

CIV/APN/25/83

IN THE HIGH COURT OF LESOTHO

In the Matter of :

KANANELO TLEBERE

Applicant

v.

BASOTHO ENTERPRISES DEVELOPMENT
CORPORATION

Respondent

J U D G M E N T.

Delivered by the Hon. Mr. Justice B.K. Molai
on the 27th day of May, 1983

On 31st January, 1983, Applicant filed with this Court an application in which he sought an order directing the Respondent Corporation to :

- "1(a) Pay to the Applicant an amount of M812-42 being the Applicant's salary for the month of January 1983;
 - (b) Pay to the Applicant the sum of M2437-26 being the Applicant's notice pay due to the Applicant;
 - (c) Pay to the Applicant the sum of M1732-50 being leave pay due to the Applicant;
 - (d) Pay the costs of this Applicant.
2. Granting the Applicant such further and/or alternative relief as the court deems fit."

The case made by the Applicant in his founding affidavit was that during August, 1979, he and the Respondent entered into a contract whereby he was employed as a Project Officer. On 20th June, 1980 and

2/ 3rd July

3rd July, 1981, he was appointed/promoted to the positions of Manager - Project Development and Director of Projects respectively by the Respondent Corporation.

On 6th January, 1983, the Respondent Corporation wrote to Applicant advising him that he was thereby demoting him from the position of the Director of Projects to that of Manager - Project Development which was lower in both prestige and salary on grounds of inefficiency. Applicant denied the accusation of inefficiency and regarded Respondent's unilateral move to demote him to a position lower than that of the Director of Projects which he was holding at the time, as unlawful. It was, in his contention, a repudiation of the terms of their employment agreement on the part of the Respondent. He was, therefore, entitled to either accept or refuse it. He opted on the latter. On the following day, 7th January, 1983 he accordingly addressed a replying letter to Respondent advising him that he was tendering his resignation. He offered three month's notice which offer was rejected by the Respondent. Applicant averred that as of his resignation date he was entitled to 38.5 leave days which converted in monetary terms amounted to M1732-50. Wherefor he prayed for an order as aforementioned.

The Respondent filed intention to oppose and to that end a resolution dated 24th February, 1983 purporting to have been passed on 6th May, 1982 by the Board of Directors of the Respondent Corporation (Annexure "A") was attached. On behalf of the Respondent, the Managing Director, one Benjamin Sebatana, filed the opposing affidavit in which he admitted the Applicant's averments except that when on 7th January, 1983 he resigned from Respondent's employ, Applicant was holding the position of Manager - Project Development and not that of the Director of Projects as Applicant had been effectively demoted on 6th January, 1983.

The opposing affidavit denied that Applicant's demotion was unlawful as it was justified by Applicant's inefficiency and his interests were looked after by offering him a position demanding less responsibilities from which position Applicant had prospects of developing his abilities upwards.

Although in his opposing affidavit the deponent conceded Applicant's entitlement to payment during January, 1983, his entitlement was only from 1st January to 6th January, 1983, the period during which he was an employee of the Respondent Corporation. In his opposing affidavit, Respondent conceded that if at the time of his resignation, Applicant were still engaged in the position of Director of Projects, he would have been entitled to three months' notice pay but because his position had already been reduced to that of Manager - Project Development, his correct entitlement was one month's notice in terms of Clause 12 of the Conditions of Employment (Annexure "B"), governing the employees of the Respondent Corporation, which Clause reads as follows:

"an employee may tender his resignation by giving a one month written notice or payment in lieu thereof. The notice applicable to senior executives and Department Heads shall be three (3) months."

Respondent further admitted that on the day of his resignation, Applicant was entitled to leave pay but denied that it was 38.5 days which amounted in monetary terms to M1732-50. The correct position was that Applicant had 28.5 leave days calculated on the basis of the position that Applicant occupied for the twelve months immediately preceding his resignation (Director of Projects) plus 5 days accumulated leave from the preceding year.

Applicant filed a replying affidavit in which he disputed the genuineness of the Resolution purporting to have been passed by Respondent's Board of Directors on 6th May, 1982 to oppose an action that was instituted in 1983. However, this Resolution was clearly dated 24th February, 1983. 1982 instead of 1983 was most probably written in error as the year on which the Resolution was passed. It appears to me that the insistence that the decision of this application should be based on this minor point is to raise a hair splitting argument.

Applicant reiterated that by unilaterally removing him from the position of Director of Projects, the Respondent effectively repudiated the terms of the parties' contract of employment and as a result he was entitled to terminate the contract and sue for damages as he had done. Applicant persisted in his averment that he was entitled to 38.5 leave days and in proof thereof attached a copy of his completed leave application form (annexure "A") according to which he had 22.5 days leave holiday due to him as at the end of September, 1982. He averred that during the next succeeding months i.e. October, 1982, November, 1982, December, 1982 and January, 1983, he earned an additional eight leave holidays. A further six days had to be added to the three months' notice period. During the month of December, 1982, the Respondent closed for the festive season on 22nd December, 1982 during which period he was still on leave as reflected on his completed leave application form (annexure "B"). The total number of leave holidays due to him was thus 38.5. It must, however, be pointed out that the application form (annexure "B") refers to Applicant's leave taken during the period 22nd December, 1980 to 2nd January, 1981 and does not seem to have anything to do with the festive season December, 1982. It cannot, therefore, be relied upon as a basis for Applicant's contention that he is entitled to additional two days leave. Indeed, I can find nothing on the conditions of employment, Annexure "B", to support this contention.

It is not really disputed that Applicant was holding the position of Director of Projects in the Respondent's employ until 6th January, 1983 when Respondent demoted him to a position lower in status and salary namely that of the Manager - Project Development. The reason advanced by the Respondent for his unilateral move to reverse Applicant's position was that he was inefficient in the discharge of his duties. That was of course vehemently denied by the Applicant and was therefore not an issue that could be satisfactorily resolved on affidavit papers.

It may be mentioned, however, that confirmation to the position of Director of Projects admittedly required prior satisfactory service of a period of probation which period Applicant had satisfactorily served before he was confirmed on the position of Director of Projects. That granted, it seems to me that the implication was that Applicant had effectively proved his efficiency in the discharge of the responsibilities attached to the position of Director of Projects. It follows, therefore, that if Respondent now avers that Applicant had to be reverted to a lower position because of inefficiency, the onus is on him to prove his averment on a balance of probabilities. To discharge this onus more is required from the Respondent than his mere bold averment that Applicant is inefficient. This, in my opinion, he has failed to do on the affidavit papers before this Court. I am not, therefore, satisfied that Respondent has on a balance of probabilities proved that the reason on which Applicant had been reverted to a lower position was justifiable. Ramsbottom, J. writing on a majority judgment in Venter v. Livni 1950(1) S.A. 524 at p. 528 held :

"a master cannot by a unilateral act of dismissal terminate a contract of employment unless he has good grounds for doing so."

By analogy, it must be accepted that the employer cannot by a unilateral act demote an employee unless he has good reasons for doing so. If he does surely the

employee is entitled to regard that as a repudiation of the contract. In Smith v. Cycle and Motor Trade Supply Co. 1922 T.P.D. 324 at p. 326 et seq. Wessels, J.P. succinctly put the law in the following terms:

"An employer who employs a servant for a particular work, and gives him a particular status, is not entitled without the sanction of the employee to alter the character of that contract. The contract remains intact until both parties agree to alter it; it cannot be altered at the instance of one of the parties. The employer cannot say to his employee, 'I am now going to alter the contract between us - which is that you shall act as Manager of the local branch at Johannesburg - into another contract that you shall act as bookkeeper at the Johannesburg branch.' If he does so it is tantamount to breach of contract and to a dismissal and the employee is then entitled to say "I will accept this as a dismissal and I will sue you for damages."

On the authority of the above cited decision when on 6th January, 1983, the Respondent unilaterally reverted Applicant's position of Director of Projects to that of Manager - Project Development which was lower in status and salary, he was repudiating the contract which repudiation amounted to a dismissal. Applicant was therefore entitled to say, as he did, he accepted that dismissal and would sue the Respondent for damages.

However, when he was so dismissed, Applicant was entitled to a notice pay. Indeed, this was common cause. The only question was whether the Applicant's entitlement was a notice of one month or three months. As has been pointed out earlier, Clause 12 of the Regulations which govern the employees of the Respondent Corporation provides that an employee holding a senior executive position is entitled to a three months' notice. I take the view that at the time his contract was repudiated and therefore his

dismissal, Applicant was holding the position of Director of Projects which is admittedly a senior executive position. It follows, therefore, that Applicant was entitled to notice pay calculated on the scale enjoyed by officers holding senior executive positions (e.g. Director of Projects) namely three months' notice. In their work, Mercantile Law of South Africa 15th Ed. at p. 228, Wille and Millin say :

"Notice may validly be given at any time on the first day of whatever period of Notice is necessary. Thus, in Tiopaizi v. Bulawayo Municipality (1923 A.D. 317), where the servant was entitled to a calenda month's notice, he was held to have received a valid notice on the 1st December to expire on the 31st December."


Having decided that Applicant was entitled to a three months' notice, it would appear that to be valid his notice had to begin on the first day of the month, namely, the 1st of February, 1983 and not in the middle of the months of January for which he had already started working for the Corporation and therefore, entitled to at least 6 days pay plus damages (on the basis of his unlawful dismissal) for the remaining days of the month.

Although it did not dispute that Applicant was entitled to payment for the number of leave holidays due to him, Respondent Corporation's contention was that Applicant had 28.5 days due to him. However, Applicant disputed the correctness of that figure and contented that as at the end of September 1982, he had 22.5 days' leave holiday due to him. In proof thereof he attached his completed leave application form (annexure "A" to the replying affidavit) signed by the Respondent's personnel officer and the Deputy Managing Director. According to the Regulations governing the employees of the Respondent Corporation, the leave entitlement of a Director of Projects is 24 days per annum. From October 1982 to January, 1983, the leave entitlement

8/ which accrued

which accrued to him was 8 days which must be added to the 22.5 days, a further six days must be added for three months' notice period. That gives Applicant a total number of 36.5 leave days due to him. I have already pointed out earlier that Applicant's contention that he was entitled to a further 2 days leave based on the completed leave application form, annexure "B", of the replying affidavit is unacceptable because annexure "B" refers to leave taken during the period between December 1980 and January, 1981.

In the light of what I have said, It is obvious that I hold the view that the application must succeed. I accordingly make the order in terms of prayers 1 (a) (b) (d) and (c) in the sum of M1,642.50 being the equivalence of 36.5 leave days in monetary terms.


B.K. MOLAI
JUDGE

27th May, 1983.

For Applicant Mr. Radebe
For Respondent : Mr. Harley