

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 348/2001

In the matter between:

LUCKY GIFTUS MAHLALELA

APPLICANT

and

UMBRELLA MANAGEMENT SERVICES

CO (PTY) LTD

RESPONDENT

CORAM:

NDERINDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

M. SIBANDZE

FOR RESPONDENT:

Z. JELE

JUDGEMENT

30/05/02

The Applicant seeks by way of an urgent Notice of Motion an order in the following terms:

1. Respondent be ordered to pay Applicant's arrear salaries in the amount of E63,000.
2. Respondent be ordered to pay Applicant's December salary in the amount of E15,000.
3. Further and/or alternative relief.
4. Costs on the scale as between attorney and own client.

The application is founded on the Affidavit of Lucky Giftus Mahlalela. Upon close of pleadings, the parties by consent applied that the matter be

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referred to oral evidence. The matter was referred consequently to oral evidence whereupon the Applicant testified and a Mr. Lesotho D.Kock testified for the Respondent.

The thrust of the Applicant's case is that he was employed by the Respondent in terms of a contract annexed to the Application marked 'LMI'.

The terms of the contract were that he was appointed to the position of a General Consultant with effect from 1st June, 2001 and was placed on a three months probation period subsequent to which he was to be permanently employed. His performance was to be reviewed at least once a month during probation. He was to report to the Umbrella Management Services Company, Swaziland Executive Director, Dr. Mamba and was to be paid a monthly allowance of E15,000 (all inclusive), A curious clause states that

"you shall be responsible for any income tax deductions".

In respect of hours of work, the contract reads "All staff will work a flexible daily programme which has been set up to be mutually convenient for both staff and customers. In addition you are required to remain available at short notice at all times". The working hours were then stated to be 8a.m. to 4.30p.m. He was also to be "required to perform other duties" from time to time.

The Applicant was then requested to "confirm your acceptance of the above position and terms of employment".

The letter of appointment was signed by Dr. B.B. Mamba, the Swaziland Executive Director.

The Applicant accepted the terms of contract in the letter 'LM1' and started work in earnest. From the first month, June 2001, the Applicant wasn't paid in full, he was paid in bits and pieces as reflected in paragraph 9 of the Founding Affidavit. He tried to settle the issue of non payment amicably but was eventually forced to seek the assistance of the court when it became clear that the Respondent was not ready to honour its part of the bargain in full or at all.

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On the 19th October, 2001 the respondent wrote a letter marked 'LM2' purporting to re-employ the Applicant on new terms, stating that his earlier employment had lapsed upon unsatisfactory completion of probation at the end of August.

The Applicant denies that his services were ever terminated and states that from June, 2001 up to mid November, he continued to work in spite of the difficulties he was experiencing with the hope that he would eventually be paid. That he never accepted the revised terms of his employment but instead chose to resign in January, 2002 after it became clear that the Respondent was acting in bad faith or would in fact not honour its contractual obligations.

On the contrary, Dr. Mamba who deposed to the Answering Affidavit denies that the Respondent ever took up the Applicant as an employee but merely engaged him through a consultancy management service incorporated by the Applicant himself. The letter of appointment "LM1" however tells a completely different story. The Applicant was employed as a consultant in his personal capacity and was to be paid a monthly remuneration, as opposed to a fee, per work done, that is associated with consultancy services.

The contract stated that the Applicant's performance was to be reviewed on a monthly basis and that during the probationary period, termination of contract would be on two weeks notice.

No such notice was ever given the Applicant to terminate his employment up to the time the letter dated 19th October, 2001 was written purporting to re-employ him. The contract does not also indicate that the Applicant was to file any reports nor does it state that payment of the allowance was dependent on production of any such report.

At the end of August, the Managing Director Mr. Chababa came to Swaziland to review the performance of the Applicant. He did not communicate in writing the result of his appraisal but what has clearly come out of the evidence from both parties is that the Applicant between August and November did various work for the Respondent and was continuously at the Respondent's office at Manzini. Chababa's allegation in the affidavit that he advised Applicant that his services had been terminated is neither supported by oral nor documentary evidence.

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Indeed to the contrary, Mr. D Kock admits attending business meetings with the Applicant in November and in October, he met Applicant in Arnot South Africa, and gave him R30.000 for running the Manzini office.

In terms of the employment Act No. 5 of 1980, once the probation period has expired, it is immaterial whether there is a written confirmation of continued employment or not. If the employee continues to work for the employer, he becomes a permanent employee to whom Section 35 of the Act applied.

Termination for failure to satisfactorily meet the employers expectation must be done within the probation period and not after. Once the probationary period expires, termination must be in terms of Section 36 as read with Section 42 of the Act.

Neither Dr. Mamba nor Chababa came to give oral evidence but instead Mr. D.Kock who had very scanty knowledge of the going ons in Swaziland especially between the Applicant and Dr. Mamba gave evidence which materially contradicts that of Dr. Mamba in the Founding Affidavit and is also at cross purpose with the contract of employment.

The document 'LM1' speaks with sufficient clarity and read as a whole, discloses a contract of employment between the Applicant and the Respondent contrary to the assertions of Dr. Mamba and Mr. D. Kock that he was merely hired as a consultant.

Upon considering the oral evidence of the Applicant and that of Mr. D.Kock, the court is satisfied that the Applicant worked for the Respondent, as a General Consultant from the 1st June, 2001 to mid November at a monthly allowance of E15,000.

That the Respondent has fully paid the Applicant for the months of June, July and August but he was not paid the monthly allowance for September, October and November.

The Applicant was unable to attend work partly in November and during December due to lack of funds to operate as a result of non payment of his salary by the Respondent. He however continued to tender his service until he opted to resign at the beginning of January, 2002.

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The Applicant in the circumstances should be paid a monthly allowance up to the month of December 2001 as he is deemed to have remained in the employ of the Respondent until the time of his resignation.

The Applicant will thus receive a monthly allowance for the months of September, October, November and December at the contractual rate of E15,000.

In the result, the Respondent is to pay E60.000 to the Applicant.

As a mark of disapproval of the malafide conduct of the Respondent as an employer, and in delaying the prosecution of this matter, the court orders that it also pays the costs of this Application.

Since the Respondent did not remit PAYE taxation to the Commissioner for Taxes for the months of June, July and August, 2001, the Commissioner is notified of this judgement to act as she deems fit.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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