



It is the Applicant's case that the Respondent had no lawful right to unilaterally withdraw the Applicant's appointment as a permanent employee in the post of Development Facilitator and to apply the terms and conditions of a fixed term contract without the Applicant's consent.

The Applicant told the court that he raised a grievance regarding the unfair and unlawful conduct of the Respondent but the grievance was not dealt with. On 22nd September 1997 the Respondent gave the Applicant notice of termination of his services on 30th September 1997 . A copy of the notice is annexed and marked "D" to the Application.

Subsequent to this, the Applicant reported a dispute to the Labour Commissioner who was unable to resolve the dispute and issued a certificate of unresolved dispute a copy of which is annexed to the Application marked "E".

The Applicant told the court in no uncertain terms that he did not request the Respondent to revert him to a fixed term contract on the 20th May 1997. Though he acknowledges that he had transport problems in his new permanent position because he was required to travel to remote areas of Swaziland , he said this was no reason for him to ask for less favourable term on contract basis as compared to his permanent employment.

The Applicant also acknowledged the differences he had with his supervisor in his permanent position but also reiterated that he at no time asked management to return him to a fixed contract term he held prior to his permanent appointment.

He was emphatic that he was never placed on probation as this was the practice of the Respondent whenever it appointed on permanent terms employees who had worked for the Respondent on contract. Once they were appointed on permanent basis they were not required to serve probation.

Indeed, the World Vision International Swaziland Office, conditions of service revised in August 1996 and approved by the National Director Mr. David Montague at Clause 3.5 thereof stated as follows:

"3.5 The National Director may confirm as a permanent employee one who has been either a temporary or contract employee without that employee undergoing the normal

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probationary period if (a) the employee has satisfactorily served three or more months and (b) otherwise fulfilled all additional requirements" for confirmation".

This document was produced by the Applicant and marked exhibit "p2". It was Applicant's case that he had satisfied both requirements (a) and (b) when he was appointed on permanent basis and that the National Director had expressly confirmed him to his permanent position in the meeting held on the 24th February, 1997. He told the court that he had served the Respondent on contract basis for over two years prior to this appointment and had a good record of service. In the circumstances, there is no way he would have been required to serve on probation.

In support of his case, the Applicant called "AW2" Mr. Simeon Nxumalo. He told the court that he was the immediate supervisor of the Applicant when he was appointed on permanent basis. He was working as Area Development Manager at the time, but stopped working in July 1998 when he apparently resigned as he was not happy with his conditions of service. He was consulted by the head of operations Mr. Siame on whether or not he was willing. to take in the Applicant in his department and he willingly obliged to the request. He was informed by Mr. Siame that the Applicant was familiar with all the areas and communities involved in his programme. This occurred in December 1996.

Mr. Simeon Nxumalo corroborated the testimony of the Applicant that at a staff meeting held on 24th February 1997, the National Director Mr. Montague announced the appointment of the Applicant to the meeting and he explained that the Applicant would not be required to serve probation since he had worked for the organisation for a long time. He expressed surprise that the minutes of that meeting do not reflect these assertions by the National Director and insisted that this must have been an omission by the person who recorded the minutes.

Mr. Nxumalo stated further that the practice of the organisation was not to place employees with prior experience on probation once they are appointed on permanent terms. He said that this was what happened to him when he was reverted from fixed contract term to permanent appointment.

It was explained to him that since he had served the organisation for more than five months there was no need for him to serve probation period. He had been appointed as a Development Facilitator then, a similar position to which the Applicant had been appointed to. He was however not sure whether there had been a previous case of a contract employee who had been appointed on permanent terms required to serve probation.

On 12th May 1997 Mr. Simeon Nxumalo wrote a memorandum to the Applicant expressing his dissatisfaction with the Applicant's explanation regarding his absence from work on the 5th, 6th and 7th May 1997. He told the Applicant in that letter that Applicant's explanations were unacceptable and his absence had caused work to suffer in the programme.

This letter was produced as exhibit "p4". On the 20th May 1997 the Applicant replied to "p4" by a memorandum produced and marked "p5". The Applicant disputed that he was absent from duty on the 6th and 7th May 1997 save for the 5th May when he was sick. He

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explained that on the 6th and 7th May he had arrived at work late at 9.30a.m. due to transport problem. The Applicant accused Mr. Simeon Nxumalo of not following the correct procedures in addressing this problem and added that the memorandum "p4" contained untruths. The Applicant further expressed his dissatisfaction thereof with the manner Simeon was handling the staff members under his supervision.

The Respondent heavily relied on the two memorandums "p4 and "p5" to show that the relationship between the Applicant and his supervisor had deteriorated to such an extent that on the 20th May 1997 he requested management to return him to the fixed contract terms.

This witness however disputed that there was any serious acrimony between himself and the Applicant. He emphasised that his concerns as raised in the memorandum were not personal in nature but he was concerned with the effect the lateness and absenteeism of the Applicant had on his work programme. He also was aware of his transport problems and could not have taken these matters personally as a supervisor. He blamed lack of transport as the main cause of the problem, he told the court.

On the 12th May 1997, Simeon Nxumalo attended a meeting convened to discuss the transport problem of the Applicant. Mr. Patrick Siame the Head of Operations, Mr. Montague the National Director and the Human Resources Manager Mr. Kunene were present.

After the discussion, he told the court that the management resolved that; the Applicant could not be provided transport by the Respondent. He had to use public transport or make alternative arrangements to get to his work place. That he was expected to report to work on time. Simeon was asked to strictly monitor him for seven days and report back in a meeting to be convened thereafter.

Simeon described the meeting as heated as the National Director did not take it kindly that the Applicant had by passed other officers and complained to him directly. The Applicant was chastised also for telephoning Patrick Siame who he had told that the Respondent organisation was not serious by not providing him with transport as they continued to pay him whilst he was not able to work. After the meeting the Applicant made personal arrangements for transport and on the 20th May 1997 a meeting was convened wherein Simeon reported on the Applicant's performance. He explained to the meeting that the Applicant arrived to work on time and that he had no problem continuing to work with him provided he continued coming on time and performed his duties well.

In spite of Simeon's explanation, the management was not happy especially due to the statement the Applicant had earlier made to the Operations Manager on telephone. The National Director asked the Applicant to go out of the meeting. At that moment Mr. Montague requested to see the Applicant's file and that is the time it was discovered that there was no letter appointing the Applicant to his

permanent position. They decided to write one and it be backdated to the 1st March, 1997. It was also decided that the Applicant should be transferred back to the department of Water and Sanitation on fixed contract terms so that the said contract would expire on the 30th September, 1997. According to Simeon, at no time in the meeting did

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the Applicant ask to be put to his previous job on contract terms. When the transfer was discussed the Applicant was already outside.

Mr. Simeon was subjected to very lengthy cross examination by Mr. Sibandze. He stood his grounds very well and in our view attempts to discredit his testimony were unrewarding. We were satisfied with the explanation he gave regarding the circumstances and the context in which the memorandums "p4" and "p5" were written. We are also satisfied with his testimony that indeed the National Director asked the Applicant whether he wanted to continue working with Simeon Nxumalo and he answered in the affirmative.

Patrick Siame was called to testify on behalf of the Respondent as DW1. At the time of his testimony he had replaced Mr. Montague as the National Director of the Respondent organisation.

In a nutshell, the Respondent's case was that the Applicant on the 20th May 1997 requested to be reverted to the position he had earlier held in the department of the Water and Sanitation on fixed contract terms. That the said contract expired on the 30th September 1997. To this end, employment of Applicant terminated lawfully by effluxion of time.

In the alternative, the Respondent's case was that even if the court held that such reversion to contract terms was not by request, still he is not an employee as described under Section 35 of the Employment Act because his fixed term contract was revived while he was still on probation and his employment terminated by effluxion of time in terms of his contract on the 30th September 1997. Accordingly, it is the Respondent's case that the Applicant is not entitled to any of the relief he seeks in his Application.

In his testimony Mr. Siame told the court that management had decided to employ the Applicant on permanent or pensionable terms and upon deliberation by management on what conditions he would be offered such permanent employment, the opinion of the National Director prevailed to the effect that the Applicant should not be exempt from serving probation for two reasons; (1) his duties on fixed contract terms in the department of Water and Sanitation was not similar to what he was going to be doing on his new appointment as a Community Project Facilitator and (2) his academic qualifications and training was basically in health and not community development hence the need to put him on three (3) months and not six (6) months probation.

Though this was not discussed with the Applicant, Mr. Siame told the court he informed him of the management's decision and that this was to be communicated to him by the National Director in the Letter of Appointment. The Applicant vehemently denied this contention by Mr. Siame.

Mr. Siame further told the court that the Applicant was very excited about this appointment and he did not query any aspect of it. That in the staff meeting of 24th February 1997 the National Director announced the appointment of the Applicant as a Development Facilitator in charge of Lubombo Development Programme.

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Mr. Siame referred to page 10 of "p1" the minutes of the said meeting as evidence of what the National Director said. He categorically denied that the Applicant was exempted from serving probation by Mr. Montague in this meeting.

No evidence of the recorder of the minutes of the meeting of 24th February 1997 was called by the Respondent to counter the Applicant's assertion that the record of the minutes of the meeting of the 24th February 1997 omitted numerous things that were said therein including the statement by Mr.

Montague that he would not be required to serve probation. The minutes were recorded in "reported speech" and not in the first person. Whatever is contained therein can best be explained therefore by the person who reported the events of that meeting.

Explaining the circumstances that culminated to the meeting of the 20th May 1997, Mr. Siame told the court that he had visited U. S. A and he returned towards the end of March. He was rang by the Applicant who told him that World Vision was not a serious organisation for they continued to pay him even though he was not working. Mr. Siame was not happy about this and he called the Applicant and Simeon Nxumalo to a meeting in an attempt to resolve his transport problems. This meeting was held on 23rd April 1997. Though it was agreed that Thuli Chapa provide transport to the Applicant up to Mpaka from where he would be picked up by Simeon Nxumalo, the arrangement turned out to be impractical because the Applicant would arrive at Mpaka after Simeon had already gone. The problem was therefore not solved.

The Applicant according to Mr. Siame then approached the National Director on his transport problem on 12th May 1997. Neither Mr. Siame nor the National Director was happy with this move by the Applicant. Mr. Siame told the court that he felt that the Applicant did not trust him since the two agreed on 23rd April 1997 that the Applicant would write to Mr. Siame if he required further assistance regarding his transport problems.

Mr. Siame corroborated the evidence of Simeon Nxumalo regarding the meeting of 12 May 1997 wherein the Applicant was chastised for not following the laid down procedures in addressing his problem. He was given seven (7) days to rectify his habits of reporting late and absenting himself from work and a sequel meeting was arranged for 20th May 1997 to review his progress.

According to Mr. Siame, at the meeting of 20th May 1997 Management comprising Mr. Montague, Mr. Kunene and himself first called Simeon Nxumalo who briefed them. According to Simeon, the Applicant was reporting to work on time though his output was not up to his expectation. He gave an example of an incident on 19th May 1997 when they were working at Khuphuka Community where the Applicant did little work and went to sleep in a car reading a newspaper.

At that point, contrary to the evidence of Simeon, Mr. Siame said they asked Simeon to go out and they summoned the Applicant to the meeting.

The Applicant informed the meeting that though he was reporting on time, it was very expensive for him as he had to make arrangements for private transportation from his home to Manzini. The Director also queried him about the incident at Khuphuka community on 19<sup>th</sup>

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May 1997. The Applicant is said to have disputed these allegations made by his supervisor and he also told the meeting that inspite of his transport problem, he would somehow manage. He was sent out of the meeting at that point, according to Mr. Siame.

The management deliberated on the issue and decided to allow the Applicant to continue as a Project Facilitator inspite of the difficulties he was experiencing.

Mr. Siame told the court that after they had made this decision, they called the Applicant back to the meeting and the National Director asked him "we have heard what you have said about your transport problems, where do we go from here ?".

Mr. Siame testified that, at that point the Applicant told the meeting that it was better for him to be taken back to his previous job as Water and Sanitation Manager. Mr Siame expressed surprise at this suggestion by the Applicant and he asked him whether he was aware this would change his employment on permanent terms to a fixed contract one. The Applicant told them that he fully understood the implications and he was ready to go back. The Applicant was sent out of the meeting and Mr. Daniel Maduna the Manager of the Water and Sanitation Department was called in for consultation. He expressed willingness to take the Applicant back.

The Applicant was called back to the meeting and was informed that Mr. Daniel Maduna had no problem taking him back and the National Director informed him that he should consider himself

transferred to the Water and Sanitation Department and he would receive a letter to that effect. The Applicant was very happy according to Mr. Siame and he felt relieved because he had no problem working with Mr. Daniel Maduna.

Mr. Siame told the court that this was the last he heard of the matter until sometime, in July 1997 when the National Director came to his office and gave him a letter of appeal written by the Applicant that was produced as exhibit "p6" in this trial.

The Applicant was summoned in the presence of Mr. Siame, National Director and Sibusiso Kunene. The National Director told him that an appeal ought to be lodged within seven days and that this appeal was belated. The National Director then referred the matter to the two Managers, Mr. Siame and Mr. Kunene to attempt to resolve it.

Mr. Siame told the court that in the discussions that ensued, the Applicant for the first time ever brought up the issue of an existing bad relationship between himself and Mr, Simeon Nxumalo. He levelled many allegations against Simeon and Mr. Siame was surprised that the Applicant had failed to raise these matters at the meeting held on the 20th May 1997.

Even though Mr. Siame told the court that the management expressed surprise that a person who had requested to be transferred would now appeal against that decision, his conduct and that of Mr. Kunene and more so, the steps taken by the National Director on receipt of the Appeal Letter is not suggestive at all of any surprise by the management team. Their reaction if anything is consistent with the allegations by the Applicant that indeed, it is them who had decided arbitrarily to revert him to contractual terms. The letter itself in our view was not a bolt from the

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blue as Mr. Siame would want to have us believe. His demeanor when answering questions on this aspect of his testimony is suggestive of a person with something to hold back.

In spite of the Applicant's appointment to a permanent position as a Development Facilitator with effect from the 1st March 1997 he was not served with a letter, of appointment . stating the terms and conditions of his appointment until the 20th may 1997 and only after a decision to revert him to contract terms had been taken. Indeed, the letter putting him back on contract terms was also given to him on 20th May 1997 simultaneously with the letter of appointment he had taken up on the 1st March 1997.

The letter of appointment is annexure "B" to the Application and the same purports to place the Applicant on probation in the following terms :

".....you will need to undergo the normal period of probation as is described in the World Vision Conditions of Service (Section 3). During the probationary period you will be expected to undergo a physical examination at the expense of World Vision. Also during your probationary period, your work will be evaluated by yourself and management, and a decision relative to confirmation will be made after three months but not later than six months from the above date ".

Regarding this, we note the following :

- (a) the period of probation was not definite.
- (b) no evidence was given to the effect that the Applicant was subjected to any physical examination.
- (c) no evidence of any evaluation reports by management or by himself during the period was presented to court as evidence, (d) this letter was given to him on the 20th May 1997 approximately 10 days to the expiry of 3 months since his appointment on the 1st March 1997.

These factors amongst others, make the evidence of the Respondent on this aspect of the case suspect especially taking into consideration annexure "C" which was written and served simultaneously to the Applicant with Annexure "B" referred to.

The said Annexure "C" purports to return Applicant to his former position of Assistant Water and Sanitation Project Manager on fixed contract terms. Mr. Siame states that there was nothing wrong with this action by the Respondent for two reasons:

(i) Applicant was still serving probation. (ii) this was done at Applicant's own request.

Annexure "C" interestingly enough does not state that this transfer was on request. In terms of the contract, the Applicant's services were terminated with effect from the 30th September 1997.

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Mr. Siame denied that the transfer of the Applicant nor annexures "B" and "C" to the Application were discussed by management in the presence of Mr. Simeon Nxumalo. He emphasized that this could not have happened since Simeon was not a member of management.

We however note that Simeon was the immediate supervisor of the Applicant and there would have been no anomaly whatsoever in discussing his work performance and or possible transfer in the presence of his supervisor. Simeon's evidence is more plausible in our view.

Mr. Siame told the court that Mr. Simeon Nxumalo was not present when the Applicant allegedly requested the management to transfer him. He said that at no time was the Applicant at the meeting together with Mr. Simeon Nxumalo. This is in spite of the evidence by Mr. Simeon Nxumalo that he was initially together at the meeting with the Applicant and it was never put to him by Respondent's Counsel that at no time was he together in the meeting with the Applicant.

It is important to note that by a Notice of Intention to Amend filed on the 2nd September 1998, the Respondent sought leave to amend paragraph 7 of its reply which stated that the Operations Manager Mr. Siame had made it clear to the Applicant that he would serve a probation period and substitute the Operations Manager for the National Director Mr. Montague.

Paragraph 10.1 was also amended by adding "and to discuss his transport problems"

at the end of the paragraph.

This application to amend was allowed before the Respondent had commenced its case. After Mr. Siame's testimony to the effect that Mr. Simeon Nxumalo was not present when Applicant requested to be transferred, the Respondent by an application dated the 3rd May 1999 sought to further amend paragraph 10.2 of its reply to replace "Applicant in the presence of the four men said be was unhappy in his new position ...." with "Applicant in the presence of the National Director Operations Manager and Human resources Manager". This application was opposed by Mr. Dunseith for the Applicant and the court disallowed it.

It appeared to the court that the Respondent was bent to clean all material contradictions that arose as its case progressed. Indeed the conduct of the Respondent added to our doubts about the veracity of the testimony of Mr. Siame and later Mr. Montague on what actually transpired at the meeting held on the 20th May, 1997.

What is worse is that the National Director could also not recall having discussed the issue of probation with the Applicant as was stated in the amended paragraph 7 of Respondent's reply.

Mr. Siame's testimony as a whole left a lot to be desired. He was shaken time and again in the lengthy cross examination by Mr. Dunseith and his explanations to anomalies pointed out was not convincing at all.

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Mr. Sibusiso Kunene the Human Resource Manager gave evidence as DW2. He told the court that he was present when management decided to appoint the Applicant on probationary terms. He is the officer who provided the Applicant with the terms and conditions of service produced as exhibit "p2".

He told the court that he discussed the issue of probation with the Applicant contrary to the allegations of the Respondent as contained in its reply. This was during the first week after the Applicant had commenced work.

In view of the material contradictions in the Respondent's case thus far, his testimony did not take its case any further.

Mr. David Lee Montague in his testimony as DW3 told the court that he was the National Director of the Respondent at the time the services of the Applicant were terminated by reason of the expiry of his contract. That himself, Mr. Siame and Mr. Sibusiso Kunene comprised management and usually made collective decisions.

That it was the policy of the organisation to identify valued employees who were on contract and employ them on permanent terms. He said Applicant was one of such valued employees and therefore they decided to employ him on permanent terms as of the 1st March 1997. He denied ever assuring him in the meeting held on 24 February 1997 that he would not serve probation. He said indeed he never mentioned probation at all in that meeting. He claimed that though the Applicant was not immediately furnished with a letter of appointment, he had signed the organisation's conditions of service which stated at Clause 3.1 that all permanent employees are required to serve a probationary period of not less than three months and not more than six months and that during that period the National Director after consultation with the Departmental Managers may terminate without notice such employee serving probation and the employee may also do likewise.

We however note that Clause 3.5 states that the National Director may confirm as a permanent employee one who has been either a temporary or contract employee without that employee undergoing the normal probationary period where such employee has satisfactorily served three or more months and has otherwise fulfilled all additional requirements for confirmation.

The Applicant had served the Respondent organisation on contract terms for more than two years. He was described by the National Director as a valued employee. The reasons advanced for putting him on probation after such a long period of service are not convincing at all.

Our views are fortified by the contradictory versions given by the Respondent's witnesses as to how, where, when and by who this information was conveyed to the Applicant. Secondly, the fact that the Applicant was not until the 20th of May 1997 served with a letter stipulating that he was to serve probation makes the Respondent's claim hollow and finally, even when such letter was served the same did not stipulate a fixed period of probation in terms of the Employment Act.

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We must add that we were not convinced by Mr. Montague's explanation as to why the Applicant was not given an appointment letter upon his appointment on the 1st March, 1997. That he was served with the letter of appointment and the letter terminating such appointment on the same date discredited the Respondent's case.

Examples of former contract employees who were appointed later on permanent basis without serving probation were given and such included, Mr. Simeon Nxumalo, Daniel Maduna and in case of Nozipho Mkhathshwa the probation period was waived in writing. It follows that if the Applicant was appointed on probationary basis it was of essence that he received such notification in writing prior, or at the commencement of his new appointment.

Mr. Montague's account of what transpired on the 20th May 1997 in material ways differs with Mr. Siame's account. According to Mr. Siame, Mr. Simeon Nxumalo told them that the Applicant was now arriving on time and did not absent himself save for an incident when he decided to sit in a motor vehicle and read news papers. Over all Mr. Simeon was happy with the progress made by the Applicant. According to Mr. Siame, the Applicant was ready and willing to continue working as a Field Facilitator though it was expensive to him, however according to Mr. Montague, there was an impasse because Mr. Simeon Nxumalo was unhappy with the Applicant and Mr. Montague was uncertain of what would happen next.



At that point Mr. Montague told the court that he asked the Applicant what was the way forward and the Applicant told the meeting that the management was not serious because they continued to pay him though he was not working. Mr. Montague interjected at that point and asked him again what the way forward was, and the Applicant answered quickly that it would be better if he was returned to his earlier position.

This statement by the Applicant about being paid for no work according to Mr. Siame had been made to him by the Applicant by telephone prior to the meeting of the 12th May 1997. The version as told by Mr. Montague differs from that told by Mr. Siame therefore.

For these reasons, we do accept the testimony of the Applicant as corroborated by Mr. Simeon Nxumalo on what transpired at the meeting of 20th May 1997.

In spite of the amendment sought by the Respondent to paragraph 7 of its reply to read that the National Director made it clear to Applicant (and not the Operations Manager) that he would serve probation, Mr. Montague, had no recollection that he had expressly told the Applicant that he would serve probation. He also said that he was not consulted before the amendment was sought by Mr. Sibandze for the Respondent and added that he liked it the way it read originally. This was not helpful at all to the Respondent's case.

After considering the testimony of all the witnesses and the relevant law applicable we find the following:

- i) The Applicant was appointed on permanent basis with effect from the 1st March 1997.
- ii) That he was not appointed on probation due to his previous service on contract basis with the Respondent.

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- iii) That on the 20th May 1997, he was without his consent reverted to his earlier position on a fixed term contract that was due to expire on the 30th September 1997.
- iv) That the Respondent had no lawful right to withdraw the Applicant's appointment on permanent basis.
- v) For the above reasons the termination of the Applicant was unlawful and unfair in the circumstances.

On consideration of all the circumstances of the case we have found that this is not a suitable case where reinstatement should be ordered. The following factors have been taken into account in determining the amount of compensation awarded to the Applicant:

- a) He had served for a period of seven months only on permanent basis with the Respondent organisation.
- b) He was unemployed to date in spite of his efforts to get alternative employment.
- c) He has suffered personal and professional damage especially as concerns the prospects to further his career by fact of this unfair dismissal.
- d) we have also recognised the loyal service he had given to the Respondent on two contracts prior to his appointment on permanent terms.

We accordingly order the Respondent to pay the Applicant six months salary as compensation for the unfair dismissal in the sum of Emalangeneni Sixteen Thousand Eight Hundred (E16,800.00).

There will be no order as to costs.

The Members concur.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT