

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C of A (CIV) 11/2022
CIV/APN/400/2021**

In the matter between -

PRINCIPAL SECRETARY, MINISTRY OF

**LOCAL GOVERNMENT AND CHIEFTAINSHIP
APPELLANT**

1ST

MINISTER OF LOCAL GOVERNMENT

**AND CHIEFTAINSHIP
APPELLANT**

2ND

**ATTORNEY GENERAL
APPELLANT**

3RD

AND

**MATHAHANE SELESO
RESPONDENT**

CORAM: KE MOSITO P
J VAN DER WESTHUIZEN, AJA
NT MTSHIYA, AJA

HEARD: 10 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

The respondent was appointed to the Local Government Service Commission in violation of the provisions of the Local Government Service Act of 2008 and the Local Government Service Regulations of 2011. Therefore the appointment as well

as the contract resulting from it were unlawful and invalid. The appellants were entitled to withhold the salary and benefits from the contract. The judgment of the High Court in favour of the Respondent is overturned on appeal.

JUDGMENT

J VAN DER WESTHUIZEN AJA

Introduction

[1] This is an appeal against a judgment of the High Court. As the applicant in that court, Ms Mathahane Seleso, who is the respondent in this Court, sought – on the basis of urgency – an order that the appellants in this Court (as respondents in that court) :-

(a) acted unlawfully by withholding her salary;

(b) must pay her contractual benefits as a commissioner of the Local Government Service Commission (the Commission); as well as –

(c) costs.

Factual background

[2] In a letter, dated 12 July 2021, the Principal Secretary of the Ministry of Local Government, Chieftainship and Parliamentary Affairs (the Principal Secretary; the Ministry) informed the respondent that she had been directed by the Minister to “offer (the respondent) a Special Assignment to the Local

Government Service Commission in terms of sections 29(1)(3) (*sic*) of the Local Government Service Regulations 2011 with effect from the 12th July 2021”. The letter further stated: *“Your terms and conditions of appointment will be communicated in due course.”*

[3] Also on 12 July 2021, the respondent received a document titled “A CONTRACT OF EMPLOYMENT FOR ASSIGNMENT IN THE THE (*sic*) LOCAL GOVERNMENT SERVICES COMMISSION”. She signed the contract on the same day.

[4] The contract provided (in clauses 6 and 7) for “REMUNERATION AND OTHER BENEFITS AND PRIVILEGES” including a salary, utilities, official travel, an official vehicle for both official and private business and a death gratuity.

[5] According to her, she was paid for the days she worked in July 2021 and for the month of August 2021. From September 2021 her salary and all contractual benefits had been withheld.

[6] She wrote to the Principal Secretary to request payment of her salary and benefits. Then she approached the High Court. In her founding affidavit she averred that her written request had never been responded to; her salary and benefits were still being withheld; she had not been given a hearing although her “property rights” were involved; and that this had taken place

“without any justification or cause for which (she) could be blamed”.

[7] In his answering affidavit the head and accounting officer of the Ministry did not dispute the facts. However, after mentioning the non-joinder of the Commission, he forcefully argued that the respondent’s *“appointment on special assignment to the Local Government Service Commission leave so much to be desired”* and was *“without any doubt unlawful”*.

[8] The deponent submitted that commissioners were appointed pursuant to section 13(3) of the Local Government Service Act of 2008 (the Act). The provision states that *“the commission shall consist of a chairperson and four other members, all of whom shall be appointed by the Minister by notice published in the Gazette”*. This did not happen, as is evident from the absence of any notice in the Gazette. There was no vacancy. If the respondent were appointed, there would have been six instead of five commissioners, stipulated in section 13(3).

[9] Regulation 29(1), mentioned in the letter of appointment, on which the respondent relied, provides that an officer *“may be temporarily assigned duties of a different or similarly graded position within the Service for a period of not exceeding 3 years and thereafter shall return to his or her substantive post or similarly graded position”*. Regulation 29(3) states: *“Terms and*

conditions relating to employment of an officer on special assignment shall be as set out in the officer's letter of assignment."

[10] The deponent points out that the respondent was not serving in the local government. The provision deals with the temporary assignment of officers in the service to the duties in other comparable positions.

[11] Furthermore, the contract signed by the respondent states that she was employed for a period of five years, whereas Regulation 29(1) limits an assignment to three years. According to the deponent on behalf of the appellants, his discovery of the unlawfulness of the appointment and contract was "*shocking*". Resulting from an unlawful purported appointment, the contract was similarly unlawful and therefore null and void. For that reason, payments to the respondent were stopped.

[12] In reply to the above, the respondent denied that failure to comply with the legal provisions mentioned rendered the appointment unlawful and the contract null and void. If the appointment were not in accordance with the provisions of any governing statute, it should have been reviewed and set aside through due legal processes. She added that she was qualified for the appointment and did not fall under the disqualifications

mentioned in section 67(4) of the Local Government Act of 1997.

The High Court

[13] The High Court rejected the complaint about non-joinder. It declared the withholding of the salary and benefits unlawful. Based on the prayer for further and/or alternative relief, it ordered the appellants to pay to the respondent the benefits in terms of the contract. The court ordered the appellants to pay the costs.

[14] Relying on the letter of appointment, including its reference to Regulation “29(1)(3)”, the High Court readily accepted that a binding contract existed between the parties. Its judgment refers to several of the contents of the contract concerning the due diligence required of the respondent. It says, *inter alia*, that “(i)t should suffice to be stated that the contract entitles her to remuneration to the tune of M451 752.00 per annum and to a host of the listed benefits”. The judgment mentions the five-year contract period and how the respondent is expected to conduct herself during that period. Even the clause dealing with termination of the contract is quoted in the judgment.

Issues on appeal

[15] This Court is called upon to decide whether the High Court erred or misdirected itself in (1) holding that the non-joinder point of law was irrelevant; (b) holding, accepting, or assuming that both the appointment of the respondent and the contract she entered into with the Ministry were lawful; as well as (3) declaring that the appellants' act of withholding her salary was unlawful; and (4) by ordering the appellants to pay costs.

Non-joinder

[16] The appellants submit that the Commission had been established in terms of the Act; and had a direct interest in the respondent's claim that she was a commissioner, because her salary would come out of the Commission's purse. During oral argument before this Court counsel for the appellants did not forcefully pursue this point but indicated in response to a question from the Bench that it had not been abandoned.

[17] The High Court correctly regarded the non-joinder as inconsequential. It is indeed not fatal in this case. The Commission is part of government, as are the first and second appellants, who were joined as respondents in the High Court. Furthermore, the Attorney General, whose office is responsible for litigation involving the government, was a respondent and is now an appellant. As concluded by the High Court, the Commission can be assumed to have been aware of the application.

The appointment

[18] The respondent was clearly not appointed in terms of section 13(3) of the Act. Even if it could be argued that the Minister's authority to appoint commissioners had been delegated to the Principal Secretary, there was no notice in the Gazette and all five positions on the Commission were occupied. The respondent furthermore did not in her founding affidavit claim to have been appointed in pursuance of section 13(3). In her replying affidavit she stated that the power to appoint commissioners "is vested in the 2nd respondent as provided by section 67(3) of the Local Government Act 1997 and section 13(3) of the Local Government (Service) Act of 2008." It is unclear if she then was of the view that section 13(3) of the Act was indeed applicable.

[19] Was she appointed at all; and legally so? She relies on the statement in the letter of appointment of 12 July 2021 that she was offered an appointment in terms of "*Regulation 29(1)(3)*". The High Court's judgment refers sometimes to "*Regulation 29(1)*", but also to "*29(3)*" and to "*29(1)(3)*". Presumably the confusing references resulted from the sloppy reference in the letter.

[20] As mentioned above, the appellant's position is that the respondent could not have been lawfully appointed under

Regulation 29, because she was not serving as an official in local government. The regulation does not necessarily refer to officers in local government only, but the respondent did not aver that she was employed as an officer within the public service of Lesotho.

[21] Furthermore, as mentioned above, Regulation 29(1) limits the temporary assignment to a three-year period, whereas the contract signed by the respondent states the term to be five years.

[22] The High Court mentioned the appellants' opposition based on Regulation 29 but did not deal with these apparently obvious problems raised by the appellants. Instead, the court referred to the contents of the resulting contract, including the clause on termination. The contents of the purported contract do not prove the existence of a valid contract; and the termination of the contract is only relevant if there is a valid contract to terminate! In any event, the contract resulted from the purported appointment and was supposed to stipulate the conditions of the appointment. As is evident from the wording of Regulation 29(3), in the case of an appointment on special assignment, the terms and conditions of the appointment have to be set out in the letter of appointment.

[23] The appointment was unlawful and invalid. In this regard the High Court erred.

The benefits

[24] For the respondent to be entitled to the benefits stipulated in the contract, the contract has to be valid and binding. It is not, because it was “born in sin”. It resulted from and embodied an appointment that was clearly unlawful. To uphold a contract resulting from an illegality, would violate the rule of law. This is evident from the judgment of the South African Constitutional Court in *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014(1) SA 604 (CC). A massively important contract to pay out social grants resulted from an irregular tender process. The Constitutional Court of South Africa held that the contract could not be regarded as valid, in spite of the enormous negative consequences for receivers of social grants and went to great lengths to manage the situation in a fair way. Counsel for the appellants referred to *Principal Secretary of Communication, Science and Technology and Others v Mabohlokoa Letsie Rabotsoa* C of A (CIV) 38/2021 as authority to the same effect.

[25] The respondent argues that she could not be blamed for the mistakes of government officials. As submitted by the appellants with reference to *Rabotsoa* (above), her blamelessness could not rescue an unlawful contract from invalidity. It could be a factor as far as a cost order is concerned, as recognised by the appellants. No view is expressed here either on the possible availability to the

unfortunate respondent of alternative remedies against the appellants, based on the negligence of officials or other factors, or on the payments that she indeed received.

Conclusion

[26] The respondent was neither appointed under section 13(3) of the Act as a commissioner, nor lawfully assigned to the Commission, in terms of Regulation 29(1). The contract resulting from the purported appointment is invalid. She is therefore not entitled to the benefits stipulated in it.

[27] The appeal must be upheld and the order of the High Court set aside.

[28] Costs should not be ordered against the respondent. She is not to blame for the unlawful conduct of the Principal Secretary or other officials of the appellants, who are employees of the government.

Order

[29] The following is ordered:

(a) The appeal is upheld.

(b) The order of the High Court is set aside and replaced by the following:

(i) The application is dismissed.

- (ii) There is no order as to costs.
(c) There is no order as to costs of the appeal.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree:



KE MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



NT MTSHIYA
ACTING JUSTICE OF APPEAL

For the Appellants:

Adv PTBN Thakalekoala
Adv N Moupo

For the Respondent:

Adv L Molati