

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 146/00

HELD AT MASERU

IN THE MATTER OF:

KHOAI MATETE

APPLICANT

AND

**INSTITUTE OF DEVELOPMENT MANAGEMENT
RESPONDENT**

JUDGMENT

The respondent is an institute owned by the three countries of Botswana Lesotho and Swaziland. It has campuses in each of the three countries which are headed by Country Directors. There is a Regional Director to whom all the three Country Directors are responsible. He/she is based in Gaborone Botswana. The applicant was appointed the Lesotho Country Director with effect from 1st April 1993. On the 20th April he was confirmed and admitted to the permanent and pensionable establishment of the respondent.

In September 1995 he was seconded to the Institute of Development Management (IDM) in Botswana as Regional Director for three years. Whilst in Botswana he was suspected of involvement in activities aimed at

defrauding the institute. He was thus criminally charged of fraud. This led to his tendering a resignation as Regional Director with effect from July 15, 1997. This was some one year and three months prior to the end of his tour of secondment as Regional Director.

Following his resignation the applicant returned to Lesotho and sought to resume his position as Country Director. The respondent did not allow him to do so, as a result he launched proceedings in the High Court of Lesotho in CIV/APN/332/97 in which he sought to have the respondent ordered to allow him to resume his position as Country Director. The application was however dismissed on the ground that the applicant could not be put back in that office prior to the expiration of his period of secondment namely; thirty six(36) months. That period was due to end on the 30th September 1998. He duly waited and on the 3rd September 1998, he wrote a letter to the Regional Director, advising her that his secondment which was cut short because of his resignation as Regional Director would be coming to an end on the 30th September 1998. He further advised that he would be reporting for duty on the 1st October 1998, and sought the assistance of the Regional Director that his return to office be a smooth one.

On the 14th September 1998 the Regional Director wrote back advising applicant not to report for duty because he would be violating the terms of his suspension if he enters any premises of the Institute without the approval of the Chairman of the Board. A letter from the Chairman of the Board was enclosed. In it the Chairman stated in part;

“please inform Mr. Matete that until his case in Botswana has been concluded and which was the cause of his interdiction by the Board as an employee of IDM, his interdiction remains in force and will be equally applicable to his claimed position of Country Director of Lesotho.”

It must be stated at this juncture that the High Court of Lesotho found in CIV/APN/332/97 that, whilst the Board resolved to suspend the applicant, its attempt to deliver the letter of suspension to him (the applicant) was not successful. The Court then concluded that, “since no suspension was in fact effected, there is no suspension.” (See p.5 of the typed judgment of Guni J.). Accordingly, nothing turns on the Chairman’s suggestion that applicant

is or was on interdiction. It is worth noting that all what has been said up until now is common cause between the parties.

In his testimony the applicant avers that as advised by the Chairman of the Board he awaited the outcome of the criminal case. On the 8th December 1999, the applicant was acquitted by the Magistrate Court in Botswana. On the 10th December 1999, the applicant wrote to the Chairman of the Board advising him of the outcome of the criminal case and asking to be reinstated in his position as Country Director of Lesotho. The applicant avers in his testimony that there was no response to this letter. He consequently approached this Court for relief as follows:

1. An order directing that the applicant be reinstated to his substantive post as Country Director;
2. 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;
3. Costs of suit;
4. Further and/or alternative relief.

The respondent for their part do not deny applicant's factual averments save that they claim that applicant and the respondent reached a settlement in terms of which applicant received a payment of a sum of money in full and final settlement of the matter.

DW1 Audrey Kgosidintsi who is the current Regional Director could not testify firsthand in this regard as she had not yet assumed the position at the time. She could only rely on records. In her testimony she said she was aware of correspondence relating to a settlement. She further said she was aware of the letter of the then Regional Director Dr. Mamphono Khaketla who had written to applicant's attorney giving applicant two options: immediate reinstatement or payment to him of "...amounts due to him and for him to withdraw any potential legal action against IDM and terminate his services with IDM." Under cross-examination DW1 conceded that safe for letters of offers and counter offers she has not seen one that shows an agreement on the amount to be paid.

Under cross-examination the applicant also conceded that some negotiations in pursuit of a settlement was done. He said however that the negotiations aborted. He also agreed that following the Regional Director's letter giving him two options he made some calculations in order for him to see what the second option meant in monetary terms. They however disagreed with the respondents on the amounts. This was also the evidence of DW1 that the respondent rejected the amount put forward by the applicant. It was put to him (applicant) that he started making calculations because he had opted for cash. He denied and said he made calculations because he had no calculations from the respondent. He then made his calculations to enable respondent to weigh the figures. He averred further that while they were weighing the options, the respondent went ahead and issued a cheque in the sum of twenty five thousand three hundred and seventy Maluti, ninety one lisente unilaterally. The applicant testified that he did not cash it. He presented it in court as an exhibit and it indeed bore no bank stamp endorsement as proof that it was either cashed or deposited.

It seems to this Court that the first issue to determine is whether the applicant made an option in accordance with the Regional Director's letter and whether any settlement was reached in accordance with that option. The respondent's case is that the applicant made an option not to be reinstated. Under cross-examination Mr. Molete put it to the applicant that he made calculations of the amounts due because he had opted for payment of amounts due. The applicant on the other hand said the respondent's offer did not have calculations. He said he made calculations in order to weigh what the option for payment of benefits meant, but as we know his calculations were rejected by the respondent.

The respondent's letter of offer specifically provided that if the applicant opted for cash, "the amounts payable will be negotiated between the two parties..." It does appear that the applicant opted for the second option and negotiations on the amounts due, commenced. It is common cause that the parties did not agree on the amounts due. The respondent then proceeded to make a cheque in the amount that it seems they felt was due. Can we say that a settlement was reached in such a situation?

In their book *Contract General Principles* 5th ed. 1999 at p.11 Schalk Van Der Merwe et al state that:

“the basis of a contract is either consensus, that is an actual meeting of the minds of the contracting parties, or the reasonable belief by one of the contractants that there is consensus.”

The applicant says he kick-started the negotiations by proposing what he believed were amounts due. On their own version the respondent rejected the offer and there is no evidence of the meeting of the 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 consensus. In all the circumstances the amount paid by the respondent to the applicant was a unilaterally imposed one and there cannot be a talk about a settlement in such a situation. We are fortified in this view by the fact that all the other elements of that option were abandoned. These were termination of the applicant's employment with the respondent and the withdrawal by the applicant of all potential litigation.

The Regional Director's letter was silent on what would happen in the event of there being no agreement on the sums due. The view that 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. It is common cause that the initial position had been that the respondent should allow applicant to resume his position as IDM Country Director – Lesotho. Accordingly, therefore, the next issue is whether the applicant should be reinstated in his position as Country Director?

The position of the applicant is that he is so entitled because he has neither been dismissed nor suspended and he on his part never resigned his position as Country Director. The views of the respondent as expressed by DW1 Audrey Kgosidintsi is that the Court should help them reach a reasonable settlement of this dispute. She ventured to suggest that in their view a reasonable settlement would be payment of one year's salary to the applicant as compensation. This Court determines rights of parties. It is neither a bargaining forum nor a conciliation forum. When negotiations fail parties come to court for the pronouncement of their rights. This is what the applicant has done and the Court must discharge its duty in this regard.

In the case of *The National University of Lesotho .v. Thabo Moeketsi* 1995-1996 LLR-LB 100 Kotze AJ aptly captured the notion of secondment at page 102-103 in the following words: “Implicit in a contract of secondment

is that when it terminates the contract of employment between the seconder and the person seconded resumes.” In the case that the applicant herein instituted in the High Court of Lesotho claiming reinstatement Guni J stated at p6 of the typed judgment:

“I have no problems with the applicant’s claim that he is entitled to return to his original position occupied by him prior to his taking another position on secondment. NATIONAL UNIVERSITY OF LESOTHO .V. THABO MOEKETSI Lesotho Law Reports and Legal Bulletin 1995-1996 at page 102-103. The contract between the parties did not only acknowledge such an eventuality but it has made it one of the terms of service, in the new contract of employment as a regional director that all conditions of service, entitlements attached to the applicant’s position of country director – Lesotho will be frozen on acceptance of the offer of employment, as a regional director, until the end of the employment contract. It was more than probable that this applicant will return to his position as country director – Lesotho.”

Clearly therefore the applicant’s right of resumption of duty as Country Director – Lesotho, upon completion of the secondment contract is something that is inherent in the law and the very contract between the applicant and the respondent. This Court cannot deny the applicant that which he is entitled to in law and in terms of his contract with the respondent.

The last question to decide is the practicability of the applicant’s return to this position. The applicant testified and his testimony was corroborated by DW1 that his position of Country Director is still not substantively filled. It is only filled in an acting capacity. The applicant further testified that his relations with the staff at the institution are cordial. This Ms Kgosidintsi confirmed, but added that organizationally they have been hurt by the applicant’s protracted litigation with the respondent. The Court sought to be clarified on the status of the respondent as a company.

While no one could say for certain what it is; it turned out however, that the respondent is not a private company. It is a public company registered in each of the three countries falling under a designated Ministry of Government which in the case of Lesotho is the Ministry of Education. It seems to this Court that given the nature of the company status of the respondent, its size – it operates in three countries, and the fact that it is connected with Government; it is unjustified for its officers to talk of a hurt as though the respondent is a small private company. Indeed above everything else it must be noted that the applicant is prosecuting a right which is being trampled upon by the respondent. For these reasons we are of the view that reinstatement in casu is not only practicable but is a due right which must be accorded.

The respondents sought to show that the applicant had during his period of ostricisation by the respondent been earning a living through some consultancies which he did with the Ministry of Education. The applicant conceded doing some two consultancies which earned him M48,000-00 and M19,000-00 respectively. The respondent sought to lead the evidence that the applicant did other consultancies which will earn him M836,520-00 when they are concluded. This evidence was objected to, correctly in our view, because it was never put to the applicant to enable him to rebut it. In the premises only the amounts admitted by the applicant will be taken into account. Accordingly, applicant's prayers are granted as prayed in the Originating Application. However, the amount payable will be less the M67,000-00 applicant earned through consultancies. The cheque for M25,370-91 which was issued unilaterally shall be returned to the respondent, as it has by now expired.

THUS DONE AT MASERU THIS 9TH DAY OF
AUGUST, 2002.

L.A LETHOBANE
PRESIDENT

A.T. KOLOBE
MEMBER

I AGREE

M. MAKHETHA
MEMBER

I AGREE

FOR APPLICANT :
FOR RESPONDENT:

MR PHAFANE
MR MOLETE

