

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

LAC/REV/9/02

In the matter between:

INSTITUTE OF DEVELOPMENT MANAGEMENT
And

APPALLENT

KHOAI MATETE

RESPONDENT

JUDGMENT

CORAM: Justice S.N. Peete

Panelists: Messrs Twala and Tau

DATE: 25th February, 2005

HEADNOTES

Labour Code Order 1992 - Contract of employment without a termination date - section 62 of the Code. Employer without good reason refusing employee opportunity to resume duties after a secondment spell - Such constituting termination of employment "on the initiative of the employer" - Section 68 of the Code, Reinstatement - Practicality of

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Held: Where upon his return from secondment an employee is denied opportunity to resume his duties, the question whether he had tacitly opted to negotiate a monetary settlement is one purely of fact to be determined from the circumstances particular to the case.

Held: A denial or refusal without good reason by an employer to allow employee to resume duties after a secondment spell may amount to termination of employment "on the initiative of the employer," and may constitute an unfair dismissal.

Held: Reinstatement shall not be ordered where in the light of the circumstances such relief would be impracticable.

1. This is an appeal against the judgment of the Labour Court delivered on the 9th day of August 2002 in which the respondent (then applicant) sought relief couched as follows:

" (a) An order directing that the applicant be reinstated to his substantive post as Country Director

- (b) An order that the applicant be paid his full salary and other benefits from the 1st October 1998 to date of reinstatement/resumption of duties as respondent's Country Director.
 - (c) Costs of suit
 - (d) Further and/or alternative relief
2. After the evidence had been led and submissions heard the Labour Court President granted "applicant's prayers as prayed in the Originating Application" having found as a fact that there was no agreement (consensus ad idem) that the present appellant relinquished

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his substantive post of country director and opted for a negotiated retirement package.

.....On their version the respondent rejected the offer and there is no evidence of the meeting of minds in this regard any time thereafter. Neither is there any evidence of a basis for a reasonable belief on the part of the respondent that there was a consensus".

"The view we hold is that failure to agree on the sums due invalidated the option and the parties reverted to their positions before the offer was made" (Judgment, page 4-5, record page 142)

3. The thrust of this appeal is founded upon the submission that there was a tacit (implied) agreement between the parties namely that the respondent had opted for a negotiated retirement package and could not be entitled to be reinstated when the negotiations fell through and that it was for the Labour Court to make a fair assessment amounts due to the respondent.

1. Historical Background:

It was common cause at the trial before the Labour Court that -

- a) the present respondent Khoai Matete had been employed as a Lesotho Country Director since 1st April 1993
- b) and that he had been confirmed as a pensionable and permanent employee on the 20th April 1994.

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- c) On the 15th September 1995 respondent had been appointed Regional Director of the Institute of Development Management for a three year period secondment to the Headquarters in Botswana. He assumed duties on the 1st October 1995.

- d) On the 10th July 1997 respondent resigned as Regional Director in Botswana and this resignation was accepted per letter dated 12th August 1997.
- e) His substantive post as Country Director in Lesotho remained in tact after his resignation as regional director.
- f) Criminal proceedings in Botswana against respondent alleging corruption or fraud resulted in an acquittal - dated 14th December 1999.
- g) Having returned to Lesotho, the respondent on the 3rd September 1998 immediately sought reinstatement but this was turned down because the proceedings in Botswana were not yet finalized.
- h) In judgment of Civ/Apn/332/97 Guni J. had held that reinstatement of respondent could not be effected until a three years period of secondment (after 15.09.95) had expired and also held that after expiration of that period respondent would resume his duties as country Director as per his contract of employment
- i) Per letter dated 10th December 1999 respondent advised the appellant of his acquittal.
- j) The respondent should - all things being normal - have resumed his official duties on the 1st October 1998.
- k) A formal letter was written on 29th March 2000 to respondent after some correspondence with the IDM. It reads as follows:

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"Institute of Development Management
Regional Office
P.O. Box 60167
Gaborone, Botswana

S. Phafane Chambers,
1st Floor Mohlanka Area
P.O. Box 036
MASERU WEST 105
Lesotho

Dear Sir,

RE: REINSTATEMENT - MR KHOAI MATETE

Our (Khaketla/Phafane) telephone conversation of this morning refers. My call was in response to your letter addressed to the Chairman of the IDM Board, regarding the issue of the reinstatement of Mr. K. Matete as the substantive Country Director for IDM in Lesotho. I have been mandated by the Board to deal with this matter with you, on its behalf.

As indicated in our discussion, IDM wishes to inquire which of the following options is your client willing to accept; either to reinstate him immediately or to pay him amounts due to him and for him to withdraw any potential legal action against IDM and terminate his services with IDM. If he opts for the second option, the amounts payable will be negotiated between the two parties, but will include outstanding gratuities and compensation for loss of income.

As you intimated, you will be meeting with your client this Friday (31st March) and you will table the matter before him and revert back to me at the above fax number. Since I will not be in the office from the 1st to 8th April 2000, I would appreciate getting your response by Friday 31st March so that I can leave instructions on action to be taken in my absence.

Yours sincerely,

'Mamphono Khaketfa"
REGIONAL DIRECTOR

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l) It was later followed by a delivery of a cheque (dated 19.06.2000 - for M25, 370.91) as an offer "in full and final settlement of the matter".

m) S. Phafane Chambers responded as follows on the 23 June 2000.

"Messrs Webber Newdigate & Co.
Metropolitan Building
P.O. Box 1176
Maseru 100

Dear Sir,

Re: Khoai Matete vs Institute of Development Management

Your letter of the 20th instant together with a cheque have reference.

We are most surprised by allegation that the cheque is "as agreed" nowhere did we ever agree as alleged or at all. Our letters on the subject are very clear. We are still waiting for the necessary documents from yourselves pertaining to a package for a country Director. It is on the basis thereof that we would be able to make a proposal for your consideration. Without this vital information, client is unable to say whether he is opting out or insisting on reinstatement.

Kindly let us have this information soonest.

Yours faithfully,

Sgd:

S. PHAFANE CHAMBERS"

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- n) It is not a dispute that this cheque payment was not accepted by respondent
 - o) In August 2000, the respondent made a composite offer (dated 22.08.2000) amounting in all M553,068.09
 - n) This was rejected out of hand by the Institute of Development Management (IDM).
4. What remained to be decided by the Labour Court as a trial court and trier of fact was whether subsequent to the letter from the Regional Director dated 29th March 2000, the respondent in fact relinquished his post of Country Director and opted for a negotiated retirement package. Even though in his judgment, the learned President states "it does appear that the applicant opted for the second option and negotiations on the amounts due, commenced", the respondent never in fact abandoned his claim or right to his post as Director - and more importantly, this is conceded by Mr .Loubser.
5. Before the Labour Court, the primary onus was upon the Institute of Development Management (IDM) to prove on the balance of probabilities to show that despite the still existing contract of employment as Country Director, the respondent Khoai Matete had voluntarily agreed to take the option to relinquish his post and take a negotiated retirement package, thus voluntarily terminating the contract of employment. This could come about if the respondent had explicitly

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or impliedly accepted the offer of negotiated monetary settlement made in the letter dated 29th March 2000.

6. It should be clear that since under his contract, the respondent was still the substantive holder of the post of Country Director; it is incorrect for the letter to speak of "reinstatement" instead of "resumption". Mr Loubser has candidly conceded to this but urged the court to infer a "tacit" agreement to opt for a negotiated package.
7. The substantive contract of employment between the Institute of Development Management and Khoai Matete. It reads:-

"Institute of Development Management
P.O. Box 1357,
Gaborone, Botswana

March 19, 1993.

Mr Khoai Matete,
P.O. Box 47
Maseru Lesotho

Dear Mr. Matete:

OFFER OF EMPLOYMENT COUNTRY DIRECTOR - LESOTHO

Reference is made to your application for employment with the Institute of Development Management, (IDM) Botswana, Lesotho and Swaziland, dated 25th January 1993. On behalf of the Institute I am

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pleased to offer you an appointment as Country Director - Lesotho on the following terms and conditions.

Under the general direction of the Regional Director and subject to his authority, you will carry out all duties of Country Director - Lesotho. You will also carry out such other duties as will be assigned to you by the Institute of Development Management Regional Director from time to time.

1. BASIC SALARY

The Institute of Development Management (IDM) shall pay you an annual basic salary of M73, 248 (fixed) per annum within salary scale IDM 1. The salary is subject to Lesotho Taxation.

2. PENSION AND MEDICAL SCHEME

The Institute contributes the equivalent of 10 per cent of a staff member's basic salary after successful completion of 12 months probationary service and on permanent appointment towards staff pension's fund.

Upon your confirmation and permanent appointment with IDM, you will qualify for entry to the pension fund.

IDM also pays for its permanent staff 50 per cent of their medical expenses arising from an illness covered under a medical aid scheme approved by the Institute.

3. VACATION AND SICK LEAVE

Vacation leave shall accrue at the rate of 30 days per annum, and paid sick leave at the rate of 14 days per month.

The appointment is effective as soon as possible and, at any rate, not later April 1, 1993.

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4. PROBATION

The appointment is on probationary basis for twelve (12) calendar months after which period your performance will be assessed. Your satisfactory performance during the probationary period will be acknowledged in writing before you can be appointed on permanent terms with the Institute.

5. MEDICAL EXAMINATION

The appointment is subject to the production of a satisfactory medical report, including a chest x-ray. The examination shall be conducted by a Medical Practitioner approved or appointed by the Institute and at the expense of the IDM.

6. ACCEPTANCE OF OFFER

If you accept this offer, please sign and return to the undersigned four (4) copies of the appointment on the space provided below.

Yours sincerely,

Dr Musa P. Dlamini
REGIONAL DIRECTOR

I accept the offer.....(Signature)
Khoai Matete

I shall commence duties on:.....

cc: Registrar
Acting Country Director – L
Financial Controller"

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8. It will be noticed that there is no clause regarding "termination". The question to be answered is whether there was at any time a mutual agreement express or tacit to terminate the contractual relationship that hitherto existed between the respondent and the appellant and to engage on a negotiated settlement
9. This is principally a question - not of law - but purely one of fact and whether such agreement did occur can only be inferred from the circumstances or events that followed Ms Khaketla's letter of the 29th March 2000.
10. The approach must necessarily be an objective one; in the absence of an explicit agreement the inquiry could be paraphrased:

could a reasonable person from the circumstances of the case, justly infer that the respondent had opted to a negotiated monetary settlement in lieu of resumption of his duties as country director ? - Conversely, are there any acts or responses from respondent inconsistent with an agreement?
11. The appellant has sought to convince the court that once he opted for a negotiated settlement - the respondent - even after the negotiated offers and counter - offers failed - must be taken to have renounced his right to resumption of duties as country director.

12. For his part, the respondent give viva voce evidence before the Labour Court refuting agreement saying he had even rejected a cheque for the amount of M25,370.91 offered by the appellants. It is clear that whilst the respondent had in fact started negotiating a monetary settlement, he was not satisfied in the end by the offers made by the appellants and even the appellant's witness Ms Khosidintsi conceded to the fact that (even though she had no firsthand knowledge of what had happened previously) it seemed no tangible agreement was ever reached between the appellant on one hand and the respondent on the other.
13. It seems the parties were engaged in a futile negotiation exercise wherein their offers and counter-offers were diametrically opposed. In those circumstances or climate it is not possible or reasonable to infer agreement Antagonists hardly agree on anything.
14. Under the law of contract, the offeree is not bound to accept what is offered by the offeror who is also not bound to accept the counter-offer of the offeree. There was even no provisional or conditional acceptance by conduct, word of mouth or by writing by either side; in fact, an atmosphere of hostility reigned supreme. A neutral mediator at that stage could have saved the situation; instead the tension worsened into an acrimonious battle of pride and wits.
15. It is in this scenario - coupled by the evidential vacuum created by the fact that Ms Khaketla was not called as a witness -crucial though her evidence was - the evidence of the respondent stood uncontroverted -at least on the critical issue of whether an agreement was mutually

reached that respondent was no longer to resume his duties but had opted for a negotiated settlement once and for all. One is left with an uncomfortable feeling that the relations between the parties were developing from bad to worse. How then could a mutual agreement then be struck?

16. That the negotiations fell though was to be expected regard being had to the prevailing bitterness; to say that there was an agreement reached in that climate would be fool-hardiness. To demonstrate this, it is necessary to refer to the record - i.e. evidence of the respondent and of Ms Kgosidintsi and to some correspondence that passed between parties after the letter of Ms Khaketla. Having received the letter, the reactions and responses of the respondent will demonstrate his *animus contrahendi* (Christie supra page 98)
17. Record, page 13
 Question: It has been raised as a defence here that you have in fact been paid and you have accepted the payment which has had the liquidating your claim?

 Answer: No, Sir. Question: You have not?

Answer: I have not accepted payment.

18. It is not in dispute that a cheque of the amount of M25, 370.91 dated 19.06. 2000 was delivered to the respondent who withheld it and did not present it for payment.

19. Record, page 17

Question:....Amongst others, it is alleged in the pleadings that when you were in the High Court (CIV/T/332/00) you agreed to abandon your claim and accepted payment in full. Any comment on it?

Answer: No. Sir, I never agreed to abandon any claim and accept .
.....(intervene)

Question: You were never party to such an agreement? Answer: Yes.

20. Record, page 19 - line 10

Question... The general question that I will ask you is this, are you aware or not of any concrete agreement that has been reached between yourself and the employer regarding your fate?

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Answer: No, I am not aware of any agreement that has been reached between me and the employer regarding my fate."

Question: I see. To be more precise, it is alleged that you, the parties actually, you and the IDM actually met and came to some agreement. It is alleged that you met, I do not know where, but you came to some agreement after that meeting between yourself and the IDM. Was there any such meeting?

Answer. No, Sir, there was no such meeting.

Question: You have never had, there has never been such a meeting?

Answer: No, sir.

Question: Of course this will be fair to both parties, I must mention it, but definitely you are aware that there were offers and counteroffers which did not bear any fruit in the final analysis?

Answer: Yes.

Question: We have mentioned that in fairness to them?

Answer: Yes, I am."

21. These are refutations which were not controverted by reliable evidence from the appellant. The evidence of Ms Audrey Khosidintsi is based on what she had been told had transpired between the parties or what she herself gathered from the records since assuming office as Regional Director - its weight, indeed its very admissibility left much to speculation and conjecture - and she was candid enough to say so in her evidence.
22. Mr Molete: You can just give us a summary from what you remember on your records, if that was the offer of one year payment and certain accompanying amounts due to him?

Answer: Yes

Question: Was that settlement accepted, your proposal to him?

Answer: I have not seen anyone saying specifically we accept.... However there have been offers and counter-offers from the records.

Question: Are you aware of his counter-offer?

Answer: Yes, I am aware of his counteroffer.

Question: What the IDM do to his counter-offer?

Answer: IDM disagreed with the counteroffer.

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23. Mr Phafane (in cross examination)

Question.Your file that you have before you, your record clearly indicates amongst others that Mr. Matete was desirous of resuming his duties as country director at the end of his secondment amongst others, am I correct?

Answer: Correct, Sir.

Question: And that was turned down by the employer, correct?

Answer: Yes, Sir.

Question: Again look at the file that you have before you, all the records that you have, whether before you or in your office, there is not one document, correct me if I am wrong, there is not one document in terms of which the parties ever reached an agreement regarding what should be paid, what should not be paid, what should happen, what should not happen. There is no such a document; you have offers, rejections of those offers, counteroffers, rejections of those counteroffers, which is what you have in your file. Am I correct, mam, or not?

Answer: Correct

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Question: Thank you, mam, there is no agreement anywhere in your files. And of course leaving your files aside, to be fair with you, you know of no such agreement yourself as a person, because you only came in here last month as you said, but ... (intervenes).

Answer: Yes, I had not been involved in the case."

24. The tenor of this evidence - both from the respondent himself and Ms Kgosidintsi - demonstrates that there was no mutual agreement ever reached between the parties; what was rather more apparent was tension and bitter acrimony between them.
25. If the respondent had accepted the cheque, for instance, and had deposited in his account, an inference could rightly be drawn that he was opting for a negotiated retirement package. But this was not so.
26. Section 62 of the 1992 Labour Code Order No.24 reads:-
 - 1) A contract of employment may take the form of a contract without reference to limit of time, a contract for one period of fixed duration or a contract to perform some specific work or to undertake a specified journey.
 - 2) A contract without reference to limit of time is a contract which contains no termination date. It may be terminated by either party, subject to the provisions of the Code concerning dismissal and notice of termination."

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Section 63 (1) (a) reads:-

- (1) For contracts without reference to limit of time, either party may terminate the contract upon giving the following notice:
 - a) where the employee has been continuously employed for one year or more, one month's notice."
27. It is also clear that whilst the IDM was not prepared to accept the respondent back as the Lesotho Country Director, it was also making offers which were not acceptable to the respondent. The cheque payment was also vehemently rejected. The letter dated 23 June 2000 from respondent's counsel reads:-

"Messrs Webber Newdigate & Co.
Metropolitan Building
P.O. Box 1176 Maseru 100

Dear Sir,

Re: Khoai Matete vs Institute of Development Management

Your letter of the 20th instant together with a cheque has reference.

We are most surprised by allegation that the cheque is "as agreed" nowhere did we ever agree as alleged or at all. Our letters on the subject are very clear. We are still waiting for the necessary documents from yourselves pertaining to a package for a country Director. It is on the basis thereof that we would be able to make a proposal for your consideration. Without this vital information, client is unable to say whether he is opting out or insisting on reinstatement.

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Kindly let us have this information soonest

Yours faithfully,

S. PHAFANE CHAMBERS."

[See Collen v Rietfontein Engineering Works - 1948 (1) SA 413 at 429-30 where Centlivres, JA had this to say

"There is no doubt in my mind that the plaintiff did by its conduct accept. It did not reply in writing that it accepted, but it paid the defendant's cheque into its banking account. Its conduct in so doing and its retention of the proceeds of the cheque, coupled with the fact that it failed to notify the defendant that it did not accept his offer, was, in my view, a sufficient indication to the defendant that it had accepted his proposals."

28. Respondent's counter offer in the amount of M553, 068.09 (dated 22nd August 2000) was also totally not acceptable to the appellant.
29. Whether the respondent impliedly terminated his employment as country director is purely a question of fact; this applies equally to the inquiry whether the termination of this employment was "on the initiative of the employer" - in which case this amounted to a dismissal in terms of section 68. Section 68 reads:-

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"Definition of dismissal-

For the purposes of section 66 "dismissal" shall include -

(a) termination of employment on the initiative of the employer."

(b)

(c)

30. In our view the refusal to accept the respondent back as country director even after his acquittal in Botswana was in the circumstances unreasonable and not justified in that save for the Botswana problem or saga there was no other good reason why he was not taken back. If such reason existed, it is not apparent from the record. If the appellant felt that after the Botswana criminal prosecution, it was not in the best

interests of IDM to allow respondent to resume his duties, it should have sooner terminated the contract upon giving the respondent the necessary one month's notice (section 63 (1) (a) of the Labour Code.

31. In the circumstances of this case it seems fair to conclude upon the facts that in refusing the respondent resumption of his duties this amounted to a termination of employment for all intents and purposes in terms of section 68 of the Order.

The appellant on the other hand has not established facts that justified this de facto dismissal and hence it is unfair, (see section 66 (2) which reads:-

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"Any other dismissal will be unfair unless, having regard to all the circumstances, the employer can sustain the burden of proof to show that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment "

32. Remedy is in our view provided under section 73 of the Code. It reads in full

"(1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlement or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.

(2) If the Court decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement the Labour Court shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and

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whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses."

33. It is common cause that since the 1st October 1998 (expiration of three year Botswana secondment) some six to seven years have passed and gone. By all means, o reinstatement of the respondent cannot be practicable in the circumstances; and the Labour Court ought not to have ordered reinstatement but fixed an amount of compensation to be awarded to the respondent in lieu of reinstatement (section 73 (2))
34. This court finds that the appellant terminated respondent's employment unfairly (see Section 66 and 68) and that reinstatement is however is impracticable and that the Labour Court ought to have fixed an amount of compensation. The case is therefore remitted to the Labour Court for it fix the compensation within 30 days hereof. My panelists agree with this finding.

S.N. PEETE
JUDGE OF THE LABOUR APPEAL COURT

For Appellant: Mr. Loubser

For Respondent: Mr. Phafane