IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/155/2020**

In the matter between:

TANKI MAPHAONG **APPLICANT**

And

MINISTER OF EDUCATION AND OTHERS **1st RESPONDENT**
THE PRINCIPAL SECRETARY – MINISTRY OF EDUCATION **2nd RESPONDENT**
THE MINISTER OF PUBLIC SERVICE **3rd RESPONDENT**
THE MINISER OF FINANCE **4th RESPONDENT**
ATTORNEY GENERAL **5th RESPONDENT**

Neutral Citation: Tanki Maphaong vs Minister of Education and others (CIV/APN/155/2020) [2021] LSHC 35 (22 APRIL 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **04 MARCH 2021**

DATE OF JUDGMENT: **22 APRIL 2021**

SUMMARY:

LAW OF CONTRACT: *A contract of special assignment concluded in terms of the Public Service Regulations included a term which is contrary to Cabinet decision against payment of gratuities when it comes to an end- both parties were oblivious to this Cabinet decision, with the contract-denier becoming aware of it a month before the effluxion of contract- this being a unilateral mistake on the part of the respondents, which despite being material was negligent and therefore, not reasonable- In consequence, the court held the respondents to the contract as it was concluded.*

ANNOTATIONS

LEGISLATION:

Public Officers' Defined Contribution Pension Fund Act No.8 of 2008

Public Service Regulations, 2008

BOOKS:

Van Huyssteen et al **Contract General Principles 5th ed. Juta**

Dale Hutchison et al **The Law of Contract in South Africa 3rd ed. Oxford**

CASES:

Trollip v Jordaan 1961 (1) SA 238 (A)

Be Bop A Lula Manufactured Printing v Kingtex Marketing (Pty) 2008 (3) SA 327 (SCA)

South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704

Sonap Petroleum (SA) Ltd v Pappadogianis 1992 (3) SA 234 (A)

[1] This matter concerns a contract which was allegedly signed in error by one of the parties to it. The facts of this case are without complications and are common cause between the parties. The applicant is a public officer employed as a driver on a permanent and pensionable basis. On the 13th July 2017 he was placed on a Special Assignment to the Ministry of Education to perform the duties of a Senior Chauffeur, on a two-years fixed term contract. After the contract had expired by effluxion of time, he was re-deployed to the Ministry of Energy on a permanent and pensionable basis to date.

[2] Clause 7 of the said fixed-term contract made provision for him to be paid gratuity at the end of the contract, based on a formula also provided therein. At the time of signing the agreement on behalf of the Government, oddly, the Principal Secretary for the Ministry of Education and one witness from the Ministry of Public Service were unaware of the Cabinet decision taken on the 22nd October, 2013 prohibiting payment of gratuities to public officers appointed on Special Assignment. The applicant was also unaware of this decision. A Savingram was issued communicating the said Cabinet decision, and it was couched as follows (in relevant parts):

> "*<u>Cabinet Approved:</u>*
>
> *(i) That Public Officers appointed on 'Special Assignment' to the offices Honourable Ministers cease to earn terminal benefits (gratuity) on Special Assignment and*
>
> *(ii) That Officers on Special Assignment continue paying the contributory Pension Fund where applicable.*

On the basis of the foregoing, all HR officers are urged to ascertain that their staff contributes into the Pension Fund and start to compute the amounts such officers owe and then make arrangements with the Treasury Department on how best start servicing those debts especially to those who already owe the previous contributions. Ultimately, casually Returns should be issued to effect such changes as soon as possible. Please be proactive since repercussions of not complying will not be bearable in the long run especially to those do not contribute as per the legislation.

SIGNED
M. LEMPHANE – LETSIE (MRS)
PRINCIPAL SECRETARY"

[3] This decision was communicated to the Public Service from the Government Secretary. I have quoted the Savingram in full to give a clear picture of what animated Cabinet decision to order that all public servants appointed on Special Assignment should not be paid gratuity. The decision seems to have been brought about by the fact public officers who were engaged on Special Assignment did not contribute to the compulsory contributory pension fund (**Public Officers' Defined Contribution Pension Fund** ('the Fund'), established in terms of **Act No.8 of 2008**(hereinafter 'the Act or Pension Fund Act'))**.** Incidentally, the applicant did not contribute as well as this court was informed by his counsel Mr Makara.

[4] A month before the expiry of the Special Assignment, the 1st respondent's officials realised that they had signed a contract which made provision for payment of gratuity contrary to the above Cabinet decision. As a result, they caused a new contract absent payment of gratuity clause to be signed in replacement of the initially signed contract. The applicant refused to

accede to the request for a variation of the initial contract. When the contract expired the applicant sought in vain to enforce clause 7 of the contract on gratuity. The response he got was that he was not entitled to payment of gratuity in view of the Cabinet decision banning it. In response to a letter of demand from the applicant's legal counsel, PS Ministry of Education says payment of gratuity to the applicant will flout Public Service laws and this line of argument she maintains in her answering affidavit. In short, the respondents' refusal to be bound by clause 7 is based on what they call human error on their part.

[5] **ISSUES FOR DETERMINATION:**

(a) Whether the kind of mistake alluded to is enough to vitiate clause 7 of the Contract.

[6] The Contract in issue was signed on the strength of the provisions of Regulation 18 of the **Public Service Regulations, 2008**. The said Regulation 18 provides that:

> *"18(1) A public officer may be temporarily assigned duties of a different or similarly graded position within the public service for a period not exceeding 3 years and thereafter the officer shall return to his or her substantive post or similarly graded position.*
>
> *(2) Notwithstanding sub-regulation (1), a public officer may be assigned a non-political position (including that of a Secretary, Chauffeur or a special assistant) in the office of a government Minister the duration which shall be upon the Minister's tenure of office.*
>
> *(3) Terms and conditions relating to employment of an officer on special assignment shall be as set out in the officer's letter of appointment."*

[7] As already said, the respondents' contention is that the contract is not enforceable in terms of clause 7 because it was signed by mistake, as the said clause is contrary to Cabinet decision (resolution) prohibiting payment of gratuity to officers who are engaged on special assignment during the currency of their permanent and pensionable status within the Public Service.

[8] In the law of contract, mistake is classified into either unilateral, mutual or common **(Trollip v Jordaan 1961 (1) SA 238 (A)).** The instant matter concerns unilateral mistake:

> *"The expression 'unilateral mistake' has also been used in the case law and literature when dealing not with a misconception of an external fact but with the intention of the parties. This goes along with the deviating view that where there appears to be consensus in the parties' declaration of intent seemingly correspond, such outward appearance of consent is taken to be the real contract. Hence a person who actual intention is not in accordance with 'contract' is then considered to be the only mistaken person and for this his mistake is described as a unilateral mistake. This would be an instance of material mistake."* **(Van Huyssteen et al Contract General Principles 5th ed. Juta para. 2.50). (Be Bop A Lula Manufactured Printing v Kingtex Marketing (Pty) 2008 (3) SA 327 (SCA) at para. 10.**

[9] The basis of contractual liability is primarily that parties must be *ad idem* that they are bound by the contract they have entered into and what they have do in terms of it (performances). This is what is commonly known as the "will theory" of contractual liability. Consensus of the parties on the subject of the contract once proved leads to the parties being bound by the

contract unless it is not compliant with other requirements. Consensus in terms of the 'Will' theory is subjective. The 'will theory' is not without its shortcomings (see for discussion: **Van Huyssteen et al** p.32).

[10] Occupying the extreme end of the spectrum of contractual liability is the theory of 'Declaration'. This theory postulates an objective approach to contractual liability in the sense that the subjective workings of the parties' minds to be bound by the contract are insignificant, what count for much are the outward manifestations of their intentions to be bound evidenced by the concluded contract(**South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704, at pp. 715-716**).

[11] As regards the 'will' theory, in order to take care of its shortcomings, quasi-mutual assent (Reliance theory) was introduced. This theory merely supplements and does not replace the 'will' theory as the primary basis of contractual liability. It merely stipulates that, contractual liability arises, in situations where there is dissensus between the parties to the contract, if a reasonable belief was induced to the contract-enforcer/asserter by the contract-denier that they had an agreement (or that a contract had been concluded). The contract-asserter must have reasonably relied on the outward appearance of an agreement induced by the conduct of the contract-denier (See: **Van Huyssteen et al paras 2.69 to 2.77).**

[12] Another important doctrine for purposes of this judgment is the doctrine is *Justus error* (reasonable mistake or error). The requirements for this doctrine are that the mistake must be reasonable and material in order to exclude consensus. Material mistake excludes consensus, for example, where there is no intention to contract; parties are not in agreement about the material aspects of the contract such as the content of their obligations

and how they will be discharged(performed); consciousness about the agreement that is being entered into must exist between the parties. (**Dale Hutchison et al The Law of Contract in South Africa 3rd ed. Oxford pp.87-88).** Reasonableness on the one hand is determined based on whether (a) mistake will be regarded as material and therefore reasonable where it was caused by misrepresentation of the contract-enforcer, or (b) if the contract-denier is not to blame for his mistake in that he acted reasonably and not negligently, (c) if the contract-denier did not cause the contract-enforcer reasonably to belief that a binding contract has been created(**Dale Hutchison et al (ibid) pp.104-106)**. This doctrine does not provide for a basis for contractual liability like the reliable theory does, but it rather seeks to "explain when a contractant will not be contractually liable" (**Van Huyssteen et al para. 2.98)** or "as a corrective measure in the case of dissensus and provides that a party will not be held bound to an agreement if that party apparently (but mistakenly) gave his or her consent and if his or her mistake is material and reasonable (*justus*)" (**Dale Hutchison et al (supra) at p.103).**

> **"**2.98 The reasonable mistake approach does not purport to provide an alternative basis for contractual liability but it rather explains when a contractant will not be contractually liable. If the declarations of the will made by the parties correspond it is assumed that there is a valid contract, unless the contract-denier can prove that he laboured under a mistake which was not only material but also reasonable. If he failed to do so he would be held liable." **(Van Huyssteen et al supra para. 2.98**).

[13] As a general rule as stated in **South African Railways and Harbours v National Bank of South Africa Ltd** (supra), the court is not concerned with the subjective workings of the parties' minds to the contract, but

rather the external declaration of their intention to be bound by the contract. So, in order to determine whether contractual liability arises in a case of dissensus, reliance theory is resorted to in order to determine whether the parties did conclude a binding contract, in which case it must be determined whether there has been reasonable reliance or that the contract-denier had created a reasonable belief that consensus has been reached(**Van Huyssteen et al** ibid at pp. 38-39). The integration of the doctrine of *Justus error* (reasonable mistake) into the reliance theory was done in the case of **Sonap Petroleum (SA) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 239 I – 240 B** when the court formulated the test to be applied in the case of a unilateral mistake:

> *"In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?.... To answer this question, a three-fold enquiry is usually necessary, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby?... The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?*

[14] The learned authors **Dale Hutchison et al** (supra) at p. 108 put the essence of this test as follows:

> *" The Sonap test (reliance test) thus enquires whether, in instances of dissensus, the contract denier misled the contract enforcer into a reasonable belief that the contract denier had actually assented to the contractual terms in question. If the contract enforcer realised or should, as a reasonable person, have possibility of a mistake on the*

part of the contract denier, the contract enforcer had a duty to speak and enquire whether the contract denier's expressed intention conformed to his or actual intention. Failure to do so results in an absence of reasonable belief in consensus on the part of the contract enforcer and, conversely indicates a reasonable mistake on the part of the contract denier."

[15] In the instant matter, the applicant was induced by a material misrepresentation that the respondents were agreeing to a contractual term which entitled him to be paid gratuity at the end of the contract. The circumstances of this case are such that indeed the applicant was misled (not the other way around) into concluding a contract which entitled him to be paid gratuity despite being a permanent and pensionable civil servant. The respondents have sought to argue that it is against the law for the applicant to be paid gratuity while at the same time being permanent and pensionable. I was not referred to any law which prohibits this, other than the Cabinet resolution alluded to above.

[16] To me, the very fact that Cabinet had to make a resolution makes it patently plain that no law prohibits a public officer who is engaged on a second contract of special assignment not to be paid gratuity. Any argument which seeks to rely on the Public Officers' Defined Contribution Pension Fund Act, 2008 is misguided. This Act merely makes it compulsory for permanent and pensionable public offices (and other incidental matters) to contribute into a Fund for purposes of providing pension benefits to these public officers, and when those benefits should be payable.

[17] Cabinet Resolution or decision, as I understand it was aimed at remedying a mischief where public officers would be on special assignment, and

during that period did not contribute to the Fund as obliged. During that period the record of the Fund would reflect a gap in his contributions. This clearly would not redound to the benefit of such an officer at the time of retirement. The Cabinet decision was aimed at doing away with payment of gratuity to public officers who are engaged on special assignment, so that while so engaged, they continue to contribute to the Fund as obliged and only for them to be paid gratuity on retirement in terms of the Act and Fund regulations. Explicit in the Cabinet Resolution and the Savingram, is that the decision was made for the benefit of the officer involved.

[18] In the instant matter, the mistake in issue is material as it relates to a material term of the contract. The applicant was actually misled by the respondents, and it is also patently clear that he could not reasonably be said to have been aware of the Cabinet decision now in issue, he is simply not to blame for the mistake of the contract-denier. The mistake on the part of the respondents was not reasonable. The respondents were negligent in concluding a contract which contained a clause which runs counter to the Cabinet decision not to do so. To crown this negligence, as already said, the applicant did not contribute into the Fund while on special assignment, and so, the directive to Human Resources offices in the Ministries to ensure that officers continue to contribute into the Fund while on special assignment was not heeded as well. The conclusion to be reached from this discussion is that Clause 7 of the contract is enforceable. I do not see how payment of gratuity to a public officer based on a separate contract of special assignment would offend Pension Fund Act because the officer's benefits under the special assignment flow directly from it and not from the Act.

[19] **Costs**

The applicant had sought costs on the scale as between attorney and client. It is equally trite that costs should follow the event. A determination of whether costs should be awarded is a matter falling the exercise of discretion by the court. Attorney and client costs are punitive in nature and ought to be awarded where exceptional circumstances warranting their award exists. The instant matter, however, is not a case the circumstances of which cries out for the award of punitive costs.

[20] In the result the following order is made:

(a) The Respondents are directed to pay to the Applicant gratuity in terms of the Contract of Special Assignment signed on the 13th July 2017, calculable at 25% of the amount of aggregate salary drawn during the two-year period of the contract.

(b) The applicant is awarded costs of suit.

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MOKHESI J

For the Applicant:	**ADV. M. MAKARA** **instructed by Phoofolo & Associates Attorneys**
For the Respondents:	**ADV. MOHLOKI** **from Attorney General's Chambers**