IN THE LABOUR COURT OF LESOTHO **LC/77/2013**
LC/83/2013

HELD AT MASERU

In the matter between:

TŠIU MOSALA	**1st APPLICANT**
NKATANA PHATELA	**2nd APPLICANT**
THAPELO KOALI	**3rd APPLICANT**
'MAPHALALI PHAMOTSE	**4th APPLICANT**
'MAMPINANE MASUPHA	**5th APPLICANT**
'MATANKI MOHLAKANA	**6th APPLICANT**
'MAMASHEANE MATELA	**7th APPLICANT**

And

DIRECTOR – DEPARTMENT OF RURAL WATER SUPPLY	**1st RESPONDENT**
P.S – MINISTRY OF ENERGY, METEOROLOGY & WATER AFFAIRS	**2nd RESPONDENT**
MINISTER OF ENERGY, METEOROLOGY & WATER AFFAIRS	**3rd RESPONDENT**
ATTORNEY GENERAL	**4th RESPONDENT**

And in the matter between

SHOTOPA MOTLOI **APPLICANT**

And

DIRECTOR – DEPARTMENT OF RURAL WATER SUPPLY	**1st RESPONDENT**
P.S – MINISTRY OF ENERGY, METEOROLOGY & WATER AFFAIRS	**2nd RESPONDENT**
MINISTER OF ENERGY, METEOROLOGY & WATER AFFAIRS	**3rd RESPONDENT**
ATTORNEY GENERAL	**4th RESPONDENT**

JUDGMENT

Hearing Date: 3rd December 2013
Application in terms of section 24(2)(e) of the Labour Code Order 24 of 1992, as amended. Applicant claiming duress and misrepresentation on the part of the Respondent to induce them to sign new contracts of employment. Applicant requesting the rescission of the said contract and consequential thereto payment of monetary differences between new and old contract. Court finding that Applicants were not duressed into singing the new contract of employment. Further finding that Respondent made no misrepresentation to induce Applicant to sign the new contracts. Court declining the consequential relief on account of the dismissal of the primary claim. Applicants claim being dismissed and the interim order granted being discharged. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the rescission of the contract of employment of the Applicants. It was made in terms of section 24(2)(e) of the *Labour Court Order 24 of 1992*, as amended. The said section provides as follows,
   "(2) The Court shall have the power –
   …
   (e) to rescind any contract of employment and make such consequential orders as may be just in the circumstances."
   The application was made on urgent basis.

2. Applicants sought the following substantive relief,
   "a) That the 2013 employment contracts unlawfully imposed by duress and consented to by misrepresentation on applicants be declared unlawful and rescinded.
   (b) That consequential to the declaratory order under 2 (a), applicants be paid the monetary differences in amounts withheld as a result of unlawful imposed contracts.
   (c) That respondents pay costs on attorney and own client scale only in the event of opposition."

3. The facts surrounding this application are that Applicants were employed by Respondent on the 2nd May 2006 on a month to month basis. On or around the 2nd May 2013, Applicants were called to a meeting where they were informed that they would be offered new contracts of employment. It was added that those who would not accept the new contracts would not be

paid any salaries from June 2013, as their old contracts would have lapsed by the end of May 2013.

4. Thereafter, Applicants were paid their terminal benefits for the period that they served from 2006 to 2013. Further, those who did not accept the new contracts of 2013, were not paid salaries in June and were also returned from work when they reported. Faced with the reality of loss of salaries, Applicants then singed the new 2013 contracts and were thereafter paid their salaries. On the basis of these facts, it is Applicants case that they were made to sign the new contracts of 2013 under duress and a misrepresentation of facts. Further that the new contracts were an unfavourable unilateral variation of the old 2006 contracts and thus claimed to be paid the difference in salaries between the new and the old contracts.

5. Respondent rejects the Applicants claims on the grounds that Applicants were not made to sign the new contracts under duress. In fact, Respondent claims that Applicants did so out of their own volition, as their old contracts had expired. Further, that the old 2006 contracts ended in May 2013 and that as a result, the new contracts of 2013, could not have been a unilateral variation of the old ones. Furthermore, that owing to the fact that the old 2006 contracts had ended, there can be no claim for the difference in salaries between the old and the new contract.

6. On the first day of the hearing of this application, having determined that the matter was urgent, We made an order, at the request of and by agreement of the parties, that Applicants continue to be regarded as employees of Respondent with full benefits under their old 2006 contracts of employment, pending finalisation of this application. We wish to highlight that these two applications *(LC/77/2013 & LC/83/2013)* were initially referred separately, but that by agreement of parties both matters were consolidated, hence Our present approach. In the light of this order, parties made their presentations on the matter and Our judgment is therefore in the following.

SUBMISSIONS AND ANALYSIS

7. Applicants claim they signed the new contracts of employment out of fear of being without a salary and not out of their own volition. They added that harm was not only imminent towards

them but had actual materialised as they had not been paid in June 2013, following their failure to sign the new 2013 contracts.

8. Applicants further claimed that their old 2006 month to month contracts, were without limit of time and that the new contracts unilaterally varied the old ones. It was added that in varying the old 2006 contracts, the new 2013 contracts introduced new terms which were less favourable than those contained in the old contracts. They claimed that the conduct of the Respondent constituted a unilateral variation of their contracts as no prior consultations were conducted and further that their consent to the variation was never obtained. It was added that the fact that Applicants received their terminal benefits, is not conclusive that the old contracts ended.

9. They furthermore argued that according to R. H. Christie in *The Law of Contract in South Africa* (2nd Ed.) at page 367, a contract which has been entered into as a result of duress, is voidable at the instance of the duressed party. Further reference was made to the case of *Smith v Smith 1948 (4) SA 61 (N)* at pages 67 to 68; and the book by A. J. Kerr in *The Principles of the Law of Contract* (4th Ed.) at page 238, in support.

10. It was furthermore argued that the facts pleaded have established a case for actual threat that was caused by the Respondent. It was added that the said threat was unlawful as it was based on a misrepresentation of facts that the old contracts of 2006 would end in May 2013, while in actual effect they were without the limit of time. It was further argued that as a result of the actual threat of loss of salaries and the misrepresentation of facts, they signed the new contracts of 2013.

11. It was submitted that the circumstances of the case *in casu* meet the requirements to sustain a claim for duress, in signing the contracts of employment on the part of Applicants. The Court was referred to the following authorities in support of the alleged requirements; *Broadry v Smuts NO 1942 TPD 47* at page 52; R. H. Christie *(op cit)* at page 368-377; and *Arend & another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C).*

12. Further reference was made to the cases of *Bundach v United Tobacco Co. Ltd (2000) 21 ILJ 2241* at 2246-2247J-AB; and *Leloko Selebalo v Stallion Security Lesotho (Pty) Ltd LC/15/2010*, for a principle that a party cannot be held to a contract that was made as a result of misrepresentation of facts or circumstances. It was concluded that the new contracts of 2013 are therefore not binding upon Applicants as they were induced by a misrepresentation.

13. It was furthermore argued that the conduct of the Respondent to vary the contracts of Applicants without their consent is a prohibited practice in law. The Court was referred to the cases of *La Vita Boymans Clothiers (Pty) Ltd (2001) 22 ILJ 454* at 461; *Leloko Selebalo v Stallion Security Lesotho (Pty) Ltd (supra); Makhobotlela Nkuebe v Metropolitan Lesotho Ltd LC/79/2006*; and *Lesotho Highlands Development Authority v Motumi Ralejoe LAC/CIV/A/03/2006*. It was submitted that in these cases, the Court expressed their discontent against a unilateral variation of a contract of employment and the right of a party to refuse to be bound by the imposed terms of the contract.

14. It was prayed that on the basis of the above submissions and authorities, the Court find that the new 2013 contract have been concluded under duress and that they be rescinded. Further that the Court find that the conduct of the Respondent is a unilateral variation of the old 2006 contracts as Applicants were never terminated and that the said variation be held not to be binding upon Applicants. Lastly that, consequential to the primary relief sought, Respondent be ordered to pay the difference in salaries between the old 2006 contracts and the new 2013 contracts.

15. It is Respondent's case that the Applicants did not sign the new 2013 contracts of employment under duress. The Court was referred to the book of C. G Van der Merwe & J. E. Du Plessis entitled *Introduction to the Law of South Africa,* 2004, found in Kluwer Law International, at page 248, where duress is defined as follows,
"Duress consists of an unlawful threat of harm which induces another to contract."

16. Respondent argued that Applicants were not duressed but merely warned that their old 2006 contracts were ending and that for them to continue to receive salaries, they would have to sign the new 2013 contracts. It was stated that evident to the fact that the old 2006 contracts had ended, was the fact that Applicants were paid and they received their terminal benefits for the years 2006 to 2013, in June 2013. Respondent further submitted that even assuming that their conduct of warning Applicants about the lapse of their old contract and the introduction of the new contracts, amounted to threat, which they disputed, that was neither an unlawful threat nor a misrepresentation of facts as their old contracts had ended.

17. It was argued that for a claim of misrepresentation to sustain, an applicant party must establish the following requirements,
    - A representation;
    - By a contracting party;
    - Representation must be false, inaccurate or *contra bonos mores;*
    - Representation must have induced the other party to contract; and
    - Representation must have caused damage to the other party.

    The Court was referred to the cases of *Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A*) at page 568B; Van Der Merwe *(op cit)* at page 92; and *Absa Bank v Fouche 2003 (1) SA 178 (SCA)* at 180, in support.

18. It was further submitted that even assuming that the Applicants were correct that the old contracts were concluded out of duress, which was equally disputed, the Applicants would be out of employment. It was said that the effect of a rescission of the new contracts of employment claimed by Applicants, is to restore them to the previous state. The Court was referred to the book by *C. G Van der Merwe & J. E. Du Plessis (op cit)* at page 155, in support. It was said that the previous state in this instance is that of being unemployed, as their old 2003 contracts had already lapsed at the time that they signed the new 2013 contracts. It was argued that the situation would have been different had Applicants prayed for

the reinstatement of the old 2006 contracts, which they have not done.

19. It was argued that the requirements for a claim for misrepresentation to sustain, have not been met in that the representation about the contracts ending was not false or inaccurate or *contra bonos mores*. It was further argued that, in fact the representation about the contracts ending and the fact that they would not be paid beyond May 2013, if they did not sign the new contracts, was true, accurate and in favour of public morality, as they were indeed not paid when they failed to sign the new contracts. It was submitted that Applicants had failed to discharge the onus on their claim for misrepresentation.

20. It was furthermore submitted that Applicants claims cannot sustain, as by accepting their terminal benefits in June 2013, they signalled their acceptance of the ending of their 2006 contracts and therefore that put the entire matter at rest. The Court was referred to the case of *Tšeliso Moiloa v Total Print House (Pty) Ltd & others LC/REV/524/2006*, where the Court stated as thus,
"It suffices to say that the applicant cannot approbate in other words approve termination and reprobate or disapprove of it at the sametime."
It was submitted that by accepting the terminal benefits, Applicants are barred from claiming that the 2006 contracts were not terminated but varied. It was prayed that on these basis this claim be dismissed.

21. Regarding the claim for payment of the differences in salaries in the old 2006 and the new 2013 contracts, Respondent submitted that Applicants are not entitled to any monetary difference, on account of the fact that the old 2006 contracts no longer exist by virtue of their termination in May 2013. It was submitted that the main premise behind this claim, seems to be that Respondent varied the contracts of employment of Applicants unilaterally. It was argued that this is not part of the substantial claims of Applicants. It was added that the claim for monetary differences is based on finding of the Court that the new contracts are rescinded.

22. In the proceedings before this Court, the standard of proof is on the balance of probabilities. It is the Applicants case that they were never terminated from their old 2006 contracts. However, that notwithstanding, they do not deny that they were paid their terminal benefits. In Our view, this tilts the balance of probability in favour of the Respondent that indeed the Applicants were terminated in May 2013, as alleged. Supportive of Our finding, is the attitude of the Court in the case of *Tšeliso Moiloa v Total Print House (Pty) Ltd & others (supra)*, cited by Respondent, that acceptance of terminal benefits signifies termination of a contract of employment.

23. If this is the case, then there was no misrepresentation on the part of the Respondent when informing the Applicants that their contracts would end in May 2013, as they in fact did. We are, in fact, in agreement with Respondent that the representation was merely made to warn them about non-payment if they did not accept to be contracted. Therefore the representation made by Respondent lacks sufficient merit to render it a misrepresentation. It simply does not fit within the requirements of misrepresentation as outlined in the authorities cited by both parties, for the reason that it misses the key element of *contra bonos mores* and/or inaccuracy.

24. While we concede that a contract that is entered into out of duress stands to be voided, it is Our opinion that the conduct of the Respondent *in casu,* does not amount to duress. The communication made is not an unlawful threat, as Applicants have attempt to suggest. Rather the communication was lawful given the fact that the old 2006 contracts were not only due to end but veritably ended. According to both case law and text book authors reference by both parties, the lawfulness and otherwise of a threat, is a vital elements in the classification of conduct as amounting to duress (see *Smith v Smith (supra); A. J. Kerr (op cit)*; and *C. G Van der Merwe & J. E. Du Plessis (op cit)).*

25. In Our view, the absence of both duress and misrepresentation towards the conclusion of the 2013 contracts, means that the said contracts are binding upon the Applicants for their entire period of existence. However, this is not suggest that Applicants are bound to continue with them despite their clear and unequivocal discontent about them.

They have an option to terminate them, if they so wish. An election has always been open to them from the moment that they were given the new 2013 contracts, to either accept or reject them. Moreover, if Applicants are unhappy about the manner in which their old 2006 contracts ended, they have a cause in law.

26. Regarding the issue of the unilateral variation of the contracts of employment, We agree with Respondent that this is not part of the claims of Applicants and cannot therefore be the basis of the claims for the monetary differences. Applicants have stated in their pleadings that they seek the monetary differences in consequence of a finding that the new contracts were either due to misrepresentation or duress or both. Given Our finding regarding the principal claims, the consequential relief accordingly fails as its basis has failed to sustain.

27. We wish to comment that even if the issue of a unilateral variation was part of the substantial claims of Applicants, it would not hold as there is clear evidence of the termination of the old 2006 contracts, as We have already shown. However, for purposes of emphasis, We wish to highlight that Applicants have accepted that they were told about the ending of their old 2006 contracts but rather refuse to accept the termination and elect to tag it a misrepresentation. Further, Applicants accept that they received their terminal benefits but rather attempt to argue that such was not conclusive of a termination of employment.

28. In Our view, the above evidence and concessions are sufficient to lead to a conclusion that the old 2006 were terminated at the time that the new contracts came into place and therefore there was no variation. There simply cannot be a variation of a lapsed contract of employment. Applicants cannot accept terminal benefits and claim that their contracts have not terminated. We wish to add that We acknowledge and accept the principles in the authorities cited by Applicant on the issue of unilateral variation of contracts of employment, which regrettably have not been helpful to them.

29. Finally, We wish to comment that it cannot be accurate that if We were to find in favour of Applicants, that would render them destitute. We say this because, a finding in their favour

would mean that the initial contracts never ended, that there is a misrepresentation of facts which induced Applicants to sign the new contracts. That being the case, the effect would be that the Applicants old 2006 contracts would continue to operate. However, We have not found this to be the case and We accordingly reiterate Our finding above.

COSTS

30. It was further submitted that whereas, Applicants had prayed for costs, they have not bothered to motivate their claim. Further that whereas Applicants had claimed an award for costs on attorney and client basis, they have not provided any justification as such an award is make in exceptional circumstances. The Court was referred to the cases of *Nel v Waterberg Landbouwers Co-operative Vereeniging 1946 AD 597* at 607; and *Swiss borough Diamond Mines (Pty) Ltd & another v Lesotho Highlands Development Authority LAC 1995 – 1999 87.*

31. Respondent prayed that under the circumstances, the prayer for costs and the main application, be dismissed with costs in favour of Respondent as being frivolous and vexatious. In reply Applicants submitted that the decision to award costs is the sole discretion of the Court. They nonetheless stated that they have not been vexatious or frivolous, as Respondent alleges and that therefore that an award of costs against them would not be appropriate.

32. It is Our view that Applicants have not made out a case for an award of costs at all. No averments nor motivation of any form has been advanced in support of the award. In the same vein, it is also Our attitude that Respondent has also failed to make out a case for an award of costs against the Applicants. Respondent had barely alleged frivolity and vexatiousness without illustration in specific terms how Applicants have acted in that fashion. It is trite law that bare allegations are unsatisfactory and unconvincing and cannot thus not be relied upon to make a substantive conclusion (*see Mokone v Attorney General & others CIV/APN/232/2008*). Consequently, no order as to costs is made.

AWARD

We therefore make an award in the following terms:

a) That this application is refused; and

b) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF FEBRUARY 2014.

T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO

Mrs. M. THAKALEKOALA **I CONCUR**
MEMBER

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANTS: **ADV. TLHOELI & ADV. MASHAILE**
FOR RESPONDENTS: **ADV. MOSHOESHOE**