IN THE HIGH COURT OF LESOTHO

CIV/T/329/99

In the matter between:

AARON LITHOKO	**PLAINTIFF**
And	
TIKOE MATSOSO	**1ST DEFENDANT**
NTJA NCHOCHOBA	**2ND DEFENDANT**
THE MINISTRY OF WORKS (CIVIL SECTION)	**3RD DEFENDANT**
ATTORNEY GENERAL	**4TH DEFENDANT**

JUDGMENT

Delivered by the Honourable Madam Justice L. Chaka-Makhooane on the 27th day of November, 2012.

Summary

Action for damages for unlawful termination – Plaintiff failed to prove any damages – Order – Absolution from the instance with costs.

ANNOTATIONS

CITED CASES

1. Pillay v Krishna 1946 AD 955
2. WD Russel (Pty) Ltd v Witwatersrand Gold Mining 1981 (2) SA 21W6
3. Theko v Commissioner of Police 1990 – 1994 LAC P 239
4. Frasers Lesotho Limited v Hatabutle (Pty) Ltd LAC 1990 – 1994
5. Benson & Simpson v Robinson 1917 WLD
6. Robinson v Ranfontein Estates Gold Mining Company Limited 1925 AD
7. Impretet (Pty) Ltd v National Transport Commission 1993 Volume 3 SA 94
8. Keketso Liphotho v The Commander of LDF and the Other CIV/T/488/2007
9. Victorial Falls and Transvaal Power v Consolidated Langlaagte Mines 1915 AD
10. Hoffman and Carvalho v Minister of Agriculture 1947 1947
11. Lebajoa Monamatha and Lehlohonolo Mataboe C of A (CIV) 24/2009
12. Commander LDF and Others and Motlatsi Magaga C of A (CIV) No. 33/2011

STATUTES

BOOKS

1. LTC Harms, Amler's Precedents of Pleadings 4th Ed 1993
2. Schwikkard PJ, Principles of Evidence 1997
3. Christie RH, The Law of Contract in South Africa, 4th Edition, 2001

[1] This is a matter involving a claim for damages for breach of contract. The plaintiff entered into a written contract with the 1st defendant (representing the Ministry of Works of the Government of Lesotho) for construction of a footbridge. The said footbridge was to be constructed in Qacha's Nek, at the Thaba-Chitja constituency. It is common cause that the life span for the contract in question was to be for six (6) months. The contract price agreed by the parties was M120,297.50.

[2] In terms of clause 2(d) of the contract, the contractor (plaintiff) was expected to be on the site and working within 14 days of the signing of the Agreement. Failure to observe the aforesaid timeframe was to automatically annul the contract according to the same provision of the contract. The Plaintiff was obliged to provide two (2) or three (3) skilled employees for performance of the work, while the unskilled labour was to be provided and remunerated by the Member of Parliament ("MP") for the Thaba-Chitja constituency, in terms of clause 3 of the contract.

[3] It is common cause that the footbridge in question was not ultimately constructed. Furthermore, the contract was finally terminated by the

respondents. It is in view of that termination that the plaintiff instituted the present action for breach of contract claiming:

a) The contract price in the sum of twenty thousand, two hundred and ninety seven Maluti and fifty lisente (M20,297.50).

b) Costs incurred while on the site before and after termination to the tune of three hundred and fourteen thousand, three hundred and fifteen Malotu and fifty lisente (M314,315.50).

c) Interest at the rate of 18%.

d) Costs of suit.

e) Further and or alternative relief.

[4] The claim was vehemently opposed.

[5] It is fitting to recount the brief facts which led to the dispute in this matter. It is to be noted that the plaintiff abandoned prayer (b) wherein he was claiming three hundred and fourteen thousand, three hundred and fifteen Maluti and fifty lisente (M 314,315.50). The facts are that the plaintiff claims that the MP for the Thaba-Chitja constituency had informed him not to go to the site where the bridge was to be constructed until the latter had

secured the labour force that would work there. The plaintiff contends that the aforesaid arrangement was a term of the contract, that is, for the MP to provide the semi-skilled labour force. As a consequence of the MP's instruction, the plaintiff alleges that he started work almost two (2) months after the time prescribed in the contract. From this, it is gathered that the labour force was finally provided though belatedly. The Plaintiff then collected crushed stone and ferried it to the site following which he was paid an amount of twelve thousand Maluti (M 12, 000.00) plus, as a mobilization fee.

[6] The plaintiff contends that the engineer, one Mr. Heckey, then ordered him to dig foundations, which he did. He thereafter awaited the Rural Clinics and Foot Bridges ("Rural Clinics") to come and inspect the foundations. According to him, in terms of the contract, the Rural Clinics were supposed to send their engineer to inspect the work, which he claims they refused to do. He further claims that he was ultimately verbally invited to the office at the Ministry of Works and was told that the contract had been suspended. He alleges that he was given a written confirmation of termination of the same contract later in May, 1997.

[7] The plaintiff claims that the defendants made it impossible for him to perform in terms of the contract, by delaying to provide him with labourers on time and that they were the ones at fault, hence the claim for contractual damages. As to why the contract was terminated, the plaintiff feels that it was terminated due to his delay to start the work, which delay he claims was occasioned by the defendants. He contends that he should be paid the balance of the contract price.

[8] It is undisputed that the Rural Clinics had also paid for certain equipment which was to be used at the site, namely forty four thousand four hundred and twenty five Maluti and nineteen Lisente (M44, 425.19) for the equipment and machinery, to Maluti Irrigation and four thousand two hundred and fifty five Maluti and eighty Lisente (M4, 255.80) to Mashai Transport Hire. These amounts were to be deductable from the contract price. That was done after it had bee concluded that the plaintiff appeared not to have the capacity to buy such equipment. Both parties agreed to this arrangement. However, plaintiff claims that since the equipment in question was repossessed by the defendants after termination of the contract, the

money used to buy such property should not be subtracted from the balance of the contract price.

[9] The defendants deny any liability to the plaintiff. Two (2) witnesses were called to testify on behalf of the defendants, namely, one Tikoe Matsoso ("Matsoso") and Khasapane Kikine ("Kikine"). As a point of departure, it is common cause that the plaintiff started the work way after the period of 14 days provided in the contract, in breach of clause 2(d) of the said contract. However, from the evidence adduced, it surfaced that, the apparent, breach was condoned by both parties and the plaintiff was allowed to proceed with the work. This view is fortified by the evidence of Matsoso where he indicated that they (the defendents) had agreed that they should ignore the plaintiff's breach and allow him to proceed if he still showed interest to continue. The plaintiff, as matter of fact, resumed the work after such alleged breach.

[10] The defendants deny that the contract was terminated for the reasons advanced by the plaintiff. According to Matsoso, the river on which the bridge was to be constructed had changed course necessitating a need to

extend the bridge to cover the new dimension. The redesign of the bridge would of necessity also require the plaintiff to recost and amend his bill of quantities. Matsoso further contends that the plaintiff was informed that he should only amend the costing and not the unit rates. He claims that, despite the instruction, the plaintiff submitted new unit rates which he had not initially used.

[11] Matsoso contends that the new cost had multiplied by four (4) from the original contract price. Kikine also alleges that the new rates submitted by the plaintiff were more than two (2) times higher than the original unit rates. It was put to the plaintiff that he was told not to change the unit rates. This, the plaintiff vehemently denied. He was further informed that if he continued with the new rates, the contract would be terminated. He nonetheless continued with the new rates and it is alleged that the contract was consequently terminated. This also the plaintiff unreservedly disavowed.

[12] It appears that a meeting was held on the 7th May, 1996 of all the stakeholders (including the plaintiff), whereby the issue of different unit

rates was discussed with a view of trying to resolve the dispute. This was to no avail. The defendants claimed that, it was resolved in that meeting that the contract should be suspended, and a letter of suspension was written to the plaintiff on the 10th June, 1996. The plaintiff flatly denies all these allegations and claims that he was verbally informed about the suspension and that he only received such a letter a year later. He alleges that the letter of suspension he received has been backdated. When asked by the Court as to why he would say that the letter in question was backdated, he responded that he had assumed so because he had asked to be furnished with that letter since 1996 and he only got it in 1997.

[13] It is not in dispute that the plaintiff stopped the work immediately when he was informed that the contract had been suspended. The contract was ultimately terminated on the 7th May, 1997. The Court was informed that the bridge had since been constructed with a different contractor in the 2008/2009 period. The plaintiff claims that since the new rates were never agreed upon, that is why he was sticking to the contract he had signed. He further agued that the defendants had no right to unilaterally terminate the contract. Surprisingly, the plaintiff did not refer to the issue of the new rates in his evidence-in-chief.

[14] The plaintiff claims that the refusal to inspect the work by the engineer and the refusal or delay by the MP to hire labourers were two (2) things that made it impossible for him to perform his contractual obligations. On the other hand, the defendants claim that the real dispute which led to the suspension and the ultimate termination of the contract, was the disagreement over the new unit rates that were used by the plaintiff. The defendants appeared to rely on clause 2(b) of the contract which provides that:

> *"The Contractor must note that this is a <u>FIXED PRICE</u> contract not subject to any escalations or fluctuations unless otherwise agreed to beforehand.*" [Original emphasis].

[15] As already alluded to, the plaintiff did not raise the issue of unit rates as the cause for termination of the contract. It may perhaps be necessary to refer to part of his evidence in that regard:

*'**DC:** After the inspection it was discovered that the river had changed course and it became necessary to redesign the bridge to be longer?*

***PLAINTIFF:** Yes.*

***DC:** A plan was actually drawn correcting the new bridge and you were asked to cost it taking into account the new bridge?*

PLAINTIFF: *Yes.*

DC: *In your new bill of quantities you had now changed your rates from the original in the contract?*

PLAINTIFF: *Yes.*

DC: *You were told that the rates were not meant to change only the costing of the new bridge was to change?*

PLAINTIFF: *This was not so.*

DC: *This is what constituted the dispute?*

PLAINTIFF: *Not so.*

DC: *This is what caused the suspension of the work?*

PLAINTIFF: *Not so.'*

[16] The above evidence clearly shows that to the plaintiff, the issue of the rates was never the cause for suspension and or ultimate termination of the contract. It is understandable from his point of view because his claim is based on the fact that he failed to perform his part because the engineer refused to inspect the work at the site, together with the fact that the MP failed to hire labourers on time. To him those two (2) things led to the unilateral suspension and eventual termination of the contract which caused him to suffer contractual damages as he has claimed.

[17] The Court accepted earlier on that a breach to clause 2 (d) of the contract appeared to have been condoned by both parties, since the work proceeded as usual after the breach and the parties continued to perform their respective contractual roles. The plaintiff was even paid 10% of the contract price which was the mobilization fee. The plaintiff cannot now be heard to complain about the breach which both parties condoned. The unchallenged evidence of Matsoso (DW1) showed that both parties agreed to continue with the terms of the contract despite having breached clause 2 (d) of their contract.

[18] In my view the plaintiff's claim for damages for breach of contract based on the breach of clause 2 (d) of the contract is not sustainable. The subsequent termination of the contract does not appear to have been occasioned by a breach of clause 2 (d), but by some other factors or considerations, which the defendants claim to relate to the use of new unit rates. The issue of the new bill of cost as a defence as pointed out by Mr. Sepiriti, Counsel for the plaintiff was not pleaded in order to enable the plaintiff to come to trial

prepared[1]. See also **Keketso Liphoto v The Commander LDF and Two Others**[2], where my sister Majara J had this to say:

> "*The Court accepts the submission that it was improper for the defendants to raise a new defence which they had not raised in their plea thereby oscillating between two (2) defences to the surprise of the plaintiff …"*

I concur.

[19] The defendant's plea is that the plaintiff had failed to perform his part of the contract and instead had demanded that the defendants should buy him the equipment he was going to use at the site. It is common cause that the defendants did pay the suppliers for the equipment on behalf of the plaintiff. According to the defendants what was wrong with that, was that, paying for the equipment was never part of the agreement since the plaintiff had claimed that he already owned such equipment during the initial interviews.

[20] No where in his evidence did the plaintiff deny this allegation. Instead he seems to agree with the defendants about the payment for the equipment. I however, disagree with Mr. Sepiriti's suggestion that this had been agreed

[1] See Frasers Lesotho Ltd V Hatabutle (Pty)Ltd LAC 1990 – 1990 698 at 702

[2] CIV/T/488/2007 (unreported) at P 12

upon by the parties, that the plaintiff was free to negotiate the supply of the equipment to be paid for by the defendant. According to DW1's evidence which was corroborated in material respects by DW2, the plaintiff bought the equipment and machinery from Maluti Irrigation Company and failed to pay for it until the defendants intervened and paid for it. It was then agreed that the amount would be deducted from the contract price.

[21] It is also not in dispute that the contract between the plaintiff and defendants was initially suspended and eventually terminated by the defendants when the problems between the plaintiff and the defendants could not be resolved. The plaintiff says the defendants unlawfully terminated the contract, and that they did not even tell him properly when they did so, since he did not receive the letter they claimed had been sent to him. The plaintiff would have us believe that the defendants never sent the letter at the time they say they did. But it turns out he was the one who misled the court in his evidence. The evidence of DW1 as corroborated by DW2, showed that DW2 was the one who delivered the letter of suspension personally to the plaintiff's wife, at the plaintiff's home. The court has no reason to

disbelieve the evidence of DW2 in particular, since the plaintiff did not show that he had separated from his wife. That means he did receive the letter of suspension.

[22] It seems to me that it would not be true that the defendants terminated the contract for no reason at all. On the contrary the evidence shows that the plaintiff was approached several times in an attempt to assist him to complete the work. What the evidence portrays is that the plaintiff had bitten far more than he could chew. Be that as it may, the plaintiff failed to prove the damages that he claims against the defendants, regard being had to the fact that he bore the onus to prove his case on a balance of probabilities[3]. The plaintiff did not bring any evidence which could be used as a basis for a proper assessment of damages[4].

[3] Pillay V Krishna 1946 AD 955

[4] Lebajoa Monamatha and Lehlohonolo Mataboe C of A (CIV) 24/2009 unreported. See also Commander LDF and Others and Motlatsi Magaga C of A (CIV) No. 33/2011 (unreported)

[23] In the circumstances the appropriate order is one that absolves the defendants from the instance, with costs.

_____

CHAKA-MAKHOOANE J
JUDGE

For Plaintiff : Mr. Sepiriti

For Defendants : Mr. Mapetla