

IN THE HIGH COURT OF LESOTHO

CIV/APN/106/2021

HELD AT MASERU

In the matter between

'MANTHATISI RAMOABI

APPLICANT

and

PRINCIPAL SECRETARY – MINISTRY OF

EDUCATION AND TRAINING

1ST RESPONDENT

MINISTRY OF EDUCATION AND TRAINING

2ND RESPONDENT

PRINCIPAL SECRETARY – MINISTRY OF

FINANCE

3RD RESPONDENT

MINISTRY OF FINANCE

4TH RESPONDENT

TEACHING SERVICE COMMISSION

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

Neutral Citation: 'Manthatisi Ramoabi v Principal Secretary Education & Training & 5 others [2022] LSHC 255 Civ (27 September 2022)

JUDGMENT

CORAM : **M.P. RALEBESE J.**
DATE HEARD : **16 AUGUST, 2022**
DATE DELIVERED : **27 SEPTEMBER 2022**

SUMMARY

Law of Contract – Fixed Term Service Contract signed between the parties – Applicant entitled to gratuity in terms of the signed contract – Respondents reneging liability of gratuity - Caveat Subscriptor principle and Doctrine of quasi mutual assent applied – Parole Evidence Rule also applicable – Respondents liable to pay applicant the gratuity pursuant to the contract.

ANNOTATIONS

CITED CASES:

LESOTHO

Maphaong V Minister of Education (CIV/APN/155/2020) [2021]LSHC 42 (22 April 2021)

SOUTH AFRICA

Absa Bank Ltd v McCreath (26/14) [2014] ZAECGHC 51 (13 June 2014)

Beaton v Baldachin Bros 1920 AD 312

George v Fairmead (Pty) Ltd 1958(2) SA 465

Pillay V Shaik 2009 4 SA 74 (SCA)

National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel 1975(3) SA 16

Rielly v Seligson and Clare Ltd 1977(1) SA 626

ENGLAND

Smith v Hughes (1871) LR 6 QB 597

BOOKS AND ARTICLES:

Christie, The Law of Contract in South Africa, 2nd edition, 1991 Butterworths

P. Thejane (Rankoane) The Doctrine Of Quasi-Mutual Assent - Has It Become The General Rule For The Formation Of Contracts? The Case Of Pillay V Shaik 2009 4 SA 74 (SCA) Potchefstroom Electronic Law Journal 2012 Volume 15 No. 5

Cambridge International Dictionary of English: Cambridge University Press 1995
Cambridge; New York: Cambridge University Press, 1995.

Hornby, Albert Sydney, and Joanna Turnbull. Oxford Advanced Learner's Dictionary of Current English. 8th edition. Oxford: Oxford University Press, 2010.

Background and Facts

1. This is an opposed application in terms of which the applicant seeks to enforce a fixed-term contract that she signed with the 5th respondent (Teaching Service Commission (TSC)) on 18th November 2011. The facts surrounding this case are that the applicant was at all material times prior to the 1st November 2011 engaged on permanent and pensionable terms as a teacher by the Ministry of Education and Training (the Ministry). During the subsistence of that substantive contract, the applicant entered into a fixed-term Service Contract for a School Principal (Service Contract) with the TSC which commenced on 1st November 2011 and ended on 31st October 2016.
2. The Service Contract expressly provided in clauses 7 and 8 that the employee would be paid gratuity at the rate of 25% of the total gross salary at the end of the contract. Clause 18 of the Service Contract provided that a principal appointed under the contract who held a substantive post in the teaching service and was subject to contribute to the pension fund had to continue to so contribute whilst serving under the Service Contract. The applicant consequently continued to contribute to the pension fund throughout the term of the Service Contract.

3. At the end of the Service Contract, the respondents declined to pay the applicant the gratuity as the parties were then at loggerheads on the interpretation of clauses 7 and 8 and the rest of the Service Contract regarding the applicant's entitlement to gratuity. That prompted the applicant to institute the instant application in terms of which she is seeking an order in the following terms:-

(a) Declaring that the Cabinet decision of 11th June 2019 is not applicable with regard to the applicant's contract of employment.

(b) The respondents be ordered and/or directed to comply with the provisions of the contract entered into by the parties and effect payment of 25% gratuity to the applicant as reflected in "**Annexure MR2**".

(c) Interest at the rate of 18.5% *ex tempore morae*.

The issue to be determined

4. The major issue, in this case, is the interpretation of the Service Contract to determine whether the applicant was entitled to payment of gratuity at the end of the contract.

The arguments

5. The applicant contends that she was entitled to payment of gratuity as stipulated in clauses 7 and 8 on the Service Contract. She asserts that other people who entered into a similar contract were paid their gratuities and she reasonably and legitimately expected that she would also be paid the gratuity.

6. The respondents' case on the other hand is that clauses 7 and 8 do not apply to the applicant but only apply to employees who did not hold any government substantive positions when they entered into the Service Contract. The respondents' contention is that since the applicant still held the substantive position as a teacher throughout the term of the Service Contract, she was not entitled to gratuity. They submit that since the applicant continued to contribute towards her pension during the subsistence of the Service Contract as anticipated in clause 18, she was entitled to a pension at the end of her substantive contract and she could not also be entitled to gratuity.
7. The respondents further decline to pay the applicant any gratuity premised on the Cabinet decision of the 11th June 2019 as contained in a savingram from the Government Secretary dated 27th June 2019 annexed the applicant's founding affidavit as "**Annexure MR3**". The relevant paragraphs of the savingram read:-

"At its meeting ... Cabinet approved:-

(i) That the period which the permanent and pensionable teacher spent on Performance Contract be considered as part of their continuous service in order to normalise their service.

(ii) That the terminal benefits of teachers who were once engaged on Performance Contract by the Ministry of Education and Training but exited the teaching service through either death, resignation or retirement be processed and paid as per pension proclamation, 1964 and Public Officers' Defined Contribution Pension Fund 2008...."

The respondents maintain that the foregoing decision of the Cabinet applies to the applicant's case and is binding on the respondents.

Analysis and the Law

8. In terms of the *caveat subscriptor* rule “a person who signs a contractual document thereby signifies his assent to the contents of the document, and if these subsequently turn out not to be to his liking, he has no one to blame but himself.¹” The rationale behind the *caveat subscriptor* principle according to Christie² is the doctrine of quasi-mutual assent (or reliance theory) which is succinctly elaborated by Thejane³ in the following terms:-

“It firstly acknowledges that the general principle for the formation of valid contracts is that there must be a meeting of the minds of the parties or subjective consensus. Thus, the primary basis of liability in contract law is the expressed will of the parties. It further concedes that there are instances where confusion could arise as to whether there has been a meeting of the minds or not, because one of the parties may have an intention different from that of the other party, but fail to communicate this intention. Its essence is, therefore, that since contractual liability is based on the parties' subjective intention, and since it can be difficult for the one party to read the other's mind, there should, in such instances, be an alternative basis for determining a party's liability. Consequently, where there is dissensus which is not readily apparent, the party that acted contrary to the subjective consensus should be held bound to the apparent agreement. The doctrine thus protects parties who would otherwise not be able to dispute the other contracting party's denial of their "true" intention, and who would as a result be left destitute. This is because the doctrine refers to the surrounding circumstances to determine the disputing party's intention.”

9. The Service Contract in this case is a standard printed form wherein the specific particulars of the applicant and the signatures have been inserted with ink. The contract was signed by the applicant (employee) and for

¹ Christie, The Law of Contract in South Africa, 2nd edition, 1991 Butterworths at page 202.

² *Supra*.

³ P. Thejane (Rankoane) The Doctrine Of Quasi-Mutual Assent - Has It Become The General Rule For The Formation Of Contracts? The Case Of Pillay V Shaik 2009 4 SA 74 (SCA) Potchefstroom Electronic Law Journal 2012 Volume 15 No. 5.

TSC (employer) on 18th November 2011 and 15th August 2012 respectively. The *caveat subscriptor* rule, therefore, applies to the respondents, they are bound by everything that appears above the signature of their representative and they cannot be heard to be reneging on the terms of the contract that they signed (**George v Fairmead (Pty) Ltd**⁴). Apart from that, the standard form contract has undoubtedly been authored by the respondents and they very well knew the terms therein and what they were signing for.

10. The Service Contract clearly stipulates under the introduction that it was entered into between the parties with the intention to achieve a common understanding concerning the assignment of the responsibilities of a Principal to the applicant. Now that there is dissensus between the applicant and the respondents on their true intention regarding payment of gratuity to the applicant, the doctrine of quasi-mutual assent becomes relevant. The court has to resort to the signed Service Contract and other surrounding circumstances to decipher what the true intention of the parties was (**Maphaong V Minister of Education**⁵). This is basically because the court cannot read the subjective minds and true intentions of the parties when they entered into the Service Contract. The signed contract, therefore, comes to the aid of the court as it constitutes the apparent agreement between the parties that contains their expressed true will (**Absa Bank Ltd v McCreath**⁶).

11. The critical question then is whether the respondents' led the applicant to reasonably believe that the Service Contract represented the actual intention of the respondents regarding payment of gratuity. When the

⁴ 1958(2) SA 465 at 4720

⁵ (CIV/APN/155/2020) [2021]LSHC 42 (22 April 2021) at paragraph 13.

⁶ (26/14) [2014] ZAECGHC 51 (13 June 2014)

respondents gave the applicant the standard Service Contract form with clauses 7 and 8 which were to the effect that she would be paid gratuity; and the applicant duly signed it on 18th November 2011; and the respondents also had the contract signed and witnessed on their behalf; the respondents did mislead the applicant to believe that the actual intention of the respondents was to pay her gratuity as per the express terms of the contract. In the absence of any indication by the respondents prior to the signing of the contract that some clauses of the Service Contract would not apply to her, the applicant was reasonably misled into believing that the true intention of the respondents was that she would be entitled to payment of the gratuity (**Pillay V Shaik**⁷). There is nothing in the circumstance of this case to suggest that the applicant could not reasonably labour under the apprehension that she would be paid gratuity at the end of the Service Contract under clauses 7 and 8.

12. This is an appropriate case where the doctrine of quasi-mutual assent should apply in favour of the applicant. The applicant was reasonably led to assume that the respondents, by authoring the contract, signing it and having it witnessed by the Education Secretary and the Chief Education Officer – Teaching Service, had actually signified their intention to be bound by its terms. The *locus classicus* of this principle is traced back to the case of **Smith v Hughes**⁸ where it was stated that:-

“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

⁷ 2009 4 SA 74 (SCA) at para 55

⁸ LR 6 QB 597 at 607

13. The applicant served under the contract for five years up to its close out without any issues being raised by the respondents on its terms. Clauses 7 and 8 of the contract are unequivocal that the employer shall, for the benefit of the employee, put aside 25 per cent of the gross salary to create a gratuity fund; and that the gratuity shall be payable on the termination of the contract to a teacher who would have worked for 12 months and above under the performance contract. In view of the parole evidence rule, these clauses should be interpreted in their literal sense and as the true reflection of what the parties intended when they contracted (**National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel**⁹). The respondents' submission that notwithstanding the clear terms of clauses 7 and 8, the applicant was not entitled to the gratuity is therefore dismissed.

14. The respondents' contention that clause 18 of the Service Contract should be interpreted to mean that the applicant's continued contribution to the pension fund disentitled her to payment of gratuity under clauses 7 and 8 cannot be sustained as it is without any basis whatsoever. This submission is void of merit in view of the parole rule that where the parties have decided to record their contract in writing, their decision shall be respected and the resulting document should be accepted as the sole evidence of the terms of their contract unless contrary evidence can be led of what the parties really agreed on. This rule was enunciated in **Beaton v Baldachin Bros**¹⁰ in the following terms:-

“Now the general rule is clear: a party to a written instrument cannot vary its terms by parol evidence. But a party to such a writing, which it is sought to use against him, may lead evidence to show that the document in question is not a contract at all, that it was not intended by the signatories to operate as such, but was

⁹ 1975(3) SA 16 at 26A

¹⁰ Beaton v Baldachin Bros 1920 AD 312 at 315

given for another purpose. And when he has thus got rid of the writing, he may if he can establish another verbal contract as the true agreement."

The respondents being the ones who alleged that the written and signed contract did not reflect the true intention of the parties regarding payment of gratuity to the applicant, shouldered the onus to prove what the true intention of the parties was. The respondents failed to rebut this burden as they have not put forth any evidence whatsoever to prove that the parties ever intended that the applicant would not be entitled to gratuity under clauses 7 and 8.

15. Clause 18 makes no reference whatsoever to clauses 7 and 8 and this portrays the understanding that the parties intended that clause 18 shall subsist site by site with clauses 7 and 8. This is more so because, from the reading of the Service Contract, it is apparent that gratuity and pension are two distinct benefits. In terms of clause 7, the gratuity which shall be calculated at the rate of 25 per cent of the total gross salary of the employee, shall be at the full cost of the employer. Clause 8 stipulates that the gratuity shall be payable to the employee at the effective termination of the Service Contract.

16. Pension on the other hand, as it is apparent from clause 18, is not wholly at the cost of the employer. The employee also contributes to the pension fund at the rate, I assume, determinable under the laws governing the pension fund. I further take judicial notice of the fact that pension is payable to the employee upon retirement.

17. Even the ordinary English interpretation of the two words does not negate the fact that the two benefits can subsist side by side in respect of an employee. Pension is defined in the **Cambridge International Dictionary of English**¹¹ as

“A sum of money paid regularly by the government or a private company to a person who does not work anymore because they are too old or they have become ill.”

The Oxford Learner’s Dictionary of Current English¹² defines pension as;-

“An amount of money paid regularly by a government or company to sb (somebody) who is considered to be too old or too ill/sick to work: to receive an old age/ a retirement pension, a disability/widow’s pension, a state pension...”

18. In contrast, the **Cambridge International Dictionary of English** (supra) defines gratuity as:-

“A sum of money given as a reward for a service”.

The Oxford Learner's Dictionary of Current English (supra) defines gratuity as:-

“(1) (format) money that you give to sb who has provided a service for you (2) money that is given to employees when they leave their job.”

19. Within the context of the instant case, it is apparent from the foregoing definitions of the two words that they serve entirely different purposes. Pension is given to an employee upon retirement and through instalments. Gratuity on the other hand is given at the pleasure of an employer or in appreciation of services rendered. It is normally given in a lump sum in

¹¹ Cambridge ; New York : Cambridge University Press, 1995.

¹² Hornby, Albert Sydney, and Joanna Turnbull. Oxford Advanced Learner's Dictionary of Current English. 8th edition. Oxford: Oxford University Press, 2010.

appreciation of a service. It also covers payment made when an employee leaves the employment service, in this case the fixed term Service Contract. The word gratuity seems to come from the word gratuitous (given freely or free of charge).

20. I have already indicated that the respondents have failed to put forth evidence that added, varied or contradicted the intention of the parties as expressed in the written and signed Service Contract regarding payment of gratuity to the applicant. It is my view that it is not utterly unreasonable to find a contract where an employee is entitled to gratuity at the end of a fixed-term Service Contract in which the employee performed a specific assignment, while the same employee would still be entitled to pension later on upon retirement. Indeed this is what can be assumed from the reading of clause 9 of the Service Contract which is to the effect that a teacher who was permanent and pensionable and was 55 years and above upon entering into the contract, would be deemed to have taken early retirement and would permit the employer to retire him/her forthwith. Definitely, the employer would then be entitled to get such an employee pension upon retiring as well as the gratuity at the end of the service contract under clauses 7 and 8.

21. This court, premised on the parole evidence rule, gives effect to the true intention of the parties as expressed in the contract. The court, therefore, finds that the parties intended that the applicant would be paid gratuity pursuant to clauses 7 and 8 upon the expiry of the Service Contract.

22. It is trite that to ascertain the true intention of the parties from a written contract, the court has to refer to the language used on the contract and apply the golden rule of interpretation by giving the language its

grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the contract (**Rielly v Seligson and Clare Ltd**¹³). The principle has been elaborated by Christie¹⁴ in the following terms:-

“The key to understanding the modern law is the concept of the common intention of the parties, which may be a very different thing from the actual intention locked up in the mind of each party at the time of contracting, and even more different from what, after a dispute has arisen, each party honestly or dishonestly maintains his intention then to have been. In pursuing either of the latter concepts the court is on slippery ground but the language of the contract to which both parties have assented or must be taken to have assented offers a firmer footing, so it is there that the common intention of the parties must be sought, and in order to take proper advantage of this firmer footing the inquiry must start with the grammatical or ordinary sense of the words.”

23. It is my view therefore that as a matter of the ordinary meaning of the language of clauses 7 and 8 of the Service Contract, their plain and ordinary meaning is that the applicant was entitled to payment of gratuity at the end of the contract.

24. Now coming to the issue of the Cabinet decision which was made on 11th June 2019, it cannot apply to amend or vary the Service Contract between the parties on two grounds. Firstly, it was unilateral as the applicant had not been consulted as he submitted; and secondly, it was made long after the Service Contract had expired on 31st October 2016. The respondents’ submission that the Cabinet decision applies to the Service Contract between the applicant and the TSC is without merit and it is therefore dismissed.

¹³ 1977(1) SA 626 at 638 G

¹⁴ Supra at page 248

25. On the conspectus of all of the foregoing considerations, I find that the applicant was, pursuant to clauses 7 and 8 of the Service Contract which she signed with TSC, entitled to payment of gratuity at the end of the contract. Since this was not an action for damages, the respondents shall not pay any interest on the gratuity due to the applicant.

26. The following order is therefore made:-

(a) The Cabinet decision of the 11th June 2019 does not and cannot apply to vary the Service Contract between the applicant and the TSC.

(b) The respondents are ordered to pay the applicant the gratuity to which she was entitled pursuant to clauses 7 and 8 of the Service Contract signed between the applicant and the TSC.

(c) The respondents shall bear the costs of this application.

M. RALEBESE

JUDGE

For the applicant: Adv. Pheko
For the respondents: Adv. P. T.B.N. Thakalekoala