

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 71/96

In the matter between:

ARMYBOY DLAMINI                      APPLICANT

AND

CITY SECURITY GUARDS              RESPONDENT

(PTY) LTD

RULING

This is an application by the Respondent for an order in absolution.

The Applicant's case in so far as we understand it viva voce has been that in May, 1993 the Respondent City Security Guard Limited employed him as a Security Guard. He stated that he was employed by Makhosini Shongwe and posted at Tisuka Building for two weeks thereafter he was shifted to the Swaziland Television Authority where he stayed for two years until June, 1995 when he was moved back to Tisuka Building. On the 7th December, 1995 he received a letter from City Security Guards terminating his services. At the time when his services were terminated he was earning E340.00 per month.

When he was cross examined the Applicant stated that he knows that a company is a legal person which can sue and be sued. He further stated that he understands that a company can only come into existence if it is registered by the Registrar of Companies. He then stated that he was employed by City Security Guards (Pry) Ltd on the 13th May 1993. He insisted that City Security Guards (Pry) Ltd employed him in May 1993 and that the fact that they were registered in 1994 was an act of dishonesty.

The Applicant maintained that position even when he was shown the certificate on registration dated 8th September 1994 relating to City Security Guards (Pty) Ltd.

An application was then made on his behalf for a postponement to enable him amend his application and modify calculation for terminal benefits and underpayment.

Under further cross examination the Applicant stated that he was employed by Makhosini Shongwe who was working partnership with Prince Lonkhokhelo in City Security Guards. The

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Applicant conceded that a claim for leave pay, additional notice, and severance pay were not discussed before the Labour Commissioner nor conciliated upon. In fact in the certificate of unresolved dispute the only issues in dispute are (1) unfair dismissal - maximum compensation, (2) Notice pay and (3) Unpaid Balance of wages.

After the cross examination the Applicant moved an application to amend his particulars of claim to show that he was employed by City Security Guards (Pty) Limited on the 1st February 1995; that from the date of employment he was paid less than the statutory wages a month; that he was under paid throughout his employment period. In the prayers the Applicant now sought an order in the following

- 1) 24 months wages as compensation
- 2) 1 month wages in lieu of notice
- 3) 17 & ½ days leave pay
- 4) underpayment.

As we have shown earlier on the certificate of unresolved dispute did not include a claim for leave pay. In his evidence viva voce the Applicant did not lay any foundation for a claim for underpayment notice or compensation least of all leave pay.

The application for amendment was resisted by the Respondent on the ground that it would be prejudicial to its interests as it had completed the cross examination of the Applicant. The application was allowed as the court was of the view that no prejudice was likely to befall the Respondent if the amendment was allowed.

In summary this is the case for the Applicant. The Respondent would like it to be dismissed on the ground that the Applicant has not proved that he was hired by the Respondent, but that he states he was employed by Makhosini Shongwe working in partnership with Prince Lonkhokhelo. For the Respondent it has been argued that the Applicant has insisted that he was employed by Makhosini Shongwe and Prince Lonkhokhelo and that the amended papers are not supported by the viva voce evidence. It is the Respondents case that the Applicant has not sued Makhosini Shongwe and Prince Lonkhokhelo in their personal capacities or as a partnership and that at the time he says he was employed the Respondent was not in existence. It has been argued on behalf of the Respondent that the Applicant has not proved how much he was earning as a salary to sustain a claim for under payment and that the amendment was sufficient proof that the Applicant was clutching at straws.

We have in the past pleaded with the parties that before they institute a case they should determine the names, capacity or legality of their opponents. They should research on the law and peruse the certificate of unresolved dispute before they launch the proceedings in court. This advice appears to have fallen on deaf ears. The Applicant has to establish who the Respondent is. He has to establish the salient ingredients of his case before he can expect a Respondent to defend himself. A trial is not a fishing expedition where you expect sympathies to prove or establish the case for you. The one that alleges must prove those allegations with oral evidence. The evidence of the Applicant in the present case is that he was employed by City Security Guards (Pty) Ltd. from the uncontrovertible evidence before court thus cannot be because City Security Guards (Pty) Ltd was only established on the 8th September 1994 and could not have employed him in May 1993. He has not through evidence established that he was in any way underpaid. He has not established that he is entitled to a claim for leave pay, one month's wages in lieu of notice or compensation.

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Would it be right and proper for the court to invite the Respondent to lead evidence in defence of the allegations of the Applicant as then now stand before court. Whilst conceding that ordinarily we are not very particular on the degree of proof that a party must establish. It is incumbent upon a party to do justice to his case by not leaving anything to doubt or chance.

In his own evidence Applicant was employed by Makhosini Shongwe working in partnership with Prince Lonkhokhelo. He was employed in May 1993 as a security guard. The Respondent City Security Guards (Pty) Ltd was established on the 8th September 1994. In his own evidence a claim for leave pay, additional notice and severance pay were not conciliated upon the Labour Commissioner. His services were terminated by the Respondent on the 7th December 1995. The evidence that we have heard does not sustain a case against City Security Guards (Pty) Ltd. We do not doubt that in may 1993 the Applicant was employed and that he stayed in such employment until

7th December 1995. Our problem is has the Applicant identified with a certain degree of clarity who his employer was from commencement of his employment to its termination. Has he instituted the current proceedings against such employer. The Applicant has not through evidence shown how City Security Guards (Pty) Ltd find themselves being sued by him. As he states he was employed by a partnership. He has instituted an action against a limited liability company. The two are separate and distinct entities. He has not brought an action against Makhosini Shongwe or Prince Lonkhokhelo in their personal capacities. City Security Guards (Pty) Ltd did not have the capacity in May 1993 to have employed the Applicant. They did not exist.

The Applicant has not established that he was employed by the Respondent. He has not established that the Respondent owed him any notice, leave pay or underpayment. He is under a duty to establish the basis of his claim by evidence. In the present case. No such evidence has been put before court.

In the present case the Applicant has lamentably failed to show or make out a case. The Respondent will not be put on their defence. The application for absolution is sustained.

MARTIN SAMSON BANDA

PRESIDENT OF THE INDUSTRIAL COURT