

**BREACH OF THE IMPLIED DUTY TO  
PRESERVE MUTUAL TRUST AND  
CONFIDENCE IN AN EMPLOYMENT  
RELATIONSHIP: A CASE STUDY OF**

***Moyo v Old Mutual Limited*  
(22791/2019) [2019] ZAGPJHC 229 (30 July 2019)**

## **1 Introduction**

This case note is intended to revisit the contentious aspect of the implied duties of South African labour law in the individual employment relationship. Significantly, the case note intends to remind the reader about the importance of adhering to certain implied duties in the contract of employment. In this regard, the implied duty to preserve mutual trust and confidence is the central theme of this case note. On the one hand, the implied duty to safeguard mutual trust and confidence imposes an obligation upon the employer to conduct itself in a manner not likely to destroy, jeopardise, or seriously damage the trust relationship and confidence in the employment relationship. On the other hand, this implied duty is becoming a significant yardstick used by employers to address contractual labour disputes in South Africa. In order for an employer to invoke this implied duty, it must be expected that the employee would have to conduct him or herself in a manner likely to demonstrate to his employer loyalty, good faith and cooperation.

Against this background, the recent case of *Moyo v Old Mutual* (22791/2019) [2019] ZAGPJHC 229 (30 July 2019) (*Moyo*) demonstrates the impact of a breach of the implied duty to preserve mutual trust and confidence on the employment relationship. This case note intends to examine the implied obligation that rests upon the employer to safeguard trust and confidence in the relationship. The case note further reflects on the implied duty of employees to safeguard and protect mutual trust and confidence. After all, trust forms the basic fundamental core of the employment relationship, and any breach of this duty is likely to result in an irretrievable breakdown of the employment relationship. Once there is a breakdown of trust and confidence, it remains a mammoth task to restore the relationship.

## **2 Facts of the case**

Mr Peter Moyo was an employee and also the Chief Executive Officer (CEO) of Old Mutual Limited (Old Mutual), the employer (*Moyo v Old Mutual* (22791/2019) [2019] ZAGPJHC 229 (30 July 2019) par 1). This court action

was triggered by a series of events that began in March 2018 when Moyo questioned certain conflict-of-interest elements involving Mr Trevor Manuel, (Chairperson of the Board governing the employer) and Rothschild (*Moyo v Old Mutual supra* par 3). This conflict of interest stems from a large multibillion rand commercial project on the delisting of Old Mutual PLC from the London Stock Exchange and the proposed listing of the employer on the Johannesburg Stock Exchange (*Moyo v Old Mutual supra* par 3). It is important to note that Manuel was a director of all these companies.

As soon as it became apparent to Moyo that there was a potential conflict of interest on the part of Manuel, he openly voiced his concerns and cautioned him not to participate in the discussion meetings (*Moyo v Old Mutual supra* par 5). However, Manuel ignored and failed to act on Moyo's objections, proceeding to participate in the discussion of this matter. From that point onward, Moyo noticed that his employment relationship with Manuel turned sour (*Moyo v Old Mutual supra* par 6) because Manuel continued to ignore Moyo's further advice relating to improper non-disclosure of a payment amounting to millions of rand paid by the employer in respect of the chairperson's legal fees (*Moyo v Old Mutual supra* par 7). Efforts to restore a good employment relationship between Moyo and Manuel yielded no results. On 23 May 2019, Moyo was suspended and was ultimately dismissed on 17 June 2019 for failure to discharge his fiduciary duties as a director of the employer. It was alleged that Moyo made certain disclosures about payment of Manuel's legal fees before allegations of a conflict of interest were then made against him in respect of another matter. This prompted Moyo to lodge an application in the High Court reinstating him to his position as CEO of Old Mutual.

### **3 Legal issues**

Legal issues arising from this case are (a) whether the dismissal of Moyo was in line with the parties' contractual obligations and (b) whether the Protection of Disclosures Act (26 of 2000) is applicable in the matter.

### **4 Analysis of the employment relationship**

The employee and employer relationship is founded on obligatory duties to work by the former, and the duty to pay wages and salaries by the latter (Fouche "Common Law Contract of Employment" in *A Practical Guide to Labour Law* 8ed (2015) 16 par 266). These obligatory duties fall within the confines of the contract of employment, even though not all these duties may invoke contractual elements. However, the *Moyo* case espouses all elements of an employment relationship, which is founded on the prescripts of contractual obligations.

The employment relationship between Moyo and Old Mutual can best be described as one where labour is bought and sold as a commodity (Davidson *The Judiciary and the Development of Employment Law* (1984) 7). In this instance, Old Mutual as an employer owns labour and further regulates Moyo, who is an employee. In the words of Kahn Freund, "there can be no employment relationship without a power to command and a duty

to obey, that is, without this element of subordination in which lawyers rightly see the hallmark of the contract of employment” (Davies and Freedland *Kahn Freund’s Labour and the Law* 3ed (1983) 9). Furthermore, Strydom rightly justified this regulation when he asserted that the “employer’s right to control the workforce is the cornerstone of the employment relationship” (Strydom *The Employer Prerogative from Labour Law Perspective* (LLD Thesis UNISA) 1997 1–38). Thus, the control dynamism of the employment relationship is deeply embedded in the jurisprudential philosophy of the contract of employment. In other words, the duty of subordination forms a central part in the contract of employment. The duty of subordination entails that the employee ought to conduct him or herself in an honest and obedient manner and also be willing to cooperate with the employer at all material times (*Impala Platinum Limited v Zirk Bernardus Jansen* (JA100/14)). In terms of power dynamics, this expressly implies that Old Mutual finds itself in a position of authority over Moyo. In return, Moyo is expected to carry out his employment duties subject to Old Mutual authority and further to obey the lawful orders that the employer expects him to carry out.

Generally, disobeying the lawful commands of the employer by an employee may constitute the misconduct of insubordination. For this reason, the discipline and ultimate dismissal of the employee may be justifiable, as long as those actions are compliant with both the substantive and procedural requirements for dismissal.

## **5 Implied duty to safeguard of mutual trust and confidence in *Moyo***

Although the duty to safeguard trust and confidence in the employment relationship was not expressly explored in the *Moyo* case, its implied significance could evidently be felt in the case. This is because this duty imposes an obligation on both parties in the contract of employment. However, it is significant to note that a much greater obligation of this duty is imposed on the employer. In the present case, the employer is Old Mutual. In the landmark case of *Malik v Bank of Credit & Commerce International (In liquidation)* [1998] AC 30 (*Malik*), Lord Steyn held that an employer may not, “without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee” (par 45). The *Malik* case laid a greater obligation at the doorstep of the employer not to act in a manner likely to breach mutual trust and confidence. In other words, not only is Moyo expected to act in good faith and fair dealing, but so too is Old Mutual.

The same principle of good faith and fair dealing was raised in the case of *Wallace v United Grain Growers Ltd* 1997 CanLII 332 (par 139), where Judge McLachlin held:

“A contract of employment is typically of longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater opportunity for harm or abuse. It is quite logical to imply that parties to such a contract would, if they turned their minds to the issue, mutually agree that they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it.”

In the same vein, Moyo's contract of employment appointing him as CEO of the employer was a permanent one and depended heavily on a trust relationship between employee and employer (par 3).

Consequently, Moyo owed a fiduciary duty to desist from acting contrary to the interests of Old Mutual. This fiduciary duty takes centre stage in the employment relationship between employee and employer. This notion was further upheld in the case of *Council for Scientific & Industrial Research v Fijen* ((1996) 17 ILJ 18 (A) 26D–E), where it was found:

"It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent party' to cancel the agreement ... It does seem to me that, in our law, it is not necessary to work the concept of an implied term. The duties referred to simply flow from *naturalia contractus*."

Once there is a breakdown of trust, therefore, termination of the employment contract may be justified as a result of the conduct of both parties in the employment relationship.

Against this background, this note now intends to examine the *Moyo* case based on the arguments advanced by both parties to the contract of employment. The case note further intends to reflect on what caused the judge to arrive at his decision. Such an examination would take into account the following:

#### **(a) Confidential information**

The principles of individual employment law dictate that an employee is expected to safeguard confidential information gained in the course of employment. Furthermore, the employee may not disclose such confidential information for personal gain whatsoever. One classic case on the protection of confidential information is *Cooler Ventilation Co Ltd (SA) Ltd v Liebenberg* (1967 (1) SA 686 (W) 691), where it was held that "an employer is entitled to be protected from unfair competition, as it is called in American law, brought by confidential information of his business to a rival by an employee or ex-employee." However, it was evidently clear from the *Moyo* case that the employee was actually persecuted for objecting to the non-disclosure of payments in respect of Manuel's legal fees (*Moyo v Old Mutual supra* par 7). Moyo further highlighted that these payments were quite irregular and improper (*Moyo v Old Mutual supra* par 7). In the end, Judge Mashile found:

"The discovery of the alleged conflict therefore came well after the disclosures. For this reason, the connection is apparent – disclosure followed by alleged conflict and then the occupational detriment. On the understanding that causality was the only issue, I find that the Applicant [Moyo] should be protected." (*Moyo v Old Mutual supra* par 62)

It is evident from the above judgments that in the contract of employment, employees have an implied duty not to use information obtained at their workplace to advance personal interests contrary to those of their employers on the one hand. Furthermore, an employer is expected to protect those employees who protect the information gained during their course of

employment against those who seek to use confidential information against the employer's interests.

**(b) Conflict of interest**

It is a generally accepted principle of employment law that an employee may not engage him/herself in conduct that would result in a conflict of interest with the employer. In other words, an employee is under an obligation to promote the interests of the employer in the course of the employment contract. This assertion was also confirmed in *Prinsloo v Harmony Furnishers (Pty) Ltd* ((1992) 13 ILJ 1593 (IC)), where it was held in paragraph 5 that

“at common law an employee is under an obligation to enhance the business interests of his employer and to avoid a conflict of personal interests and those of his employer. He should not involve himself in an undertaking that is in competition with his employer.”

Having said that, an employee who engages in conflicting activities against those of the employer's interests is virtually dishonest and, as such, should be disciplined.

It is evident in the *Moyo* case that Manuel, who was simultaneously a director of Old Mutual PLC, the chairman of Old Mutual, and the chairman of Rothschild had subjected himself to three actual and/or potential conflicts among these entities (par 5). Therefore, Moyo's protest against and objection to Manuel's continued disregard of his conflicted role was justifiable and did not warrant dismissal. It was for this reason that Judge Mashile held:

“The conclusion that the Respondents [Old Mutual Limited] first accused the Applicant [Moyo] of conflict of interest and misconduct and then denied him of the procedures laid down in the contract, specifically clause 25, is unavoidable. Having done so, they then invoked Clause 24.1.1, which in reality had nothing to do with the situation that they faced with the Applicant. The point is Clause 24.1.1 was incorrectly applied and the dismissal cannot be justified on that ground. Both the suspension and subsequent dismissal were unlawful.” (par 67)

In light of this judgment, the employee ought to guard against all forms of conflict of interests emanating from the contract of employment. Furthermore, dismissal is justifiable against an employee who actively engages him/herself in activities contrary to the employer's interests.

## **6 Conclusion**

This case note has managed to cement a view that the implied duty to preserve mutual trust and confidence remains a thrust of the contract of employment. In this context, a brief analysis of the employment relationship also laid a foundation for this case note. The implied obligations imposed on both employer and employee were revisited. In doing so, the case of *Moyo* was used to advance the importance of the implied duty to protect mutual trust and confidence. Furthermore, a thorough examination of the conduct of both Moyo and Old Mutual Limited that had the potential and likelihood to

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destroy or seriously damage the employment relationship of confidence between the two parties. At the centre of this relationship, it is clear that good faith and loyalty reigned supreme on the part of Moyo to his employer. Towards the end, the case note examined the importance of non-disclosure of confidential information and avoiding conflict of interest.

The case of *Moyo* also draws some lessons that both parties to the contract of employment should honour at all times. Most importantly, the employer ought to refrain from acting in a manner likely to destroy the contract of employment. The employer further ought to be reminded of the fact that this duty does not only lie with the employee, but also heavily rests on itself.

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