

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 37/98

In the matter between:

ABEL KUNENE

APPLICANT

and

C & M CONCRETE

RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

MR. KUNENE/MOTSA:

FOR APPLICANT

MR. MADAU:

FOR RESPONDENT

RULING

8/9/00

At the close of the case for applicant Mr. Madau for respondent made an application for absolution from the instance. As the application involved consideration of an important point of law I took time to consider it and now give my ruling.

In his application for determination of an unresolved dispute the applicant claims compensation for unfair and unlawful termination of his services by respondent, notice pay, additional notice pay and severance pay. Applicant alleges that he was unfairly dismissed from his work for an alleged poor work performance.

Mr. Madau in his application stated that applicant has failed to prove a case of unfair dismissal.

Mr. Motsa in his reply stated that the burden to prove the fairness or unfairness of the termination of service lies with the employer at all times.

What is incumbent upon the applicant is to prove that he was employed by respondent and that his services were terminated.

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Regarding this point of law it is proper to look at the provisions of Section 42 (2) of the Employment Act/1980. Section 42 (2) provides: "THE SERVICES OF AN EMPLOYEE SHALL NOT BE CONSIDERED AS HAVING BEEN FAIRLY TERMINATED UNLESS THE EMPLOYER PROVES -

(a) THAT THE REASON FOR THE TERMINATION WAS ONE PERMITTED BY SECTION 36; AND

(b) THAT TAKING INTO ACCOUNT ALL CIRCUMSTANCES OF THE CASE, IT WAS REASONABLE TO TERMINATE THE SERVICES OF THE EMPLOYEE"

This clearly demonstrates that Section 42(2) of the Act shifts the burden to respondent as soon as

applicant has established that he was the employee of respondent to whom Section 35 of the Employment Act applies. Secondly that he was dismissed by respondent.

It is common cause that applicant was employed by respondent. The issue in dispute is whether respondent dismissed applicant from his employment.

According to the certificate of unresolved dispute filed with the court, the respondent company denied that it ever dismissed applicant. It stated that the applicant left on his own accord. It further stated that it was willing to take the applicant back to work.

The applicant rejected the offer by respondent to take him back to work.

In this document it is clear that the applicant demonstrated that he was not prepared to continue working even after respondent had offered that his position is still vacant as he was not dismissed.

This court therefore is of the view that applicant has not shown that he was dismissed from work - and as such respondent cannot be required to prove that the dismissal was fair when there had been no dismissal at the first place.

The absolution from the instance succeeds. No order as to costs

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Members concur.

KENNETH NKAMBULE

JUDGE - INDUSTRIAL COURT