IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU LC/22/2015

IN THE MATTER BETWEEN

MATLALANE RAPAPA	**1st APPLICANT**
MOTLALANE MOTSOPA	**2nd APPLICANT**
MPONE MOLAPO	**3rd APPLICANT**
TSEPANG MOKIBA	**4th APPLICANT**
NTSEBO THAMAE	**5th APPLICANT**

AND

TŠEPONG (PTY) LTD	**RESPONDENT**

JUDGMENT

Claims for a prohibitory, declaratory and specific performance orders. Parties reaching settlement on some of the claims and agreement being made an order of Court. Court finding in favour of Applicants on all the remaining claims – that an offer once accepted creates a binding contract which cannot be unilaterally altered; and that employer has an obligation to meet welfare needs of its employees. Court finding that the offer made to Applicants is a valid contract of employment; and

that Respondent has an obligation to confirm employment status of Applicants. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for an order in the following terms,

"(a) That the 1st and 2nd respondent cannot be ordered to stop forcing/threatening employees to sign new contract in as much as they still have valid contracts with respondent.

(b) That this honourable court cannot declare that signing of new contract with new terms and conditions which are contrary to the Labour Code and the original contract of employment be null and void.

(c) That the 1st and 2nd respondents cannot be ordered to sign confirmation of employment for applicants to the bank or elsewhere services required for the benefit of applicant.

(d) This honourable court declare employment offer as a contract of employment.

(e) Applicant reserved the right to file further grounds on the proceeding."

2. On the date of hearing parties stated that they had reached an agreement to abandon prayers (a) and (b). They stated further that they have agreed that Applicants have no obligation to sign contracts with which they do not agree. They wished for their agreement to be made an order of this Court. We then accepted and made the parties agreement an order of this Court. This essentially meant that We only

had to determine prayers (c) and (d). Having heard parties, Our judgment follows.

SUBMISSIONS AND ANALYSIS

3. Applicants' case is that they were offered employment by Respondent, which they then accepted. Following their acceptance of the offer, they commenced employment and were accordingly thereafter remunerated in terms of their offers of employment. Later on, in the course of their employment, they were called to sign contracts of employment. They then noted that the terms of the contract were different from those in the offer of employment, and in particular, that they had inferior terms. An example was that in the offer of employment, it was stated that employees "*would qualify*" for a thirteenth cheque annually, while in the proposed contract it was said that they "*may receive*" a thirteenth cheque. Reference was made to annexures A and C2 to the Notice of Motion, which are the offer of employment and the proposed contract of employment, respectively.

4. It was further submitted that although the offer was conditional, Applicants were of the view that the conditions to be satisfied should not alter the terms against which they accepted the offer of employment. It was prayed that the Court declare the offers of employment as valid contracts of employment between Applicant and Respondent. The Court was referred to the cases of *Carlill v Carbolic Smoke Ball Co.*

(1893) 1 QB 256 and Whitehead *v Woolworths (Pty) Ltd (1999) 20 ILJ 2133 (LC).* It was submitted that the principle in these authorities is that an offer once accepted creates a binding contract between the offeror and the offeree.

5. Further reference was also made to the case of *Flyde v Wrench [1840] 49 ER 132*, to the effect that, an offer once accepted becomes binding on parties and that the offeror is prevented in law from unilaterally altering the terms of the offer, earlier made to the offeree. The Court was further referred to the case of *Francis v Canadian Imperial Bank (1994) 7 C.C.E.L. (2nd) 1 (Ont. C.A),* where the employee had accepted an offer of employment. Later on, he was given a contract to sign which had altered some of the terms contained in the initial offer. The terms of contract which had altered the terms of the offer were declared unlawful and thus unenforceable.

6. Respondent answered that Applicants were given a conditional offer. Respondent submitted that in law, unless the condition in the offer is met, then there is no contract to speak of. The Court was referred to the heading of the offer, annexure C2, to demonstrate that the offer was conditional. It was argued that Applicant's conduct of refusing to sign the proposed contracts amounts to non-acceptance of its terms. It was stated that again in law, non-acceptance of the terms of a contract is a clear manifestation that parties minds are not *ad idem.* It was added that once that is the case, the

employment relationship created by the offer, becomes *void ab initio.*

7. It was further argued that a contract of employment only comes into effect if the offer is accepted unconditionally, by the employee. It was stated that if the employee expresses a reservation, then that becomes a counter offer which may or may not be accepted by the employer. If not accepted, then there is no contract. The Court was referred to the case of *Solidarity & Another v SA National Parks (2008) 29 ILJ 2801 (LC)*. It was argued that on these bases, a conditional offer cannot be a contract.

8. It was further submitted that it is common course that following the offer, Applicants worked and were remunerated before the proposed contract came into being. It was added that while that is the case, it would be improper for the Court to make a conditional offer a contract. It argued that to do so, would be to offend the principle of freedom to contract. Regarding the authorities cited by Applicants, it was submitted that the case of *Whitehead v Woolworths (Pty) Ltd (supra)*, was inapplicable. It was stated that the case is about an offer without conditions. It was said that the offer in that case, was made a contract because it did not have any condition, which circumstances are absent *in casu*.

9. About the terms being different and inferior, it was submitted that it is inaccurate as what has simply been changed is the

wording, while the effect remained the same. Reference was made to the example cited by Applicants that in terms of their offer of employment, their entitlement to a thirteenth cheque was subject to performance and business targets. Further that in the proposed contract, it has been stated that Applicants may receive the thirteenth cheque but subject to performance, business targets and affordability on the part of the business to pay. It was argued that in both cases entitlement is subject to the same conditions.

10. We have carefully considered the submissions of parties and have noted a number of factors which are common cause. They can be summarised as follows,

1. Applicants were given offers of employment which they accepted.
2. After accepting the offers of employment, Applicants commenced being in the service of Respondent.
3. Applicants were then remunerated.
4. The proposed contract of employment came after all these above mentioned.
5. The terms of the proposed contract are different from those in the offer of employment, at least in their wording.

From this summary, the question is therefore whether the conditional offer that was made to Applicants is capable of being made a contract of employment and consequently supersedes the proposed contract.

11. We wish to note that it is not in dispute that an offer, without conditions, once accepted, becomes a binding instrument on the parties. Further, that any alterations on the terms of the offer by a single party, after being accepted, are unlawful as they amount to a unilateral variation of a common agreement. This is supported by the authorities of *Carlill v Carbolic Smoke Ball Co. (supra); Hyde v Wrench (supra);* and *Francis v Canadian Imperial Bank (supra).* We endorse and agree with the position presented.

12. The latter authority of *Francis v Canadian Imperial Bank (supra)*, has gone further to demonstrate that even if conditional, the terms of an offer are binding on parties and cannot be unilaterally varied by the employer. This in essence means that Respondent's attempt to alter the provisions of the offer, which was accepted by Applicants, cannot stand in law. Those accepted terms created a binding contract between the parties. As a result, the argument by Respondent that, by refusing to sign the proposed contract, Applicants demonstrated non-acceptance, cannot hold.

13. We say this because a contractual relationship already existed between parties, per the accepted offer. The parties' minds were *ad idem* when the Respondent made an offer, which was accepted by Respondent. The proposed contract does not mark the beginning of the employment relationship, but merely seeks to formalise the said relationship. This is basically the purpose of a contract that follows an accepted

offer of employment. It essence, the position would have been different had the proposed contract not been preceded by the offer.

14. While We agree with Respondent that a contract of employment only comes into effect if the offer is accepted unconditionally, the proposition does not apply *in casu*. We say this because, Applicants were given an offer which they accepted unconditionally. That acceptance in Our view created a contractual relationship between parties. Therefore, the authority in *Solidarity & Another v SA National Parks (supra),* does not apply *in casu*.

15. About the principle of Freedom to Contract, it has similarly been misapplied. The principle dictates that parties to a contract must be allowed to do so without restrictions from government. The principle is based on the assumption that contracting parties have equal bargaining power, skill and knowledge. Where the assumptions are absent, then intervention is necessary to ensure fundamental fairness for those who lack the power to bargain, skill and knowledge (see *Carolyn Edwards, Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues, (2009) Law Review Vol. 77:3, 647 at 647-648*). In Our view, the latter position holds.

16. About the terms being inferior, We agree with Applicant. While there are conditions to entitlement to a thirteenth

cheque, but the use of the word '*may*' as opposed to '*will*' affects the conditions of entitlement. A word '*will*', carries a guarantee that if the specified conditions are met, one will be paid a thirteenth cheque. However, the word *'may'*, carry an uncertainty that lies in the discretion of the employer, to either award or not to award a thirteenth cheque even if the conditions are met. In essence, We agree with Applicants that the conditions are inferior.

17. We are of the view that if Respondent is of strong opinion that the effect of the wording in both the offer and the proposed contract is the same, and that this is just an issue of semantics, then Our finding will not prejudice them in any manner. In fact, it means that Respondent can afford to maintain the terms contained in the initial offer of employment when preparing the proposed contract. The offer of employment accepted by Applicants constitutes a valid contract between parties.

18. Assuming that We were to hold the Respondent's view, We would be setting a very ruinous precedent both in our legal jurisprudence and jurisdiction. We say this because, the effect Our decision would be to encourage employers to deceive potential employees by offering attractive employment packages, only to alter them when preparing the contracts of employment. This is one exercise that We do not want to encourage. We therefore hold that a contract that seeks to formalise the relations between parties, must

not alter the terms contained in their employment offer, failing which it runs the risk of being set aside.

19. Applicants' second claim is that Respondent refused to acknowledge their employment by declining to sign confirmation of employment forms, when so required by Standard Lesotho Bank. The Court was referred to annexure B to the Notice of Motion, which the form in issue. It was argued that by virtue of being the employer, Respondent is obliged to confirm the employment status of its employees, when required to do. It was prayed that Respondent be ordered to confirm the employment status of Applicants by signing the Standard Lesotho Bank form, annexure B.

20. Respondent answered that it had no obligation in law to confirm the employment status of Applicants. It was added that in any event, Applicants have not signed the proposed contracts and therefore are not Respondent's employees. It was submitted that if they had accepted employment with Respondent by signing the proposed contracts of employment, Respondent would have confirmed their status of employment with Standard Lesotho Bank.

21. We agree with Respondent that there is no law where it is expressly stated that an employer has an obligation to confirm the employment status of its employee. However, We agree with Applicant that Respondent has an obligation to confirm his employment status for Standard Lesotho Bank.

We say this because in an employment relationship, parties have duties and obligations to one another. The said duties and obligations include employee welfare rights. Employee welfare entails all various services, benefits and facilities due to an employer from an employee. These include the service and benefit in issue.

22. As it is trite in law that no general rule stands without exceptions, there are circumstances where employee welfare rights may be withheld. The circumstances may vary depending on the nature and reasons for such refusals, but the reasons must be reasonable. *In casu*, Respondent claims that it does not confirm employment status of Applicants because they are not its employees. We have already determined that they are by virtue of having accepted the offer, Applicants are Respondent employees. As a result the refusal on the part of Respondent to confirm Applicants employment status, on these grounds, is therefore unreasonable.

AWARD

We therefore make the following award,

1. The offer of employment is a binding contract between parties.
2. Respondents are directed to confirm the employment of Applicants by signing annexure B, which is a letter from Standard Lesotho Bank.

3. No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 31st DAY OF AUGUST 2015.

T C RAMOSEME
DEPUTY PRESIDENT (a.i.)
LABOUR COURT OF LESOTHO

MR. MATELA **I CONCUR**

MRS. RAMASHAMOLE **I CONCUR**

FOR APPLICANTS: **MR. SEOAHOLIMO**
FOR RESPONDENT: **ADV. MOSHOESHOE**