IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.698/99, 701/99,702/99, 703/99, 704/99, 705/99, 706/99, 707/99, 708/99, 709/99, 710/99, 711/99, 712/99

In the matter between

PHUMZILE VILAKATI AND TWELVE

SIMILAR CASES APPLICANTS

And

THE PRINCIPAL SECRETARY – MINISTRY

OF EDUCATION 1st RESPONDENT

THE PRINCIPAL SECRETARY - MINISTRY OF PUBLIC SERVICE AND INFORMATION 2nd

RESPONDENT

THE ACCOUNTANT GENERAL 3rd RESPONDENT

THE ATTORNEY GENERAL 4th RESPONDENT

Coram SB. MAPHALALA- J

For Applicants MR. MDLADLA

For Respondents MISS GAMA

JUDGEMENT (21/05/99)

Maphalala J:

These applications came with a certificate of urgency for an order in the following terms:

1. That the rules relating to time and manner of service be dispersed with and this matter be heard as one of urgency.
2. Directing the respondents or anyone of them responsible to pay to the applicant her monthly salary in terms of the agreement entered into by parties.

3. Directing that the respondents or anyone of them to pay to the applicant her salary dating from 1st December 1998, to date and that same be paid within 5 (five) days of service of the order.
4. That a rule nisi do issue returnable on the 19th March 1999, calling upon the respondents to show cause why prayers 2 and 3 should not be made final.
5. That the respondents pay costs of this application.
6. Further and/or alternative relief.

At the commencement of submissions on the 24th April 1999, Mr. Mdladla for the applicants informed the court that they have filed a notice to consolidate the matters in terms of Rule 11 of the rules of the court. Miss Gama for the respondents agreed to the said application. The court then granted the application that the matters be consolidated and be argued as one matter. That the subsequent judgement will be taken to have force in respect of all matters for purposes of convenience the arguments that ensued were based on the case of Phumzile Vilakati.

The application is supported by the founding affidavit of Phumzile Vilakati together with annexure pertinent to applicants' case. The respondents filed a notice to oppose through the 4th respondent who is a nominal respondent as well as the legal representative of the other respondents. Subsequent to that the respondent filed an answering affidavit of one Phindile Mkhonza who is the incumbent Principal Secretary in the Ministry of Education. She further attached various annexures to support respondents' case. In turn, the applicants filed a replying affidavit in answer to the respondents' answering affidavit.

The facts of the matter can be summarized as follows. The applicant is a teacher under the Ministry of Education. During the period 1997, she applied for a scholarship together with authority of paid leave. She was granted the go ahead by the Ministry of Public Service. She further received a memorandum, which was from the 2nd respondent and was addressed to the 1sr respondent. In terms of the said memorandum she was granted authority for a paid study leave for a period of four years with effect from 1997/98. She proceeded to complete the bonding agreement between the Government of the Kingdom of Swaziland and herself and same was duly submitted to the Ministry of Public Service & Information. On the strength of the authority she proceeded and enrolled at the University of Swaziland, and during the first academic year 1997/98, she was paid her full salary and in fact, she was even paid even during the first semester of her second year. During the second year, she was paid seventy five per cent (75%) of her basic salary and that was in terms of Establishment Circular No. 2 of 1994 dated 20th January 1994. During 1998 the Ministry of Education then raised an issue about her salary. On the 25th May 1998, there was a meeting between officials of the Ministry including the 1st respondent, herself and some of her colleagues who were also affected. In that meeting it was brought to their attention that the Ministry of Education was contemplating withdrawing their salaries. Their response to this was that they preferred that they rather have the monies deducted from their salaries when they were through with their studies at the University. She avers that the reason why they propose this is that they

did not want to confront Government on the issue as they thought that reason will prevail. To their surprise and dismay, during 1998 they received letters from the 1st respondent to the effect that the Ministry will terminate their salaries. She avers further that she is advised and verily believed that the Ministry of Education had no authority to terminate her salary, this is particularly so as even in terms of the memorandum the function to grant in-service training belonged to the Ministry of Public Service and Information. The applicant is of the view that she entered with the Swaziland Government into an agreement which constitute a written consent and as such the Swaziland Government cannot unilaterally cancel the contract. The said act has placed the applicant into financial embarrassment that she cannot honour her financial obligations, which she had since she was working as a teacher.

On the other side of the coin respondents denies that the application for a scholarship was together with the authority for paid study leave. Even if the applicant had applied for a scholarship with paid study leave, this would have been wrong in that it would have been contrary to the provisions of Circular No. 1/96. The applicant had only been in employment with government for a period of five (5) years six months at the time she applied for study leave. Respondent admits that annexure "B" was indeed purporting to grant authority for paid study leave to the applicant. However, fail to understand how it is in the possession of the applicant as the same is neither addressed to the applicant nor is it copied to her. This is a memorandum between Ministry and ought not to be in possession of the applicant. Furthermore this memorandum was never brought to the attention of the deponent but was effected through the accounts office. Hence she could not have known of the mistake in time. It is on the basis of this memorandum that the applicant was paid a salary for the period alleged. The respondent submit that the memorandum was issued in error by the Ministry of Public Service and Information in,that it did not take cognizance of Circular No. 1/96 which requires teachers to have worked for a period of at least eight years prior to being granted paid study leave. More over the Ministry of Public Service and Information does not have the power to grant study leave with pay. It only grants scholarships. Indeed the scholarships are paid by the Ministry of Public Service and Information. Study leave with pay is granted by the Ministry of Education as it comes from the funds and budget of the Ministry of Education. The respondents avers that annexure "B" was issued in error and should not be id possession of the applicant.

It is averred further by the respondents that Ministry of Education put it clear to the students that were

granted study leave with pay in error and that this error had completely eroded the funds available to the Ministry. Respondent admitted that some of the teachers/students preferred that this money be converted into a loan by Government. However, the Ministry stated clearly that there were no funds to continue such payments. For every month paid out the Ministry is put further into debt. Further the Ministry has to pay other teachers of fill the posts for the period of four years. The issue of confrontation did not in fact arise in that the students portrayed an understanding of the position that Government was placed. In light of the zero growth in Government it will eventually be impossible for government to employ other teachers to fill the posts of those who have been fortunate to be awarded a scholarship. The applicant and her colleagues were allowed three (3) months notice within which to reassess their financial situation and Government eventually stopped the salary at the beginning of December 1998. Government allowed applicant and colleagues a period of six months prior to stopping the salary. The applicant clearly

could not have suffered any prejudice in this regard especially in view of the fact that the scholarship also comes with allowances.

Respondents further submitted that applicant benefits are four folds:

1. The applicant has obtained a scholarship to further her studies and will definitely be better placed on completion of the degree. Applicant already holds a diploma in teaching which was funded by the Government.
2. Applicant is bonded to the Government and thus ensured of employment upon completion of the degree.
3. Applicant was further receiving a salary which ought to pay the teacher who replaced her when she was granted the study leave.
4. Applicant has a scholarship that pay her allowances as well.

Government has not asked the applicant to repay the money already paid as the error was not caused by the applicant.

This is the case for the respondents.

The applicant duly filed a replying affidavit which answered some of the issues raised in respondent's answering affidavit.

The matter came for arguments on the 24th April 1999.

Mr. Mdladla for the applicant contends that the applicant applied for leave with pay and Government agreed to that application. Annexure "A" paragraph "B" reflects that applicant applied for this and this is not denied by the respondents in their papers. Respondents' defence is that it was granted in error. He submitted that the view taken by the applicant is that a contract was formed. The respondents have pleaded mistake but do not state what type of mistake it is. He went further to contend that a party can only rescind a contract when there is a Justus error. The court was referred to the cases of George vs Fairmeod Ltd 1958 (2) &A. 265 and the case of National Overseas Distributors vs Potato Board 1958 (2) S.A. 473 to support this proposition. He submitted that the latter case is at all fours with the present case.

Mr. Mdladla further contended that annexure "PVA1" annexed to the respondents' opposing papers is illegal in that in terms of The Interpretation Statutes Act subsidiary legislation should not contain anything which is contrary to Acts of Parliament. However, I must say that upon my enquiry as to which act it was at variance with Mr. Mdladla at that point abandoned this argument.

He went on to argue that the averments in paragraph 14 at 13.2 of the respondents' opposing affidavit as to question of fairness in neither here nor there in the law of contract. He cited J.A. Lillie The Merchantik Law of Scotland (1970) where the learned author stated that mere error of one party has no legal effect. If a man buys too dear or sells to cheap he is not by reason of his mistake protected from loss.

Per contra Miss Gama for the respondents took the court through the historical background of this matter. The Ministry of Education has been granting in-service scholarship especially to teachers. An issue arose that the issue of in-service training lay with the Ministry of Public Service & Information (per annexure "PVA5"). She conceded that the respondents admit that a mistake was made on the part of the Swaziland Government. She contends, however, that there is no agreement in the payment of the salary between the applicants and the respondents. There is no contract between Government and the applicants in that there was no consesus ad idem between the parties the court must find such a contract was void for the reason that it was against public policy. To support this point she cited the case of Eastwood vs Shepstone 1902 T.S. 294 at 302 where Innes CJ had this to say:

"Now this court has the power to treat as void and refuse in any way to recognize contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such as arrangement void. What we have to look at is the tendency of the proposed transaction, not actually proved result"

These are the issues before me. I have read the papers filed in the matter and have considered the authorities cited by both counsel. My view on the matter is that there was never any contract between the parties as to the payment of a salary to the applicant. Annexure "B" which purports to be the basis of the contract between the parties was correspondence between one Ministry to another and it is no where directed to the applicant neither was it copied to the applicant. The applicant is not candid before the court in that in her founding papers she avers that annexure "B" was a reason why she enrolled as a student at the University of Swaziland. However, on her replying affidavit she states that she received annexure "B" together with other documents through the office of the Dean of Student Affairs at the university. To me this means that she had already enrolled as a student at the university not that this was an incentive, which influenced her to enroll at the university in the first place. Even if one looks at the outward manifestations of the parties' conduct to impute agreement it is clear that applicant was simply enjoying a windfall and it cannot be said that this was a material term of the contract. I find that it was not.

Further, when respondent discovered the mistake it called the applicant and colleagues who according to the papers saw that this was a mistake and implored the respondent to convert the salary into a loan. This in my view as it is not denied in applicant's replying affidavit can be construed as a waiver such that now we do not have a contract between the two parties, if ever there was any. I agree entirely with the submissions made by Miss Gama on points of fact and law.

I dismiss the application with costs.

S. B. MAPHALALA

JUDGE