

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 74/94

In the matter between:

GUY DOULT

APPLICANT

AND

SWAZILAND COMMERCIAL RADIO (PTY) LTD

RESPONDENT

CORAM:

MARTIN BANDA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

PETER DUNSEITH

: FOR THE APPLICANT

HILTON FINE

: FOR THE RESPONDENT

JUDGEMENT

The Applicant seeks compensation for his unfair dismissal by the Respondent from his employment.

It is common cause that the Applicant was employed by the Respondent on the 1st June, 1990 as an Engineer until the 31st January, 1994. His salary was E5000.00 per month. He was entitled to 20 days leave per annum. Each party was required to give three months notice of termination. He was entitled to participate in a medical aid scheme operated by the Respondent. He was entitled to membership of a contributory pension scheme operated by the Respondent. He was entitled to free use of the company house and vehicle.

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11. The Managing Director of the Respondent victimised the Applicant and conducted himself in a petty and insulting manner towards the Applicant.

12. On the 20th January, 1994 the Respondent unfairly demoted the Applicant from the position of Chief Engineer to that of Engineer, without any lawful justification and removed him as Station Manager.

13. The aforesaid conduct of the Respondent was unfair and intolerable to the extent that the Applicant could not reasonably be expected to continue in his employment.

14. The Applicant was compelled to summarily terminate his employment on the 31st January, 1994 and in the premises his services have been constructively and unfairly terminated in terms of Section 37 of the Employment Act of 1980.

16. The Applicant claims payment of maximum compensation of 24 months salary for unfair dismissal as well as:

RELOCATION EXPENSES E 9500.00

3 MONTHS NOTICE E18564.00

SEVERANCE ALLOWANCE E 5711.12

33, 33 DAYS LEAVE PAY E 9517.58

16 DAYS OVERTIME PAY E 4568.89

UNPAID TRAVEL CLAIMS

FOR COMPANY

USE OF PRIVATE VEHICLE

(1206 km x 50c) E 603.00

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7.1 Respondent admits that it cancelled the participation in the existing medical aid scheme and pension fund but it did so with a view to replacing the said scheme and pension fund with a new scheme and fund because the existing scheme and fund was no longer available to the Respondent at that date.

7.2 Applicant summarily terminated his employment with the Respondent before a substitute scheme and pension fund had been put in effect.

8. Although it is admitted that the Applicant was given written warning on the 26th September, 1993 this was necessary because of his unprofessional conduct, unco-operative attitude towards the Respondent and failure to carry out the directives of his superior.

The Court has been informed that the Applicant has abandoned his claim for relocation expenses as these have been paid.

The Applicant gave evidence. He stated that he was actually hired as a Chief Engineer to follow after the three months probation period. He completed the probation period and was confirmed as Chief Engineer. His duties included the technical running of the station and administration. He was in charge of the station. In all the correspondence between the Applicant and the Respondent his position was referred to as Chief Engineer. He was given free and exclusive use of a two litre Datsun Skyline for both business and private use for the first three years. The petrol and maintenance expenses for the personal and private use were paid by the company. The Datsun Skyline was replaced with a new Nissan Skyline two litre in 1992. He enjoyed the benefits for a period of three years/.....

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contributions from the Applicant's monthly salary. The period the deductions covered was 1st August, 1993 to 31st December, 1993. In January, 1994 the Applicant received a fax saying that the Respondent had cancelled the medical aid and pension fund for all employees from 1st January, 1994. The reason given by the Respondent for terminating the pension scheme and medical aid was that they wanted to save money or curb expenditure not that they intended setting up a replacement pension fund.

On the 13th January, 1994 the Applicant wrote to the Respondent informing them that they were not entitled to deprive him of his benefits since they formed part of his contract of employment. The Respondent did not pay the Applicant its portion of pension contributions and medical aid which it was liable under the contract. The Respondent did not account to the Applicant for the deductions made during the period 1st August, 1993 to 31st December, 1993. They did not pay the money back to the Applicant. The Applicant made inquiries from the medical aid fund to which the Respondent belonged prior to 1st August, 1993 and he was informed that no contributions had been received from the Respondent since 1st August, 1993. The employees of the Respondent received a letter from the pension fund administrators regarding their pension as at 31st August, 1994. The letter confirmed that no contributions were paid by the Respondent during the period 31st July, 1993 to 31st January, 1994.

On medical aid deducted from the Applicant's salary during the period 1st August, 1993 to 31st December, 1993 at E311.96 per month for 5 months the medical contributions are E1559.60. The Applicant is claiming interest of 9%

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On the 13th January, 1994 the Applicant received a letter from the Managing Director of the new Management alleging that the Applicant was absent without leave which the Applicant considered to

be victimisation. The Applicant was asked to give justification why he was absent without leave on the 12th January, 1993. The Applicant was not on duty on the 12th January, 1994. Before the Applicant could reply a Policy Directive dated 13th January, 1994 was issued and circulated to all employees at the station and put on the notice board in which the Applicant was being accused of insubordination. The Applicant gave a full written explanation.

Another incident related to a request for compassionate leave which the Applicant made on behalf of his subordinate Officer ENOCK BHEMBE in his capacity as Station Manager. The request was made on 17th January, 1994. The Respondent replied on the 18th January, 1994. The Applicant considered the Respondent's reply to be unreasonable and to be victimisation and he was very upset. The application for compassionate leave was not approved. On the 20th January, 1994 the Applicant received a letter from the Respondent informing him that he had been demoted because of lack of respect. He was not given an opportunity to make representations before the demotion was effected. The Applicant was placed under the supervision of his former subordinate. He felt embarrassed and that the situation was intolerable.

On the 20th January, 1994 the Applicant received Policy Directive No. 6. The Applicant was residing in the Respondent's House at the Station. Policy Directive Number 6 did not entitle him to have visitors at home including relatives. The Applicant found the situation

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The Applicant is 54 years old married. After the termination of his employment by the Respondent the Applicant had money in the Bank and some in a pension fund. He has spent all of it and a bit more to survive. His wife has also had to take up employment.

In paragraph 13 of its claim, the Respondent admits that the Applicant was earning a monthly salary of E6188.00. The Respondent in its reply admits that it demoted the Applicant.

The Respondent then lead the evidence of MR. AUGOSTINHO DE ANDRADE DW1 who owns the Respondent. DW1 stated that he took over the Respondent on the 1st August, 1993. He did not inform the employees of the Respondent that he had taken over control. When DW1 was referred to exhibit P3, a letter addressed to SAMUEL MASUKU of Swaziland Commercial Radio (Pty) Ltd informing him that DW1 was the owner of the Respondent. DW1 said he recognised exhibit P3 it has his signature but does not know what it contains. DW1 agreed that he was introduced to the employees of the Respondent soon after he took control of the company. DW1 also agreed that a number of Policy Directives were issued by the Respondent. DW1 agreed that pursuant to exhibit P4 a Policy Directive, a Nissan Skyline motor vehicle which was used by the Applicant was taken to Johannesburg. DW1 agreed that the Applicant was entitled to use company transport for private purposes. DW1 said he was given the personnel files relating to the employees of the Respondent but not that of the Applicant which he alleged was kept by the Applicant at the station. DW1 said when the Applicant left his file disappeared. DW1 said prior to the launching of this dispute he was not shown the Applicant's letter of appointment.

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DW1 said he never saw the Applicant's letter of appointment and that the personal file of the possession of the Respondent at Head Office. The attention of DW1 was drawn to exhibit P6 a letter dated 9th August, 1993. DW1 agreed that exhibit P6 had his signature. DW1 said he never saw the Applicant's letter of appointment though exhibit P6 written by him enclosed the Applicant's letter of appointment. DW1 said it was his decision together with MR. BETTENCOURT to place the Applicant on 3 months probation after the Applicant had failed to play a tape. DW1 agreed that the Applicant was not called to a disciplinary inquiry. DW1 never read the letter from the Applicant explaining the position why the tape was not played.

DW1 said he decided to replace the Applicant with MR. PETER DLAMINI because the Applicant was not communicating well with the workers. MR. DLAMINI does not speak Portuguese. DW1 spoke a little Siswati and a little English to MR. DLAMINI. DW1 said it was the duty of the Applicant to pay for the medical aid scheme. DW1 denied giving instructions to his Attorneys relating to paragraph 6 of the Respondent's reply. DW1 said the instructions were given by MR. BETTENCOURT. DW1 admitted that he did not have a document showing that he was telling the truth when he said the Applicant was in charge for making payments of medical aid and pension scheme. DW1 further denied that in the Respondent's reply filed into Court the Respondent admits that it cancelled the medical aid and pension scheme. DW1 further denied writing to the staff telling them that the scheme had been cancelled. DW1 was referred to exhibit P10 signed by him and he said he does not remember it. DW1 further said he never cancelled any contracts.

The Respondent then lead the evidence of DW2 PETER DLAMINI who is employed a a Chief

Engineer by the Respondent. DW1 said he was employed on the 1st November, 1992 as an
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Applicant or any employee. The Court was informed that the Respondent will lead evidence to the effect that all deductions with respect to medical aid and pension schemes were paid to the Applicant by the Respondent's previous controllers. No such evidence was placed before Court. The Respondent informed the Court that it will lead evidence

as to an incident whereby the Applicant was absent without leave from the radio station. The only evidence from DW2 is that he did not think that DW1 was aware that the Applicant and DW2 worked 4 days on and 4 days off. DW2

further said DW1 only found out when DW2 was called to Johannesburg where he was asked how they worked.

As we said earlier the Applicant's claim in paragraph 8, 9 and 10 of his application was admitted by the Respondent. Paragraph 8 of the Applicant's claim related to medical aid and pension fund contributions which were deducted from his salary. Paragraph 9 related to cancellation of the medical aid and pension fund scheme. DW2 confirmed all these allegations. DW1 said he never gave such instructions to his Attorneys. At the end of the Respondent's evidence no application was made to amend paragraph 6.1 of the Respondent's reply which admits deducting medical aid and pension fund contributions. No application was made to amend to paragraph 6.2 of the Respondent's reply which alleges that the deductions were paid to the relevant authorities and certainly no evidence was placed before Court confirming that such deductions were indeed paid to the relevant funds. No application was made to amend paragraph 7.1 of the Respondent's reply which admits that the existing medical aid and pension fund schemes were cancelled. The evidence of DW2 confirms such cancellation. There was no application to amend paragraph 8 of the Respondent's reply. The evidence of DW1 is that the Applicant was placed on 90 days probation after the Applicant had failed to play a tape.

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The Court has been left with no option infact it has been impressed by the evidence of the Applicant and DW2 which is clear and concise. The evidence of the Applicant has not discredited even under the intense cross examination that it was subjected to. The Court has taken the evidence of the Applicant which outlines what happened in this matter. The Applicant has supported by documentary evidence established his case. He has outlined the treatment that the Respondent subjected him to. He has shown through documentary evidence the deliberate treatment the Respondent subjected him when it was taken over by a new shareholder and new Management. Systematically the Respondent first withdrew the Nissan Skyline that had been allocated to the Applicant for his

business and personal use and asked him to use an old 1984 4 x 4 light truck which was also being used by the station on a day to day basis. The Respondent then stopped paying overtime claims submitted by the Applicant. The Respondent cancelled the medical aid and pension schemes to which the Applicant was a member. The Respondent kept the money deducted from the Applicant's salary as contributions for the medical aid and pension scheme without refunding the Applicant. The Respondent charged the Applicant with abandoning his site at the station when he was on his day off without finding out how the Applicant worked. The Respondent placed the Applicant on 90 days probation yet he had been working for the Respondent for three years and had already completed his probation, for allegedly failing to play a tape without asking the Applicant for an explanation. The Respondent demoted the Applicant for allegedly failing to communicate with the other members of staff because the Applicant did not speak Siswati. The Respondent prohibited visitors to the station yet the Applicant was housed at the station. The evidence of DW1 clearly shows that the Respondent had decided to remove' and replace the Applicant

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way from Johannesburg to Mbabane for the second meeting before the Labour Commissioner. The Respondent did not attend. We are satisfied and that is our judgement that by its conduct the Respondent terminated the Applicant's employment.

We order that the Applicant be paid the following terminal benefits :

1. 3 MONTHS NOTICE E18,564.00
2. SEVERANCE ALLOWANCE E 5,711.12
3. 33,33 DAYS LEAVE PAY E 9,517.58
4. 16 DAYS OVERTIME PAY E 4,568.89
5. UNPAID TRAVEL CLAIMS
FOR COMPANY USE OF PRIVATE

VEHICLE (1206 kms x 50c) E 603.00

6. PENSION CONTRIBUTIONS INTEREST ON PENSION CONTRIBUTIONS AT 17% PER ANNUM E 6,064.28

7. MEDICAL AID CONTRIBUTIONS INTEREST OM MEDSAVE CONTRIBUTIONS AT 9% E 1,559.60

8. VALUE OF COMPANY TRANSPORT FOR THE PERIOD 14TH AUGUST, 1993 - 31ST JANUARY, 1994 E 9350.00

The Respondent was aware that MR. BETTENCOURT was going to be a very material witness. On the 4th August, 1995 a List of Witnesses was filed into Court in which the name of MR. BETTENCOURT was deleted as a witness. MR. BETTENCOURT was shown as a witness on the Reply filed into

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