

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 333/2002

In the matter between:

OK BAZAARS SWAZILAND (PTY) LTD

APPLICANT

and

ENOCK MAVUSO

RESPONDENT

In Re:

ENOCK MAVUSO

APPLICANT

and

OK BAZAARS SWAZILAND (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: MUSA SIBANDZE

FOR RESPONDENT

: SELBY DLAMINI

JUDGEMENT

26/03/03

Motion proceedings were initiated by the Applicant on an urgent basis seeking for an order in the following terms:

- 2.1. That the Honourable Court hereby rescinds its order granted on the 12th December 2002.
- 2.2. That the Writ issued pursuant to the granting of the order of the 12th December 2002 in this matter be hereby set aside.
- 2.3 That the Execution of the Writ of Execution in the above matter be stayed pending the finalization of this matter.
3. That prayer 3 above operate with immediate interim effect pending the finalization of this matter.
4. That costs be awarded against the Respondent only in the event that it opposes this Application.
5. Granting further and/or alternative relief.

1

The Application is grounded on the Affidavit of Vona Ellison who states that she was the administration

manager of the Applicant with authority to bring the Application.

That the Respondent resigned from the employ of the Applicant with effect from the 3rd September 2002 and reported a dispute to the Labour Commissioner in terms of the Industrial Relations Act No. 1 of 2000. The dispute was referred to the Conciliation Mediation and Arbitration Commission (CMAC) for conciliation wherein one Maduduza Zwane was appointed the commissioner to facilitate the process.

That agreement was reached pursuant to the process and same was reduced into writing. Same is annexure "A" to the Application.

Subsequently an agreement was reached to amend paragraph 2.1 of the Agreement to include the phrase "the payments shall be in accordance with the Swaziland Labour Legislations and Regulations".

This agreement to amend is contained in a letter written by the commissioner Maduduza Zwane on the 11th December 2002 whereas the initial agreement was executed on the 1st November 2002.

The Respondent proceeded to make an application for the original agreement to be made an order of the court which application was granted by the court in the absence of the Applicant who did not turn up on time for reasons found in the Affidavit.

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It is common cause that there existed only one signed agreement since no amended version was presented to the parties for signature.

In the signed agreement the Applicant agreed to pay the Respondent notice pay, additional notice, severance pay. Leave pay for the last 6 months worked and both employer and employee portion of pension. There was agreement that the Applicant shall not make any other claims on these items. It was further agreed that the parties would continue to find a compromise on the annual bonus and maximum compensation outside the conciliation process facilitated by CMAC.

The Applicant claims that the amendment of the Agreement meant that only statutory terminal benefits available to a dismissed employee in terms of the Employment Act No. 5 of 1980 would be paid in terms of the Agreement.

The effect of this, according to the Applicant is that no payment is due to the Respondent in respect of notice pay, additional notice, and severance pay since his services were not terminated at the behest of the Applicant but to the contrary he had resigned.

In an attempt to boost this view, the Applicant sought leave to adduce oral evidence to enhance the understanding of the intention of the parties at the time of entering into the Agreement marked "A" especially clause 2.1.

It was argued further for the Applicant that the parties appear to have been at cross purpose as to what they intended to achieve by entering into the agreement. This being the case, they were not ad idem and therefore no contract was entered into. That this was not apparent at the time the contract was entered into but in hindsight it is clear there was a mutual mistake.

Tested against the doctrine of quasi mutual assent as with unilateral mistake, if the Applicant and the defendant are at cross purpose and the understanding of the Applicant of what was agreed is unreasonable but the defendant's understanding is reasonable, then the Applicant cannot rely on the doctrine of mutual mistake, so an enforceable contract will exist in accordance with the defendant's understanding. See Peiters & Co v Solomon 1911 AD 1211.

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In the present dispute, it is the court's view from a reading of the Agreement before court and the amendment thereof, and after considering the oral evidence of Maduduza Zwane the commissioner that, the intention of the parties was to settle the dispute by paying the Respondent all the items specified in paragraph 2,1 and that computation of the figures was to be done in accordance with the "Swaziland Labour Legislations and Regulations" given that one of the parties to the agreement was ordinarily resident in South Africa.

In the alternative and without derogating from the above, the understanding of the Respondent which has been supported by the Applicant's own witness Maduduza Zwane, the conciliator, is the reasonable understanding of what was agreed upon and the version of the Applicant is unreasonable and therefore the Applicant cannot properly rely on the doctrine of mutual mistake.

Accordingly, the Agreement entered into by the parties with the subsequent amendment meant that notice pay, additional notice, severance pay and leave pay for six months and both Employer and Employee portion of pension was to be paid to the Applicant in full and final settlement of the dispute between the parties arising from the termination of his services.

That the calculations were to be done in accordance with the Swaziland Labour Legislations and Regulations.

Accordingly, the Application to set aside the order of the court and declare the agreement a nullity is dismissed with no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT- INDUSTRIAL COURT