

IN THE HIGH COURT OF LESOTHO

In the matter between:-

PHILLIP KEKANA

Plaintiff / Applicant

And

THE COMMISSIONER OF POLICE

1st Defendant/Respondent

THE ATTORNEY GENERAL

2nd Defendant/Respondent

**DIRECTOR GENERAL NATIONAL
SECURITY SERVICES (NSS)**

3rd Defendant/Respondent

JUDGMENT

Coram: Hon. Hlajoane J

Date of Hearing: 27th February, 2014

Date of Judgment: 17th March, 2014.

Summary

Claim for damages for assault – Defendants having made an offer of settlement – Plaintiff having accepted the offer – whether defendants could validly renege from the contract – Application for writ of mandamus granted with costs.

Annotations

Statutes

Books

Cases

1. Otubanjo v Director Immigration & Another C of A (CIV) 35 of 2005

[1] This matter came before Court by way of a trial action. Initially there were only the 1st and 2nd Defendants. An Application for joinder of 3rd Defendant was made and was duly granted. The application was made after the investigations revealed that it was a member of NSS who was involved.

[2] After the pleadings were closed a date for the pre-trial conference was set. In the pre-trial conference counsel on both sides identified the issues for determination by the Court. This was in August 2011. Later both parties came before Court to say that they were negotiating a settlement as Defendants were not disputing liability but quantum.

- [3] During December of 2012 an Application for a writ of mandamus was filed with the Court. In that application the Court was made aware that there had been some correspondence between the parties concerning the same matter.
- [4] The Application revealed that on the 14th March, 2012 defendants wrote to the Applicant proposing a settlement of the matter in the sum of M100,000.00 and copy of that letter has been attached as an annexure.
- [5] In the summons Plaintiff had made a claim in the amount of six hundred and fifty thousand maloti (M650,000.00) as damages for assault which was broken down as follows:
- (a) M250,000.00 for pain and suffering
 - (b) M100,000.00 for past hospital and medical expenses
 - (c) M150,000.00 for future hospital and medical expenses.
 - (d) M50,000.00 in respect of loss of income. Plaintiff having alleged that before the accident he was self-employed selling clothes.

[6] The Application for mandamus further revealed that after the offer was made on the 14th March, 2012, the Applicant on the 7th August 2012 wrote back to the Respondents accepting the settlement proposal in the amount of M100,000.00 for damages. The said acceptance letter was served on the Respondents on the 9th August, 2012.

[7] It would be important to show as to what was contained in both letters of the offer and the acceptance. The offer came from the Legal Officer, in the Attorney General's office dated 14th March 2012 and it reads:-

“We consulted with our client in the matter and propose settlement in the sum of Hundred Thousand maloti (M100,000.00) being full and final payment.”

[8] In response to that offer Counsel for the plaintiff/applicant wrote on the 7th August, 2012 and responded as follows:

“We refer to the above-mentioned matter and previous correspondence herein, particularly your letter of the 14th March, 2012.

We now take instructions from our client and our instructions are as follows:

- 1. The settlement payment of M100,000.00 for damages is accepted.*
- 2. Costs incurred to the date of settlement be awarded to the Plaintiff.*

Lets now approach the Court on any suitable date to have the settlement arrangement made an Order of Court.”

This was received on the 9th August, 2012.

[9] Sometime later on the 8th February 2013, the Respondents filed notice of intention to oppose the mandamus application. Answering papers were only filed on the 19th March, 2013. Third Respondent in that answering affidavit wanted to renege from the settlement offer indicating that the Legal Officer concluded the settlement without his authorization as the decision maker.

[10] Plaintiff had proposed a settlement in the amount of M350,000.00 but the defendants would only settle for M100,000.00.

[11] Applicant's Counsel argued that Respondents made an offer through the officer from Attorney General's Chambers which offer was duly accepted by the Applicant / Plaintiff. That it

would be wrong to renege from the settlement as it was a contract which was already concluded. The more reason why Plaintiff approached Court on an Application for mandamus.

[12] Plaintiff further argued that the offer could have only been validly withdrawn before acceptance which has not been the case. The offer was at the stage where it could no longer be withdrawn as it had already been accepted and therefore a valid contract concluded. Even the intention to oppose mandamus and the answering papers were filed long after the offer had already been accepted.

[13] But the Defendants' Counsel still felt she could still renege from the offer made since the agreement had yet not been made an order of Court. The explanation being that the Legal Officer who had no powers to settle the matter made the offer.

[14] Defendants' referred to the case of **Otubanjo v Director of Immigration and Another**¹ where the Court decided that,

“the representation must have been indeed by the decision maker.” Further that:

¹ Otubanjo v Director Immigration & Another C of A (CIV) 35 of 2005

“the representation must be one which was competent and lawful for decision maker to make without which reliance cannot be legitimate.”

[15] The facts in **Otubanjo** being that as a foreigner he had been offered a job by the Teaching Service Commission (TSC) and his residence permit also given to him by the same commission. He had been refused an indefinite residence permit by the Minister of Immigration. He therefore challenged such refusal on the basis that since he had been granted a job and residence permit by the TSC he had legitimate expectation that it was binding on the Immigration to abide or be given a hearing before the refusal of his application.

[16] **Otubanjo’s** appeal was dismissed as it was decided that TSC was not a decision maker to have granted residence permit in Lesotho but the Immigration Office.

[17] The Applicant/Plaintiff in challenging reference to the **Otubanjo’s** case showed that the case was distinct from the present case. The reason being in **Otubanjo** there were two separate departments, being that of Education and the other of Immigration. But in *casu* the Legal Officer of the same department was involved.

[18] Again, the Applicant argued further that it has only been alleged that the third Respondent is the decision maker without any proof of that.

[19) On looking at Counsel's submissions on both sides the Court finds that what is to be determined is whether or not there had been a binding contract between the two parties. Also whether the Respondents could at that stage be permitted to renege from their agreement.

[20] There is no dispute that the offer that was made by the Respondents through their Legal Officer from the Attorney General's office was accepted by the Applicant. Under the Law of Contract once an offer has been accepted that concludes the contract.

[21] The Respondents are only saying that though there has been an offer and acceptance they could still renege from it since that had yet not been made an Order of Court. They are again saying the Legal Officer had no powers to have concluded the settlement as was not a decision maker.

[22] But the Court can safely take a judicial notice of the fact that the Attorney General's office is always the legal representative of Government in all civil suits. Plaintiff in his summons has referred to the Attorney General as such.

[23] Besides the 3rd Respondent has attached to his answering affidavit some correspondence which clearly showed that the change of client came after the contract had already been concluded.

[24] Even with the Application for writ of mandamus the Applicant has attached the correspondence between the two parties. In his letter in which the offer was communicated to the Applicant, the Officer from Attorney General's office showed that she had consulted with their client and were making a proposal in the sum of M100,000.00 in full and final settlement.

[25] In the same way, when the Applicant's Counsel accepted the offer on behalf of his client pointed out that the instructions from client were to accept the offer. Counsel on both sides did not just act without have consulted and taken instructions.

[26] In the circumstances of this case the offer could only have been validly withdrawn if it was before acceptance, but since there was offer and acceptance that resulted in a binding contract between the parties.

[27] The Application for a writ of mandamus is granted, ordering the Respondents/Defendants to honour the agreement of settlement, with costs.

A. M. HLAJOANE
JUDGE

For Applicant / Plaintiff: Mr Mahlakeng

For Respondents / Defendants: Ms Maapesa