IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 240/2002

In the matter between

THANDO S. DLAMINI APPLICANT

And

SWAZILAND LIQUOR DISTRIBUTORS LTD RESPONDENT

CORAM:

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : D. MSIBI

FOR RESPONDENT ; S. DLAMINI

JUDGEMENT - 13 OCTOBER 2004

Thando Dlamini a male adult of Logoba area brought an application for determination of unresolved dispute against his former employer, Swaziland Liquor Distributors Ltd on the 12th September 2002. This followed a report of dispute under Section 57 and 58 of the Industrial Relations Act, 1996 now repealed by the Industrial Relations Act 2000 ('the Act") on the 18th February 2000. Conciliation efforts by the office of the Commissioner of Labour failed and

a certificate of unresolved dispute was issued on the 22nd May 2000 giving rise to the application serving before the court.

From the pleadings, all the matters avered in paragraphs 1,2,3, 4 and 8 of the particulars of claim have not been placed in dispute by the Respondent in its Reply. Consequently the following matters are common cause:

The Applicant was employed by the Respondent on the 10th August 1998 and worked continuously until the 31st January 2000. That the Applicant held the position of Empty Clerk earning a sum of El,400.00 per month.

The Respondent in its paragraph 1 of the Reply alleges that the Applicant was given a fixed term contract on the 1st December 1999 to 31st January 2000.

It is not alleged that the employment of the Applicant from the 10th August 1998 up to the purported date of the fixed term contract (1st December 1999) was terminated first.

It is common cause therefore that the Applicant in the least worked continuously as a Empty Clerk from the said 10th August 1998 to 30th November 1999.

The question that arises is whether the Applicant was an employee to whom Section 35 applied before the purported fixed contract was put in place and therefore a protected employee whose employment could not be terminated contrary to the express provisions of the Employment Act.

Section 35 is headed as follows;

'Employee's services not to be unfairly terminated'

The provision reads as follows: 35 (1) This section shall not apply to –

(a) an employee who has not completed the period of probationary employment provided for in Section 32;
(b) an employee whose contract of employment requires him to work less than twenty-one hours each week;
(c) an employee who is a member of the immediate family of the employer;
(d) an employee engaged for a fixed term and whose term of engagement has expired;

35(2) No employer shall terminate the services of an employee unfairly,'

From the pleaded facts, the Applicant had completed his probationary period and had served the Applicant for more than one year continuously prior to the 1st December 1999. He did not work less than twenty one hours each week, was not a member of the immediate family of the employer and was not engaged for a fixed term.

The aforesaid facts are uncontroverted and therefore in terms of Section 42(1) the Applicant has established that he was an employee to whom Section 35 of the Act applied.

The Applicant told the court that he was called to the office and was informed that his work performance was not satisfactory and was made to sign a letter dated the 10th February 2000 produced and marked TD2'. The letter reads as follows: "this serves to confirm that Mr. Thando Sipho Dlamini was employed by Swaziland Liquor Distributors in Matsapha on contract from the 11th August 1998

to the 31st January 2000, His contract has since expired and was not renewed". The letter is by the General Manager of the Respondent.

He was not given a letter of dismissal at all. On the 11th February he wrote to the General Manager of the Respondent the letter marked TD3' stating that his employment was unfairly brought to an end and that he had been made to sign a fixed term contract under duress and thus the same was null and void in terms of Section 27 of the Employment Act. The Applicant did not get a response to this letter.

The purported fixed term contract dated 30th November 1999 was produced and marked TD1'. It sought to employ the Applicant on a temporary basis as from 1st December 1999 to 31st January 2000. The effect of this was to transform the continuous employment the Applicant enjoyed since August 1998 into a bi-monthly contract. The Applicant was given the option of signing the monthly contract or go home and he complied to avoid loss of job. As it came to pass, the employment was not extended after the expiry of the two months and was conveniently terminated.

Section 27 of the Employment Act reads as follows: Contracts not to conflict with law'

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 the law."

The contract TD1' purported to reduce the permanent continuous employment of the Applicant into a temporary contract. It purported to deprive him of a Christmas bonus enjoyed by permanent employees and most importantly it purported to deprive him of the protection provided by Section 35 (2) of the Employment Act by stating in clause 6 as follows: "No legitimate expectations will arise from this contract to be renewed or to be changed into a permanent employment relationship." How convenient for the Respondent!! Indeed this served as a two months termination notice, as the employment of the Applicant was promptly curtailed on 31st January 2000.

Let me make it clear that, it is immaterial whether or not the Applicant consented to the new relationship. The employment Act and in particular Section 35 and 27 were enacted to protect employees upon realization of their weaker bargaining power against the employer while entering into contracts.

The consent of the employee accordingly does not validate an otherwise unlawful contract in terms of Section 27 of the Act, Therefore the contract TD1' whether or not was entered into by consent (which is denied by the Applicant) was null and void abinitio.

The Applicant still remained an employee protected by Section 35 of the Act and the Respondent could only terminate his contract in terms of Section 36 of the Employment Act.
It is not pleaded at all that the Applicant had committed any offence to warrant a dismissal in terms of Section 36, It was clearly not intended by the Respondent to lead any such evidence.
The Respondent called one Sipho Senzo Dlamini a co-worker of the Applicant who testified that he had been employed on the same date as the Applicant.

That both of them had completed six (6) months probationary period subsequent to which their employment was confirmed. That on the 30th November 1999, a new boss named Dumsane DIamini, introduced the fixed term contracts to all of them and asked them to sign them. He alleged that they were not coerced to sign the temporary employment contracts. That the Applicant was part of the group that had been told to sign the contracts.

He said out of the fifteen (15) employees only the Applicant and another were terminated after the first two months contract. The other continued to sign similar bi-monthly contracts notwithstanding that after the probation they had been employed permanently and filled forms to that effect.

RW2 was Dumisani DIamini who was the General Manager of the Respondent, Swaziland Branch from 1998 to 2000.

He told the court that in 1999, the company decided to right size the business due to the diminishing of their market in Mozambique. He added that they targeted casual employees like the Applicant for purposes of retrenchment. That this was explained to them in a group and they were made to sign TD1' which they did voluntarily. He denied that the Applicant was ever employed permanently.

The evidence of the two witnesses did not and could not further the case of the Respondent at all. From the facts that are common cause, the Applicant was protected by Section 35 (2) of the Act and TD1' could not change that position at all.

If it was Intended to retrench the Applicant and his colleagues, then the Respondent should have followed the procedure set out under Section 40 of the Act. This is not the case pleaded by the Respondent in any event.

On the 31st August 2004 the Respondent intended to call one last witness. Without any notification to the Applicant's representative or to the court, the Respondent's attorney did not turn up. The Applicant applied that the Respondent's case be deemed closed. The court acceded to the Applicant's application. The Respondent's case was deemed closed and the court allowed the Applicant's representative to make final submissions. The court subsequently allowed the Respondent to file in written submissions.

As stated earlier the Respondent faced an insurmountable obstacle in that as a matter of law TD1' was null and void abinitio and no amount of evidence could change that.

There was therefore no lawful reason permitted by Section 36 of the Act to terminate the employment of the Applicant.

Inevitably the Respondent failed to discharge its onus in terms of Section 42 (2) (a) and (b) in that it did not show that the Applicant was dismissed for a reason permitted by Section 36 of the Act and that it was fair and reasonable to terminate his services in the circumstances of the case.

The application succeeds accordingly.

The Applicant had served continuously for one year and five months. He lost prospects of career advancement. He was still unemployed and suffered financial loss resulting in hardship to himself and his dependants.

The conduct of the Respondent was outright unlawful and was contrived to circumvent the provisions of the Employment Act. This should be discouraged. Accordingly the Applicant is awarded compensation for the unfair dismissal

represented by twelve months salary in the sum of 12 x El,400 = E16,800 (Sixteen Thousand Eight hundred Emalangenl).

One month pay in lieu of notice in the sum of El, 400 (One Thousand Four Hundred Emalanegini).

There was no sufficient evidence to prove the claim for payment in lieu of leave days not taken.

Accordingly the Respondent is to pay a sum of E18,200.00 (Eighteen Thousand Two Hundred Emalangeni).

Further, Respondent is to pay costs of the Application considering that the Applicant was an innocent victim of an attempt to circumvent the provisions of the Employment Act No. 5 of 1980.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRAIL COURT