

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 86/2002

In the matter between:

FRANCE DLAMINI

APPLICANT

And

A TO ZEE (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: SELBY DLAMINI

FOR RESPONDENT

: JABULANI MASEKO

JUDGEMENT

28 OCTOBER 2003

This is an application for determination of unresolved dispute in terms of the Industrial Relations Act No. 1 of 2000 (herein after the IRA).

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The Applicant claims reinstatement or compensation for alleged unfair dismissal that took place on the 11th March 2002. He further claims notice pay, underpayments and payment in lieu of leave not taken.

The evidence of the Applicant in brief is that he was employed on the 9th July 2001 as a shop assistant at the Respondent's A to Zee shop situate at West Street Mbabane.

He was promised a salary of E250.00 (Two Hundred and Fifty Emalangeni) per month. He started working as per the arrangement but to his dismay he was not paid a salary at the end of the month. This state of affairs continued up to the 11th March 2002. Mr. Rashid Salim Khan, the proprietor of the shop however kept on making false promises to him that payment would be made.

Fed up with these false promises, on the 11th March 2002, the Applicant reported a dispute to the Commissioner of Labour and was given a letter to deliver to Mr. Khan. Upon delivery of the letter, Mr. Khan asked the Applicant how much money he wanted and further requested Sibongile Dube, a fellow employee to enquire from the Applicant about this. The Applicant insisted that the issues would be deliberated before the Conciliation, Mediation and Arbitration Commission (CMAC). Not amused by this development Mr. Khan chased the Applicant from the shop and told him never to return again. The Applicant demanded payment before he left, but in vain.

The Applicant took his food container and went away. He reported the dismissal and non-payment to the Commissioner of Labour. A conciliation meeting was arranged wherein Mr. Khan attended. The dispute was not resolved hence a certificate of unresolved dispute was issued.

The Applicant was neither charged with any offence nor brought before a disciplinary hearing. He denied that he was employed as a casual insisting that he worked continuously for a period of 8 months. He worked seven days a week from 7.15a.m. to 6.30p.m. on Mondays to Saturdays and 9.30a.m. to 4.00 p.m. on Sundays.

He was not granted leave, or any off days during the entire period he worked for the Respondent. He walked for about 55 minutes everyday to the shop because he had no money for bus fare from Mahwalala to Mbabane. He depended on the rations he carried from home for lunch and was helped by his workmates with little amounts of money to buy food. The colleagues assured him that he would eventually receive payment as they had also patiently waited for a long time before Mr. Khan started paying them.

The applicant was twenty-four years old and was not married. He had not obtained another job since the dismissal. He did not receive any written terms of employment from the Respondent. He claimed that though he was not aware of the minimum wage he was entitled to as a shop assistant at the time, E250.00 per month was too little. His work was to display merchandise and served customers in the shop.

He claims he was automatically unfairly dismissed since he was victimized for demanding his salary and reporting a dispute to CMAC.

Mr. Rashid Salim Khan testified as RW1. He was the managing director of the Respondent. His testimony may be summarized as follows:

That he employed the Applicant towards the end of October 2001 to 'tout' for customers outside the A to Zee shop at West Street Mbabane. That the Applicant

was employed as a daily paid casual worker. He paid him twenty-five Emalangeneni (E25) per day though at times he paid him at the end of the week.

He did not produce any record of the alleged payments nor did he have the statutory standard form 22 showing the terms and conditions of the Applicant's employment. It is mandatory for an employer to fill in the terms and conditions of an employee in a Form 22 and provide a copy to the employee. Failure to do so amounts to a criminal offence in terms of Section 22 of the Employment Act No. 5 of 1980.

Where the employer has failed to keep such record and there is a dispute as to the terms and conditions of service of the employee, the onus rests on the employer to rebut the evidence of the employee as to the terms and conditions of service. A negative inference will be drawn from his failure to produce the records of the employee showing the terms and conditions of service under which he served.

The evidence of the Applicant and that of Mr. Khan are mutually destructive in this regard. The Applicant insists that he was employed as a shop assistant but not a 'tout' and that he was a permanent employee payable at the end of each month but not a daily paid as Mr. Khan alleged.

The Applicant further insists that he received no payment whatsoever from Mr. Khan for the period he worked whereas Mr. Khan states that he paid him E25.00 daily and at times at the end of the week.

Mr. Khan does not deny that the Applicant worked from Monday to Saturday, however he denies that the shop ever opened on Sundays. Mr. Khan denies also that he dismissed the Applicant on the 11th March 2001, after the applicant delivered a letter from CMAC to him. He stated that upon

receipt of the letter, he requested for clarification from M/s Sibongile Dube about the letter as this was the

first time he had been summoned by CMAC and that he attended the meeting as requested. He further told the court that the Applicant absconded from work from that day and never returned until they met at CMAC. He denied that he had dismissed the applicant. He further denied that the issue of dismissal was discussed at CMAC in his presence. According to him the only issue that was discussed was that of unpaid wages.

From the testimony of Mr. Khan, it is clear that he had no proper understanding of what is meant by the term casual employee in terms of the Employment Act. He admitted that the Applicant worked from 8a.m. to 5p.m. everyday and that he worked for Five and a half days a week. Mr, Khan thought that by paying him daily it meant that he was a casual employee and not protected by Section 35 of the Employment Act. To the contrary, from the facts that are common cause, the Applicant was an employee to whom Section 35 of the Act applied.

The evidence of Sibongile Dube, who testified as RW2, was not helpful because she had no personal knowledge of the terms and conditions on which the Applicant was employed.

Even though she had introduced the Applicant to Mr. Khan, she was not privy to the discussions between the Applicant and Mr. Khan resulting in the employment.

She told the court that the Applicant enticed customers into the shop and was also involved in delivery of goods into and out of the shop. She did not know how much he was paid but she told the court that she saw him receive money from Mr. Khan at the close of business each day, She was paid E1, 200 per month as the shop cashier.

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From the evidence of the Applicant and that of M/s Sibongile Dube it is apparent that the Applicant was assisting customers in and outside the shop. That he was also involved in the delivery of sold merchandise. He was a general labourer but not a 'tout', as Mr. Khan would like the court to believe. In terms of Legal Notice No. 158 of 2000, the Wages Act No. 16 of 1964, the minimum wage for general labourers in the urban areas in the Industry at the time was E771.32. The Applicant ought to have been paid that sum instead of E250.00. He was entitled to one-day leave for each month worked or payment in lieu thereof.

We do accept the evidence of Sibongile Dube and Mr. Khan that the Applicant commenced work at the end of October 2001 until 11th March 2002. He therefore worked continuously for a period of five months.

The court finds that the Applicant was underpaid for the entire period of five months and when he reported a dispute to the Labour department, Mr. Khan dismissed him.

The Respondent offered no explanation for dismissing the Applicant but instead denied that it dismissed him. The court finds to the contrary that the Applicant was dismissed for a reason not provided for under Section 36 of the Employment Act. The court further finds that the dismissal was unfair and unreasonable in the circumstances and therefore the Respondent has not discharged its onus in terms of Section 42 (2) (a) and (b) of the Employment Act.

The Applicant has not found alternative employment. He lost his means of livelihood unjustifiably and has suffered loss and damage. He had served for a short while but lost prospects of career advancement.

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In the circumstances, the court finds that he should have been paid E771.30 per month instead of E250.00 per month at the time of dismissal.

The court orders that the Respondent pays the applicant five (5) months arrear wages in the sum of E2, 606.00 (Two Thousand Six Hundred and Six Emalangen).

The Applicant should further be paid six months salary as compensation for unfair dismissal in the sum of E4, 957.20 (Four Thousand Nine Hundred and Fifty Seven Emalangeneni and Twenty Cents). Furthermore the Respondent is to pay five days salary in lieu of leave days not taken (sum to be calculated based on a salary of E771.20 per month).

No order as to costs. The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT