IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN **CASE NO D390/99**

In the matter between:

DALE ALEXANDER CHAYCHUK Applicant

and

EIRE CONTRACTORS (PTY) LTD Respondent

JUDGMENT

JAMMY AJ

1. The Respondent company is primarily engaged in carrying out surface drilling and blasting operations involving road construction and open cast quarries and mines. Its director and sole owner, Mr John Moffatt, testified that having been established in 1988 with its head office then in Durban, the business expanded and grew steadily and by 1992 had extended its operations beyond the provincial boundaries of what was then Natal and into Northern Zululand, the Transvaal and, ultimately, Swaziland.

2. By 1995, the company employed five qualified surface blasters, two contract managers and a surveyor in Natal and two contract managers and five blasters in the Transvaal.

3. It was at that time determined, said Mr Moffatt, that the services of an additional surveyor were required and an employment agency, Pine Personnel, was retained to procure one. The position was advertised and the Applicant duly applied, was initially interviewed by the agency proprietor, Ms Carol Steyn and was then referred for a further interview to Mr Moffatt.

4. The Applicant was duly employed by the Respondent with effect from 1 March 1995. He was

qualified as a surface blaster but was retained ostensibly as a surveyor. In addition to the testimony of Mr Moffatt, evidence was presented by Ms Steyn to the effect that, in her initial interview with the Applicant, she informed him that the Respondent was operating both inside and outside South Africa and that his employment as a surveyor might involve movement in that context. She was aware, she said that this was an important feature of the job and she would not have referred the Applicant to the Respondent as a potential employee had he indicted any unwillingness to fulfil this obligation.

5. Mr Moffatt testified that the Applicant was similarly informed by him in his initial interview with him and further evidence from Mr Trevor Moldenhauer, at the time the Respondent's contracts and commercial manager, was to the effect that such a requirement was invariably a standard term and condition of employment as a surveyor in the industry.

6. It is common cause that, although according to Mr Moffatt, the Applicant's duties as a surveyor, his working conditions, hours of work, pay rates, working sites and objectives were fully canvassed by him with the Applicant in the course of his initial interview, no written employment contract was at that time concluded between them.

7. Mrs Christina Moffatt however, Mr Moffatt's wife, who described herself as a secretary and head of administration in the Respondent company, testified that during August 1995, that is to say some months after his engagement, the Applicant, together with a receptionist who had been employed at the time, a certain Ms Ferguson, requested a written contract of employment which was then drafted by the Respondent's lawyers and furnished to each of them. No aspect of that contract, she said, was ever challenged or queried by the Applicant but, to the best of her knowledge, it was never signed by him and returned, notwithstanding two separate requests to him to do so.

8. Two clauses of that contract, the unsigned copy of which was tabled as evidence by the Respondent, are material to this dispute. They read as follows:

The employee is hereby notified that due to the nature of the company's business, the employee could be requested by the company to work on sites anywhere in South Africa, including the neighbouring states and the employee hereby agrees to perform such work for the company as

may be requested of him in terms of this agreement at any one or more of its sites in one or more of these countries.

The employee agrees to obey all lawful and reasonable orders and to perform such work as he is directed to perform which falls within his ability, without loss of remuneration for his normal work, regardless of whether or not such work falls within the scope of the post to which the employee is appointed and to perform such work for the company at such place as he is directed by the company".

9. A considerable portion of the evidence adduced in this matter is peripheral to the core issue for determination. The kernel of the dispute between the parties arose in October 1998 when, in the context of a contract initially tendered for by the Respondent and subsequently awarded to it as a partner in a joint venture with another company (whose interests in Natal were eventually acquired by it), the Applicant was requested by Mr Moffatt to go to Swaziland as the Respondent's site representative on the project, the construction of a dam. In an organogram prepared in relation to that tender, the Applicant's name had been identified in the capacity of site manager. He had, said Mr Moffatt, been informed of the joint venture and the possible Swaziland contract some months before and with regard to his willingness or otherwise to work outside South Africa, he had previously carried out surveying functions in Swaziland on a relatively short term basis and had also indicated an unqualified willingness to work in Mauritius. When the possibility of a significant move to Swaziland had first been mooted to him, he had indicated no objection.

10. The Applicant's response to Mr Moffatt's request to him to move to Swaziland was to reject it. It was not, he contended, a term and condition of his employment that he would be required to do so. He had recently become engaged, was involved in pre-marital counselling and had undertaken a correspondence course. These were not considered by Mr Moffatt to be adequate reasons for his refusal and by that time an air ticket to Swaziland had been acquired for him for a flight on 6 November 1998.

11. The Applicant however persisted in his refusal to go and correspondence, submitted in evidence, then ensued, initially between the Respondent and the Applicant himself and subsequently with a firm of industrial relations consultants retained by the Applicant. In an initial letter, dated 26 October 1998, the Applicant tendered to go to Swaziland for "a period

of one month in total, this period affording the company the opportunity of making arrangements for another individual to take up the position of contracts manager in Swaziland". Mr Moffatt responded by drawing the Applicant's attention to the fact that he had been informed two months previously, without demur, that he would be transferred to Swaziland as site manager and had not objected. It was recorded that the Respondent's work in the Durban area had "decreased dramatically" and could be handled by another employee.

12. On 2 November 1998, Mr Moffatt addressed a significant letter to the Applicant. It read as follows:

" I refer to our meeting that we had on 30 October 1998. At that meeting I gave to you my letter in which I set out in writing the possibility that your refusal in transferring to Swaziland would result in your retrenchment. Notwithstanding the contents of that letter and our discussion your attitude is that you still refuse to accept the transfer to Swaziland.

I confirm that at the meeting there were no alternatives put forward by you to a possible retrenchment notwithstanding the fact that you were afforded the opportunity to make representations about the entire issue.

The purpose of this letter is to confirm what has transpired and further to afford you the final opportunity of accepting the transfer to Swaziland in the absence of any alternatives. You are aware that I have investigated the matter closely and I do not have any alternative proposals and you are also aware that you have put forward no alternative proposals either.

I regret to advise therefore that unless you confirm with me that you will accept the transfer to Swaziland with immediate effect and that you convey that acceptance to me by no later than 08h00 on Friday 6 November 1998 you give me absolutely no alternative other than to proceed with the retrenchment.

I have been advised that your unreasonable refusal to accept an offer of alternative employment will be mean that you forfeit your rights to severance pay".

13. The Applicant's response was that he had indeed volunteered an alternative, namely that he offered to work in Swaziland for a period of one month **"whilst you seek and appoint a suitable candidate to the position of contracts manager. Thereafter I would return to my position based in Durban"**. The contention "that a transfer to another country or even across provincial borders was never a term and condition of my employment", was

reiterated. The proposed transfer to Swaziland was **“nothing short of unilateral change to accepted terms and conditions of employment”**.

14. The respective positions of the parties were then recorded and reiterated in an exchange of correspondence between the Respondent’s attorneys and the Applicant’s representatives and in due course, as had been indicated in the earlier correspondence as the Respondent’s intention, the Applicant’s services were terminated on 30 November 1998 when he was paid all amounts considered by the Respondent to be legitimately due to him.

15. In the course of cross-examination the Applicant suggested that his dismissal in the context of a purported retrenchment was contrived and that there were other personal motives on the part of Mr Moffatt and relating to his relationship with his fiancée, which were in fact the underlying reason for disposing of his services. No such submission or contention was at any stage of the proceedings put to Mr Moffatt in the course of cross-examination or alluded to in any other context and I do not propose to have any further regard thereto in these circumstances.

16. In assessing the probative value of the conspectus of the evidence presented in this matter, I can find no basis to impugn the credibility of any of the witnesses who testified on behalf of the Respondent. The basis of the Applicant’s employment by the Respondent and the relevant terms and conditions pertaining thereto were succinctly described by Mr Moffatt and no material aspect thereof was significantly challenged in the course of cross-examination. The specific requirement that, at the company’s reasonable behest, the Applicant would be required to work outside the borders of South Africa in his capacity as a surveyor, was endorsed by Ms Steyn’s testimony that he had been directly informed by her of that possibility and by that of Mr Moldenhauer, regarding the norms prevailing in that context in the industry. Of even greater significance in that regard however is the Applicant’s undisputed failure to respond or react to a contract of employment submitted to him and containing that express and unambiguous provision. His explanation that he could **“did not think that this applied”** to him, defies understanding. In the context of the contract as a whole, these were provisions of such material significance that the least that could have been expected of him, if indeed they were not a term and condition of his initial employment, was that he would have reacted vigorously and expressly to the Respondent to that effect. I am in full agreement with the submission by Advocate Pitman for the Respondent, that his silence in that regard must be interpreted as an indication of his acceptance of those terms,

notwithstanding that for reasons not adequately explained, the agreement, which he himself had requested, was at no stage signed and returned by him. This principle was emphatically defined by the Appellate Division (as it then was) in

McWilliams v First Consolidated Holdings (Pty) Ltd 1982(2) SA1 at 10

in which Miller J A, alluding to the fact that failure to reply to an assertion **"does not always justify an inference that the assertion was accepted as the truth"**, continued thus:-

"But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute and an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject matter of the assertion".

That, precisely in my view, is the situation obtaining in this matter.

17. Any more detailed review of what I have referred to as the evidence peripheral to the core issue for determination in this matter would, in my view, serve only to burden this judgment unnecessarily. Suffice it to say that I am satisfied, where disputes of fact exist in that regard, that the evidence of Mr Moffatt regarding the situation in which the company found itself in the Durban area in or about October/November 1998 constituted commercial justification for its inability to retain the Applicant in meaningful occupation in that area. The requested move to Swaziland was, on the documentary evidence and witness testimony presented in the course of the hearing, both lawful and reasonable. The Applicants refusal for no reason which I am able to regard as valid, to do so and his manifest inability to suggest any alternative course of action which would have enabled the Respondent to address its commercial operational requirements prevailing at that time, fully justified the Respondent's perception that it was left with no alternative but to retrench him. The alternative position legitimately offered to but declined by him, save for the superficial inconvenience to which he sought to attach unwarranted significance, was in no respect materially prejudicial to him and his refusal to accept it was, in my view, unreasonable to an extent which negated his entitlement to any form of compensation other than the amounts which were lawfully due and paid to him.

18. For all of these reasons, I have concluded that the Applicant has failed to establish his entitlement in law or in equity to the relief sought by him in these proceedings and the order that I make is therefore the following:

The application is dismissed with costs.

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B M JAMMY

Acting Judge of the Labour Court

18 May 2001

Representation:

For the Applicant: Mr A Prior: Prior & Prior Attorneys

For the Respondent : Adv M Pitman instructed by Strauss Daly Inc