

IN THE COURT OF APPEAL OF LESOTHO

**C OF A (CIV) 70/2014
CIV/T/241/2013**

In the matter between:

MINISTER OF FOREIGN AFFAIRS MINISTER OF PUBLIC SERVICE PRINCIPAL SECRETARY-FOREIGN AFFAIRS THE ATTORNEY GENERAL	1ST APPELLANT 2ND APPELLANT 3RD APPELLANT 4TH APPELLANT
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and

MALEFETSANE MOHAFA

RESPONDENT

CORAM: P.T. DAMASEB, AJA
 P. MUSONDA, AJA
 J.Y. MOKGORO, AJA

HEARD : 29 JULY 2015
DELIVERED : 7 AUGUST 2015

SUMMARY

Tacit renewal of Foreign Service Engagement Contract – non-compliance with termination Clause 7 (1) of Schedule to contract, read together with contract itself – conditions of termination clause not met-constituting unlawful termination.

JUDGMENT

MOKGORO, AJA:

[1] This is an appeal against the judgment of Makara J, handed down on 15 October, 2014, in the High Court.

[2] The first appellant in this matter is the Minister of Foreign Affairs, while the Minister of Public Service and the Principal Secretary – Foreign Affairs are the second and third appellant respectively. The respondent is Malefetsane Mohafa, then Ambassador of Lesotho to Libya, Tripoli.

[3] The question before the High Court was whether or not the termination of what is termed an *engagement contract* between Respondent and the Government of Lesotho was in terms of the termination clause 7(1) of the schedule to the engagement contract, read with the contract itself.

[4] The Court *a quo* concluded that the termination of the contract was not in accordance with clause 7 (1) and held that, on a balance of probabilities, the termination was contrary to clause 7 (1) and therefore unlawful.

Factual Background

[5] Material facts which are common cause are that, a written contract of employment had been concluded between the

government of Lesotho (“the government”) and Malefetsane Mohafa (“Respondent”), on or about 2 April, 2009, in terms of which Respondent was appointed Ambassador of Lesotho to Libya, to be stationed at Tripoli; Libya.

[6] That contract was for a period of 36 months and could be renewed by Respondent on a 5 months’ notice before the completion of the contract term.

[7] The government could also terminate the contract on a written notice period of three (3) months. Important for the purposes of this matter is that, in the absence of a written notice of three (3) months, government may pay a three (3) month’s salary in lieu of the written notice.

[8] On 18 August, 2011 Respondent gave government the requisite five (5) months’ notice, but expressing his appreciation for an extension or renewal of the contract for a further 36 months.

[9] On receiving Respondent’s request the Minister of Public Service submitted a memorandum to cabinet, recommending extension of the engagement contract, for a further 36 months as requested.

[10] In terms of clause 10 of the contract of engagement, satisfactory completion of the period of appointment makes him eligible for a gratuity of 25% of the aggregate amount of salary

received during the period of employment. The same benefits and policies would apply in relation to any extension period he would serve.

[11] Indeed the recommendation for a renewal of the Respondent's term of engagement was punctuated with recognition of his good service.

[12] However, between 18 August 2011 and the time when Respondent had submitted his request, to 22 August, 2012, some eight (8) months after his initial contract of 36 months had expired, Government had not provided any official response to Respondent's written request for extension of his contract.

[13] Despite the absence of a formal response to the request, it is common cause that Respondent continued to serve in his capacity as Ambassador to Lesotho in Libya, for another eight (8) months with no change in any of the terms and conditions of the initial contract, including the same salary and other related benefits.

[14] On 22 August, 2012, eight (8) months later, government replied to Respondent's request in a letter, informing him that his request for extension of his appointment was unsuccessful. In the letter, he was instructed to round up his affairs in Libya, and to return to Lesotho, reporting to the Headquarters of the Ministry of Foreign Affairs and International Relations on 6 November 2012.

[15] After his return to Lesotho, the Respondent did not continue to serve Government. However his salary for the last month of service in November was paid.

[16] However, it was also common cause between the parties that government had, at the time the matter came before the High Court, not paid the gratuity due to Respondent for both the full term of the contract of 36 months and the extended period he actually served, i.e eight (8) months.

[17] What the parties are at variance with is whether Respondent's period of engagement was extended beyond the date he was served with the letter of termination of Foreign Service. In that regard, the Court *a quo* had distilled three further questions for determination in that Court:

- (i) Whether Respondent's extended period of employment was terminated in compliance with the termination clause of the employment contract;
- (ii) Whether government was liable for the loss of salary for the remaining 28 months of the renewed contract period and
- (ii) Whether government was liable to pay gratuity for the initial period of the full contract term of 36 months and for the extended term.

[18] The High Court held that the termination of the Respondent's engagement had not been in compliance with the

termination clause. The Court held that the letter communicating the termination did not address the essential terms of the contract. Instead it addressed issues irrelevant to those which determine the contractual rights of the Respondent.

[19] Rather than stipulating the termination rights of the engagement contract, in terms of clause 7 (1) of the contract, Government did not indicate the option it is exercising in the choice between giving Respondent the written notice of three months or the payment of salary for three months in lieu of salary.

[20] Thus, the High Court concluded, the termination of the contract was not in compliance with clause 7 (1) of the contract of engagement. Thus, on a balance of probabilities, Respondent had established his claim, the Court held.

[21] It is this decision of the Court *a quo* that Government is taking on appeal before this Court.

In this Court

[22] The appellants raise three grounds of appeal:

- (i) The Court *a quo* was in error, deciding as it did, that appellant's had unlawfully terminated a tacitly renewed contract of engagement, concluding that Government had failed to give Respondent the required three – month

written notice, which Government had paid Respondent a full salary for each of the three months in lieu of notice.

- (ii) The Court *a quo* erroneously decided that government had unlawfully terminated the contract, based on the reasons given in the letter of termination, which was not an issue before the Court. What was at issue was whether the termination was in compliance with the termination clause 7 (1) of the engagement contract.
- (iii) The Court *a quo* erroneously decided that the contract was not terminated where the Court was uncertain whether Respondents' contract had been terminated, in that the letter of recall was not properly a letter of recall. The Court thus based its decision on a non-issue before that Court.

The Issues at Hand

[23] It is common cause that Respondent had entered into a contract of engagement with government, wherein Respondent was appointed as Ambassador of Lesotho to Libya, to be posted to Tripoli for a period of 36 months.

[24] Attached to the contract was the Schedule containing conditions of the contract of engagement, including the terms of engagement, the duties of the engage, salary conditions leave of absence and liability for damages.

[25] More importantly, however, for purposes of this judgment, the schedule includes the terms and conditions regarding termination of the contract of engagement, i.e clause 7(1) – (3) and also issue of the gratuity in terms of clause (10) (1).

[26] Clause 7 (1) provides:

“Termination of engagement

7(1) The government may at any time terminate the engagement of the person engaged by giving him/her three months’ notice in writing or on paying him/her three month’s salary in lieu of notice.”

[27] Indeed, government may, in terms of this clause, terminate an engagement at anytime. However, government may not freely do so, as clause 7(1) comes with internal conditions which require compliance as the clause forms part of the contract between government and the engage.¹

[28] The internal conditions specifically stipulated in clause 7 (1) are:

- *A three-month notice to be given to the person engaged;*
- *The notice must be in writing and*
- *Government must in lieu of notice in writing, pay the person so engaged, 3 month’s salary.*

[29] It was the contention of the appellants that, although Respondent was not provided with the requisite three-months’ notice in writing prior to the termination of his tacitly extended

¹ See “The Kingdom of Lesotho Form of agreement or officers employed in Local Contract Terms (In the preamble, P.7 of Court Record.

contract, he was paid his full salary for each of the remaining three months.

[30] Respondent indeed received a letter terminating his engagement, on 22 August, 2012. So much was common cause. In the letter he was instructed to report to the Ministry Headquarters on 6 November, 2012. Nothing in the letter gave an indication why he had to report to the Ministry.

[31] The reason for the reporting, it turned out in oral testimony before the High Court, as contended by Appellants, was “for the purposes of serving the remainder of his term at the Ministry.” The High Court rejected this justification on the part of Government, and correctly so, as it had been brought up for the first time in Court, too late for the purposes of compliance with clause 7 (1). Besides there was, in addition, as the learned Judge held, no basis laid in the pleadings.

[32] It is not for nothing that certain employment contracts require a period of time to be given as notice regarding the termination of an employment contract. When an employee is faced with termination of employment, it may have serious unemployment implications for future life-plans, particularly when the termination is unexpected and not of his or her own doing.

[33] An employee may need to know ahead of time that a life-changing experience is on the horizon. And as he or she plans ahead he or she may want to be certain of the reasons for the termination in the event that they may have to make alternative arrangement for the

[34] Also common cause between the parties was that Respondent had served his full 36 months term in his position in terms of a contract which had come to term. At the requisite five months before the expiry of his 36 month term of office, he duly expressed his intention to continue in his post, submitting an application to be considered for another 36 month term, in terms of clause 10 of the Schedule to the contract.

[35] It was also common cause that Respondent had been recommended for the renewal of his contract term, drawing attention, as part of the recommendation to his good service as Ambassador. The contract which commenced on 31 March 2009 had been due to reach its full term of 36 months on 31 March 2012. The 5 month notification in terms of clause 11, was submitted on 18 August, 2011.

[36] Until 22 August, 2012, as already indicated, there had been no word from Government regarding Respondent's application. On that particular date in August, 2012, he was presented with the letter of recall. That letter terminated his existing contract which, it was also agreed between the parties, was an extension of the initial contract which had come to full term. The letter was

written by 3rd appellant, acting with the concurrence of 1st Appellant, and had resulted from a cabinet decision.

[37] In the interim, he had spent eight (8) months after the expiry of his initial contract, in his position as Ambassador, drawing his usual salary and benefits of employment.

[38] Whereas according to Respondent, what was extended was 36 month contract renewal he had applied for, appellants however contended that the extension was for 8 months only, because the letter of recall was presented to him eight months after he had submitted his application for renewal.

[39] Once this question, presenting the clear difference between the parties is resolved we would then determine whether that contract was breached. If there is no breach, it will be the end of the matter. If however a breach is shown, the question of *quantum* constituted by loss of earnings or salary will become relevant.

The tacit contract

[40] The main question for consideration now is the question of the status of the contract which existed at the time the Respondent was presented with the letter of recall.

[41] As already indicated, there is no question that Respondent had, on 18 August 2011, presented government with a letter requesting renewal of his existing contract for another 36 months

in terms of clause 11 of the engagement contract. Further, after the expiry of the first engagement term of 36 months, Respondent continued to serve in his position as Ambassador, drawing a salary and all other benefits until 8 months into the period after the expiry of his initial contract. That was when he was presented with the letter of recall dated 28 August, 2012.

[42] There is no question between the parties as to the existence of a tacitly renewed contract of engagement. They however differ as to how long the tacitly renewed contract was extended for. Whereas Appellants contended that it was for another 8 months, Respondents submit that it was for another 36 months, the period of time stipulated in his written request for extension.

[43] The position of Respondent was that the letter of recall was not a response to his request for a further 36 month engagement, for which he had not even had an acknowledgment of receipt. In this regard, the Court *a quo* held that the letter communicating the termination of the contract did not address any of the other issues relating to the contract of engagement. Although the letter clearly ended the existing contract, it was silent as to any of the conditions required to be stipulated therein by clause 7 (1). For that reason in our view, that the Court *a quo* found that the termination letter was not compliant with clause 7(1) of the contract.

[44] It is also for that reason, in our view that properly considered, the reasons for termination of the contract, as part of

the *content* of the termination letter was not a non-issue before the Court *a quo* as Appellants contend. They were central to the question whether the termination letter had conveyed to the Respondent what he had to know, regarding the conditions of the termination of his engagement, so that presumably he may determine an exit plan for himself, in line with the real purpose of a period of notice at the termination of a contract of employment.²

[45] It was the submission of Appellants and indeed a strong ground of their appeal that the Court *a quo* had erroneously taken into account, the reasons given in the termination letter as the basis of its decision, that government has failed to comply with clause 7 (1).

[46] Although we do not proceed to the specific reasons provided in the letter of termination, we do determine that the contents of the letter of recall in this case were central to the determination of compliance with clause 7(1). What the termination letter must convey to the engagee, whose contract is terminated is clearly prescribed in clause 7 (1): whether the employee will serve a notice period of 3 months, or whether a salary- equivalent of 3 months - will be paid in lieu of notice is critical. Thus, in regard to the approach we take, regarding what needed to be conveyed to the Respondent in the termination letter, government's own submissions in their heads, is fortifying indeed.

² See f/n 2 above, para.30

[47] Therefore, the content of the letter must include the conditions of the termination of the contract of engagement, in the terms prescribed in clause 7 (1). Failure to do so results in non-compliance with clause 7 (1) of the contract of engagement.

[48] To the extent that the termination letter did not include the conditions of termination of the contract required to be conveyed in clause 7 (1), we agree with the Court *a quo* that the termination of the contract of engagement was non-compliant with clause 7 (1) of the contract of engagement and therefore unlawful.

[49] Regarding the length of the tacitly renewed contract, the question is whether the contract had been extended for a period of 8 months or for a full term of 36 months, as government and Respondent had submitted respectively. The question is also crucial.

[50] Having decided that the termination of the contract was unlawful, the issue of the amounts of termination benefits payable comes into sharp focus.

[51] It was agreed and common knowledge between the parties that Respondent had applied for another 36 months – contract 5 months before his initial contract had expired and recommendations had been made, motivating for the approval of his application.

[52] He continued with his service in the position of Ambassador and continued to draw a salary and earn other employment benefits applicable in his position. He is also on record as having expressed that he had expected that his contract will be renewed, as although there was no response regarding his application for extension, it will be approved, as it was not unusual for government to give approval to applications of this nature in retrospect.

[53] In addition, considering the glowing terms in which the recommendation to cabinet for his re-appoint was treated, he had in our view, a legitimate expectation that his contract will be renewed, even after eight months into the expected second term. In this regard, the learned judge in the Court *a quo* held:

“There is a foundation in the [Plaintiff] submission that the Government had tacitly renewed his contract for the following 36 months. Thus is attested to by the material background to the letter of recall. The supportive relevant revelations are that it was authored almost 8 months after the [Plaintiff] had lodged a request for renewal/extension of the initial 36 months of contract. The Government kept silent without even acknowledging in writing its receipt of the request. And in the meanwhile he continued with the service on the understanding that the silence indicated that he would be retrospectively engaged for the next 36 months. The expectation was indisputably based upon precedence in treating cases of the officials.”³

[54] To fortify his analysis of the above background, the learned judge draws fortification thus:

“If after the agreed date for the termination of the contract the employer continues to pay the agreed remuneration, the contract is

³ See Judgment of the Court *a quo* at para 35 p. 191 of the record.

deemed to have been tacitly renewed, provided that an intention to renew is consistent with the parties conduct.”⁴

[55] Besides, there is indeed no evidence on the record demonstrating that government had after receipt of the request for renewal, displayed conduct that it will *not* renew the contract, considering the glowing recommendations of cabinet and the continued employer and employee relationship, which manifested itself between them. For the foregoing reasons, we agree with the finding of the Court *a quo*. The tacit contract which was established was that of 36 months and not the 8 month duration as Appellants had submitted, that conclusion is based on the conduct of Government prior to the presentation of the letter of withdrawal. Government’s conduct in this regard is indeed a classical example of what would culminate in the application of the principle of estopped.⁵

[56] In our view, the above narrated reasons suffice for our conclusion that the tacit contract which existed at the time Respondent was presented with the letter of recall, was for 36 months as opposed to the 8 month contract Appellant’s contended for.

[57] As for the question whether the letter of recall was properly a letter of termination, based on our approach in this matter, it is in our view not decisive of the unlawful termination of the contract of engagement, considering the conduct of the parties

⁴ See John Grogan; Employment Rights; Juta, p.62 as referred to at para.34 of the judgment of the Court *a quo*.

⁵ See *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co. Ltd* 1963 (1) SA 632 (A)

clearly pointing to the termination of the contractual relationship between them.

[58] Having concluded that government was non-compliant with clause 7 (1) of the Schedule to the contract of engagement and therefore in breach of its terms and conditions, in that the 36 month tacitly renewed or extended period of engagement was terminated without complying with the relevant clauses requisite payment of gratuity, and, in the context that Appellants did not discharge the onus of proof that the termination did not fall within the prescripts of clause 7 (1), we hold that the appeal cannot succeed.

[59] In the result, we make the following order:

Order:

The appeal is dismissed with costs.

J.Y. MOKGORO
ACTING JUDGE OF APPEAL

I agree

P. T. DAMASEB
ACTING JUDGE OF APPEAL

I agree

DR P.T. MUSONDA
ACTING JUDGE OF APPEAL

For the Appellant : Adv. F. Mohapi

For the Respondent : Adv. Z.Mda KC