IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 97/2002

In the matter between:

WILLEM JACOBUS DE KOCK (DECEASED) **1st APPLICANT**

KENNETH JOSEPH ENGLISH **2nd APPLICANT**

and

USA DISTILELRS (PTY) LIMITED **RESPONDENT**

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: L. ZWANE

FOR RESPONDENT: B. MAGAGULA

J U D G E M E N T - 13/02/06

The Is and 2 A pplicants have moved an application for determination of unresolved dispute. At the commencement of the trial, the Applicant's attorney indicated that the 1st Applicant had passed away. The matter proceeded in respect of the 2nd Applicant's case. Points of law with regard to the *locus standi* of the Applicant due to lack of a work permit at the time of his dismissal were reserved to be argued in the closing submissions.

It is opportune to dispose of the legal points because they have the potential of resolving the dispute in a final manner.

The first point in limine goes as follows;

The Citizenship and Immigration Act of 1964, Section 20 (3) © prohibits any person from employing or continuing to employ an illegal immigrant.

It therefore follows that the Applicant as he did not have a work permit was not an employee within the meaning of section 1 of the Industrial Relations Act of 2000.

Firstly, the Applicant stated that he was at all material times in the country legally. There is no evidence that at any one time the Applicant contravened Section 4 (1) of the Immigration Act (as amended) by Act 17 of 1982 as follows:

"*subject to this section, no person other than a citizen of Swaziland shall enter Swaziland unless he is in possession of a valid entry permit or a valid pass*".

The evidence available is to the effect that the Applicant was a citizen of South Africa and crossed the boundary between Swaziland and South Africa regularly. This he could only do whilst he held a valid pass. There is therefore no evidence that the Applicant was an illegal immigrant to Swaziland.

The only valid issue raised is with respect to a work permit by Swaziland government allowing the Applicant whilst in Swaziland to engage in gainful employment.

In terms of Section 5 (2) of Act 17 of 1982, an employer lawfully in Swaziland must apply to an Immigration officer and satisfy him that the person whom he wishes to employ is suitably qualified for such employment and thus should be granted a work permit to enable him to work lawfully (as opposed to remain lawfully) in Swaziland for a stipulated period.

The Respondent admits that it recruited the Applicant from South Africa, and relocated him to Swaziland to employ him at its plant at Big-Bend.

The Respondent continued to employ the Applicant from the 1st April 2001 to the 2nd February 2003, a period of approximately two years.

There is no dispute that the Applicant offered his labour and skill during the period in exchange of a salary and other benefits. This relationship persisted until the time of termination.

Section 35 (1) of the Employment Act lists categories of employees not protected by Part V of the Act headed; "Termination of contracts of employment". The subsection does not include an employee whose employer has unlawfully failed to obtain a work permit amongst the class of employees, not protected against unfair termination. If this were the intention of the legislature, it would have stated so in clear and unequivocal terms. It is not for the courts to legislate such a prejudicial clause with respect to a class of vulnerable employees, often who come to the country for reasons beyond their control.

Section 35 (2) simply says:

"*No employer shall terminate the services of an employee unfairly*".
The Act defines an employee under Section 2 as follows:

"*means any person to whom wages are paid or are payable under a contract of employment*".

It is common cause that for a period of about two years, Kenneth Joseph English, worked for the Respondent and was paid wages. That is sufficient for the purposes of the Employment Act. The Employment Act No. 5 of 1980 was specifically re-enacted to "*consolidate the law in relation to employment and to introduce new provisions designed to improve the status of employees in Swaziland*".

Nowhere does the Act, make reference to the provisions of Immigration Act with respect to validity or otherwise of contracts of employment. The Acts main purpose was to protect employees. The immigration Act is for a different purpose and is enforced by different government agencies. The Industrial Court is not one of those.

On the other hand the Industrial Relations Act No. 1 of 2000 defines an employees as "*a person whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provisions of work upon, another person*".

It is clear from this definition that the common law definition of a contract does not offer any magical key to a working arrangement. What is essential is prove of control of a person by another or sustained dependence for the work upon another person.
Such is evident from the papers filed of record and the oral evidence before the court.

The court accordingly finds that the Applicant was an employee to whom Section 35 of the Employment Act applied and in terms of Section 2 of the Industrial relations Act and therefore has *locus standi injudicio* to bring this matter before court.

The legal objection is dismissed.

With respect to the second point in limine, the matter was duly certified as unresolved dispute on the 25th July 2003 by the Conciliation Mediation and Arbitration Commission (CMAC). The certificate is attached to the application. No evidence was presented before court to justify a finding that such certification was irregular or null and void.

The court has jurisdiction over this dispute by virtue of the certification by CMAC in terms of the rules of the court and Part VI11 of the Industrial relations Act No. 1 of 2000 as amended by Act 3 of 2005.

MERITS

In the respondent's reply to the particulars of claim, the Respondent states the following at paragraph 18 and 19:

"*18. It is correct that the 2nd Applicant commenced engagement with the respondent in the aforementioned date, but it is denied that he was unlawfully and unfairly dismissed from employment Mr. English was informed about the on going restructuring of the plant, which would reduce the dependence on boilers, but as a consequence he was alerted that there was a possibility that his position will be affected*"

"*19. It is denied that the dismissal of the 2nd Applicant was unfair. The 2nd Applicant was fairly retrenched*".

In terms of Section 36 (j), it is lawful to terminate the services of an employee because the employee is redundant.

It is important to note that no other reason other than redundancy was offered for the termination.

In terms of section 42 (2) (a), the employer bears the burden of proving on a balance of probabilities that the 2nd Applicant was redundant. This has to be done by way of tangible evidence by the employer. From the outset, the court notes that the evidence of the 2nd Applicant in a detailed manner demonstrated that the Distilling plant heavily depended on boilers for its operations up to the time of his termination.

Prior to his recruitment, the 2nd Applicant had been called to Swaziland by the respondent to repair two (2) boilers at the Plant. He was then enticed to leave his work in Cape Town for employment by the Respondent. After a meeting with Mr. Caldera, the managing Director of the Respondent in Johannesburg in February 2001, he was persuaded to relocate to Swaziland. His fiancee who was to join him had to give up her employment in Cape Town.

Unfortunately the agreement was not reduced into writing by the time the Applicant relocated. It was a gentlemen's agreement.

The motivation to come to Swaziland was a better package offered to him by Mr. Caldera.

On the 29th April 2001, he came to Swaziland and was housed at Riverside in Big Bend. He was employed as a maintenance engineer doing mainly mechanical and electrical work on the whole plant. His salary was E30.000 (Thirty Thousand Emalangeni) per month. The Plant was old and had numerous breakdowns. The

Applicant spent days and nights fixing the machinery to keep it running. The relationship was good but was slowly strained due to the constant breakdowns. Mr. Caldera often blamed him for the breakdowns.

At the end of February 2003, out of the blue, and on a Sunday afternoon the company Director Mr. Louis Borrageiro arrived at his residence and gave him an envelope. Earlier in the day an accountant by the name of Muzi Dlamini had phoned the Applicant informing him that he had been dismissed. That is the closest hint he had to what befell him that afternoon. It was a dismissal letter on grounds of redundancy. The 1st Applicant Willem De Kock, the General manager was also dismissed at the same time.

At the time, new instrumentation equipment was due for installation. The Applicant was meant to work on it with a new colleague by the name of Joe Snyman. Snyman was shocked about the developments because himself and the Applicant were due to start the installation.

On the 5th February 2003, the Applicant discussed the matter with Mr. Caldera who told him that the Respondent could no longer afford to pay him. The Applicant explained his difficulties with the termination because he had resigned from a lucrative job and sold his property in South Africa on the strength of Caldera's gentleman's promises. Mr. Caldera was not moved and he paid him three (3) months salary and was promised repatriation to South Africa.

The company had no financial difficulties at the time. Indeed all employees received bonuses in December 2002. It employed 70 workers. It had 3 managers and 3 directors. There were 9 expatriates from South Africa. The Applicant headed the Engineering and Maintenance Department with 7-8 local technicians. He was at the time, the only qualified person to head the department. The Plant was expanding by way of bigger tanks, industrial column and dams. The Respondent needed his services more than ever before. He dismissed the allegations that his position had become redundant as a big deception to cover up the unlawful conduct of Mr. Caldera. At the time Mr. Caldera had asked the Applicant to get a quote for 3 high pressure boilers. This deal was cancelled upon his termination.

Up until the time of the trial, the Applicant told the court that the number of the boilers at that Plant had not gone down. The Respondent must have employed another maintenance engineer as soon as he had left or before. He however had no evidence regarding that.

The Applicant maintained that the termination was sheer victimization and exploitation due to their perceived vulnerability by Mr. Caldera.

The Applicant only became aware of the requirement of a work permit whilst he

was working in Swaziland. He was unfamiliar with the laws of Swaziland. The Respondent did not update him on the issue. He crossed the border regularly and got temporary entry permits at the boarder. He was therefore in the country lawfully, at all material times.

Louis Borrageiro testified for the Respondent. He became a Director of the Respondent in 1988. At the time the applicant was recruited, the Respondent had two boilers that required constant maintenance. He was recruited for that purpose.

The Respondent had acquired the 2nd boiler in 2001 which was also not new. The boilers had frequent breakdowns and as a result alcohol production targets weren't often met.

This led to a decision to reduce management, which he described to have been top heavy at the time.

The last employees to be employed were the first to be replaced. These were Mr. Simedon, Muzi Dlamini, Barry Hogg, Mike Mcgreedy, Kenneth English and William De Kock.

After the Applicant was dismissed, the Respondent got an expert from Cape Town to sort out the breakdowns of the boilers and power failure. He said that all the managers were aware of the financial problems at the time because Mr. Caldera spoke about it regularly. The witness supervised the Applicant but was not involved in the retrenchment exercise. He said it was all done by Mr. Caldera. He said no one knew what Mr. Caldera was planning. No one knew if retrenchments would be there or not. This he got to know on the day the Applicant was terminated at around 3.00 p.m. He was given the letter of termination to deliver to the Applicant. He said he was reluctant to deliver it. There were no notices of impending retrenchment prior to the day. He said that he had a work permit but did not get one for the Applicant.

Mr. Caldera was expected to testify to enlighten the court on the reasons why he terminated the services of the Applicant and his colleagues on such short notice. The matter was postponed a few times for that to happen but eventually, Mr. Caldera did not attend the hearing.

The Respondent had been given enough opportunity to bring him but had failed. The court had no alternative but to proceed with the matter for final submissions in the absence of any other witness for the Respondent.

From the evidence of Mr. Louis Borrageiro, it is apparent that the boilers at the Plant had constant problems and needed constant attention by a qualified person. This was the work of the applicant at the time his services were terminated. The

respondent required another expert from South Africa to come and attend to the boilers and the Plant upon the termination. Indeed uncontroverted evidence was to the effect that Joe Snyman was employed by the Respondent on the 3rd January 2003, a day after the termination of Applicant's services. There was no evidence of any attempt at alternative cost saving measures.

The Respondent in the circumstances dismally failed to make out a case of redundancy so as to justify termination of the Applicant in terms of Section 36 (j) of the Employment Act. The onus in terms of Section 42 (2) (a) was therefore not discharged.

A belated attempt to justify the termination after the event on the basis of illegality was rejected by the court for reasons contained in this judgement.

Though the court does not condone flouting of immigration laws, by errant employers who should know better, the court is loathe to allow any exploitation of the workers by employers who after employing them for periods in excess of a year, then turn around with their dirty hands to crave for technical absolution from employment liability when such workers turn to the court to assert their rights.
The Chief Immigration Officer should be vigilant with respect to inspections of work permits.

It was disturbing to find in this case that nine (9) expatriates including the General Manager, Engineers, and other technical people served the respondent for periods of two years without work permits and were not detected by the relevant authorities.

Christie R.C in * *The Law of Contract in Southern Africa, 2nd Edition at 412 states:*
"*……..Indeed the fact that a penalty is provided may be an indication that the legislature is content with the penalty as sufficient sanction without also intending that the contract should be void*"

This reasoning augurs well with the ILO Coventions that prohibit exploitation of immigrant workers by denying them rights to which every employee is entitled to simply because of non fulfilled technical requirements, over which the employee has no control.

For these reasons, the court finds that the Respondent has failed to prove that it terminated the services of the 2nd Applicant for a reason permitted by Section 36 of the Employment Act. It has also failed to show that such termination was fair and reasonable in the circumstances of the case.

REMEDY

The testimony of one Louis Borrageiro, the Operations Director for the Respondent was riddled with deception and irreconcilable contradictions as to the reasons for the termination. On the one hand, he attempted to explain the financial predicament of the Respondent that may have led to the termination of the Applicant and his colleagues, whereas on the other hand pleaded, complete ignorance of the circumstances leading to the termination.

Clearly no tangible evidence was offered to remotely justify the retrenchment of the Applicant. The Respondent had gone to great lengths to persuade the Applicant to leave his job in Cape Town and relocate to Swaziland. His fiancee too quit her job on the face of the sweet carrot dangled to the Applicant. They sold their property and relocated to Swaziland. The sudden and unexpected termination left them stranded in high seas as it were. They were jobless, houseless and financially embarrassed by the predicament. Indeed the Applicant at the time approached the court for urgent relief to get money for sustenance, and relocation expenses. The Applicant's prayers were granted.

An employer who exploits the labour of employees and fails to provide them with the necessary legal cover for them to remain and work lawfully in the country commits a criminal offence, in terms of the Immigration law. When such an employer goes further to rely on his deliberate omissions to subvert the rights of the employees, the employer becomes dishonest to the core and unworthy of having control over the most valuable resource - Human Resources.

The court is of the opinion that Mr. Caldera, the ultimate owner of the Respondent deliberately avoided to appear before court due to the obvious transgressions he had committed and may be continues to commit against his employees.

It is in this light that the court directs the Immigration Department to conduct an audit of the employees at the Respondent's place to ensure compliance with the Laws of Swaziland.

Further the Labour Department should conduct an inspection at the premises to ensure that the Respondent is in compliance with the legal requirements set by the Employment Act, the Industrial Relations Act and other relevant laws and regulations relating to the welfare and safety of employees in the Kingdom.

Having said that, upon consideration of the entire circumstances of this case, the court deems it fair and just to award the Applicant 10 (ten) months salary being compensation for the unfair dismissal in the sum of (E30,000 x 10 = E300.000) Three Hundred Thousand Emalangeni.

The Respondent is also condemned to pay the costs of the application especially because it acted in a vexatious manner towards the applicant and caused

deliberate delay in the processing of this matter.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT