of First Secretary/ Consul: Political when he was in Lagos, Nigeria, the respondents are ordered to regard him as having been upgraded to Assistant Director from the commencement of his posting abroad to his departure in Lagos, Nigeria.

3. Each party to pay its own costs.

M.MOTHA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

J. YENDE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I CONCUR

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SELBY BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I CONCUR AND IT IS SO ORDERED

Date of hearing: 18 October 2023

Date of judgement: 21 December 2023

APPEARANCES:

ADVOCATE FOR APPELLANT:	G. T. AVVAKOUMIDES SC
	F. STORM
INSTRUCTED BY:	STATE ATTORNEY
ATTORNEY FOR RESPONDENT:	L. MBANJWA
INSTRUCTED BY:	L. MBANJWA INC.