

**IN THE INDUSTRIAL COURT OF SWAZILAND**  
**HELD AT MBABANE**

**CASE NO.320/2002**

In the matter between:

**WILLIAM ZWANE**

**APPLICANT**

and

**SWAZI ELBA (PTY) LTD**

**RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE:**

**ACTING JUDGE**

**GILBERT NDZINISA:**

**MEMBER**

**DAN MANGO:**

**MEMBER**

**FOR APPLICANT:**

**MR. B. MNTSHALI**

**FOR RESPONDENT:**

**MR. Z. JELE**

**J U D G E M E N T 26.04.06**

[1] This is an application for determination of an unresolved dispute in terms of Section 85(2) of the Industrial Relations Act No. 1 of 2000 as amended (hereinafter referred to as "the Act").

[2] The applicant is an adult Swazi male of KaBhudla area in the Manzini District, and a former "employee" of the respondent.

[3] The applicant claims that he was unfairly dismissed by the respondent and is therefore seeking an order for maximum compensation and payment of all his terminal benefits.

[4] The respondent denied that it dismissed the applicant. The respondent averred that there was never any employer/employee relationship between it and the applicant. The respondent's defence was that the applicant was a Freelance Commission Agent and as such an independent contractor.

[5] In his application the applicant stated in part as follows:-

"3. The applicant was employed by the respondent as a Service Industrial Manager, on the 4<sup>th</sup> May 1992 and continued in such employment until the 22<sup>nd</sup> January 2002.

4. The applicant alleges that his dismissal aforesaid was both substantively and procedurally unfair alternatively;

5. Applicant alleges that he was constructively dismissed by the respondent who refused to pay the applicant his monthly salary for December 2001, January 2002 claiming that the applicant was not employed on a permanent basis but as a Freelancer.

6. At the time of his dismissal aforesaid the applicant was earning a monthly salary of E1,000:00 (One Thousand Emalangeneni)."

[6] All these allegations were denied by the respondent in its replies.

[7] The evidence led before the court revealed that the applicant was hired by the respondent following an advertisement that was published in the Swazi Observer.

[8] The post that was advertised was that of a senior sales representative. The applicant went for the interview and was successful. He was employed by the respondent in May 1992. It was an oral contract of employment. At the end of the first week the applicant said he was given business cards. These business cards were handed to court as exhibits and were marked "A" and "B" respectively.

[9] The applicant said that he became Sales Manager in 1995. He said his daily duties included making a daily plan where he was going to sell and deliver the goods. He said he was also responsible for collecting the money for the respondent. He said he reported to the Managing Director, Mr. Jan Dijs, who is now deceased. He said he earned a salary of E1000:00 plus a commission of seven and a half per cent from every sale. He said he was paid by cheque. He said the respondent was the one responsible for the payment of the Swaziland National Provident Fund contributions. He was given a motor vehicle to use at work. He left it at work after working hours.

[10] The applicant said he was responsible for the funeral arrangements of Mr. Jan Dijs as he had no relatives in Swaziland. He said he did that in his capacity as Sales Manager.

[11] After the death of Mr. Jan Dijs, the Squires family was appointed to run the company. The evidence revealed that the Squires were close friends to RW2, Lambert Prust, the Non-Executive Director of the respondent. RW1, Mr. Justin Charles Squires was appointed the new Managing Director of the respondent. It was during the term of the Squires that the working relationship between the applicant and the respondent became tense.

[12] Mr. Squires said the applicant did not listen to them as Managers. He said the applicant came and went away from work as he pleased and had no fixed working hours. RW1 said the applicant was once found not doing the respondent's work with the motor vehicle. RW1 said the applicant told them that he could do whatever he wanted as he was not an employee but an agent who got paid based on what he had brought in to the company.

[13] RW1 said the sales continued to go down and when he told the applicant to improve the sales, the applicant told him that he earned whatever he brought in. RW1 then had to hire another Sales Manager by the name of Elaine Thomas. RW1 said thereafter, the sales improved on her side but continued to decline on the

applicant's side.

[14] RW1 was the one who paid the salaries. He said the applicant raised the issue of the salary a few months after he had taken over. RW1 said there was nothing on record showing that the applicant was supposed to be paid a salary or a bonus. RW1 said he confirmed from the company records that the applicant was never paid any salary, but was paid a commission based on the sales achieved per month. RW1 said the applicant then left the respondent's employ. RW1 said he learnt after January 2002 that the applicant was working for a competitor in Manzini. RW1 denied that he created a situation in which it was not conducive for the applicant to continue to work.

[15] RW2 told the court that he resides in the Netherlands. He said he was a non-Executive Director of the respondent. He said he used to come to Swaziland from time to time. He said he came to Swaziland in June 2001 after the demise of Jan Dijs. He was appointed an executor in Jan Dijs' estate. He explained to the court why he wrote the letters handed to court as exhibits "D" and "E" respectively.

[16] Exhibit "D" was a letter addressed to "Whom it may concern". In that letter the applicant was referred to as Sales Manager. In that letter RW2 was asking that co-operation be given to the applicant by the relevant authorities in obtaining a death certificate of the late Jan Dijs. The applicant relies, *inter alia*, upon this letter as evidence that he was an employee of the respondent.

[17] Exhibit "E" was a letter addressed to "All customers". RW2 in that letter referred to the applicant as an Industrial Service Manager. RW2 said he wrote this letter to ensure confidence of the customers in the company.

[18] RW2 also told the court that the applicant did not get a salary, but was paid a commission based on what he brought in.

[19] The question that the court must decide is whether the

applicant was an employee of the respondent, and if he was, whether or not he was unlawfully and unfairly dismissed by the respondent.

[20] The problem that the court faced in this matter was that there was no written agreement. The applicant entered into an oral agreement with the respondent's then Managing Director, Mr. Jan Dijs. The court will therefore depend on the oral evidence led before it and also on the documents handed in, to make a determination whether the applicant was an employee or not. Present at the interview was a certain Mr. David Utley. Mr. Utley did not however testify before the court.

[21] Firstly, the applicant relied on the business cards as evidence that he was an employee of the respondent and not a Freelance Commission Agent. In his evidence in chief the applicant said he responded to an advert for the post of Senior Sales Representative. It seems however that he was eventually hired as a Sales Representative as one of the business cards that he presented in court was only written "Sales". He said he became Sales Manager in 1995. Indeed the other card that he presented to the court and marked exhibit "B" was written "Sales Manager".

[22] There was no change in the salary however when the applicant was promoted to the position of Sales Manager. According to the applicant the salary remained at E1000:00 per month. He said that his income was enhanced by the commission that was charged on the sales. If the applicant was not an employee, it is not clear to the court why the respondent promoted him. Furthermore, the applicant responded to an advertisement for the post of senior sales representative, and not that of an agent or freelance commission agent. It is therefore not clear why the respondent now wants the court to find that the applicant was an agent, when that was not the post that it advertised and for which the applicant applied.

[23] The applicant also relied on the two letters written by RW2 as proof that he was a permanent employee of the respondent. These

two letters were marked exhibit "D" and exhibit "E". They were not however addressed to the applicant. Exhibit "D" was addressed "To whom it may concern". Exhibit "E" was addressed to "All customers". Clearly these were not letters of appointment. The applicant is relying on these letters as proof that it was a well known fact at the respondent's place of employment that he was an employee. In exhibit "D" the applicant was referred to as "our sales manager". In exhibit "E" the applicant was referred to as the industrial service manager.

[24] It is important to note that these letters were written by PW2 who had just arrived in the country after he had been informed about the death of Mr. Jan Dijs. In his evidence-in-chief RW2 said that he referred to the applicant as sales manager because that was what he was informed at the office. That evidence showed that it was known at the place of work that the applicant was an employee of the respondent and not an agent. RW2's evidence also contradicts RW1's evidence that he learnt from RW2 that the applicant was an agent. If RW2 knew the applicant to be an agent, why did he have to enquire at the office on arrival as to the position of the applicant?

The evidence that the applicant was paid a commission based on the sales achieved was not in dispute. Furthermore, the method of the calculation was also not in dispute. The applicant was paid by

cheque. The court was shown annexures RW3 and RW4 which showed how the calculations were done based on the sales achieved by the applicant.

The evidence showed that the applicant's sales dropped to very low levels. The applicant said that was because there was no good working relationship between him and Justin Squires. The applicant agreed that the drop in sales affected his income. He denied during cross-examination that there were no sales in December, and that that was why he did not get paid and finally left in January.

The evidence also revealed why the applicant was not in good terms with the Squires. After Mr. Jan Dijs died, there was an attempt by the employees to take over the company. The attempt failed and Mr. Lambert Prust appointed the Squires family to run the company. It was then that the war of attrition began between the applicant and Justin Squires.

The evidence also showed that due to the declining sales, RW1 had to hire another Sales Manager by the name of Elaine Thomas. RW1 said he had to do that as the survival of the company depended on sales. RW1 said the sales improved on Elaine Thomas' side, and continued to plummet on the applicant's side.

The applicant averred that he was constructively dismissed by the respondent because he was not paid his salary for December 2001 and January 2002, and further that he was denied his permanent employee status. The onus of proof was therefore on the applicant to show he was a permanent employee of the respondent

(30) The Employment Act No.5 of 1980 in Section 2 defines an employee as " any person to whom wages are paid or are payable under a contract of employment".

The applicant told the court that he was paid a salary of E1000:00 per month and a bonus at the end of the year.

- (31) The question whether someone is an employee or an agent was dealt with extensively by the Appellate Division in the case of **SM3T V. WORKMEN'S COMPENSATION COMMISSIONER 1979 (1) S.A. 51 (A.D.)**- At pages 67-68, JOUBERT J.A. pointed out that:-

*"An agent's remuneration for his activities on behalf of the company is solely on a commission basis according to a tariff.... These contractual provisions in regard to an agent's remuneration clearly indicate that he is only interested in the result of an agent's activities in obtaining proposals for insurance, that is to say, in effecting new insurance business.../"*

[32] **In that case the appellant was an insurance agent. That case is clearly distinguishable from the present one as the appellant had been hired as an agent. In the present case the applicant was not hired as an agent, but as a sales representative.**

[33] The court in that case accordingly found that the appellant was an agent and therefore not entitled to any compensation as a servant under the Workmen's Compensation Act. The appeal was dismissed with costs.

[34] In the case of Liberty Life Association of Africa Ltd v Niselow (2002) 11 LAC 2 the Labour Appeal Court of South Africa found that the respondent who was hired as an agent of the insurance company was an agent and not an employee. Again in the present case the applicant was not hired as an agent. That was



not the post that the respondent advertised and for which the applicant applied.

[35] The court is alive to the confusion caused by the applicant's evidence during cross-examination. The applicant told the court that he was paid by cheque which included both the salary and the commission. The evidence on exhibits RW3 and RW4 however showed that the cheques were for the payment of commission only. That evidence also showed that SNPF, PAYE and Graded Tax was deducted by the employer from the commission. The applicant insisted that he was paid a bonus at the end of the year.

[36] The court having properly considered the totality of the evidence presented before it, namely that the applicant was not hired as an agent but as a sales representative; that the employer paid the SNPF, PAYE and Graded Tax on his behalf; that the applicant had fixed working hours; that the applicant was promoted from sales representative to be the sales manager; will come to the conclusion that the applicant has proved on a preponderance of probabilities that he was an employee of the respondent.

[37] The application will accordingly succeed. The court will make an order that the respondent pays the applicant the claims as they appear in paragraphs (a), (b), (c), (d), (e), and (f) of the applicant's application. The court having taken into account the personal circumstances of the applicant will make an order in terms of paragraph (g) that the respondent pays the applicant an amount equal to ten months' salary as compensation for unfair dismissal.

[38] No order for costs is made.

The members agree.

**NKOSINATHI NKONYANE**  
**ACTING JUDGE - INDUSTRIAL COURT**