IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 134/2001

In the matter between:

KENNETH SIBUSISO NKAMBULE
APPLICANT

and

SWAZILAND NATIONAL HOUSING BOARD RESPONDENT

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: J. M. MAVUSO (JUSTICE MAVUSO & COMPANY)

FOR RESPONDENT W. MKHATSHWA (MTHEMBU MABUZA ATTORNEYS)

J U D G E M E N T 09/03/06

[1] This is an application for the determination of an unresolved dispute brought by the Applicant against the Respondent in terms of the Industrial Relations Act of 2000.

[2] The application is thus accompanied by a Certificate of Unresolved Dispute and is marked annexure "C" thereof.

[3] The Applicant's claim is that he was constructively dismissed by the Respondent. He is therefore now claiming that the Respondent be ordered to pay him the following:

(a)	One months notice	-	E4,150.00
(b)	Additional notice	-	El,509.00
©	Severance allowance	-	El,883.60
(d)	12 months maximum compensation	-	E49,800.00
	TOTAL	**-**	**E57,342.69**

[4] The Respondent denied that it constructively dismissed the Applicant.

[5] The Applicant in its particulars of claim stated in paragraph 9 as follows and I quote verbatim:

> "*Applicant submits that his dismissal was constructive and unfair, in that the Respondent allowed him to go on study leave, whilst behind his back, it proceeded to advertise his position, thus effectively dismissing him.*"

[6] In response the Respondents stated as follows in its Replies in paragraph 9 and I quote verbatim:-

> "*Contents hereof are denied and the applicant is put to strict proof thereof In particular the Respondent denies that it dismissed the applicant. The applicant made a request for long terms paid study leave without securing the boards approval abandoned his employment.*"

[7] In his evidence before the court the Applicant stated that he was employed by the Respondent in 1992 as an Accountant. He said he earned

a gross salary of E4,150.00 per month. He said he was in continuous employment until the 27th March 1995.

[8] The Applicant's evidence further revealed that on the 19th January 1995 he learnt that Government had granted him. scholarship to pursue a Chartered Secretaries and Administrators course at Technikon Natal in Durban starting on the 30th January 1995. It was a full time study course running for three years. On the following day the 20th January 1995, the Applicant approached the Head of Human Resources Department for a paid study leave. The Head of Department advised the Applicant to approach the Managing Director as there was no policy in the company regulating applications for long term paid study leave.

[9] The Applicant wrote a memorandum to the Managing Director via the Chief Accountant's office. The memorandum is annexure "D" of the Applicant's application. The Managing Director was on leave at that time. The Applicant said he was advised by the Chief Accountant to approach the Managing Director at his residence. The Applicant did so. The Applicant said he showed the Managing Director the memorandum and they discussed the issue of the study leave. The Applicant said the Managing Director verbally approved his application.

[10] The Managing Director testified before the court on behalf of the Respondent. He denied that he approved the application for the study leave. He said he did not, and could not have done that as he was on leave and also because there was no policy in place for long term study leave at the Respondent's undertaking.

[11] The Managing Director (RW1) told the court that he tried to reason with the Applicant that his request could not be entertained as there was no policy at the workplace to back it. RW1 said he made it clear to the Applicant that he understood the position that he found himself in and that if he left, he would be taken to have abandoned his employment.

[12] The evidence revealed that the Applicant's position was advertised in the Times of Swaziland on Friday 27th January 1995. In his evidence in chief the Applicant said he stopped working on that same date, the 27th January 1995. The post was therefore advertised when he was still around.

If therefore he had got a verbal approval from RW1 to proceed on study leave, it is not clear why he did not immediately take up the issue and find out why his post was being advertised if he still regarded himself, as an employee of the Respondent.

[13] The Applicant said he did not immediately address the issue of his post being advertised because he was busy at school. During cross examination, he did not want to commit himself as to the exact date that he left the country. He only said he left towards the end of January 1995. It was clear to the court that the Applicant did not want to commit himself as to the exact date of his departure because he did not want it to appear that he was still in the country when his post was advertised and did not challenge the Respondent's action.

[14] The Applicant's conduct of not challenging the Respondent's action immediately points at one direction, and one direction only, namely that he knew that the Respondent's Management or Board had not approved his departure.

[15] From the evidence presented before the court it was clear to the court that the Applicant had made up his mind that he was leaving to pursue his studies. In his memorandum he stated that it was his long standing desire to further his studies, he said that that was hindered by Government's negative approach in sponsoring courses offered outside the country. The Government having granted him the scholarship to study outside the country, the Applicant clearly did not want to miss that opportunity

[16] The court will therefore reject the Applicant's evidence that he got a verbal approval from RW1 to proceed on long term study leave. The court accepts RWl's evidence that he did not give any verbal approval to the Applicant's application for full time study leave. The court finds that it was highly unlikely that RW1 could have done that as it was a known fact at the Respondent's undertaking that there was no policy providing for that kind of leave. It is not clear therefore why RW1 could put his job on the line by doing something that was outside the company policies.

[17] From the facts of this case, it became clear to the court that the

Applicant deliberately left his employment because he wanted to pursue his studies and he did not want to miss that opportunity. It was also clear from the evidence that the Applicant clearly appreciated the consequences thereof.

[18] RW1 told the court why they had to quickly advertise the post. He said they needed someone to fill the Applicant's post soon because it was close to the end of the financial year and the auditors would be coming.

[19] The question that must be answered in the light of the evidence before the court is whether the Applicant was dismissed by the Respondent or not.

[20] The Applicant stated in his particulars of claim that he was constructively dismissed by the Respondent as he was allowed to go on study leave, but his post was advertised behind his back. As already found by the court, the Applicants did not get the approval to go on study leave. Further, his post was not advertised behind his back. It was advertised on the basis that he had elected to leave the respondent's employment to pursue his studies. When the advert was first run he was still in the country as he said he stopped working at the Respondent's place on the 27th January 1995, the same date that the advertisement appeared in the newspaper.

[21] It follows therefore that the Applicant has failed to show that he was dismissed by the Respondent in circumstances that amounted to constructive dismissal.

The evidence before the court showed that it was the Applicant who terminated his service to the Respondent. John Grogan in his book "Workplace Law"(Juta & Co) *SP Edition (2005) at page 82 states that:*

"***Both the employee and the employer may terminate the contract of employment by giving the statutory, agreed or reasonable notice. When the employer effects termination, it is termed 'dismissal'; termination by the employee is known as 'resignation'.....Dismissals or resignations occurs only when employers or the employees, as the case may be, elect to abandon the contract.***"

[23] The Applicnat in this case abandoned the contract because he wanted to pursue his studies at Technikon Natal in Durban. His employer had not granted him the permission to go. He therefore took a deliberate act of — abandoning the contract of employment that existed between him and the Respondent.

[24] From the facts of the case, there was no way that the court could find that the Respondent dismissed the Applicnat.

[25] The evidence revealed that the Applicnat left his place of work on very short notice. The Respondent bore the inconvenience of scouting for a replacement within a short period. This case therefore is one where the court will be justified to make an order for costs.

[26] Taking into account the totality of the evidence presented before the court, the court will make the following judgement:

a) The application is dismissed.

b) The Applicant is ordered to pay the costs.

The members agree.

NKOSINATHI NKONYANE, AJ
INDUSTRIAL COURT