IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 270/2002**

In the matter between:

MANDLA MHLONGO **Applicant**

and

SWAZILAND MEAT WHOLESALERS:
MAXIMS (PTY) LTD **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**S. DLAMINI**
FOR RESPONDENT	**:**	**P. S. SIMELANE**

J U D G E M E N T – 8/12/06

1. The Applicant has applied to the court for determination of an unresolved dispute. In his particulars of claim he alleges that he was employed by the Respondent on the 29th September 1999, and he was in the continuous employment of the Respondent until the 13th July 2002, when he was "automatically unfairly dismissed". He claims reinstatement to his employment with arrear monthly wages,

alternatively payment of terminal benefits and maximum compensation for automatically unfair dismissal.

2. The Respondent in its Reply denies that the Applicant was employed on 29th September 1999 and denies that the Applicant was continuously employed by the Respondent until the 13th July 2002. The Respondent avers that the Applicant's employment was governed by a fixed term contract which expired on the 30th June 2002. The contract was not renewed and the Applicant's employment ipso facto came to an end.

3. Section 35 (2) of the Employment Act 1980 provides that:

"No employer shall terminate the services of an employee unfairly"

4. Section 35 (1) of the Act provides as follows:

"*35 (1) This section shall not apply to –*

(a) ……..

……..
……

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

5. Section 42 (1) of the Act provides that in the presentation of any complaint regarding the termination of his services, an employee is required to prove that at the time his services were terminated he was an employee to whom section 35 applied.

6. Section 42 (2) of the Act goes on to stipulate that *"the services of an employee shall not be considered as having been fairly terminated unless the employer proves-*

> (c) *that the reason for the termination is one permitted by section 36; and*
>
> (d) *that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee."*

7. The Applicant asserts that he was permanently and continuously employed for an indefinite period until the Respondent summarily terminated his services. The Respondent on the other hand asserts that the Applicant was engaged for a fixed term which expired by effluxion of time. The Respondent has not advanced any other reason for the termination of the Applicant's services.

8. The principal issue for determination by the court is thus whether the Applicant was engaged for a fixed term, such that his employment terminated upon expiry of the term of engagement. If the court finds that such a fixed term contract existed, then the Applicant has failed to prove that he is an employee entitled to the benefit of section 35 of the Employment Act. However, should the court find that no such contract came into existence, then it follows that the termination of the Applicant's services had no justification and was substantively and procedurally unfair.

EVIDENCE

9. The Applicant testified that he was employed by the Respondent as a general labourer on 29 September 1999. In July 2000 a director of the Respondent instructed him to sign a fixed term contract. He refused to do so, because he had already worked for the Respondent for about 9 months and he felt that any employment contract should have been signed at the commencement of his employment. The Respondent thereupon charged the Applicant with disciplinary misconduct in that he had "unlawfully and wrongfully refused to sign your employment contract." A copy of the charge sheet was produced in evidence.

10. According to the Applicant, he appeared at a disciplinary hearing but the charge was not proceeded with and instead the director of the Respondent apologized for not confirming the Applicant earlier as a permanent employee.

11. The Applicant further testified that on 7th May 2001 he was retrenched on grounds of redundancy. He challenged his retrenchment, and in terms of a CMAC arbitration award issued in January 2002 the Respondent was ordered to reinstate him and pay his backpay amounting to E7200-00.

12. The Applicant alleges that he was reinstated and he returned to work during the first half of June 2002. He was not however paid his backpay and he was compelled to issue out a writ of execution against the Respondent on 25th June 2002.

13. The Applicant further testified that on 13th July 2002, after service of the writ, a director of the Respondent one Shimon Torgeman requested him to sign a fixed term contract. He was denied a chance to read the contract, and he refused to sign. He was then summarily dismissed from the Respondent's employ. He was paid the backpay owing in terms of the arbitration award, but no other terminal benefits were paid.

14. The Applicant reported a dispute to CMAC. During conciliation, it was alleged that the Applicant had signed a fixed term contract, whose term had expired. The Applicant in his evidence denied that he ever signed such a contract. He said that he had never signed any document evidencing his employment, including the statutory Second Schedule Employment Form.

15. Under cross-examination, the Applicant persisted in his denial that he signed the fixed term contract. The contract was produced, and he repudiated the signature which purported to be his. It was put to him that the contract was signed by him in the presence of a witness, one Joseph Barros, and he denied this.

16. It was also put to the Applicant that he was employed as a casual. He denied this. He said that there were no casual employees when he was employed. Casuals were however employed thereafter.

17. The Respondent called four witnesses in its defence, namely:

RW1 Vivian Mafiki Dlamini

RW2 Joseph Barros

RW3 Cornelius Muzi Shongwe

RW4 Shimon Torgeman

18. RW1 is a supervisor employed by the Applicant. It emerged under cross examination that he was not involved in the hiring of the Applicant in 1999, nor was he involved with any employment documentation pertaining to the Applicant. Various comments he made during his evidence in chief concerning the Applicant's fixed term contract of employment must be disregarded as hearsay. On his own admission he was not a witness to the signing of this document.

19. This witness testified that Applicant was first employed as a casual, but he could not say when Applicant ceased to be a casual and became a permanent employee. When asked for evidence as to Applicant's employment status, he said it was "in the office". The Respondent's case, as shall be observed, is characterized by a failure to produce any documentation regarding the Applicant's employment status, save for the disputed fixed term contract.

20. RW2 Joseph Barros testified as to the witnessing of the contract. He confirmed that he signed as a witness, but he did not infact witness anyone sign the document. He was called by the receptionist Siphiwe Simelane and requested to sign. Siphiwe told him that the Applicant had already signed. Siphiwe signed first as a witness, then he signed. The Applicant was in a nearby office, but he did not see the Applicant sign the document.

21. RW3 Cornelius Muzi Shongwe said he was likewise called by one of the directors, Dror Torgeman, and asked to witness the contract. He

signed, although he did not witness anyone else signing. The Applicant was not present nor in the vicinity when he signed. He could not remember whether the Applicant's (purported) signature was present when he signed as a witness. He said all the employees signed employment contracts.

22. The receptionist Siphiwe Simelane, who also signed as a witness, is deceased. The Respondent tendered in evidence an affidavit made by Siphiwe on 29 October 2002. This was shortly after the dispute had been certified unresolved by CMAC. Notwithstanding that the affidavit was inadmissible in evidence, the Applicant's representative consented to its admission.

23. In her affidavit, the late Siphiwe confirms that she signed as a witness for a contract of employment for Mandla Mhlongo, the Applicant. She goes on to state:

> "I confirm further that he signed in my presence and in the presence of Joseph Barros who was the other witness, all of us signing in the presence of each other."

24. The latter statement is contradicted by the evidence of Barros, who testified that the Applicant did not sign in his presence, nor did Siphiwe sign in the presence of the Applicant. Since the contents of the affidavit cannot be tested by cross-examination, the court prefers the version of Barros.

25. The court is at a loss to understand why the Applicant's representative agreed to the admission of the affidavit. It was potentially prejudicial to his client's case, and its admission did not

advance the interests of justice. Labour consultants who wish to appear in the Industrial Court should acquaint themselves with the rudimentary rules of evidence.

26. The Respondent's final witness was RW4 Shimon Torgeman. He is a director of the Respondent company. He testified that the Applicant was first employed as a casual labourer. In July 2000 the Applicant refused to sign a fixed term contract, and disciplinary action was instituted against him. The witness agreed that the Applicant must have been a permanent employee by the time the disciplinary action was taken against him, since the Respondent would not have tried to compel the Applicant to sign the contract, and disciplined him for refusing, if he was just a casual labourer (who by definition is not engaged for longer than 24 hours at a time – see section 2 of the Employment Act 1980).

27. The witness could not dispute that the Applicant was employed in September 1999. When asked what was the Applicant's status between September 1999 and the 13th March 2001 when the fixed term contract was purportedly signed, Torgeman said he could not answer without referring to the company records.

28. Torgeman confirmed that the Applicant was retrenched and subsequently reinstated in terms of an arbitration award. He confirmed that the Applicant returned to work, but he could not remember on what date or when he stopped working.

29. According to Mr. Torgeman, the Respondent does not maintain employment forms as required by Section 22 of the Employment Act. In his submissions, Mr. Simelane for the Respondent argues that

Section 22 of the Act does not apply to the Applicant because his terms of service are governed by a collective agreement. However, no evidence was led that such an agreement exists, nor was any collective agreement produced in evidence to prove the Applicant's terms of service or employment status. In the case of **France Dlamini v a A to Zee (IC Case No. 86/2002)**, Nderi Nduma JP held that where an employer fails to maintain the statutory employment form, the onus shifts to the employer to rebut the terms of employment asserted by the employee. Despite Mr. Torgeman's assurance that the company maintains a wages and employment register, this was never produced in evidence, and it was apparent from the witness' testimony that he had not taken the trouble to consult the company records prior to coming to court. As a result, Mr. Torgeman was unable to credibly dispute the Applicant's evidence that he was permanently employed between 29th September 1999 and 13th July 2002.

30. Torgeman produced the disputed fixed term contract and identified the signatures. Notwithstanding his evidence that he was not present when the contract was signed, he insisted that the contract was signed in the office with everyone present at the same time – the employer, the employee, and all the witnesses.

As we know from the testimony of the Respondent's own witnesses Barros and Shongwe, this is simply not true.

31. It is significant that Torgeman did not at any stage claim to know the signature of the Applicant or to be able to identify it. He suggested that the document should be sent to a handwriting expert, but the Respondent had not done so.

32. When asked why the fixed term contract was not produced at the arbitration hearing in January 2002, Torgeman's response was that the contract had nothing to do with the retrenchment. He took exception to the implication that the contract had been fabricated by the Respondent to justify the termination of the Applicant's services. He insisted that the Respondent had no reason to rid itself of the Applicant, save that his contract had come to an end.

ANALYSIS

33. The Respondent avers in its reply that the Applicant signed a fixed term contract "in the presence of the witnesses who also signed in the presence of each other." This allegation was repeated by Shimon Torgeman in his evidence. Unfortunately the allegation is false. It is established on the evidence that none of the witnesses was present when the contract was purportedly signed. An adverse inference arises against the Respondent for advancing a version calculated to give the false impression that the signing of the contract was regular and witnessed by four independent persons.

34. At the very least, the court expected the Respondent to call as a witness the director who signed the contract on behalf of the Respondent as employer, namely Dror Torgeman. He could presumably throw some light on the circumstances surrounding the preparation and signing of the contract. However, Dror was not called to testify, and the court draws a further adverse inference against the Respondent, namely that it does not wish to disclose the true circumstances.

35. The Applicant denies signature to the contract. This denial shifts

the evidential burden onto the Respondent to advance proof that the signature on the contract is that of the Applicant.

36. None of the Respondent's witnesses claimed to be able to identify or verify the signature on the contract as being that of the Applicant.

37. The Respondent, whilst appreciating the need for a handwriting expert to contradict the Applicant's denial of the signature, failed to call such an expert.

38. The court has before it the original contract containing the disputed signature, and the charge sheet exhibit "A2" which contains an original specimen signature of the Applicant. The court is entitled to compare these signatures, whilst bearing in mind that it has no expertise in the field of handwriting. A comparison reveals significant differences between the disputed and the specimen signatures. The court would be reluctant to reach a conclusion on the genuineness of the disputed signature solely on the basis of its own comparative observation, but it may be stated that the Respondent's assertion that the Applicant signed the contract is not supported by any apparent similarity between the disputed signature and the genuine signature of the Applicant.

39. The Respondent has not advanced any satisfactory proof to gainsay the Applicant's denial that he signed the fixed term contract.

40. The probabilities also support the Applicant's denial. Having refused to sign a fixed term contract in July 2000 notwithstanding the threat of disciplinary action, it is unlikely that he would succumb to signing a similar contract a mere 8 months later.

41. The Applicant made a good impression on the court as an honest and credible witness. He emerged unscathed from cross-examination.

42. The Respondent's witnesses, namely RW1 Dlamini, RW2 Barros and RW3 Shongwe, also testified in an honest and credible manner, but their evidence did not advance the Respondent's case on the material issues for determination.

43. RW4 Shimon Torgeman appeared uncomfortable in the witness box. He failed to produce relevant employment records, without which he had no independent recollection of salient facts concerning the Applicant's employment status. On the issue of the fixed term contract "R2" he stated that he was not present when it was signed. When it was put to him that he had requested the Applicant to sign and the latter refused, he replied that he could not recall. When asked whether Applicant was dismissed for refusing to sign the contract, he said he did not know.

44. A further significant fact regarding the fixed term contract is that nowhere in the arbitration award is it mentioned that the Applicant was engaged for a fixed period which would expire on 30 June 2002. On the contrary, the arbitrator in his award referred to the Applicant as having been continuously employed as an abattoir attendant for 21 months prior to his retrenchment on 7th May 2001. It can be inferred from the award as a whole that the fixed term contract was never disclosed at the arbitration, nor was it suggested that the Applicant's employment had only commenced on the 8th March 2000.

45. After careful consideration of all the evidence, the court finds that the Respondent has failed to establish on a balance of probabilities that the Applicant ever signed a fixed term contract.

46. The fixed term contract itself has other peculiar features:

46.1 the contract purports to have been signed on 13th March 2001, but the contract period runs from 8th March 2000 to 31st June 2002. RW1 Vivian Mafiki Dlamini suggested that this was an error. RW4 Shimon Torgeman however stated that the contract was deliberately backdated to the date of Applicant's employment. He could not explain why 8th March 2000 was selected as the date of employment, and produced no document or employment records to confirm this date as the actual date of engagement.

46.2 the contract purports to confirm the applicant's employment as a casual employee, notwithstanding Torgeman's concession that the Applicant was not a casual employee when he was asked to sign the contract.

A casual employee is one who is not engaged for a longer period than 24 hours at a time. (See definition of "casual employee" in Section 2 of the Employment Act 1980).

Furthermore, a casual employee is daily paid, yet the contract provides for wages to be paid weekly.

47. This contract, which purports to employ a worker as a casual on terms which cannot be reconciled with casual employment under the Act, would be null and void in terms of Section 27 of the Act, even if it had been signed by the Applicant.

48. The court also expresses its profound dismay at the conduct of the Respondent in attempting to coerce the Applicant into signing a fixed term contract under threat of disciplinary action. The consequence of a permanent employee signing a fixed term contract is to render his employment temporary. An employee is entitled to refuse to curtail his employment in this way, and taking disciplinary action against him for exercising his lawful right is an unfair labour practice. Any employment contract entered into by an employee under this kind of duress would in any event be voidable at the instance of the employee.

See **Thando S. Dlamini v Swaziland Liquor Distributors (IC Case No. 240.02)**

49. The court finds it proved that the Applicant was in the continuous permanent employment of the Respondent at the time his services were terminated on 13th July 2002. The Applicant has accordingly discharged the onus resting on him of proving that he was employee to whom Section 35 of the Employment Act 1980 applied at the time his services were terminated.

50. The Respondent has not advanced any fair reason justifying the termination of the Applicant's service, and such termination is accordingly found to have been unfair.

51. The further question arises whether the Applicant was automatically

unfairly dismissed, within the meaning set out in Section 2 of the Industrial Relations Act 2000 (as amended). If the court finds that the dismissal was automatically unfair, then its jurisdiction in the award of compensation is extended from 12 months remuneration to 24 months remuneration.

52. Automatically unfair dismissal includes a dismissal where the reason for the dismissal is:

"*that the employee took action ….. against the employer by:*

(1) *exercising any right conferred by [The Industrial Relations Act]; or;*

(2) *participating in any proceedings in terms of this Act."*

(See paragraph (d) of the definition of automatically unfair dismissal in Section 2 of the Industrial Relations Act (as amended).

53. The Applicant pleaded in his application that the reason for his dismissal was that he caused a writ of execution to be issued and served on the Respondent to recover the arrear wages awarded to him by the CMAC arbitrator, which award was made an order of the Industrial Court.

54. Orders of the Industrial Court are enforceable by execution, and by causing the writ to be issued and executed the Applicant was exercising a right conferred on him by Section 14 of the Industrial Relations Act.

55. The Respondent offered no explanation for the termination of the Applicant's services, save to say that his fixed term contract had expired. The Respondent has failed to prove the existence of a valid fixed term contract signed by the Applicant.

56. During cross-examination it was put to the Applicant that he was not dismissed for sending the Deputy-Sheriff to attach his employer's property. in response, Applicant replied:

"He never mentioned that to me. What he mentioned was that he was dismissing me because I had laid charges against him."

By "laying charges", the court understood the Applicant to refer to the arbitration proceedings he had instituted against the Respondent for unfair dismissal, and the execution of the arbitration award.

57. The Applicant expressly stated that he was dismissed by Shimon Torgeman. The latter was not forthcoming on the circumstances of the dismissal, as the following exchange in cross-examination reveals:

Applicant's representative: Did you call the Applicant and tell him the fixed term contract had ended and there was no further work for him?

Torgeman: My assumption is that it would have been done in that way.

58. The Applicant returned to work under protection of a reinstatement

order during the first half of June 2002. Notwithstanding that the expiry date of the purported fixed term contract is 30th June 2002, the Applicant continued working in July 2002 without demur from the Respondent. It was only after the Deputy-Sheriff executed the writ that the Respondent decided that it no longer wanted the Applicant in its employ. The most reasonable and probable inference to be drawn from these circumstances is that the Respondent used the fixed term contract as a pretext for dismissing the Applicant. The actual reason for the Applicant's dismissal was that he was persisting in the recovery of the arrear wages due to him in terms of the arbitration award.

59. The court finds therefore that the dismissal of the Applicant was automatically unfair.

60. The Respondent victimized the Applicant for successfully challenging his retrenchment. It appears to the court that a continued employment relationship may expose the Applicant to possible further ill-treatment and intolerable tension at the workplace. The court declines to order reinstatement for this reason. The Applicant is however entitled to payment of his terminal benefits, and compensation for termination of his services.

61. In the assessment of compensation, the court has taken into account the following factors:

61.1 the Applicant's personal circumstances and clean employment record;

61.2 the relatively brief period of employment (about two years)

61.3 the financial hardship suffered by the Applicant on summary termination of his services;

61.4 the inability of the applicant to find alternative employment;

61.5 the element of victimization and contempt for the labour laws and institutions of Swaziland implicit in the automatically unfair dismissal of the Applicant.

62. Whether the Applicant was employed on 29th September 1999 or 8th March 2000 is irrelevant to the calculation of his terminal benefits. Infact, the precise date has no bearing on any of the material issues which arose for decision at this trial. Nevertheless, for the sake of completeness, the court will make a finding. The onus of rebutting the Applicant's assertion that he was employed on 29 September 1999 rests on the Respondent. None of the Respondent's witnesses can be expected to have an independent recollection of the Applicant's date of employment. The Respondent failed to produce any of the documentation which could firmly establish the date of employment. In the absence of any reliable evidence from the Respondent, the Respondent has failed to rebut the date asserted by the Applicant. The court finds that the Applicant was employed on 29th September 1999.

63. Judgement is entered in favour of the Applicant for payment by the Respondent as follows;

(a) Notice pay E 900.00

(b) Additional notice E 138.48

©	Severance allowance	E 346.20
(d)	13 days worked in July 2002	E 450.00
(e)	Leave pay	E 588.54
(f)	18 months remuneration as compensation for unfair dismissal	E16200-00
	TOTAL	**E18623-22**

The Respondent is to pay the Applicant's costs.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT