

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 304/2002

In the matter between:

MARTHA BUYILE MDLULI

APPLICANT

and

THE SWAZILAND GOVERNMENT

1st RESPONDENT

THE ATTORNEY GENERAL

2nd RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: A. MAPHALALA

FOR RESPONDENT

: S. KHUMALO

JUDGEMENT

23/01/03

The Applicant, Martha Buyile Mdluli is a teacher in the employ of the Swaziland Government, the Respondent.

On the 8th August 2002, the Applicant entered into an In-Service-Training Bonding Agreement with the Respondent in terms of which she was granted leave of absence from the employers from August 2002 to May 2006 to attend a course in Bachelor of Education Secondary (BED) to be held at the University of Swaziland (UNISWA).

The Bonding Agreement is annexed to the Application and marked 'A'. The purpose of the Agreement was multifold. In the preamble it states that the Respondent wished to ensure that it benefited from the In-Service Training Scheme and retain its trained personnel for a

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minimum of two years or longer depending on the duration of the training upon completion of such training. The operative clauses are Number 1 - 10.

The dispute between the parties arose immediately upon the Applicant taking up the course because she soon discovered that the Respondent did not pay the course fees to the University. Upon inquiry why this was happening she was told by the officials of the Ministry of Education that the Bonding Agreement was made in error and that she should re-apply the year that followed.

She brought the application on a certificate of urgency for the reasons outlined in paragraphs 9.1 - 9.5 of the Founding Affidavit which may be summarized as follows:

- (i) Her studies were now in serious jeopardy since she could not be able to pay the fees.

(ii) She had fully committed herself on the study programme upon reliance on her agreement with the Respondent.

(iii) The non payment of the fees was traumatic to her. She could no longer concentrate on her studies, she had already been replaced at the school where she had been teaching prior to the commencement of the study leave and most significantly she had fore gone a private scholarship from her godfather Father Biondi upon the strength of the Bonding Agreement she had obtained from the Respondent.

(iv) She had incurred legitimate debts from buying books, stationery, household necessities and other expenses wholly relying on the government's contractual commitment.

The crucial clauses of the Agreement are 3, 4, 5, 6 and I will reproduce them in full as follows:

3. The Employer shall pay the whole of the fees which amounts to E90,117.00 for the course ("the course fees") and all necessary and incidental expenses

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including passages from and to Swaziland where applicable.

4. The Employer shall during the course pay to the employee a salary in accordance with Establishment Circular Number 2 of 1994.

5. The Employee's attendance of the course shall not constitute a break in the continuity of her employment under the contract.

6. There shall be a minimum bonding period of two (2) years in respect of each beneficiary of the In-Service Training Scheme but this period may be extended when the training period exceeds two years. In this connection your Bonding period is 5 years.

In terms of these clauses, the Applicant avers that the Respondent was bound to pay the full course fees and all incidental expenses and in addition continue to pay her a salary in accordance with Establishment Circular Number 2 of 1994. In terms of this Circular, the Applicant would receive a full salary in the 1st year of study, 75% salary in the 2nd year of study, 50% salary in the 3rd year of study and 25% salary in the fourth year of study.

Whereas the parties are in agreement as to the salary payable to the Applicant, the Respondent contends that there was no agreement to pay the course fees and incidental expenses for the Applicant for the duration of the course. The Respondent avers in the Answering Affidavit that the sum of E90,117.00 reflected on clause 3 of the Agreement was entered thereto in error but the same reflects the total salary payable to the Applicant for the four (4) year duration of the course in terms of the Establishment Circular No. 2 of 1994.

The Respondent further avers that the Applicant was only granted study leave with pay for four years with effect from August 2002 but the government never undertook to pay fees for the Applicant as she is sponsored by the Catholic church. In support of this contention reference was made to annexure "AG1" to the Answering Affidavit wherein Mr. B. S. Ndlovu for the Principal Secretary - Education, wrote a Memorandum to the Principal Secretary Public Service and

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Information on the 8th August 2002, informing the latter that the Applicant was granted study leave with pay for a period of four years and that the Catholic church will sponsor her.

The Respondent in paragraph 7 of the Answering Affidavit refers the court to annexure "AG2" which is a standard form letter (This was dated 31st October 2002) utilized by the government when it grants a scholarship to study for a particular course. The letter is written to the learning institution and copied to the person awarded the scholarship. In terms of the letter "AG2" the scholarship would cover tuition, personal allowance, accommodation and meals, books and stationery, vocational allowance, airfares and research for thesis where applicable.

The contention is that no such letter was written to UNISWA in the case of the Applicant and thus no such commitment was made in her particular case and that clause 3 of the Agreement and in particular the fees in the sum of E90,117.00 was entered into in error.

It is important to note that every page of the Agreement was signed by the parties and there was a signature specifically above the figure of E90,117.00 in clause 3 of the Agreement.

Of equal importance is the admission by the Respondent that it is within its policy to grant full scholarship to its employees though it denies having done so to the Applicant.

It is not denied that where such full scholarship is granted, the recipient is also entitled to a salary in terms of the Establishment Circular Number 2 of 1994.

These matters serve as pointers in the interpretation of the Agreement in casu.

Equally important is clause 7 (a) - (c) of the Agreement which indicates that if the employee resigns from government before completing in service training, an amount equal to the full training cost incurred by government up to the time of resignation, including

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passages, course fees, traveling and incidental expenses, salary and allowances would be recovered from the employee.

The technique consistently adopted by the courts in interpretation of contracts was stated by Joubert J A in *Coopers & Lybrand v Bryant*¹ as follows:

"according to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument..... The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself..... The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is broadly speaking to have regard:

- (1) to the context in which the words or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract;
- (2) to the background circumstances which explain the genesis and purpose of the contract i.e. matters probably present to the minds of the parties when they contracted;
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."

The first question to ask herein is whether the language of the agreement herein is clear and unambiguous.

The parties utilized a standard agreement which had gaps to be filled with information relevant to the particular parties such as the dates, names, institution of learning, addresses, number of years of bonding, amount of fees payable, and signatures.

In clause 3, the sum of fees of E90.117.00 was filled in by pen and a signature appended thereof. The sentence preceding this amount i.e. "The Employer shall pay the whole of the fees which amounts to....." speaks with sufficient clarity.

This clause read in conjunction with the agreement as a whole shows clearly that there was intention by the parties to distinguish between fees, incidental expenses, salaries and allowances payable to the Applicant.

Solomon J. in *Hansen Schrade & Co. v De Carpen*² stated as follows:

"Now, it is not for this court to speculate as to what the intention of the parties were when they entered into the contract. That must be gathered from their language and this is the duty of the court as far as possible to give the language used by the parties its ordinary grammatical meaning."

I cannot agree more with the words of the learned judge, and in applying this noble rule of construction find that the parties intended to provide full payment of fees to the Applicant for the four year duration of the course and in addition, payment of all necessary and incidental expenses. The parties in addition agreed that the Applicant would receive her salary in terms of Establishment Circular Number 2 of 1994.

² 1923 TH 100 - 103

In my view the Respondent has failed to make out a case that it had made a Justus error in awarding full scholarship to the Applicant. The admission of the Respondent that it in fact does provide such full scholarship to deserving employees does vindicate the court's interpretation of the Agreement herein.

In the matter of *George v Farrnead (Pty) Ltd*³ the Supreme Court of South Africa stated: "when a man is asked to put his signature to a document, he cannot fail to realize that he is called upon to signify, by doing so, his assent to whatever words appear above his signature. If he seeks relief he must convince the court that he was misled as to the purport of the words to which he was thus signifying his assent. That must, in each case be a question of fact to be decided on all the evidence led in that particular case."

From the facts before this court, no such case has been made out on a preponderance of evidence.

In the result, the Applicant's Application has succeeded with no order as to costs.

The court orders as follows;

1. The Respondent is to fully pay "the course fees" for the Applicant at UNISWA for the four year duration of the course commencing from the month of August 2002 to May 2006.
2. The Respondent is to pay all necessary and incidental expenses in terms of the bonding agreement.

³ 1958 (2) SA 465

3. The Respondent is to pay the Applicant during the course, a salary in accordance with

Establishment Circular Number 2 of 1994.

The Members Agree.

NDERI NDUMA

PRESIDENT- INDUSTRIAL COURT