IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 239/99

In the matter between:

MSOMBULUKO MAHLALELA & 15 OTHERS **APPLICANT**

and

ROYAL SWAZILAND SUGAR CORPORATION **RESPONDENT**

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: M. SIMELANE

FOR RESPONDENT: M. SIBANDZE

RULING (ABSOLUTION FROM THE INSTANCE) - 17/11/2005

The Applicant Msombuluko Mahlalela and 15 others were all employees of the Respondent Swaziland Sugar Association.

The Applicants were all employed in the harvesting department as drivers. They allege their employment with the company was terminated on the 21st May 1998.

It is common cause that the harvesting season at the Respondent's undertaking started around April of every year and would end around the month of November.

It was not in dispute that the Applicants would sign an agreement with the Respondent at the commencement of the harvesting season and the same would lapse at the end of the season.

That the Applicants would then go to their respective homes and would be recalled through a radio announcement to resume work, the following year when the harvesting season commenced. The employees would then sign a fresh contract of employment for the duration of the season. A sample agreement was presented as exhibit ^{X}R1'.

In terms of the agreement the seasonal employees were not eligible to be members of the Pension Fund but the normal deductions and payments towards the National provident Scheme were made.

Of importance, clause 11 of the Contract reads as follows:

" *If you complete four or more contracts with the company and no longer able to continue working due to old age or ill health or incapacitation, you shall be entitled to an ex-gratia payment based on the formula for severance allowance provided in the law*".

This particular clause of the seasonal employees contracts is lifted verbatim from clause 20 of the Collective Agreement between RSSC and SAPWU, the union recognized at the undertaking.
This was the clause the Applicants relied upon to argue that although they were employed as seasonal employees, they had been accorded a permanent status upon completion of four or more contracts with the company. Mr. Johnson Lukhele who testified in court for the Applicants told the court that prior to the inclusion of clause 20 in the Collective Agreement of 1998/2001, the seasonal employees got new employment numbers at the commencement of every harvesting season. This however came to a stop after the collective Agreement. The employees retained same employment number. This was evidence of their continued employment and therefore were no longer temporary. They also were entitled to gratuity which was not available to them prior to 1995.

The witness told the court that at the end of the harvesting season in 1997 contrary to clause 20 of the Collective Agreement, the seasonal employees were asked to return the keys to their company houses. Some of the Applicants resisted this move.

All the Applicants reported to work at the commencement of the 1998 harvesting season. The Applicants who had refused to return their keys were subjected to a disciplinary hearing and their employment was unlawfully terminated.

He said that the refusal to renew the seasonal agreements amounted to an unlawful and unfair dismissal in terms of the Employment Act. He did not participate in the alleged disciplinary hearings.

The witness told the court that he had participated in the Collective Agreement negotiations that provided Clause 20 now relied upon by the Applicants. He said that the intention of the union was for all seasonal employees to enjoy permanent status. The clause improved the terms and conditions of service of the Applicants but he admitted that there was no written agreement to convert the Applicants from seasonal to permanent status.
He said this was a gentlemen's agreement between the union and the company.

There was no record produced of the alleged disciplinary hearing. No letters of dismissal were availed the court by the Applicants. The witness however insisted that the disciplinary hearings took place when it was put to him that this was a figment of his fertile imagination.

He denied that the Applicants were not re-engaged in 1998 but was unable to produce any written contracts to that effect. This is inspite of the fact that the agreements in respect of the previous seasonal engagement were available.

The second witness for the Applicants was Msombuluko Mahlalela. He was first employed as a seasonal employee by the Respondent on the 24th March 1990. He worked every season until 1998. He was a tractor driver. He admitted that he had signed a written seasonal contract of service for every harvesting season he had worked. The signing of the contract would at times be delayed and would happen long after the season and work had commenced.

They used to vacate the company houses at the completion of each harvest season. This however stopped to happen around 1995. They also started to contribute to the Pension

Fund in 1995. They stopped getting new employment numbers every season as well. This led them to believe that their status was permanent inspite of the seasonal agreements they signed every year.

In 1998 upon hearing a radio announcement he reported to work. He underwent medical check up as usual. He got food rations. This process took a few days. They were then separated into groups. Those in his group were taken into an office where he was questioned as to why he had not surrendered the keys to his home at the end of the 1997 harvesting season.
He and others explained their case. According to him their employment was then terminated on grounds that they had locked their homes and had engaged in a go slow.

He admitted that he was never re-engaged, nor did he sign a written contract of engagement for the 1998 harvesting season..

At the close of the Applicant's case, the Respondent moved an application for absolution from the instance. The application was on the basis that the Applicants had failed to show that they were employees to whom Section 35 of the Employment Act No. 5 of 1984 applied in that they were all employees engaged for a fixed term and whose term of engagement had expired as provided in terms of Section 35 (1) (d) of the Act.

Accordingly all the Applicants had failed to discharge the onus placed on them by Section 42 (1) of the Act which stated:

"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".

A close analysis of the evidence presented by the two witnesses for the Applicants shows that the Applicants were employed seasonally in terms of a written contract that expired at the end of each harvesting season.

The Applicants were unable to show that they were re-engaged for the harvesting season of 1998.

Clause 20 of the Collective Agreement that they purported to rely upon to claim permanent status clearly did not accord them such. AW1 admitted as much in his testimony before court.

In terms of Rule 39 (6) of the Uniform Rules of the Supreme Court of South Africa, which is equivalent to the corresponding rule of the High Court of Swaziland:

"*At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate*"

This procedure was followed in this matter. The test to be applied by the court at this stage of the trial is:
Is there evidence upon which a court might reasonably find for the plaintiff? See the cases of:

Gascovne v Paul and Hunter 1917 TP 170

Claude Neon Lights fSA) Ltd v Daniel 1976 4 SA 403.

Carmichele v Minister of Safety and Security 2000 4 ALL SA 537 fA):

2001 1 SA 48 (SCA1; 2001 4 SA 938 *(CO* **951**

Another approach is to enquire whether the plaintiff has made out a *prima facie* case. To the extent that the plaintiff relies upon inferences, it is sufficient if the inference the plaintiff wishes to draw is a reasonable one; it need not be the only reasonable inference. See **Build-a-brick BK v Eskom 1996 ISA 115 (CO 122 3 -123 F**

In the present matter it is clear that the Applicants were employed by the Respondent every year at the beginning of the harvesting season and in terms of a written contract that terminated at the end of the harvesting season. All the Applicants had served the Respondent for a considerable period of time and were well aware of this arrangement. It is indisputable that the Applicants did not enter into a written contract of re-engagement at the beginning of 1998, harvesting season. The Applicants therefore were not employees of the Respondent at the time they purport, their employment was terminated in 1998.

The Applicants have failed to show that they were employed at all in 1998 let alone establish that they were employees to whom terms of Section 35 (1) of the Employment Act applied.

It would be an act in futility to ask the Respondents to lead evidence on a matter that is clearly a non-starter.

The Respondent is accordingly absolved from the instance. The application is dismissed. The members agree.

NDERIN NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT