

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 168/93

In the matter between:

SIMANGA MANTANA NXUMALO

APPLICANT

and

ALLIANCE FRANCAISE DU SWAZILAND

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. M. BANDA

FOR THE RESPONDENT:

MR. N. J. HLOPHE

JUDGEMENT

1603.2000

The Applicant in this matter seeks an order directing the Respondent to pay her maximum compensation for unfair dismissal, terminal benefits in the form of Notice Pay, Additional Notice and Severance Allowance.

Further the Applicant claims salary arrears from 16th January to August 1998, unpaid rent from 1st May 1996 to August 1998, transport refund from 1st May 1996 to April 1998 and 20 days per annum leave pay from 22nd December 1992 to August 1998.

After the Court's ruling striking off part of the Applicant's claim on the basis that the issues had not been conciliated upon, the Applicant rectified the omission and the claims were reinstated and consolidated with the earlier application. In this light Case No. 168/98 and 171/99 have been heard as one.

The Applicant was employed by the Respondent as its Director on the 22nd December 1992 at a monthly salary of E2,250. She was entitled to free housing and transport refund as itemised in her particulars of claim.

It is common cause that on the 1st May 1996 the Applicant went on a two year study course to pursue her Master's Degree at Montpellier, France,

2

What is in dispute is whether the Applicant's contract was terminated by fact of her two year study absence.

The Applicant's case is that she remained in the employment of the Respondent while in France and was entitled to all the benefits she enjoyed as a Director of the Respondent.

On the contrary, the Respondent claims that the Applicant's employment was terminated by consent of

the parties. That the Applicant was informed that her two year study break was incompatible with the retention of her position as a Director and she chose to further her education rather than remain in employment.

The court has been availed documentation to help resolve the contradictory and mutually destructive versions by the parties.

It is important to understand that the Respondent is what is generally referred to as " the French Cultural Centre". It has a cultural and educational function and is a non profit making organisation funded by the French Government, The court was told that the Respondent in Swaziland is a small operation of less than five permanent staff.

The Director is the Principal Administrator of the institution and doubles up as an Educationist and Co-ordinator of all the functions of the Respondent.

In terms of the job description of the Applicant which pronounced her conditions of service ; the Director General in Pretoria , the Embassy of France in Maputo and the President of the Respondent had a final say in the termination of the service of the Director provided that the Director of the Respondent was entitled to a six (6) months notice. In the event of the Director wanting to terminate her service she was to give a six (6) months notice also to the President of the Respondent with a copy to the Director General in Pretoria and the Embassy of France in Maputo.

This agreement was signed by both parties in July 1993 and lists the benefits of the Director to have included :

- i) a salary of E2, 250 per month.
- ii) Housing.
- iii) Refund for transport expenditure in line with Government Circular.

On the 15th April 1996 the Applicant via exhibit "A2 " applied for a two year study leave to the President of the Respondent.

3

In terms of the application she had been granted a scholarship. The study was to commence as of 1st May 1996.

Mrs. Brigitte Lee the then President of the Respondent responded to the Application by the Applicant by a letter dated the 24th April 1996. An English translation of the French version of the letter is annexed to the reply and marked "AFS1". The parties agree that it was an accurate translation of the original document marked exhibit "A3".

The letter reads:

"We have received your letter PF 1 dated April 15, 1996 which retained our full attention.

We had consulted the Embassy in the person of the Ambassador as well as Mr. Corporeau. general delegate of the Alliance Francaise in South Africa, which allows us to reply the following:

The granting of a scholarship of two years by the French government cannot be interpreted as a "two years study leave" as you suggested in your letter. We feel that this important facility granted by the government is a decisive step in your training and preparation for other higher assignments either in Swaziland or elsewhere according to your own choice.

As you will easily understand, a two years absence which you have requested is totally incompatible with,

your employment at the Alliance.

The only thing we can tell you at this stage is, when the time approaches for your return in 1998. it would be wise to take up contact with the committee and with the Swaziland Ministry of Education in order to express your wishes for a new employment, it is only at this time that we will be able to examine them.

We request you to be nice enough to confirm as soon as possible in any case before your departure that the present letter gives sufficient precision and dissipates all ambiguity.

Would you accept. Mrs Director of courses the expression of our distinguished greetings ".

The Applicant wrote a letter to the Respondent dated the 29th April 1996 where she acknowledged the receipt of the above quoted letter. She stated as follows in her reply:

"I kindly acknowledge receipt of your letter dated 24th April, 1996 in which you advise me of my status upon embarking on the two year study period in France for the MA FLE.

4

The contents therein have been noted and I concur with you that I contact the committee in 1998.

May I seize this occasion to express my sincere gratitude to Alliance Francaise Du Swaziland, 1996 Committee for communicating this advice to me.

Highest considerations ".

This letter is annexed to the Respondent's reply and marked "AFS2",

The Applicant had received a comprehensive scholarship from the French government that included a return ticket, paid for accommodation and up keep while on the two year study in France. This issue was not placed in dispute at all.

The Applicant did not communicate to the Respondent upon embarking on her study until the 7th November 1998 when after her return to Swaziland she wrote exhibit "A5" to the President of the Respondent as follows:

"I am pleased to inform you that having successfully completed the above course I have just returned home and am ready to resume my normal duties at AFS.

TRANSIT ALLOWANCE: your letter AFS/11 of 27th May 1996 refers: I kindly urge AFS to commence its decision as per the said letter under reference.

SALARY: checking my bank account 2236155 at Barclays Bank Allister Miller Branch I noticed that AFS has inadvertently over looked depositing my monthly salary notwithstanding that the said account was communicated to its administration ".

The three letters quoted herein comprise the crux of the dispute herein.

It would appear to the court that the task at hand is to pick out the intention and understanding of the parties at the time exhibit "A3" and Annexure "AFS2" were written.

The questions that arise are as follows:

- i) Did the Respondent intend to terminate the services of the Applicant if she chose to embark on a two year course in France ?

ii) If so, did the Respondent communicate its intention in a clear and unequivocal language to the Applicant prior to her departure to France?

5

iii) Did the applicant upon a proper understanding of the Respondent's position opt to take up a two year Master's Course in France in place of her continued employment as a Director of the Respondent?

The answer to the afore questions can only be found upon a proper construction of exhibit "A3" and Annexure "AFS2".

In the matter of Swaziland Union of Financial Institutions and Allied Workers v Swaziland National Provident Fund 1C Case No. 164/ 97 We took instruction from the words of JANSEN J. A in SASSON CONFIRMING AND ACCEPTANCE CO (PTY) LTD v BARCLAYS NATIONAL BANK LTD 1974 1 SA 641 A 646 B as follows:

"The Jus! step in constructing a contract is to determine the ordinary grammatical meaning of the words used by the parties (Jonnes v Anglo-Africa Shipping Co 1936 Ltd 1971 (2) SA 827 AD at 834 E). Very few words however bear a single meaning and the ordinary meaning of the words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation and the nature of the transaction as it appears from the entire contract".

Granted, we are not dealing with a contract strictu sensu in the present application but the enquiry in the final analysis is intended to establish whether there was consensus adidiam between the parties prior to the departure of the Applicant for France,

The construction of the letters is to be done in the same manner as would a contract hence the words of Jansen J.A. apply mutatis mutadis to the interpretation we embark on in this matter.

In this endeavour we slated in the SUFIAW AND PROFUND CASH (supra) as follows at pg 2:

"It is not for this court to speculate as to what the common intentions of the parties were when they entered into the Agreement. That we must gather from their language and it is our duty as far as possible to give to the language used its ordinary grammatical meaning. It must be remembered however that this inquiry is not into what the parties had in mind at the lime of contracting, and is even more different from what after dispute has arisen each party honestly or dishonestly maintains its intention then to have been but the common intention in our view is as expressed in the words of the contract itself. Therefore if the contract speaks with sufficient clarity, it must be taken as expressing their common intention (TOTAL SOUTH AFRICA (PTY) LTD v BEKKER (1992) SA 617 (A) 624 G - 625 B.

Docs exhibit "A3" as interpreted in "AFS1" speak with sufficient clarity ?

6

The Respondent expressed its position in response to the Application by the Applicant for a two year study leave as follows in our view :

i) The scholarship granted to the Applicant by the French Government could not be interpreted as a grant of two years study leave by the Respondent.

ii) That a two years absence as was requested by the Applicant in her letter of 15th April 1996 was "totally incompatible with her employment at the Alliance"

iii) The Applicant was advised when time approached for her return to Swaziland in 1998 to contact the Respondent's committee and the Ministry of Education of Swaziland to apply for a " new employment if she so wished".

Of utmost importance is the penultimate clause of the letter which requests the Applicant to confirm in any case before her departure "that the present letter gives sufficient precision and dissipates all ambiguity".

The Applicant was afforded opportunity by the Respondent to raise any query if she did not understand any part or the contents of the letter from the President of the respondent (AFS) in any event before she left for France.

The Applicant was a well educated person. She understood french very well and the fact that she was in charge of the French education function of the Respondent stands testimony to our findings. Upon reading the letter from the President she replied as follows in Annexure "AFS2":

" I kindly acknowledge receipt of your letter dated 24th April 1996 in which you advise me of my status (our emphasis) upon embarking on the two year study period in France for the MA FLE".

There can be no doubt in the light of this response from the Applicant that she understood that her embarking on the two year study was "totally incompatible with" the employment at Alliance.

The President's letter spoke with sufficient clarity as to what the Respondent's intention was at the time. That the Applicant had a choice to embark on the two year study and by so doing her employment was to be terminated or remain in employment and forego the two year course is manifestly clear. This was the necessary implication of the letter by the President.

The Applicant stated further that she had noted the contents of the President's letter and " I concur with you that I contact the committee in 1998".

7

There can be no doubt in our minds that the Applicant understood and accepted the consequences of taking up the two year study scholarship by the French Government,

Her employment as the Director of the Respondent was mutually curtailed upon her going to France. She too understood well that she was not granted a study leave and was no longer entitled to any benefits she had hitherto enjoyed as a Director of the Respondent,

The Applicant's letter communicates her state of mind before she left for France with sufficient clarity. The Respondent was justified in the circumstances of the case to recruit a new Director.

We are satisfied that the respondent acted reasonably in the circumstances of the case.

The Applicant did not contact the Respondent until she was back in Swaziland on the 7th November 1998, she wrote a letter exhibit "A5" wherein she stated that:

- a) She was back home and was ready to resume her duties.
- b) Requested for transit allowance.
- c) She had checked her Bank Account and that the Respondent must have negligently failed to deposit her monthly salary for the period of two years she was out of the country.

Upon consideration of the testimony of the Applicant in court and the circumstances of the case as discerned from the correspondence between the parties in particular exhibit "A3" and Annexure "AFS2" to the reply, the contents of exhibit "A5" especially the veiled demands contained therein were made in bad faith in our view.

The Applicant understood that she could only apply for a new job with the Respondent or any other

employer and that she was neither entitled to any transit allowance nor her salary upon the mutual termination of her employment in May 1996.

Similarly, the Applicant was not entitled to any transport allowance while in France. She had been granted a comprehensive scholarship for two years. We completely fail to understand how she could have expected to be given housing in Swaziland, transport allowance and transit allowance when all these items had been taken care of by the French Government as part of the scholarship package.

The Applicant is now a lecturer at the University of the North in the Republic of South Africa. She lectures French language and admitted that she got this job as a result of the Masters Degree in French she had obtained pursuant to the scholarship by the French Government.

8

As concerns the Applicant's claim for leave pay, she told the court that she was entitled to twenty (20) days leave per annum. That due to the exigencies of work she was not able to take her leave from December 1992 to May 1996. In this regard she was entitled to twenty (20) days per year for the period of four years aforesaid.

The respondent was unable to rebut this evidence by the Applicant and we accordingly find that she is entitled to 80 days leave pay. We are satisfied that her monthly salary was 132, 388 per month in terms of the Agreement of employment and subsequent increments thereof. Her claim that she ought to have been paid E4,907 per month has no basis in her contract of employment or in any employment law in Swaziland. We reject her evidence in this regard.

We accordingly find that the Applicant was not dismissed by the Respondent. That she opted to take a two year scholarship to pursue a Masters Degree in France and the respondent accepted her decision. The employment" was therefore terminated mutually. In the circumstances, the Applicant is not entitled to any terminal benefits. The Respondent did not sever the employment of the Applicant within the meaning of Section 34 of the Employment Act.

The requirements of a six months notice to terminate the employment contract of the Respondent's Director was mutually compromised upon by both parties when the Applicant left for France. The question of Notice pay and Additional Notice pay does not therefore arise in the circumstances of the case.

The Respondent will accordingly pay the Applicant twenty (20) days salary for each of the four years served without leave in the sum of E8,683.64.

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT