

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 79/96

In the matter between:

PAUL SIBUSISO MKHATSHWA APPLICANT

and

LANGA BRICKS (PTY) LIMITED 1ST RESPONDENT

LABOUR COMMISSIONER 2ND RESPONDENT

R U L I N G

On the 11th September, 1996 the Applicant filed this application in which amongst other things he sought an order directed against the Second Respondent compelling it to issue a Certificate of Unresolved Dispute, he sought an order that is the Applicant against the First Respondent for his arrears of wages from December, 1995 to date of Judgement, that he be reinstated to his job with all benefits as at November, 1995 maximum statutory compensation in the sum of E17,107.20 and damages in the sum of E165,396.60. The application as conceded by the first order sought was not supported by a Certificate of Unresolved Dispute.

The First Respondent has raised a number of points in Limine against the Applicant's application.

These are outlined firstly in a reply filed on the 21st October, 1996 as :

" 1. This matter in so far as it relates to prayer 2,3 and alternative prayers 1 and 2 of the Applicant's particulars of claim was never reported or dealt with in accordance with Part V111 of the Industrial Relations Act No. 1 of 1996 in that :

1.1 The issue giving rise to the dispute first arose on 1st November, 1995 when the Applicant was served with

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the letter marked "A" (in Applicant's papers before this Court) informing him of the decision to retrench him. The purported report was finally made on the 17th May, 1996, six months and seventeen days later contrary to Section 57 (3) of the Industrial Relations Act No. 1 of 1996 which provides that a report may not after six months has elapsed since the issue arose.

1.2 The Applicant who attempted to report the matter was not entitled so to report in terms of Section 57 (1) of the Industrial Relations Act No. 1 of 1996 as there is an organisation active in the undertaking concerned in this matter.

1.3 No other provisions of Part V111 of the Industrial Relations Act No. 1 of 1996 were followed.

1.4 The Honourable Court, therefore may not take cognisance of this matter as this would be contrary to Rule 3 (2) of the Industrial Court Rules of 1984 which state that "the Court may not take cognisance of any dispute which has not been reported or dealt with in accordance with Part V11 of the Act".

1.5 Wherefore the Repondent prays that this Honourable Court should refuse to take cognisance of

this matter in so far as it relates to prayers 2 and 3 as well as alternative prayers 1 and 2 of the Applicant's particulars of claim ".

On the 29th October, 1996 the Respondent added further points in limine namely :

"By adding paragraph 1.6 reading as follows: The Applicant is bound by his agreement in full and final settlement

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of the 10th November, 1995 which was signed by both parties and cannot lawfully bring claims inspite thereof.

Wherefore the Respondent prays that the Court should refuse to take cognisance of the Applicant's claim in its entirety".

On the 14th November, 1996 the Respondent indicated that it intended to lead evidence in support of the points raised in Limine. And so it was that the Respondent lead the evidence of PW1 FRANK HORVATH its Factory Manager whose evidence in so far as it is material to the matters in issue was that the Applicant together with a number of employees were retrenched by the Respondent after being informed on the 1st November, 1995 of the decision to retrench him. PW1 then described the events that took place before retrenchment.

A certificate of payment was prepared. This document upon being signed was to be a full and final payment to the employee retrenched. The Production Manager explained the document at the time of the actual payout and the sum of money was handed to the Applicant in Siswati. The Foreman checked it and also explained in Siswati the circumstances. After the explanation the Applicant signed the document in the presence and in front of PW1 who then countersigned it. The Applicant left the Respondent's employment on the 10th November, 1995. The explanations that were given by the Production Manager and the Foreman to the Applicant was done in Siswati. The document which was being explained to the Applicant was in English which the Applicant did not understand and could not read English. He was paid what the Respondent regarded as due to him. There was at this stage no dispute or claim that had been lodged by the Applicant with the Respondent. The view of PW1 was that this document annexure "b" was incorrectly titled in full and final settlement as there was no dispute in existence between the Respondent and the Applicant. In the view of PW1 the words in full and final settlement as

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used in annexure B meant full and final payment of that which was legally due to the employee.

The Respondent then lead the evidence of PW2 DAISY MKHOMBE the Wages and Personnel Clerk who stated that she paid the Applicant the sum of money reflected on annexure B as he had been retrenched by the Respondent. The evidence of PW3 ABSALOM VELI ZIKALALA a Foreman in the employ of the Respondent was that the Applicant's last day at work was on the 10th November, 1995.

Thereafter he was retrenched and no longer reported for work. PW3 stated that he explained the contents of annexure B to the Applicant who did not complain that he did not understand-Thereafter the Applicant signed and PW3 saw him sign. PW3 further stated that he delivered annexure A to the Applicant. Applicant had already been told verbally that he had been retrenched. Annexure A was given on the 1st November, and annexure B on the 10th November.

The Respondent then lead the evidence of PW4 THEMBA NSIBANDZE who stated that on the 10th

November, 1995 he was still with the Union SMAWU, he went to the Respondent because he wanted to make sure that the retrenched had been properly paid. He did this. After each employee had received his pay packages, he came to PW4 to find out if he had been paid for the hours worked, additional notice, notice pay and severance allowance. The Applicant was one of these people. PW4 said Applicant did not complain that he did not understand what was going on.

On the 17th May, 1996 the Applicant reported this matter to the Labour Commissioner at Siteki. PW4 brought the attention of the Conciliator to the fact that conciliation could not be conducted as the matter had been reported out of time. The Conciliator informed the Applicant to get the Minister's authority. PW4 then referred to a letter from the Applicant addressed to the Labour Commissioner applying for extension of time in which to report the dispute as the time provided

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had already lapsed. The evidence of PW5 JOASH NKOSINATHI NDLOVU the Production Manager of the Respondent stated that on the 10th November, 1995 he was present when a number of retrenched were paid. PW5 saw the Applicant being paid and said that the Applicant did not come back to work after that day.

The Applicant PAUL SIBUSISO MKHATSHWA then lead his evidence and testified saying he went to the Office of the Labour Commissioner in November, 1996. He said he has not been to school. He can read something written in Siswati but cannot read what is written in English. The Applicant said he remembers the events of what happened on the day that he was paid monies due to him from the Respondent. In the morning he reported for work. On this particular day he was not assigned any duties. He saw his Foreman MR. ZIKALALA and asked him about this and was told that some of them were going to be paid on that day. He was told to go outside and see the list. On that day he was expecting his monthly pay. It was said there were others who were going to be paid.

After the Applicant had checked the list he found his name on it. The list was with the Union Representatives. As they were sitting outside expecting some work to do they were not assigned any.

They then expected their pay. They were given their envelopes. The pay envelope was given to the Applicant by MR NDLOVU the Production Manager. Present when the payment was given to the Applicant by MR. NDLOVU was MR. HOVER and MR. ZIKALALA. After receiving the envelope and he had already received the money he turned to JABULANI VILAKTI to read it to him. JABULANI VILAKATI was with the Union. The Applicant realised that he had been dismissed when he heard that some of them who had left were back at work. This is the time he went to the Respondent's premises and was told that he had been stopped from working and had got everything due to him. This was two to three months after receiving his last pay. Applicant said when he reported the matter to the Labour Commissioner's Office in Lubombo he was told that he had received everything that was due to him from the Respondent.

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Under cross examination the Applicant was asked to name a few people that were retrenched with him. He mentioned SIBUSISO NDWANDWA, MESHACK MAVUSO, MUSONGELWA FAKUDZE and MANGALSIO MSIMANGO. He was then asked to put the list from which he had been reading on the table. He then went on to mention BOY MASIMULA, NHLANHLA NYONI and MAKHOSINI TSABEDZE. He was asked who wrote the list from which he had been reading and he said himself.

He was asked didn't you tell this Court earlier on that you could neither read nor write. The answer was I said I cannot write English but can write vernacular.

The Respondent's position in the main action LANGA BRICKS (PTY) LTD is that the Applicant is bound by the agreement in full and final settlement in which he was paid a sum of E825.46 as there was no evidence that he was compelled to sign it. He had Union Officials, the Foreman and Supervisor who were ready and willing to explain if he did not understand.

He did not complain to anyone that he did not understand.

We must state that it is interesting to note that Applicant said the Labour Office in Lubombo informed him that the dispute he intended to report was out of time. He then instructed his Attorney to apply for extension in which the dispute could be reported but he then comes before Court and says his report was not out of time. Initially the Applicant informed the Court that he has never been to school and that he cannot read and write English and that the little vernacular Siswati that he can read he was helped to learn by his brother. Yet under cross examination he indicates clearly that not only can he read Siswati he can also write. The Applicant was consistently presenting the picture of someone relied on JABULANI VILAKATI to read a letter to him. Yet he had earlier on stated that his Foreman MR. ZIKALALA asked him to go outside and see a list. He went and checked the list and found his name on it. He note that on this particular day he was not assigned any duties. He asked his Foreman about it. Then he was paid.

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The Applicant said in terms of his application his usual salary was E475.20 per month but on this occasion he received a sum of E966 and some cents.

The evidence of the Respondent and its witnesses has in our view been consistent and not been shaken under cross examination. This evidence has shown that on the 1st November, 1995 the Applicant and other employees were informed by the Respondent that they had been retrenched. On the 10th November, 1995 they received their retrenchment packages. Thereafter they did not report for duty. This evidence taking into account even the conduct and evidence of the Applicant is the most plausible and believable of what happened between the parties.

as earlier on stated the Applicant would like the Court to issue an order directed against the Second Respondent compelling him to issue a Certificate of Unresolved Dispute. This invitation flies in the face of the Applicant's own concession that his application was out of time and required extension before it could be entertained by the Labour Commissioner as borne out by his application for extension of time in which to file the report. We shall not issue such an order infact we refuse to issue such an order as the report of dispute of the Applicant on the evidence before us was out of time and the Labour Commissioner was not competent to receive it in the absence of extension having been obtained.

The evidence before Court clearly shows that the Applicant was retrenched by the Respondent. He got his retrenchment package and went home. He cannot now be heard to be asking the Court that it grant him an order of reinstatement into his job and the payment of his salary from December, 1995 to date of judgement as the claim is not supported by any evidence. If anything the evidence is that from December, 1995 the Applicant was no longer an employee of the Respondent.

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We have already refused to give an order directing the Labour Commissioner to issue a Certificate of Unresolved Dispute. We have also refused to give an order of reinstatement of the Applicant into his job as he had been retrenched. We have also refused to give an order for arrear of wages. WE believe these orders put to rest the Applicant's application and there will be no need for us to consider the claim for maximum statutory compensation or damages. We believe there will also be no need for

us to determine whether the Applicant was competent or not entitled to make a report in terms of Section 57 (1) of the Industrial Relations Act of 1996 to the Labour Commissioner. We believe there will also be no need for us to determine whether the agreement referred to allegedly entered into between the parties was in full and final agreement. We have therefore declined to take cognisance of this matter.

MARTIN SAMSON BANDA

PRESIDENT - INDUSTRIAL COURT