

LESOTHO / JUDGMENT

Pitso Pitso V Principal Secretary- Ministry of Public Works & 3 Others (CCA/0125/2020)

[2025] LSHC 196 (14 August 2025)

[2025] LSHC 196**COURT**
High Court**CASE / FILE NUMBER**
CCA/0125/2020

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Source record**IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)
HELD AT MASERU
CCA/0125/2020**

In the matter between: PITSO JAMES PITSO
APPLICANT
AND
PRINCIPAL SECRETARY – PUBLIC WORKS
1ST RESPONDENT
MINISTER OF PUBLIC WORKS
2ND RESPONDENT
DIRECTOR BUILDING DESIGN SERVICES
3RD RESPONDENT
THE ATTORNEY GENERAL
4TH RESPONDENT
Neutral Citation: Pitso James Pitso v PS Public Works & 3 Others [2025] LSHC
196 Comm. (14 AUGUST 2025)

CORAM: MOKHESI J
HEARD: 03 JUNE 2025

DELIVERED:

14 AUGUST 2025

SUMMARY

LAW OF CONTRACT: Applicant was engaged as an independent contractor to perform certain duties for his former employer- the distinguishing features of the contract of employment and independent contractor considered and applied-Held; the respondents should pay applicant contractual damages for breach of contract.

ANNOTATIONS

Cases

Colonial Mutual Life Assurance Society Ltd v Macdonald 1931 AD 412

Fischer and Another v Ramahlele and Others 2014 (4) SA 616 (SCA)

Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (CPD)

Medical Association of SA & Others v Minister of Health & Another [1997] 5

BLLR 562 (LC)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA (SCA)

Reynolds NO Meclenberg (Pty) Ltd 1996 (1) SA 75 (W. L. D)

SA Broadcasting Corporation v McKenzie (199) 20 ILJ 585 (LAC)

SABC v McKenzie [1999] 1 BLLR 1 (LAC)

Shill v Milner 1937 AD 101

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

JUDGMENT

[1]

Introduction

This case concerns distinguishing between the contract of service or employment (*Locatio operarum*) and the contract to do work independently (*conductio operis*). Making this distinction is important in this case because it will be determinative of the question whether the applicant's claim should succeed based on the assertion that he was engaged as an independent contractor by the 1st and 2nd respondents.

- [2] Background facts The Applicant was employed by the Government of Lesotho through the 2nd Respondent Ministry in 2001 as Principal Technical Officer in Maseru district. He was later promoted to the position of Assistant Electrical Engineer. His duties involved among others designing and supervising the contractors of mechanical and electrical projects which were carried out under the auspices of the 2nd Respondent, authorising payments certificates; preparing tender documents; conducting valuations of payments certificates and rendering of final accounts. He designed and supervised construction of several police stations in the country. At the time when the 1st Respondent terminated his engagement, which I deal with in the ensuing paragraph, he was in the process of designing Qacha's Nek Police Station.

- [3] On the 04 March 2020 the Applicant attained statutory retirement age, and he duly retired from the public service. He was paid his retirement benefits and continues to enjoy same. Following his retirement, the Government of Lesotho through the 2nd Respondent Ministry concluded a written agreement between itself and him on 01 April 2020. The contract was termed “Contract for Clerk of Works (Mechanical and Electrical) Design and Supervision of Construction of Police Facilities.” The contract was for a renewable period of twelve months.
- [4] Clauses 2 to 4 of the contract provides that: “2. Termination Contract is for 12 twelve months and it is renewable. The client shall give Clerk of Works (Mechanical and Electrical) three months’ notice prior to the expiration of the contract of his intention not to renew the contract.
3. Clerk of Works (Mechanical and Electrical) will directly report to the Director who will in turn assign a relevant officer.(sic)
4. Clerk of Works (Mechanical and Electrical will carry out all duties from the assigned office and use all equipment available.”
- [5] At the time of conclusion of this agreement Mr. M. Hlalele was the Principal Secretary in the 2nd Respondent’s Ministry. It seems there was a change of guard as on 03 December 2020 the office of the Principal Secretary was occupied by one Mr Retšelisitsoe Mohale, who on the stated date wrote a letter to the Applicant terminating his engagement as the Clerk of Works. The reason for termination was stated in a cryptic manner. The said letter (in material respects) states that: “Re: Termination of Clerk of Works Contract The above matter refers It has come to my attention that you have entered into a contract with the Ministry. I have been advised and considered the contract to be null and void ab initio as it did not follow the correct lawful procedure. I therefore terminate the contract with immediate effect. It has also been noted that you have in your possession keys of the office that you used while still working as a government officer before your retirement. I therefore request that you hand over the keys of that office to the Acting Director BDS on receipt of this letter. Yours faithfully (signed) Retšelisitsoe Mohale (Mr) Principal Secretary Ministry of Public Works.”
- [6] Upon the contract being terminated in this manner, the applicant launched the current application on urgent basis – urgency was denied by the court hence the reason it had to await its turn on the congested court roll– seeking the following reliefs: “1. Rules pertaining to the period and mode of service be dispensed with on account of urgency.
2. Rule Nisi be issued on the date and time to be determined by this court calling upon the respondents to show cause why:
- (a) First Respondent termination of contract shall not be declared unlawful.
- (b) Any other alternative relief.
- (c) Costs of suits.”

- [7] Respective Parties' Cases Applicant's case is that he was engaged as an independent contractor as a Clerk of Works after he retired from the Public Service, and that he is entitled to be paid as such. On the one hand the 1st Respondent contend that the Applicant had retired and was not lawfully appointed by the Public Service Commission. The clarity on why the applicant's contract was terminated was only brought to the fore when the parties exchanged pleadings. The 1st respondent contends that he had the power to terminate the contract because it was not authorised by the Public Service Commission. In short, the 1st respondent characterises this agreement as an employment contract. [8] Issues for determination
- (i) Whether the contract in issue is one of the employment or independent contractor? (ii) Whether termination of the contract in issue is lawful or constitutes a breach of contract?
- [9] The Law
- (i) Employee – Independent contractor dichotomy. The importance of distinguishing between employee and independent contractor is important in this case because if this court were to find that the arrangement between the parties was that of an employer and employee, this application would fail as the 1st respondent would have been entitled to terminate the contract for not following Public Service recruitment procedures, which places Public Service Commission at the helm of recruitment of public servants – Public Service Commission is solely responsible for appointing public servants. On the one hand if it were to be found that the applicant was engaged as an independent contractor different considerations apply to the matter.
- [10] The exercise of identifying whether a contract in issue is one of service (*locatio conductio operarum*) or a contract of work (*locatio conductio operis*) is always fraught with difficulties as it does not admit of easy or straightforward pigeonholing. It should be stated that the 1st defendant's counsel's submissions were unhelpful in this regard as he did not seek to draw this distinction. The Respondents' case is simply that the applicant was engaged contrary to Public Service recruitment procedures. It is the applicant's counsel who approached the matter correctly – whether the facts support the assertion that this an independent contract arrangement is the matter which will be decided in due course.
- [11] The nature of the relationship between the parties will be arrived at when the contract between the parties is properly construed. The labelling which the parties have used to describe their relationship is of no moment. The terms of the contract are decisive for revealing the true relationship between the parties. In *SA Broadcasting Corporation v McKenzie* (199) 20 ILJ 585 (LAC) in para. [10] at 591 E-H the court said: "The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded (*Smit v Workmen's Compensation Commissioner* at 648; *Liberty Life Association of Africa Ltd v Niselow* at 683 B-E), "although the parties' own perception of their relationship and the manner in which the contract if carried out in practice may, in areas not covered by the strict terms of the contract, assist in determining

the relationship.” (Borchers v CW Pearce & J Sheward t/a Lubrite Distributors (1993) 14 ILJ 1262 (LAC) at 1277 H-I). In seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it (Goldberg v Durban City Council 1970 (3) SA 325 (N) at 331 B-C). As Brassey “The Nature of Employment” at 921 points out, the label is of no assistance if it was chosen to disguise the real relationship between the parties, “but when they are bona fide it surely sheds light on what they intended.”

- [12] Over the years the courts have developed three tests for determining whether a contract is one of service or work. The first test is the control test known as “supervision and control” test developed in Colonial Mutual Life Assurance Society Ltd v Macdonald 1931 AD 412 at 434-435; the second is the “organisational test” summarised in SABC v McKenzie [1999] 1 BLLR 1 (LAC) at 5: “The second is the organisational test: a person is an employee or he is “part and parcel of the organisation”..., whereas the work of an independent contractor “although done for the business, is not integrated into it but is only accessory to it...”
- [13] However the applicable standard test which is considered more flexible is the “dominant impression” test which is articulated in Medical Association of SA & Others v Minister of Health & Another [1997] 5 BLLR 562 (LC) at 569 F-G, which: “...entails that one should have regard to all those considerations or indicia which would contribute towards an indication whether the contract is that of service or a contract of work and react to the impression one gets upon a consideration of all such indicia... This is still unsatisfactory but, it seems to me that, it is unsatisfactory as is the question of how one decides whether a dismissal is fair or unfair and indeed, whether certain conduct is reasonable or unreasonable.”
- [14] The test of “supervision and control” and “organisational test” have been criticised, and therefore the “dominant impression test” is seen as helpful in dealing with borderline cases: In Smit v Workmen’s Compensation Commissioner 1979 (1) SA 51 (A) at 62C-G it is stated that though supervision and control is an important element in determining whether the contract is of service or one of work, it is not the only element; that organisation test is vague “dominant impression” test could be useful in borderline cases. The court in the same case at p.62, identified key distinguishing features between the contract of employment and a contract of work: “It is convenient at this stage to recapitulate some of the important legal characteristics of the contract of service (*locatio conductio operarum*) and the contract of work (*locatio conductio operis*):
1. The object of the contract of service is the rendering of personal services by the employee (*locator operarum*) to the employer (*conductor operarum*). The services or the labour as such is the object of the contract. The object of the contract of work is the performance of a certain specified work or the production of a certain specified result. It is the product or the result of the labour which is the object of the contract.

2. According to a contract of service the employee (locator operarum) is at the beck and call of the employer (conductor operarum) to render his personal services at the behest of the latter. By way of contrast the conductor operis stands in a more independent position vis-à-vis the locator operis. The former is not obliged to perform the work himself or produce the result himself (unless otherwise agreed upon). He may accordingly avail himself of the labour or services of other workmen as assistants or employees to perform the work or to assist him in the performance thereof.
3. Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion decide whether or not he wants to have them rendered. The conductor operis is bound to perform a certain specified work or produce a certain specified result within the time fixed by the contract of work or within reasonable time where no time has been specified.
4. The employee is in terms of the contract of service subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done. The conductor operis, however, is on a footing of equality with the locator operis. The former is bound by his contract of work, not by the orders of the latter. He is not under the supervision or control of the locator operis. Nor is he under any obligation to obey any orders of the locator operis in regard to the manner in which the work is to be performed. The conductor operis is his own master being in a position of independence vis-à-vis the locator operis. The work has normally to be completed subject to the approval of a third party or the locator operis.
5. A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work does not necessarily terminate it.
6. A contract of service also terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result.

[15] I now turn to the construction of the contract in issue to determine whether it is one of employment or of work. The principles applicable to the construction of documents as articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA (SCA) at para.18) will be followed.

[16] Discussion. The applicant is the former employee of the 2nd respondent who in the immediate aftermath of his compulsory statutory retirement was engaged on the contract now under consideration. His duties in his former position as the Assistant Electrical Engineer and under the current contract are the same. However, it does not follow that because his duties under the new contract are the same as in the old one, he should therefore be regarded as an employee. It should be stated from the onset that I found the contract to be one of an independent contractor. The fact that the applicant was to report to the Director who in turn assigned office space to him, and other facilities to enable him to

perform his duties, is a neutral factor in my view. Although the applicant was to report to the Director in the discharge of his functions, I find nothing in the contract to suggest that the applicant was under the supervision and control of the Director. The applicant got paid when he billed the 2nd respondent for the work done in any given month. Although in terms of the contract he was personally required to perform the duties of the Clerk of Works, he retained a large degree of independence in the performance of his contractual duties which suggest strongly to me that the pointers are that the contract was one of work (location *conductio operis*). Even though there is dearth of information regarding the legal relationship of the parties, the little that is available in this contract suggest that the applicant was an independent contractor. I therefore find the 1st respondent's invocation of the Public Service Commission's powers in relation to the applicant to be misplaced.

- [17] It should be stated that the state of drafting in this matter leaves a lot to be desired, and counsel may well be advised to heed the remarks of Stegmann J in *Reynolds NO Meclenberg (Pty) Ltd* 1996 (1) SA 75 (W. L. D) at 78-79 regarding how practitioners should take instructions from their clients and draft papers accordingly. In the present matter the applicant sought a single relief against the 1st and 2nd respondents and through the effluxion of time the relief that he sought became awfully inadequate to deal with his plight as the project he was engaged to work on was completed and yet he was not paid for the work he did.
- [18] Faced with this predicament the applicant's counsel, Adv. Mohlabula, urged this court to make use of the prayer for "any other alternative relief" to order the respondents to pay the applicant for the work he did. It is undisputed that he submitted invoices for this work amounting to M349,537.36. But before I turn to deal with the question whether I should make an order in these terms. It is a trite nature of our civil proceedings especially motion proceedings that the applicant must set out and define the nature of their dispute in their founding affidavits and that it is only those issues as set out their founding papers which will be adjudicated upon by the court (*Fischer and Another v Ramahlele and Others* 2014 (4) SA 616 (SCA) para. 13. However, this rule is not cast in granite, as the parties by their conduct of the proceedings may expand the issues to be decided by the court (*Shill v Milner* 1937 AD 101 at 105).
- [19] In the present matter although the applicant sought one relief against the respondent which is inadequate to address his plight, it should be noted that when the 1st respondent denied in his answering affidavit that the applicant ever performed the work he claimed to have, in his replying affidavit the applicant attached the invoices he submitted to the 2nd respondent bearing the 2nd respondent's date stamp and his signature. During argument both counsel dealt with these invoices. The court even posed a question whether now that the project may have been completed whether the court should invoke the prayer for "further and alternative relief" to order the respondents to pay him for the work done and for which he submitted invoices. The invocation of this relief should be in line with the established principles as articulated in *Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98

(CPD) at p. 112 D-F where the court said: “Such a prayer can be invoked to justify or entitle a party to an order in terms other than set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given; [citation omitted]). Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefore has been fully canvassed, viz, the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of ‘further and/or alternative relief.’”

[20] The respondents’ counsel was given the full opportunity to deal with the claim of damages being sought under the head of “further and/or alternative relief.” In the circumstances of the case given that the only relief which was sought is now moot, the only tenable relief is to award contractual damages to the applicant which are in any event not seriously disputed given that it is common cause that the applicant submitted invoices which were not honoured until his contract was unceremoniously terminated.

[21] In the result the following order is made: (i) The 2nd Respondent shall pay the Applicant damages in the amount of M349 573.36 plus costs of suit.

MOKHESI J For the Applicant: Adv. Mohlabula instructed by T. Maieane Attorneys For the Respondents: Adv. T. E. Mohloki from Attorney General’s Chambers 15

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