CIV/T/7/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

TSELISO RAKHOBOSO SHAO — Plaintiff

vs

MORIJA PRESS BOARD — Defendant

RULING ON COSTS

Delivered by the Honourable Mr. Justice T. Monapathi on the 14th day of September, 1994

In terms of Rule 32; it is required:

"(1) That parties to any civil action may after institution of proceedings agree upon a written statement of facts in terms of a special case for adjudication of the Court.

(2) Such statement shall set forth the facts agreed upon, and by agreement of all the parties copies of documents may be annexed

thereto and the statement shall also set out the questions of law in dispute between the parties and the respective contentions.

(3) The statement shall be divided into consecutively numbered paragraphs in such a manner as will be most convenient for the Court.

It shall be signed by the parties personally or by an attorney on behalf of each party or by an attorney and an advocate duly instructed by such attorney on behalf of a particular party." In terms of the said rule the parties herein duly set down for hearing the special case for the 14th September 1994. The statement in terms of the Rule 32 was made into seven main paragraphs, the first three paragraphs containing what appeared to be agreed facts, the forth paragraph containing what were termed points of law, the fifth paragraph being headed PLAINTIFF'S CONTENTION and the sixth paragraph being headed DEFENDANT'S CONTENTION. I would disregard the seventh paragraph (the last paragraph) for the purpose of my ruling.

In the morning after a short argument I made an order that the matter be postponed for hearing on evidence to the 12th and 13th October 1994 and that I would in the meantime make a ruling

as to costs of today. The argument which had necessitated this ruling has been a little over one hour and fifteen minutes. In the ruling I am supposed to make an award of costs of this today's hearing. Mr. Tsotsi for plaintiff submitted that the costs should be awarded to his client and on the other hand Mr. Matsau submitted that costs should be costs in the cause or alternatively they be reserved for decision by the trial judge after the hearing of the main matter. This he said is most prudent because the Court will have been able to observe all issues and to be able to correctly decide whether that the issues disclosed in paragraph 5.1 of the agreement and 6.1 of the agreement are matter of law or matter of fact. Mr. Matsau submitted that test would be:

(a) Whether he properly resiled from the agreement and that correct interpretation of the matters in paragraphs 5.1 and 6.1 of the agreement is that they are matter of fact not of law.

It is clear that the paragraphs 5.1 and 6.1 show that the parties are poles apart and hold (so to speak) diametrically opposed positions. Let us see how the paragraphs read :

"5.1 It is the plaintiff's contention that the

contract should be deemed to have given plaintiff a permanent appointment in the position of Assistant Manager with a view to promoting him to the position of Manager of at the end of the two year period."

and

"6.1 Defendant contends that plaintiff had been employed on a probationary period of two years commencing from the 1st October, 1986 to the 30th September 1988 in terms of the letter of appointment and the contract."

Why does the plaintiff take up the position that the plaintiff should be deemed? Does this "deemed" to refer to a permanent appointment or to the position of Assistant Manager or does it refer to promoting him at the end of the probational period? On what basis and on what understanding did the parties agree on this point of law under 2.1 which reads:

"2.1 Was the defendant obliged in terms of the contract and annexure MPB1 to confirm plaintiff to the position of the manager after the termination of the two year period

from the 1st October 1986 to September 1988?"

This appeared to suggest that the parties were in agreement as least as to what legal intepretation should be given to this agreed statement of facts. But this appears to be quite consistent with the position in 5.1 and 6.1. There is a decision of this Court on a similar point (see Lesotho Planned Parenthood Association vs Nthabiseng Moshabesha CIV/T/269/87 - per B.P. Cullinan CJ on 5th February 1992). If the parties were not in agreement as to that the plaintiff remained in probation until the allegedly purported termination why did the parties co-sign the statement as to this point of law?

I have found myself to be under extreme limitation in wanting to comment about so many things for the purpose of my ruling without prematurely pre-empting the decision of a trial judge on for instance the following things:

(a) Whether the agreement annexure A amounts to a substitution or novation of the letter of appointment.

(b) Whether the plaintiff remained on probation throughout.

It may well turn out to be true that the agreement in annexure A, which was entered into after the letter of appointment was a novation of the original contract. In that case it is important to know about the backround circumstances of the facts which brought about the novation, simply put this means a substitution of the original contract. In that case is it not correct that it now becomes a question of fact to the extent that such circumstances are a matter of of evidence or proof? In that case furthermore, it would mean that the documents do not speak a complete language for the purpose of interpretation and deducing the correct legal position from them. I have borne in mind this important commentary by the authors of South African Law of Evidence, 4th edition at page 294 when speaking of the Parole Evidence Rule that "The general rule is that a document is conclusive as to the terms of the transaction which it was intended on or required by law to embody. <u>But this statement requires considerable amplification,</u> and it will be convenient to give separate treatment to the effect of the rule on four kinds of documents: contracts which the parties have agreed to reduce to writing, transactions which are required by law to be in writing, negotiable instruments, and certain judicial and quasi-judicial records: See also <u>Johnson v Leale</u> 1980 (3) SA 927(A)

I am satisfied that a complete answer to whether Mr. Matsau

correctly resiled from the position that the matter can be resolved on the law only and his latter attitude that he needs support of evidence in his client's case can only be completely answered after the whole case. Again, very fairly so, a party would not be bound not to change his attitude to a signed agreement. I suppose it does not matter as to when he changes as long as it is before judgment. Incidentally Mr. Matsau came to a change of mind as a result what was revealed by Mr. Tsotsi's brief submissions. It may turn out that it is true after all that the parties were under a common mistake, after all.

Counsels did address me very briefly as to the costs resulting from the postponement. In these addresses they spoke of the Court's indulgence and discretion. I would find no fault with that. I was not addressed on prejudice resulting from the postponement, and in relation to the reason which has caused the postponement. I am sure if Counsels had addressed me bearing in mind the vital distinction between costs of postponement, costs of the day and wasted costs, "I may" have been persuaded to order differently as to costs. For the very reason that I have found that argument would turn around whether the Annexure A novated the letter of appointment (which can only be resolved by an investigation into the circumstances of the novation) this also suggests on the face of things a mistake common to both parties. I decide that costs shall be costs in the cause.

T. MONAPATHI
JUDGE

14th September, 1994

For the Plaintiff : Mr. Phoofolo noted judgment for M.T. Matsau & Co.,

For the Defendant : Mr. L. Thetsane noted judgment for W.M. Tsotsi & Co.