IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 275/2000
In the matter between:	
NOMBULELO MATSEBULA	1ST APPLICANT
SANELISIWE VILANE	2ND APPLICANT
and	
STANDARD BANK SWAZILAND	RESPONDENT
CORAM:	
NDERI NDUMA:	PRESIDENT
JOSIAH YENDE:	MEMBER
NICHOLAS MANANA:	MEMBER
FOR APPLICANT:	S.MOTSA
FOR RESPONDENT:	M. SIBANDZE

JUDGEMENT

29/11/02

The 1st and 2nd Applicants are both young female adults who were employed by the Respondent bank as Clerks at the Respondent's Operations Processing Centre (OPC) based in Matsapha on the 3rd and 4th February 1999 respectively.

Though the applicants worked continuously for the Respondent until the 2nd May 2000, they worked in terms of contracts similar in all respects to annexure 'SB1' and 'SB2' to the Respondent's Reply which were renewable on a monthly basis. The said contracts read as follows:

"RE: Temporary contract.

We are pleased to offer you a temporary contract at our O.P.C. Matsapha Branch under the following terms:

1. Your duties are that of a clerk effective 4"' January 2000 to and including the 31 st January 2002 Monday to Friday 8 hours per day, Saturday 4 hours per day.

2. Your engagement is on a day to day basis and the bank will give one day's notice of intention to terminate employment.

3. Your remuneration will be E1,600 (One Thousand Six Hundred Emalangeni only) per month. The bank's calendar month is 23.91 days. You will be entitled to overtime only if you work hours in excess of 44 hours per week. "

The contracts were signed by the Human resources Manager Mr. S. Dlamini and the respective

employees.

The parties tendered a statement of agreed facts in terms of Rule 33 (1) of the High Court Rules as read with Rule 10 of the Industrial Court Rules. The agreement basically stipulates the dates of employment of the two Applicants, that they were employed in terms of the aforesaid contracts which were renewed on a monthly basis and that the last contract was signed by the Applicants on the 2nd.May 2000.

The parties set out the questions for determination as follows:

2.1. Are the monthly fixed term contracts unlawful.?

2.2. Are the terms of the monthly fixed term contracts less favourable than those provided under the Employment Act as contemplated by Section 27 thereof. ?

2.3. Both parties contention are based upon common law jurisprudence and labour legislation.

In addition, evidence was led by both parties and the 2nd Applicant was AW1. She told the court that she was one among several clerks employed by the bank, some were employed on permanent and pensionable basis, whereas herself and fifteen (15) others signed monthly contracts. Both category of clerks did same work which comprised rough and fine sorting, handling statements and credit vouchers, checked cheques up to the value of E7,999 and made entries into the bank journals. She was supervised by M/s Thandi and one Ben Manana who also supervised the rest of the clerks.

They worked continuously without interruption and the written contracts would be brought for their signature either at the beginning or in the middle of the month.

On the 15th May 2000 the supervisor informed her and the 1st Applicant that they would stop working on the 31st May 2000 and were given a letter to that effect.

On the 31st May 2000 the whole group of sixteen clerks was called to the processing center by a Mr. Padayachee who openly informed them that they had been terminated and all the others had been confirmed to permanent and pensionable status. They were told not to ask the criteria used in the selection. Out of the 16 temporary clerks, 13 were confirmed. He called them one by one and gave them letters and the two Applicants were left out standing alone on the apposite side of the processing center.

They felt demeaned and humiliated in public and felt that they should have been addressed privately. She produced the letter dated 15th May 2000. whilst employed, she paid graded tax and contributed to the Provident Fund and was entitled to annual leave. She had already taken 10 days of it. She said that some of the clerks who were confirmed had been employed after her e.g. Patrick Mhlanga. She earned E1,600 per month, was not married and had no children.

Her performance had been appraised after a year's work and she was rated good by her supervisor. She was as from April 2002 employed on probationary basis by the government department of Customs & excise and earned E2,500 per month.

She had tertiary qualifications of AAT Level 3 and was presently studying ACCA to be a Chartered Accountant. She was 28 years old and lived with her parents at Mbabane.

AW2 was Nombulelo Matsebula, the 1st Applicant. She like AW1 signed a monthly contract but worked continuously up to the date of termination. She was among the three who were not confirmed out of the group of 16 employees.

She was not satisfied with the termination and reported a dispute with the Labour Commissioner. She was 26 years old, married with one child. She

was entitled to 19 days leave and had taken 5 days. She sought for relief as per the particulars of claim.

The two Applicants claim 24 months compensation for unfair dismissal. One months salary in lieu of notice. The 1st Applicant claims 23 days leave whereas the 2nd Applicant claims 18 days leave pay in the particulars.

Though it is not clear from the evidence the exact number of leave days due to the Applicants, the Respondent has tendered to pay 9 days salary in lieu of leave for the 2nd Applicant and 19 days salary in the lieu of leave for the 1st Applicant.

The Secretary General of SUFIAW Vincent Ncongwane testified as AW3. He produced a Collective Agreement dealing with the terms and conditions of service of the unionized members of the Respondent. He referred the court to Clause 2.2.1 & 2.2.2 at page 3 in particular which deals with temporary employment.

Clause 2.2.1 states that no employee shall be employed on a temporary basis in a permanent position beyond six months. Any replacement of such employee by another for a similar task shall be deemed as a circumvention of the agreement.

2.2.2. on the other hand prohibits employment of temporary staff for special project for periods exceeding 18 months.

This agreement came into effect on the 31st day of January 2000 and the Applicants lost their jobs on the 31st May 2000.

It was argued by Mr. Sibandze for the Respondents that the two Applicants had not worked for over six months from the time this agreement came into effect and since it id not have any retroactive effect it did not apply to their situation.

There was no Collective Agreement dealing with this issue prior to the commencement of this particular one which was produced as exhibit A3.

The whole case therefore turns on the question whether the temporary monthly agreements were null and void being contrary to the provisions of the Employment Act which would mean that the Applicants were employees

to whom Section 35 (2) applied and therefore could only be dismissed for reasons provided under Section 36 of the Act, where circumstances showed it was reasonable to dismiss them as per the requirements of Section 42.

Before we determine the legal issues, we will first consider the evidence of RW1, the witness for the Respondent who was the Human Resources Manager of the Standard Bank. He told the court that exhibit A3, the Collective Agreement, he was familiar with and was negotiated with the union and same was effective as of January 2000. That Standard Bank had just merged with Barclays Bank and was as such a new entity.

He said the Applicants were employed at the Operations Processing Center (OPC) on monthly contracts which had just been started. The Respondent was not certain of the full human resource requirements of the center and hence decided to employ staff on monthly basis until this was established. The positions held by the temporary employees had recently been created and were confirmed as permanent positions in March 2000. He denied that the bank violated Clause 2.2.1. and 2.2.2 of the Collective Agreement.

Under cross examinations he however told the court that the (OPC) department was established in 1998. That it took then up to early 2000 to evaluate the human resource requirements of the operations. He agreed that the Applicants worked continuously from the time they were employed up to the date of termination. They paid tax, provident fund contributions but denied they were entitled to annual leave.

He said the Applicants were not confirmed to their positions due to poor work performance but were only informed of this after the termination. He denied that all along the Applicants were considered permanent employees. He conceded that employees recruited after the two Applicants were retained. He added that the bank had no policy on temporary staff before the conclusion of the Collective Agreement exhibit 'A3'.

The employees of the Respondent were entitled to 21 days leave but this did not apply to temporary staff he added.

The thirteen employees who were confirmed were not placed on probation and the confirmation was based on their individual performance. He said the three who were dropped had less than satisfactory output compared to the rest. This was not communicated to the Applicants in writing while they

worked for the Respondents. The witness does not refute the evidence of the Applicants that their performance was rated as good pursuant to an annual appraisal.

The court has first to determine whether the Applicants have discharged the onus placed on them by Section 42 (1) which reads as follows:

"42 (1) In the presentation of any complaint under this part, the employee shall be required to prove that at the time his services were terminated that he was an employee to whom Section 35 applied. "

The court has to take into consideration the evidence of the Applicants concerning how they were employed and their terms and conditions of service in the actual performance of their work and the written contracts signed by them to determine whether or not they were employees to whom Section 35(2) applied.

The following facts have been proven:

1. The two worked continuously for a period of 16 months.

2. That while in that continued employment they were asked each month to sign a monthly contract.

3. That their performance was appraised at the end of one year service and the same was noted as good.

4. Their service was terminated for poor work performance though they had not been notified of this concern, by the employer during their tenure of service.

5. That the reason given for the termination was that the employer no longer required their service and since the monthly contract for the month of May 2000 had expired, the employer was not obliged to retain them.

Was the conduct of the employer in :

(a) placing the employees on one month fixed term contract for sixteen months contrary to the provisions of the Employment Act?

(b) If not, are the terms of the monthly fixed term contracts less favourable than those provided under

the Act, and thus null and void in terms of Section 27?

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The Employment Act No. 5 of 1980 has a pre-amble as follows:

"An act to consolidate the law in relation to employment and to introduce new provisions to improve the status of employees in Swaziland. "

The primary purpose of the Act was two fold:

1) to consolidate employment laws and;

2) to improve the status of employees in Swaziland.

Part 1V headed Contracts of Employment is one of those introduced to improve the status of employees in Swaziland. Of relevance to this case is Section 27 which reads:

"27 No contract of employment shall provide for any employee any less favourable condition than is required by any law. Any condition in a contract of employment which does not conform with this Act or any other law shall be null and void and the contract shall be interpreted as if for that condition there were substituted the appropriate condition required by law. "

The other relevant provision to this case is to be found in part V titled, termination of contracts of employment also enacted to improve the status of employees in Swaziland.

Section 31, in particular reads thus:

" This part of the Act shall apply to every contract of employment made within Swaziland and to be performed wholly within Swaziland. "

Section 32 headed Probationary Period reads:

"Section 32 (2) No probationary period shall except in the case of employee engaged on supervisory, technical or confidential work, extend beyond three months."

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Section 32 (3) states that in the case of employees engaged on supervisory, technical or confidential work, the probation period shall be fixed in writing, between the employer and employee at the time of engagement.

Section 32 was intended to protect employees from being kept for unnecessarily long probation periods because in terms of Section 32 (1) an employee while under probation has no protection in terms of Section 35, 36, 41 and 42 of the Employment Act, in that he may be terminated without notice and for no good reason at all, unlike an employee to who Section 35 (2) applies.

From the evidence before us, the Applicants worked continuously as bank clerks in the operations department. The Human Resources Manager told the court that the bank was on a needs finding mission to establish the number of personnel they would require for the department interalia. That they recruited sixteen employees on a trial basis and finally after sixteen months, opted to retain thirteen and got rid of three. He added that the supervisors knew how many permanent positions were available and the recruits were aware that they would not all be employed permanently. Those who were under performing were accordingly left out.

Though the Human Resources Manager denied that the recruits were on probation, his evidence clearly

shows the Respondent regarded the sixteen employees to be on probation, without informing them so. Their performance was kept under close scrutiny with a view to retain those who met the standards of the Respondent and get rid of the others. It is very clear that the monthly contracts were aimed at circumventing the provisions of the Employment Act, by keeping the recruits on trial for about sixteen months continuously and at the same time deny them the protection to become employees to whom Section 35 of the Employment Act applied. This way, the Respondent was able to keep them under probation for more than six months and by so doing circumvented the provisions of the Act.

The Employment Act was specifically enacted to protect employees from this kind of mischief.

To this extent, the contracts providing for one month employment, when infact the employees worked continuously for sixteen months, were entitled to annual leave, to which payment the Respondent has conceded in lieu thereof, contributed to the Swaziland National Provident Fund, were

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subjected to an annual appraisal which rated them as good workers, and their termination was allegedly due to poor work performance (unbeknown to them) provided for less favourable conditions than is required by the Employment Act and in particular Section 32 (1) (2) and (3) in that they were subjected to probationary periods longer than six months and the same was not fixed in writing at the time of engagement.

Accordingly, it was unlawful to subject the Applicants to a probationary period of sixteen months under the guise of monthly contracts. The facts of the case show clearly that the intention of the Respondent was to scrutinize the performance of the Applicants, with a view to confirming their employment if they met the mark, as indeed happened to their thirteen (13) colleagues. The Applicants are protected from this kind of abuse by the Employment Act and to this end the purported monthly contracts were unlawful and null and void.

The contract of employment was thus for a continuous period. The Applicants served continuously for sixteen months. They have proved that they were employees to whom Section 35 (2) of the Act applied.

It was argued for the Respondent that Section 35 (2) of the Act did not apply to the Applicants because they were employed in terms of Section 35 (1) (d) which reads:

"Section 35 (J) this section shall not apply to

(c) an employee engaged for a fixed term and whose term of engagement has expired."

It is the court's view that this section does not permit placement of an employee on probation for a period longer than that provided for under Section 32 of the Act, by subjecting the employee to sixteen (16) monthly contracts and then after an annual performance appraisal which rates them good and after recruiting new employees to replace the Applicants, terminate their services on the sixteenth month for poor work performance.

This section covers employees whose contract of service has expired by exflusion of time but does not protect employers who terminate employees' services for poor work performance without following the procedure provided under Section 36 (a) of the Act which provides as follows:

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"36 It shall be fair for an employer to terminate the services of an employee for any of the following reasons: (a) because the conduct or work performance of the employee has after a written warning been such that the employer cannot reasonably be expected to continue to employ him. "

During the sixteen (16) months continuous employment of the two applicants, their performance was

rated good after an annual appraisal.

Until they were dismissed, the Applicant's work performance was not questioned, orally or in writing.

The Human Resources Manager (RWI) conceded that it was after the termination that he informed the Applicants, the real reason for the termination, No written warning had ever been given to them.

The Applicants were not therefore dismissed for a reason permitted by Section 36 of the Employment Act. Having found that the monthly contracts were just a veil to circumvent the provisions of the Employment Act, the Respondent has further failed to show that it was fair and just to dismiss the Applicants in the circumstances of the case as per the requirements of Section 42 (2) (b).

The Applicant's career prospects were prematurely curtailed. They were openly humiliated in front of their working colleagues in the manner they were publicly dismissed. The employer even assuming had a right to terminate the services of the Applicants should have accorded them respect and sensitivity.

The 2nd Applicant is unmarried with no children. She earned E1,600 and was employed by government as from April, 2001. The 1st Applicant earned E1,600. She is married with one child, was 26 years old and is still unemployed.

They both suffered financial loss, anguish and diminished career prospects. The conduct of the employer was unlawful and ought to be discouraged as it amounts to abuse of human resources.

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In the circumstances, the court grants an order in the following terms:

1st Applicant Nombulelo Matsebula:

1. 19 days salary in lieu of leave. (amount to be calculated)

2. One months salary in lieu of notice. (E1,600)

3. 12 months salary as compensation for unfair dismissal (E19,200).

2nd Applicant Sanelisiwe Vilane:

1. 9 days salary in lieu of leave. (amount to be calculated)

2. One month salary in lieu of notice (E1,600)

3. 8 months salary as compensation for unfair dismissal (E12,800).

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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