IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 41/2000

In the matter between:

BAGSHAW HARRIS & ASSOCIATES (PTY) LTD APPLICANT

and

THOMAS LAWLOR ANDREWS RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR THE APPLICANT: MR. P. FLYNN

FOR THE RESPONDENT: MR. P. DUNSEITH

RULING

18.04.2000

The Applicant seeks payment in lieu of notice in the sum of E1 8,000 and payment of damages in the sum of E54,000 for breach of the employment contract in that the respondent left the employ of the Applicant without giving three month's notice as stipulated in the contract.

The Respondent has raised preliminary objection to the Applicant's claim firstly on the grounds that Section 33 (3) of the Employment Act No. 5 of 1980 provides:

"The minimum period of notice to be given by an employee who has been continuously employed by the same employer for a period of three months or more shall be two weeks, or such longer period as may be specified in the form and the second schedule to be given to the employee under Section 22 or in a collective agreement covering the terms and conditions of employment of the employee. "

The Respondent contends that any term or condition of employment in any contract that is less favourable than is provided under Section 33 (3) is null and void in terms of Section 27 of the Act. For this reason a provision for a three months notice by the employee to terminate his contract of service was in direct contravention of Section 33 (3)

which limits the period of notice that an employee who has worked for a continuous period of three months may give to two weeks.

Mr. Dunseith for the Respondent submitted that in terms of Section 33 (3) any longer notice period than the two weeks could only be provided in a Section 22 form or in a collective agreement covering the terms and conditions of employment. He argued that the fact that no mention is made of a contract of employment meant that the same is excluded for the purposes of providing a longer period of notice. Consequently the provision for a three month period in the contract of employment between the Applicant and the Respondent was null and void abinitio and therefore not enforceable.

In the premises, there must be substituted for Clause 4 of the employment contract the condition that "the employee may terminate this agreement by giving two weeks written notice to the employee without reasons assigned."

The question that arises then is whether such extended notice period may only be contained in a Section 22 form or in a collective agreement but not in a contract of employment between two or more parties.

This Section protects both the employee and the employer in the sense that the employer may not be given less than a two weeks notice period by an employee nor should the employer give the employee less than two weeks notice. There is no limitation of the maximum notice period from a reading of the section. The right conferred is for a mandatory minimum period therefore to both parties.

Which ever way I have read Section 33 (3) of the Employment Act, it does not in any way limit the period of notice to be given an employee other than to a minimum of two weeks. The Section does not also exclude the inclusion of a longer notice than two weeks to be given by an employee in other records of the terms and conditions of employment except in the Section 22 form and a collective agreement specifically stated in the section.

To my mind, the three months notice provided in the contract between the parties herein is not contrary to the Employment Act and the same is enforceable.

As concerns the second objection in limine, the Respondent contends that in the event that an employee leaves his employment without notice, an employer may claim an amount equal to the basic wages which would have been earned by the employee during the notice period, but it may not in addition claim damages or loss of earnings allegedly sustained due to the failure to give notice. To this end, Respondent states that the Applicant's claim for damages in the sum of E54,000 is bad in law and cannot be sustained. That the claim should only be limited to the amount of the employees' earnings during the two weeks notice period in terms of Section 33 (5).

We have noted the authority in the High Court of Swaziland Case No. 85/93 between SWAZILAND RANCHES LTD t/a TABANKULU ESTATES AND CHARLES RUDD which followed the decision in MANANA VS SWAZILAND TELEVISION BROADCASTING CORPORATION (1982 -6) SLR 153 at 156/7 to the effect that:

"The measure of damages for the wrongful dismissal that an employee can claim is the remuneration he would have earned had his employment continued until the earliest date for terminating the contract less the amount he has earned or could reasonably have earned during that period in similar employment. "

This obviously stipulates the common law position as opposed to the statutory compensation available to an employee who has been wrongly dismissed in terms of Section 15 of the Industrial Relations Act of 1996. We however make a distinction between the statutory compensation under the Act with a claim for damages for breach of contract in common law which is the claim we are now dealing with.

Following the authority in Manana's case which was followed in the SWAZILAND RANCHES LTD t/a TABANKULU ESTATES (supra).

The converse position in my view is that the measure of damages for breach of contract that an employer can claim from an employee is the earnings he would have obtained had the employee continued to render his services until the earliest date for terminating the contract less the amount he has earned or could reasonably have earned during that period by way of alternative service.

Clause 4 of the contract of employment attached to the Application as annexure "A" reads thus :

"Subject to paragraph I above and to the provisions of the Employment Act No.5 of 1980 either party may terminate this agreement by giving three months written notice to the other without reason assigned. "

It is alleged by the Applicant that the Respondent was in breach of the clause as he terminated the employment without the requisite notice.

It follows that the Applicant would be entitled to claim damages for unrcedered services for a maximum period of three months less any earnings realised by the Applicant in mitigation of damages during the period.

Section 33 (5) does not place any mandatory limitations on the nature of claim that an employer may have against a defaulting employee by way of loss of earnings. The section merely stipulates that an amount payable in lieu of notice should equal the wages that may have been earned by the employee during the period of the notice.

The Applicant's application will accordingly proceed to trial in respect of the claims for:

(a) Three months notice pay E18,000

(b) Loss of earnings for the period of the notice in the sum of E54.000.

There will be no order as to costs.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURY