

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO.232/2002

In the matter between:

TIMOTHY MFANIMPELA VILAKAZI

APPLICANT

and

ANTI-CORRUPTION COMMISSION

1st RESPONDENT

**ATTORNEY-GENERAL
RESPONDENT**

2nd

**ACCOUNTANT-GENERAL
RESPONDENT**

3rd

CORAM:

NKOSINATHI NKONYANE:

ACTING JUDGE

GILBERT NDZINISA:

MEMBER

DAN MANGO:

MEMEBR

FOR THE APPLICANT:

MR. B. MAGAGULA:

ROBINSON BERTRAM ATTORNEYS

FOR THE RESPONDENTS:

MR. V. DLAMINI:

ATTORNEY-GENERAL'S OFFICE

J U D G E M E N T 10.02.2006

The applicant brought an application against the 1st

respondent wherein he claimed that he was unfairly dismissed by the 1st respondent because his terms and conditions of employment were unilaterally changed. He averred in his application that this conduct of the 1st respondent amounted to constructive dismissal and he had to resign and leave the employ of the 1st respondent.

The applicant is therefore now claiming that the 1st respondent pays him maximum compensation of twelve months' wages amounting to E80,490:00 for the unfair dismissal.

The application is opposed by the 1st respondent. The 1st respondent denied that it constructively dismissed the applicant. The 1st respondent stated that the applicant resigned out of his own volition after he was offered a new employment by the Swaziland Royal Insurance Corporation.

The applicant's application is based on constructive dismissal. It is therefore predicated upon Section 37 of the Employment Act No.5 of 1980.

BACKGROUND FACTS:-

The 1st respondent in July 2001 put up an advertisement in a local newspaper for the post of investigator. The duties and requirements were mentioned in the advertisement. The post was on grade 13. The applicant applied and was successful. The applicant was at that time working in the

Auditor General's Department and he was on grade 9.

After the interview he finally started working at the 1st respondent's establishment on the 1st October 2001. He told the court that as far as he was concerned, he considered himself as having been employed on permanent and pensionable terms. The 1st respondent's witness, the late Mr. Christopher O'Connor told the court that the applicant was hired on secondment basis as he was by then already a confirmed civil servant.

The applicant said that the documents securing his secondment to the 1st respondent were obtained behind his back, and that he never consented to the process. The applicant said such conduct of securing the secondment documents behind his back by the Deputy Commissioner of the 1st respondent, amounted to unilaterally changing the terms and conditions of employment, and thus he claimed that there was constructive dismissal. Mr. O'Connor denied that the secondment process was effected behind the applicant's back. He said the applicant was verbally told by him, and also by the interviewing panel that he was being taken on secondment.

ISSUES IN DISPUTE:-

The applicant said that he was employed by the 1st respondent on a permanent basis. The 1st respondent said the applicant was taken as a civil servant on secondment for one year.

ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-

Ordinarily in unfair dismissal applications the burden of proof is on the employer to show that the reason for the termination was one permitted by Section 36 of the Employment Act, and that taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee. (See Section 42 of the Employment Act).

In the present case however, the applicant founded his application on constructive dismissal. As already pointed out, Section 37 of the Employment Act is therefore applicable. That Section states that:

'When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer.' (my underlining).

The burden of proof in constructive dismissal cases is therefore on the employee to show that the conduct of the employer was such that the employee could no longer reasonably be expected to continue in his employment. It is an objective test.

In this case the applicant said that the 1st respondent's Acting Commissioner altered his terms and conditions of employment and he therefore considered that he could no longer continue in his employment.

At this point it is important to set out in full the applicant's averments supporting this argument as they appear in paragraphs 7-8 of the application:

"7. The respondent's conduct referred to above herein amounted to constructive and unfair dismissal in that:-

7.1. My conditions of employment were unilaterally changed by the Acting Commissioner of the 1st respondent without consulting me or informing me of the changes.

7.2. The changes were also material in that I had considered myself to have been appointed permanently and pensionable by the Anti Corruption Commission whilst the Acting Commissioner of the 1st respondent changed my terms and conditions of employment to portray or reflect that I had been seconded from my previous job to the Anti Corruption Commission, which was not the position.

7.3. My letter of appointment did not reflect that I had been appointed to the Anti Corruption Commission on secondment.

7.4. If that was the case I was meant to be clearly informed

in writing from the onset and that was meant to be reflected on the advert, to which I had applied, as it was clearly indicated in another advertisement in the Times of Swaziland dated 22, 25 and 28. And if that was the position applicant would not have applied to the post.

8. As a result of the reasons, 1st respondent unlawful and wrongful conduct as stated above, applicant was compelled to leave employment. Among the letters written to the 1st respondent, the letter written to the Principal Secretary Ministry of Public Service and Information complaining about the changes is also annexed hereto marked "TMV6". In the circumstances applicant submits that he was constructively and unfairly dismissed in contravention of Section 36 of the Employment Act of 1980."

The case for the applicant is therefore very simple. He only has to show the court the letter of appointment and his terms and conditions of service. The court's duty will then be to establish for itself that indeed these terms and conditions were altered, and that the consent of the applicant was not sought. The court will consequently have to make a finding that such conduct amounted to constructive dismissal.

The applicant was however unable to show the court the letter of appointment stating that he was being appointed into the position of investigator on permanent and

pensionable terms. During cross-examination the applicant admitted that he was never given a letter of appointment by the 1st respondent. The letter of appointment that he is referring to in his pleadings and marked annexure "TMV1" was in fact a letter informing him that his application was successful and also informing him to report to the 1st respondent's offices. That letter was dated 4th September 2001.

The evidence revealed that the applicant started work at the 1st respondent's place on the 1st October 2001. The evidence further revealed that it was during the period between 4th September and 1st October 2001 that the process of the secondment was started by the Acting Commissioner of the 1st respondent. The applicant was fully aware of this process. He wrote a memorandum on the 3rd October 2001 addressed to the Civil Service Board, through the Acting Commissioner of the 1st respondent. In that memorandum he acknowledged that he had seen the memorandum written by the Acting Commissioner to the Civil Service Board requesting his secondment and that of two other officers from the Income Tax Department.

The applicant did not object or challenge the contents of that memorandum, in line with his argument that he considered himself to be a permanent employee of the 1st respondent, instead the applicant stated in his response that:

"I hereby agree to be varied from the office of the Auditor General to the Anti Corruption Commission appointed as an investigator with effect from 1st October, 2001."

In court the applicant tried to argue that there is a difference between variation and secondment. He was unable however to tell the court what the difference was. What is important to the court however is that the applicant agreed to join the Anti Corruption Commission, and that he was fully aware that he was doing so on secondment basis, because he was responding to the memorandum that was requesting his secondment.

He can not approbate and reprobate.

It is not clear to the court how could the applicant think that he was employed by the 1st respondent on permanent and pensionable terms when he was still a civil servant. There was no evidence that he had resigned from his former employer. As he had not resigned from his former employment in a government department, the only way that he could be employed by the 1st respondent was by way of transfer or secondment.

The applicant clearly could not be in two places of employment at the same time. The applicant's main argument was that he responded to an advertisement that did not say anything about secondment. He got a letter dated 4th September 2001 informing him that his application

was successful. It was on that basis that he was saying he considered himself as having been employed on a permanent basis. When the applicant applied for the post however, he was still a civil servant. He was unable to explain how one could be a civil servant and also be an officer of the Anti Corruption Commission at the same time except by secondment.

The applicant told the court that the correspondence about him was not addressed to him. The evidence indeed revealed that the 1st respondent seemed not to be quite sure how to go about recruiting its staff. It seemed that at some point the Acting commissioner wanted the officers that he had earmarked to be transferred. The Civil Service Board however did not approve any transfers, but recommended secondment.

This led to the Acting Commissioner publishing a second advertisement in which it was specified that applicants who are civil servants and who wished to remain in the Civil Service would be considered for secondment.

It is possible therefore, that there may have been some flouting of procedures in the handling of the applicant's secondment process. That however does not carry the applicant's case any further as the evidence clearly showed that he was aware that he was being engaged by the 1st respondent on secondment basis.

When the applicant resigned on the 22nd May 2002 he

addressed his letter to the Principal Secretary, Ministry of Public Service & Information through: Acting Commissioner, Anti-Corruption Commission. If the applicant thought and believed that he had been employed by the Anti Corruption Commission on a permanent basis, why then did he address his letter of resignation

to the Ministry of Public Service & Information? This conduct goes against what he told the court that he believed that he had been employed by the 1st respondent on permanent terms. This conduct also showed that he knew that he had not resigned from the civil service.

In his resignation letter the applicant stated that:-

"I also request for a shortened period of serving notice from 3 months to 1 month commencing from 23 May to 30 June, 2002. The reason being that I am expected to resume duties with the new employer at the beginning of July, 2002

It is clear from this letter of resignation that the reason thereof was that the applicant had found new employment. It is easy for the court to understanding why the applicant would want to leave the 1st respondent's place of work. He used to be on Grade 9, and at the 1st respondent's place he was placed on grade 13. If his secondment contract, for any reason, were not to be renewed, he would have to revert to the grade 9 salary scale. That would clearly not be

favourable to him.

The applicant having failed to bring to the court evidence of his letter of appointment stating his terms and conditions of employment, it cannot be said that he has proved that the 1st

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respondent's Acting Commissioner unilaterally changed his terms and conditions of service entitling him to resign on the basis of constructive dismissal. The only evidence of appointment before the court was that of the secondment of the applicant to the 1st respondent with effect from 1st October 2001. Indeed the applicant started work at the 1st respondent's place on the 1st October 2001.

The application is accordingly dismissed.

The members agree.

There is no order as to costs.

NKOSINATHI NKONYANE
ACTING JUDGE - INDUSTRIAL COURT