

IN THE HIGH COURT OF LESOTHO

In the matter between:

M.W. MATTHEWS

Plaintiff

and

STIRLING INTERNATIONAL ENGINEERING LTD

Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola  
- on the 16th day of February, 1988

---

The plaintiff is claiming payment of the sum of M33,760-11 by the defendant being unpaid annual increments and overtime earnings for the period April 1983 to March 1987, and payment in lieu of notice, interest thereon at the rate of 15% per annum, payment of damages for unlawful dismissal in the sum of M7, 079-04 and costs of suit.

On the 2nd July, 1987 the defendant filed a Notice of Appearance to defend. On the 3rd July, 1987 the defendant filed with the Registrar a Notice to furnish security for costs on the ground that the plaintiff is a peregrinus of Lesotho and that he was unemployed. In the notice the plaintiff was required to furnish the security for costs in the amount of M2,000-00 within ten (10) days after service of the notice upon him.

The plaintiff did not respond to the request until the 20th July, 1987 when the defendant filed an application in terms of Rule 48 (3)

of the High Court Rules 1980 seeking an order directing the plaintiff to furnish security for defendant's costs in the sum of M2,00-00 and directing that all further proceedings in the above matter be stayed until aforesaid order is complied with. Mr. Koornhof, counsel for the defendant, filed an affidavit in which he deposed that the plaintiff is a peregrinus of Lesotho and that he is unemployed.

The plaintiff opposes this application on the ground that he is not a peregrinus of Lesotho. In his affidavit he deposes that he has been a bona fide legal resident of Lesotho since the 7th April, 1977 permitted by the Immigration authorities of Lesotho under 2 year indefinite permits renewed successively since 1977. He claims that he currently holds a valid residence permit. He deposes that his intention is to remain permanently in this country and that as proof of this intention he has applied for citizenship of Lesotho. His application has been recommended by the Immigration authorities to the Minister of Interior. He is married to a Mosotho girl.

It is trite law that in an application of this nature the onus is on the applicant to prove that the plaintiff is a peregrinus. In the present case the defendant has failed to discharge the onus. In the founding affidavit Mr. Koornhof alleges that the plaintiff is a peregrinus but does not substantiate the allegation. He does not even mention that the plaintiff is a national or citizen of any particular country other than Lesotho, nor does he mention circumstances which tend to show that the plaintiff has no intention of remaining in this country permanently.

The evidence of the plaintiff is criticized on the ground that he has not annexed residence permit and that he has failed to obtain any affidavit from the officials of the Immigration Department to support his allegations that he has in fact applied for citizenship as proof of

his intention to remain permanently in this country. I do not think that without the supporting affidavits and a copy of the residence permit, this Court cannot decide the matter. The plaintiff has filed an affidavit in which he has stated the facts in detail and there is no evidence from the defendant to controvert those allegations, the defendant has not even filed a replying affidavit to deny what the plaintiff has deposed to. Failure to file a replying affidavit may be taken as an admission of what is alleged in the answering affidavit.

As I pointed out in the case of Lesotho Agric. Development Bank v. D.L. Ntlhansinye, CIV/APN/25/86 (unreported), the ordinary rule is that in an application of this nature three sets of affidavits are allowed, namely, founding or supporting affidavits, answering affidavits and replying affidavits. In his replying affidavit the applicant is expected to adduce any piece of evidence which is relevant to the issue and which serves to refute the case put up by the respondent in his answering affidavit. See Civil Practice of the Superior Courts in South Africa, 3rd edition at p. 72. In the present case the evidence of the plaintiff remains unchallenged because no replying affidavit was filed.

In any case, the mere fact that the plaintiff has remained in Lesotho for almost eleven years without any difficulty to have his residence permit renewed after every two years, shows that his hope that his application for citizenship is most likely to be approved is not without foundation. The application for Lesotho citizenship seems to be genuine and not made for the purposes of these proceedings. It was made on the 9th January, 1984 long before these proceedings were instituted or even contemplated because at that time the plaintiff was still employed by the defendant.

In an application of this nature the plaintiff need not show he is domiciled within the jurisdiction of the court; "it is sufficient

if he is resident within the jurisdiction, and the residence in this context means residence of permanent or settled nature, where the residence at the time of the application is prima facie of a temporary nature merely, the respondent must show that such temporary residence is the beginning of a settled and permanent residence."

See Kallos & Sons (Pty) LTD v. Mavremati 1946 W.L.D. 312 at p. 315.

The plaintiff in the present case has shown that his residence in Lesotho is of some permanent and settled nature.

The facts of this case are more or less the same with the facts in the case of Joosub v. Salaam 1940 T.P.D. 177, though in that case the plaintiff was a prohibited immigrant. The headnote reads as follows

"Respondent, an Asiatic and prohibited immigrant, had resided continuously in the Union since December, 1933, under a temporary permit which had been renewed from time to time and it was his intention to continue to reside in the Union, by reason of his calling and good conduct it was likely that he would be allowed to remain permanently. In an application for an order on the respondent to furnish security for the costs of an action instituted by him against applicant for the recovery of £5,000 damages for defamation, Held, that respondent was not liable to furnish security inasmuch as he should be regarded as an incola by reason of his residence in the Union coupled with his intention to remain permanently and inasmuch as his residence was not unlawful and he was not debarred from the acquisition of domicile."

In my opinion the plaintiff is an incola of Lesotho and as such is not liable to furnish security for costs.

The application is dismissed with costs.

J.L. KHEOLA  
JUDGE

16th February, 1988.

For Plaintiff - Mr. Addy  
For Defendant - Mr. Koornhof