

THAPISA v LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY 2009 1 BLR 177 HC

Citation: 2009 1 BLR 177 HC

Court: High Court, Lobatse

Case No: Misca 367 of 2008

Judge: Kirby J

Judgement Date: February 6, 2009

Counsel: M K Moesi for the applicant. S A Ziga for the respondent.

Flynote

Employment - Dismissal - Constructive dismissal - Onus on applicant to prove that respondent making his situation so intolerable that applicant compelled to resign.

Headnote

he applicant claimed that he had been constructively dismissed by his employer and claimed to be paid the sum equivalent to the remainder of his contract. Held: (1) Constructive dismissal takes place when an employer repudiates the contract of employment by making conditions intolerable for the employee, and the employee accepts such repudiation by resigning or leaving. (2) The onus is on the applicant to prove on a balance of probabilities that the respondent made his situation so intolerable that he was compelled to resign. (3) The applicant had failed to prove that he had no voluntary intention to resign. He had chosen to resign to take up employment elsewhere. He had further not taken advantage of grievance procedures available to him before repudiating the contract.

Case Information

Cases referred to: Greenways (Pty) Ltd v Engen Marketing Botswana (Pty) Ltd [2005] 2 B.L.R. 270, CA Groenewald v Cradock Munisipaliteit en 'n Ander 1980 (4) SA 217 (E), Kalahari Ranches (Pty) Ltd v Botswana Network of Aids and Service Organisation [2007] 1 B.L.R. 646, Moremi v Westhynd Security (Pty) Ltd [1998] B.L.R. 287, IC Mosedame v Institute of Development Management [1998] B.L.R. 72, CA Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 721 (LAC), H Rakhudu v Botswana Book Centre Trust and Others [2005] 2 B.L.R. 283, CA Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T), Stark v Crescent School (IC 15/99), unreported, Zimbank Botswana Ltd v Makura [2002] 2 B.L.R. 497, CA 2009 (1) BLR p178 CLAIM for constructive dismissal. The facts are sufficiently stated in the judgment. M K Moesi for the applicant. S A Ziga for the respondent.

Judgement

This is an application by a former employee of the Limkokwing University of Creative Technology (which is the respondent) for an order that he was 'unlawfully dismissed by the applicant from his employment'. This is obviously a blunder as the respondent was the employer. The case was argued as such, and the prayer shall stand amended accordingly. He also prays for an order directing the respondent to pay to him 'the sum equivalent to the remainder of the applicant's contract or any other such sum that the honourable court may think fit', and for costs. The applicant, who was formerly an associate professor at the University of Botswana and who is the holder of the degrees of Bachelor of Arts in Administration and Doctor of Philosophy in the Meaningfulness of Work, as he says, was with effect from 1 February 2008 employed by the respondent in the capacity of vice-president academic of its Botswana campus at a salary of P30 000 per month, on a one-year fixed-term contract, to which I will refer in more detail later. After less than six months' service, on 28 July 2008, he resigned from the job. Two days later he filed the present application on notice of motion, supported by a well-prepared founding affidavit with a number of annexures. A full answering affidavit with a counterclaim for P90 000 (being damages for failing to give notice) and a replying affidavit were also timeously filed, and the application was listed for argument on 18 December 2009. No preliminary points were taken by either party, but the application as it stood fell to be dismissed out of hand because it sought unliquidated damages, and it is impermissible to bring a claim of this sort on notice of motion. See Zimbank Botswana Ltd v Makura [2002] 2 B.L.R. 497, CA at p 500. The Zimbank case was similar to the present one, in that the balance of wages which would have been payable under a terminated fixed-term contract was claimed. The Court of Appeal held that because of the duty to mitigate, oral evidence

would be required to establish any damages. They were then not liquidated and the application was dismissed. The present case, however, took an unusual turn, because the unliquidated damages evolved into a specified sum at the doors of the court. First, the respondent begged leave to file an additional affidavit in which its representative revealed that it had come to light that the applicant had, since at least September 2008, been employed by the ABM University College in Gaborone. The affidavit, which had been commissioned in Malaysia, was not authenticated, but the deponent Wong Yeng Woong, known in Botswana as Gail Phung, was present in court. Both parties were anxious to have the matter argued and they agreed to eliminate the technicalities raised, and arguments thereon, by both formally admitting the following facts as part of the pleadings: (a) that with effect from 1 August 2008 the applicant had been employed by ABM University, Gaborone, at a salary of P20 000 per month, and (b) that the applicant's claim for damages is thus reduced from a potential P180 000 (6 x P30 000) to a liquidated sum of P60 000 (6 x P10 000). By consent a doctor's report dated 25 August 2008, which had been omitted in error and which emanated from the cardiac clinic, was also admitted in evidence. The court condoned these steps in the interests of resolving the dispute expeditiously, as both parties desired. I note for the record, though, that the applicant was less than frank with the court in his founding and replying affidavits, in failing to make a full disclosure of the material issue of his subsequent employment, which was within his knowledge, and he sought in this way to recover damages to which he knew or should have known he was not entitled. The second concern raised at the outset by the court was the legal status and thus the locus standi of the respondent, which is described in the founding affidavit as 'an educational institution registered in terms of the laws of Botswana, and having capacity to sue and be sued, and whose address is Private Bag 0092, Gaborone'. Legal personae or entities capable of suing and being sued may take various forms, but I am not aware of one called an 'institution'. Schools or universities may be statutory bodies or be run by companies, registered societies, trusts, partnerships or sole ownerships, among others. The onus is upon the applicant, as dominus litus, to satisfy the court of the locus standi of both the applicant and the respondent. See *Kalahari Ranches (Pty) Ltd v Botswana Network of Aids and Service Organisation* [2007] 1 B.L.R. 646 at p 648. There is no allegation that the respondent is a body corporate. It appears from the papers to be the Botswana campus of a Malaysian university, though what form the mother entity takes is also not clear. There are various references to its having a senate, a council, a board of directors and a president. Both counsel indicated from the bar that they think it is a company and this is borne out by references in the applicant's contract to 'company' and 'group'. Since neither party raised any objection as to locus standi, and both parties were satisfied that Limkokwing University is indeed a corporate body which has, on the papers, enrolled several thousand students and employed a full range of staff, I allowed the argument to proceed. The applicant has chosen to make his claim on notice of motion, rather than by action. This carries with it the attendant dangers of a shortened process, as set out in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at p 1162. Not only does he run the risk of having his action dismissed if there were genuine and foreseeable disputes of fact, but if there is no application for viva voce evidence, or if such an application is refused, then this application falls to be determined on: (a) the admitted facts as appear from all the affidavits on both sides; and (b) such facts, which though denied, can be shown on the material before the court to be established on the probabilities. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and *Greenways (Pty) Ltd v Engen Marketing Botswana (Pty) Ltd* [2005] 2 B.L.R. 270, CA at p 275. There has been no application here for referral to evidence and it is on the above basis that the application will be determined. The applicant bases his claim on constructive dismissal, so I will briefly set out the law, as I understand it, on that subject before dealing with the facts. Under the common law a constructive dismissal was said to have taken place when an employer repudiated the contract of employment by making conditions intolerable for the employee, and the employee accepted that repudiation by resigning or leaving. See *Groenewald v Cradock Munisipaliteit en 'n Ander* 1980 (4) SA 217 (E) at p 220. In *Moremi v Westhynd Security (Pty) Ltd* [1998] B.L.R. 287, IC at p 293 De Villiers J held that the concept of constructive dismissal had been accepted into the law of Botswana as part of our Roman-Dutch common law and it has been applied here on a number of occasions. The position has now been elaborated and clarified by statute, in South Africa by the Labour Relations Act 66 of 1995, which deals with constructive dismissal in detail, and in Botswana by s 26(2) of the Employment Act (Cap 47:01), which is not as specific, but provides (in so far as is here relevant) as follows: '(2) An employee whose contract of employment is for ... a specified period of time may terminate the contract of employment immediately, notwithstanding that ... the period of time for which the contract was made has not expired, on the ground that - ... (d) he is badly treated by his employer or his employer's representative....' By subs (3), the employee is deemed to have waived that right unless he exercises it within a reasonable time. The position is tidily summarised by Judge O B K Dingake in his work *Individual Labour Law in Botswana* (Bay Publishing 2008) at p 65 as follows: 'Constructive dismissals are in essence forced resignations as a result of the employer placing the employee under unbearable conditions. Put differently constructive dismissal refers to a situation where the employee resigns because he has no option but to do so because of the intolerable conduct of the employer. Determining whether the employee was constructively dismissed requires a two-pronged inquiry: Firstly the employee must prove that he or she had no voluntary intention to resign. Secondly, the court must regard the employer's conduct as a whole and determine whether its effect, objectively assessed, was more than the employee could be expected to bear.' [citing, in the latter regard, *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 721 (LAC)] In the Botswana case of *Stark v Crescent School* (IC 15/99) unreported, a teacher who resigned because he was relegated to typing examination papers for other teachers in the computer room while he awaited the outcome of disciplinary proceedings failed in his action for constructive dismissal, largely because he chose to resign without pursuing the grievance procedures available to him. The employer/employee relationship between the applicant and the respondent was governed by a four-page letter signed by Professor Emeritus Tan Sri Dato' Dr Lim Kok Wing, in his capacity as president of the respondent. The applicant signed the letter, accepting the terms and conditions therein. Some pertinent terms of the contract were the following: (a) First, it was expressed as being for a term of one year renewable, with full-time employment to be offered upon successful completion of the first year's service or earlier if

performance was exemplary. Medical aid contributions kicked in 'on completion of probation', while the notice period required to resign 'after confirmation' was three months. (b) Secondly, international travel was envisaged, and formed an important part of the duties of the position. The applicant was transferable 'to any of the companies within the group', he was expected 'to play a wider role internationally' and he was 'required to visit other branch companies as and when the need arises'. (c) Thirdly, the position was offered on condition that the applicant was in good health and free of any serious medical ailments. If this turned out not to be so, the contract would be nullified. (d) Fourthly, the contract was to be governed by the local labour laws. As in most cases of constructive dismissal there are many and varied areas of dispute between the parties, some as to fact, but many as to perception. In my judgment these differences and disputes arose from the fact that from the beginning the applicant and the respondent were at cross-purposes in their view of virtually all aspects of the parties' relationship, on the nature and seniority of the applicant's position, on the scope of his duties, on the lines of authority, and on the status of the Botswana campus of the respondent. In the view of the applicant, when he applied for the post of vice chancellor of the respondent he was successful, although he was appointed as vice-president academic. In terms of the organisational structure he was junior only to the vice chancellor, the senate and the council. There was no vice chancellor, no senate, and no council. Therefore, in his view, he headed the Botswana campus, and was in charge. He was unaware, so he said, of any board of directors or of the structure of the parent university in Malaysia. In particular he did not agree that Gail Phung, a senior vice-president from Malaysia, enjoyed any seniority over him in Botswana. In his perception the Botswana campus was autonomous and he was its head. The president of the respondent, Professor Lim Kok Wing, its senior vice-president, Gail Phung, and the other members of the senior management team in Malaysia saw things entirely differently. The Botswana campus was a newcomer to their international group of companies, all of which were answerable to the mother company, or mother university, in Malaysia. The position vice chancellor of the Botswana campus was never filled because there was no qualified person identified (including the applicant). Instead it was agreed with the Botswana authorities that Professor Lim Kok Wing would act as vice chancellor and the senate and council in Malaysia would serve Botswana as well. Although a senior one, the applicant was an employee of the group like any other, and was subject to the authority and supervision of the senior management team, and in particular of Gail Chung, who travelled to Botswana frequently, who was the one who interviewed the applicant for his post, and who, to a certain extent, micro-managed aspects of the Botswana campus on behalf of the president. The applicant, in their view, was never in charge of the Botswana campus at any time. This core misunderstanding led to problems for the applicant from the beginning. He was not formally received according to his expectations by senior staff members when he took up his post on 1 February 2008. There was no senior person from Malaysia present, and his co-vice-president (according to the organisational chart), Mr Chen Meng Kong, was in Francistown attending to other business. Two other members of staff, whom he regarded as junior, showed him around. Next, he was whisked away to Malaysia for a 10-day orientation session to bridge the Malaysia/Botswana cultural divide, to imbue him with the philosophy, outlook, and business approach of Limkokwing University, and to educate him on the structure of the group, which was running campuses in several countries. The orientation was a disaster. During day one, the applicant assailed the presenter, Gail Phung, with questions which he saw as pertinent but which she perceived as arrogant, self-important, rude, aggressive, and confrontational. At one stage, in her words, 'He threw his USB memory stick at me across the table, and demanded that I save my presentation in this memory stick. That to me was unacceptable, and it was deemed to be rude by all the seniors present.' His response demonstrated the cultural chasm between them: 'I aver that pushing a memory stick across a table to a colleague means nothing, yet it meant a lot to them. I still do not understand why officers at that forum took exception to that.' The result was that the next day of orientation was, in his case, devoted to personal counselling by the seniors in Malaysia (or so they saw it) in order that he could be culturally sensitive, mend his ways, and forgo his arrogance. He saw it as sustained and hostile grilling until 'as a result of fatigue, the only escape route was to apologise'. There are factual disputes as to how long these meetings took. After the trip to Malaysia it is apparent that relations between the applicant and Gail Phung never improved, and that Professor Wing took her part, as his senior lieutenant. They took every opportunity to show him that he was not in charge at the Botswana campus. He did not change his view that it was Gail who was the intruder in what should have been an autonomous Botswana campus. Thus he was excluded from a ceremonial visit to South Africa on 19 June 2008 to confer an honorary doctorate on Mr Nelson Mandela, and from a reception committee to meet Professor Wing on his return. He was not made part of a delegation which travelled to the Lesotho campus in mid-July 2008, and he was not invited to a number of meetings of the faculty management group, which were addressed by Gail Phung. There were other directives given too which showed that in the view of his seniors the applicant was to be aligned with other employees and not treated as a chief executive. Copies of his letters out, as in the case of others, were to be vetted, he received copies only of the letters from head office which directly concerned him, and he was not briefed on a post-graduate sponsorship pledged to the government. In some instances, in my judgment, he overstated his case, leading to disputes of fact. He claimed that on Sunday 22 June 2008 Professor Wing called a meeting at which he instructed that staff were no longer to call the applicant 'professor'. But in support he attached letters which showed that shortly after his appointment, as early as 15 February 2008, he was already addressed by the senior staff as 'Dr Thapisa'. It was the view of Limkokwing, rightly or wrongly, that the title of associate professor, relating to a post at the University of Botswana, did not apply in their institution. There is no evidence that this was done to humiliate the applicant. Next, he claimed to have been deliberately excluded from an important board of studies meeting held on 11 July 2008. The minutes showed that the meeting was in fact held on 9 July and that he was present (although he persisted in his denial). He claimed that he was excluded from staff recruitment and selection, but exhibits provided proved that this was not so, as he had assessed the applicants. He claimed to have had to work without a budget, but it was pointed out that he had failed to submit the budget himself. He claimed that after Professor Wing's visit of 21 June 2008 he stopped receiving weekly staff reports, but it was clarified that this only occurred when his laptop computer was inoperative. In his affidavit he made his attitude towards Gail Phung quite clear, stating that 'as

far as I am concerned, Gail is not a part of any structure of the respondent's Botswana campus'. It is not surprising in those circumstances that she did not include him in her meetings in Botswana, since a confrontation was likely to result. It does not follow that the respondent was in that way trying to force him out. He had, in any event, only a further six months to serve. A contributing factor to the misunderstanding over the range of the applicant's duties and responsibilities was a divergence between his job description as contained in the contract and his position in the structural organogram approved by the tertiary education council, upon both of which he sought to rely. Under the contract, for example, he was charged with 'managing resources both physical as well as human in the University', and for 'liaising with student services to ensure that all matters pertaining to student concerns and issues are attended to promptly'; and that he 'was to provide professional leadership in recruiting staff'. However, in terms of the organogram his equal in rank, director of operations Chen Meng Kong, was the one supervising human resources, student affairs, and operations and resources. He claimed, relying on the organogram, that he should have chaired the faculty management group, since in the structure he was placed above it. The organogram made no reference to the chair of that body, and the respondent averred that, in terms of the systems and philosophy of their university, that was a 'linear' body (presumably a meeting at equal level) and that ever since the university was opened the chair had been rotational. This was still the case. The applicant was also wrong in claiming that the FMG was attended by lecturers and tutors. Its members were more senior than that. What is clear though is that throughout the period of his fall-out with Gail Phung and Professor Wing he continued to perform his professional duties, or some of them. He received and submitted reports regularly, attended meetings, and took part in the assessment of applicants for jobs. This is demonstrated by the documents exhibited. One of these is a letter from the applicant to Professor Wing dated as late as 23 June 2008. In this he humbly apologises for an inadequate report in which he neglected positive aspects of Limkokwing and emphasised the negatives, and promised no further lapses. He also thanks the professor for 'your excellent advice which I have begun to act upon'. So as at that date it does not appear that the applicant regarded himself as being forced out of his job. Earlier on 3 June 2008 the applicant had, the record reveals, been reprimanded, and had apologised, for an 'arrogant and aggressive' text message he had sent to Professor Wing. On the morning of 25 June 2008 the applicant had a meeting with Gail Phung, at which he was informed that he was to travel to Malaysia as he needed further training. (I pause to remark that further training is not usually offered to employees whom an employer is trying to force out.) At 3.15 pm that afternoon Gail Phung received a note from the applicant. In it, unexpectedly, he announced that 'suddenly, I am not feeling very well and I have gone to seek medical attention. I shall have a medical report compiled for tomorrow.' True to his word, he returned next day with a specialist's note from the cardiac clinic, which informed her that: 'Professor Thapisa has been under our care for the last four years. We have noticed an increased fluctuation in his cardiac status as a result of a number of possible situational stressors at work. This has needed more frequent specialist review and titration of his medication. Our concern has resulted in me suggesting that he remain within Gaborone for the foreseeable future until he attains stability from a medical perspective, and more specifically within his cardiac status.' To any reasonable reader this would indicate: (a) that Professor Thapisa had a cardiac condition for which he was taking medication; (b) that he had had this for four years; and (c) that the condition was sufficiently serious to stop him travelling outside Gaborone for an indefinite period. That is how Gail Phung took it too, although she was surprised that he had always represented himself to be free of any medical complaint, and so had landed the job. He could thus not travel to Malaysia for his training. A formal letter was written to the applicant on 11 July 2008, requiring him to explain within five days why he had not disclosed his medical condition at the time of his application, since travelling was an important part of his duties. He responded on 16 July, denying any misrepresentation, claiming that his condition was not repetitive, and that he was able to undertake any trips in future if so required. He then awaited a decision from the respondent. When none was forthcoming by 25 July 2008, he wrote again requesting a decision 'by close of business' on the same day. On 28 July 2008 (following another incident concerning student orientation, about which there is a factual dispute) the applicant wrote a letter of resignation with immediate effect in which he stated inter alia that: '1. I have for some time been reviewing my relationship with the officers of Limkokwing to the discharge of my duties, functions and responsibilities. 2. I regret to say that I have come to the conclusion that the conditions have been made difficult, if not impossible, for me to continue holding and discharging the duties, function and responsibilities for which I was employed.' Two days later he filed the present application, and the following day he started work with ABM University, at a reduced salary. To test whether the applicant is right in his belief that he was appointed as the head and most senior officer in charge at the Gaborone campus of the respondent, it is necessary to examine his contract. The onus is on him to prove on a balance of probabilities that the respondent has made his situation so intolerable that he was compelled to resign. If indeed he was so appointed, then he has a better chance of showing that the actions of Professor Wing and Gail Phung made his continued employment in that capacity intolerable. If, on the other hand, he was appointed as one of the senior staff members, subject to the continuing authority of those above him, then his task will be a great deal more difficult, in the light of the evidence led. There are several aspects of the contract and the organogram which, in my view, demonstrate that he was not put in charge of the Limkokwing University Gaborone campus. (a) First, as vice president academic he had, in terms of his job description, some management and leadership roles, but it was made clear that he was in respect of these to make recommendations to 'the management', which would make the necessary decisions on training, policy and procedures. (b) Secondly, as vice president (or as one of the vice presidents) he would, by definition, report to the president, as a minimum, and that is also referred to in the job description. (c) Thirdly, another person senior to him, the manager, is referred to in the clause on sick leave. The manager is to be informed of any illness. (d) Fourthly, the contract makes it clear that Limkokwing is owned and run by a company, which would have its own senior executives. (e) Fifthly, in terms of the organogram, which he accepts, the position of vice president academic ranks equally with the director of operations. Above them comes the vice chancellor, the senate, and the council. Even if the applicant genuinely believed that he was to be in charge, he was quickly disabused of this belief after his arrival by Gail Phung and Professor Wing, who were both his seniors. It appears that

the applicant failed to appreciate the difference between an autonomous government university created by statute and a privately owned institution where, subject to the law, the owners set their own rules, procedures and policies, with which their employees are expected to comply. That the applicant did not fit in is abundantly clear. He did not embrace the culture, norms and philosophy of his employer, but that was due to his own character and his own choice, rather than the conduct of the respondent. Right up to a day or so before his resignation they were planning further training for him to improve his performance and to make the parties compatible in their approach. They had not given up on him. It is he who gave up on them. There are other reasons too why his action for constructive dismissal cannot succeed. He was not forced to resign by circumstances or otherwise. He chose to resign in order to take up employment with ABM University, albeit at a lower salary. He has failed to discharge the onus of proving that he had no voluntary intention to resign. The overwhelming probability is that even before his letter of resignation he had been negotiating his new job with ABM University since he was able to commence work only three days later. That he did not enjoy working at Limkokwing did not entitle him to terminate his contract and claim damages. There is also a strong indication that in seeking a new job he was influenced by the precariousness of his own position. He had misled the respondent as to his heart condition of four years' standing, had relied on this condition to avoid or delay travelling to Malaysia for training, and was waiting to hear the consequences of this (which could have included nullification of his contract) when he resigned. Finally, as was held in Stark's case (supra), if the applicant really wished to resolve his differences with the respondent, he should have taken advantage of available mediation and grievance procedures before repudiating the contract. The contract was governed by local labour laws. His grievance with the respondent involved the interpretation of the contract in regard to his role, functions and work description, as well as to lines of authority. The Trade Disputes Act (Cap 48:02) provides grievance procedures for the resolution of such trade disputes. By s 2 of the Act a trade dispute includes any dispute between an employer and an employee concerning the employee's terms and conditions of employment under his employment contract (see the definitions under that section of 'employer', 'employee', 'contract of employment', 'dispute of right', and 'trade dispute'). Not only did the applicant fail to invoke the statutory grievance procedures but on the papers he failed even to put his grievances in writing to Professor Wing for possible resolution. This too militates against any finding in his favour of constructive dismissal. I also cannot find that the respondent's conduct, taken as a whole and objectively viewed, was more than the applicant could be expected to bear. The respondent was entitled to expect that the applicant, subject to his own rights, would conform to its policies of mutual respect and team work and would respect the culture and seniority of those in authority over him. Their actions, if sometimes somewhat heavy-handed, seem to me to have been designed to achieve these objectives, rather than to force his resignation. The applicant's claim that he was unlawfully dismissed must thus fail, as must his prayer for liquidated damages. That leaves the respondent's counter-application for determination. The sum of P90 000 is claimed, being three months' salary in lieu of notice in terms of the contract, since the applicant departed unceremoniously without giving any notice at all, taking with him the respondent's laptop computer and, the respondent believes, certain of its files. The respondent's second claim is for the delivery of those items. The applicant admitted possession of the laptop as at the date of argument (18 December 2008) and tendered delivery, but denied possessing any files. The respondent was unable to prove such possession, so no order can be made in that regard. To sustain its claim for three months' wages in lieu of notice, the onus is on the respondent to prove that this is its entitlement under the contract. I have some difficulties with this proposition. As stated, the contract was a short one, for a one-year fixed term before permanent employment could be granted, although this could be brought forward for excellent performance. Thus the first year has all the hallmarks of a trial or probationary period during which each party could satisfy himself or itself of their compatibility. This is borne out by the reference to an entitlement to medical aid 'on completion of probation', and to the fact that it is 'after confirmation' that three months' notice is required. This begs the question as to what notice is required before confirmation. In this context 'confirmation' can only mean entry into permanent employment. The Court of Appeal has held in *Mosedame v Institute of Development Management* [1998] B.L.R. 72, CA at p 75 that: 'The obvious purpose of a probationary period is to enable the employer to assess, before taking an employee into permanent employment, if the employee is capable and competent to perform the work for which he will be employed; and for the employee to assess, before taking up permanent employment, if he would wish to work for the employer, and to do the work for which he will be employed in the conditions of employment with the employer.' In terms of s 20(1) of the Employment Act the probationary period for skilled employees, such as the applicant, shall be not more than 12 months or such period as is specified in the contract. In this case the whole one-year, or 12-month, period is in effect probationary. There is, however, no notice specified for resignation or termination before confirmation. Under the common law, where no notice period is stated for termination during the probationary portion of a fixed-term contract, the contract may be terminated on reasonable notice. Reasonable notice in such a case has been held to be 14 days' notice. See *Rakhudu v Botswana Book Centre Trust and Others* [2005] 2 B.L.R. 283, CA at p 291. Payment in lieu of notice, which is also dealt with in the contract and which is now claimed by the respondent, is thus salary for 14 days in this case, or 14/31 of P30 000 since the notice period should have been in the month of August. This is the amount to which the respondent is entitled. Accordingly: (1) The application is dismissed. (2) The applicant is to pay the respondent salary in lieu of notice in the sum of P13 580. (3) The applicant is to restore to the respondent forthwith its laptop computer if he has not already done so. (4) The applicant is to pay the respondent's costs of the application and of the counter-application. Application dismissed.