

IN THE INDUSTRIAL COURT OF SWAZILAND

Held at Mbabane

Case No. 85/90

In the matter between:-

ROBERT M.M. DLAMINI

APPLICANT

and

WALES CRUSHERS (PTY)LTD

RESPONDENT

QUORAM:-

PRESIDENT:

M.S. BANDA

ASSESSORS:

MR. V. DLAMINI

MR. A. NKAMBULE

For the Applicant

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MR. SHABANGU

For the Respondent

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No Appearance

JUDGEMENT

The Applicant in this matter is claiming compensation for his unlawful dismissal from his employment by the Respondent. Briefly outlined the Applicant claim is made up as follows: -

- (a) Payment to Applicant of the E500.00 illegally withheld by Respondent.
- (b) Payment to Applicant of salaries for the months of February 1990 up to the end of August 1990 on which date the contract of employment is deemed to have terminated.

The arrear salary amount to E10,500.00

- (c) Payment of E1,500.00 being one months salary in lieu of notice
- (d) Payment of additional notice amount to E1636.37 Payment of severance allowance amounting to E4,090.92. Four months compensation amounting to E6,000.00.

Total amount claimed being E24,227.29.

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The Respondent on the other hand denied these allegations and requested Applicant to produce proof of contract of employment proof of monthly salary and contends that the Applicants services were never terminated but that Applicant resigned from the services of the Respondent during January 1990 and was paid all wages due to him in full.

On the date of trial there was no appearance by the Respondent. After being satisfied that the Respondent had been made aware of the trial the court decided to proceed and conduct the trial as an exparte trial. The history of the case is as follows:-

Applicant started working for Cemcor (Pty) Ltd trading as Power Force Quarries in September 1982- When Wales Crushers was formed in November 1985 the Applicant was transferred to the new company

and continued working until the company ceased operations due to a court order.

The Applicant testified that his monthly salary was E1250 plus E250.00 allowance for using his vehicle totalling E1500.00 per month. Applicant stated that at the time of repudiation of his contract he did not accept it and said the other reason why he did not accept repudiation was that he was obliged by the Explosives Act of 1961 to look after the explosives until they were disposed of legally.

The Applicant was claiming salary arrears from February 1990 to end of August 1990 in the sum of E10,500.00. Applicant is claiming a sum of E500.00 illegally withheld by the Respondent. The sum of E1 500.00 being one months salary in lieu of notice. The Applicant was claiming an under payment for the month of July 1989 in the sum of E500.00.

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Applicant is claiming underpayment on various occasions totalling a sum of E4000.00, Applicant is claiming salary from the date of the order of court until the date when the employment contract is lawfully terminated.

The Applicant is claiming payment of additional notice amounting to E1636.37. Severance allowance in the sum of E4,090.92. Six months compensation in the sum of E9000.00.

The certificate of unresolved dispute which was issued herein by the Commissioner of Labour and dated 26th July, 1990 states that the nature of dispute is:-

- (a) Unfair dismissal
- (b) Wages in lieu of notice
- (c) Severance allowance
- (d) Leave pay
- (e) Six months wages compensation for unfair dismissal.

The certificate of unresolved dispute makes no mention of the fact that the Applicant was claiming salary from February 1990 to end of August 1990 in the sum of E10,500.00. The certificate of unresolved dispute does not mention a sum of E500.00 illegally withheld by the Respondent it does not mention an underpayment for the month of July 1989 in the sum of E500.00. The certificate of unresolved dispute does not mention under payments on various occasions totalling a sum of E4000.00.

These matters therefore were not conciliated by the Commissioner of Labour for if they had been reported to him he would have referred to them under the heading nature of dispute and the result of his attempt to conciliate upon them.

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Consequently matters referring to a claim for a salary from February 1990 to end of August, 1990 in the sum of E10,500.00. A salary illegally withheld in the sum of E500.00. A salary underpayment for the month of July 1989 in the sum of E500.00 various underpayments on various occasions totalling a sum of E4000.00 cannot be taken cognisance of by this court as they have not been dealt pursuant to Part VII of the Industrial Relations Act.

The claim for salary until this contract of employment is lawfully terminated cannot be considered for the same reason.

The Applicant did not produce a document which shows how much his monthly salary was at the time of

dismissal. When asked by the court the following question he answered as quoted hereunder:-

"Court

"Do you have any document showing that your salary at the time of termination of employment was E1250.00 plus E250.00 allowance for using your vehicle?"

Answer:

"I do not have the pay slips with me because the employer used to give me a cheque without a pay slip analysing"

This court therefore will have to rely on the oral evidence for proof of this item. The court has had the privilege to listen to the testimony of the Applicant. The court is satisfied on the basis of such testimony that the monthly salary of the applicant at the time of his dismissal was E1250.00 plus E250.00 allowance for using his vehicle.

The question is the Applicant entitled to the heads of claim that he has made namely:-

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- (a) Payment of E1500.00 being one months salary in lieu of notice
- (b) Payment of additional notice amounting E1636.37
- (c) Payment of severance allowance amounting to E4090.
- (d) 6 months compensation amounting to E9000.00

This is one of the rare occasions where the nominated members are not in agreement. Mr. Dlamini representing the Federation of Swaziland Employers has decided that the Respondent was forced to close. Should employees have to claim compensation as now claimed by the Applicant when it was not the Respondents fault. His decision is that the Applicant is entitled to a Notice Payment not compensation as it were. His decision is that the Applicant be given an amount equivalent to one months salary.

Mr. Nkambule representing the Industry Unions on the other hand has decided that the company was still in operation when the Applicant claimed to have been unfairly dismissed. It is the decision of Mr. Nkambule assisted by the evidence of the Applicant that the employers failed to give any evidence that the employee resigned of his own accord and also failed to tell the court how much the Applicant was earning per month.

Mr. Nkambule has decided that from the evidence lead by the Applicant that he was chased out from a meeting between the Quarry Mine Inspector and his employer confirms that was an unfair labour practice and due to the fact that the evidence lead by the Applicant there was no formal hearing of the side of the employee. Mr. Nkambule has decided that there was no natural justice considered and in view of that and other relevant evidence that has been made that the Applicant should be paid notice and additional notice, he should be paid his severance allowance that is that 3 months compensation be paid.

The President of the Court has consequently decided to invoke Section 5 (3) of the Industrial Relations Act. It is the decision of the court

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that the Applicant has discharged his burden of proof namely on a balance of probability. It is the decision of the court that the Applicant was unfairly dismissed by the Respondent. The letter of appointment of the

Applicant by the Respondent as a Quarry Manager namely exhibit P1 letter dated 8th October 1986. The Respondent appointed the Applicant as a Quarry Manager. The letter of employment does not say his continued employment or his employment at all is subject to the Respondent having a Lease in its favour on the property where the High Court of Swaziland declared a Lease null and void. The declaration therefore delivered by the High Court did not make the contract of employment entered into between the Applicant and the Respondent impossible to perform. The contract of employment between the Applicant and the Respondent did not become terminated by operation of law.

It is the decision of this court that the Applicant be awarded one months salary in lieu of notice in the sum of E1500.00. It is the decision of this court that the Applicant be awarded additional notice amounting to E1636.37. It is the decision of this court that the Applicant be awarded severance allowance in the sum of E4090.

The Applicant testified before court and gave his age as 43 years thus at the time of his dismissal he was 42 years. He testified that he is currently unemployed although working on a project from which he has not started earning any income at all. He has tried to look for a job but in vain.

In view of this evidence it is the decision of the court that the Applicant be awarded 3 months compensation pursuant to Section 13 of the Industrial Relations Act.

This Applicant has accordingly succeeded in his application.