IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 225/2005

In the matter between

TREASURE MAPHANGA **Applicant**

and

WOOLWORTHS (MANZINI) **Respondent**

CORAM:

P. R. DUNSEITH: **PRESIDENT**

JOSIAH YENDE: **MEMBER**

NICHOLAS MAN ANA: **MEMBER**

FOR APPLICANT: **N.FAKUDZE**

FOR RESPONDENT: **M. SIBANDZE**

RULING ON RESPONDENT'S APPLICATION TO AMEND ITS REPLY - 19/07/2007

1. The Applicant applied to court for determination of an unresolved dispute pertaining to the termination of her employment by the Respondent.

2. In her particulars of claim, the Applicant alleged that she was employed by the Respondent on the 23rd April 2002, and her services were unfairly terminated on 29th August 2002.

3. The Respondent in its Reply admitted that the Applicant was employed on the 23rd April 2002 and dismissed on the 29th August 2002, but denied that the dismissal was unfair. The Respondent pleaded that the Applicant's services were terminated after she was found guilty of breach of trust and theft.

4. The trial commenced on the 25th June 2007. The Applicant testified and closed her case. The Respondent's first witness also concluded her testimony, and the trial was adjourned to continue on the following day.

5. On the 26th June 2007 the Respondent's counsel gave notice that he wished to amend his client's Reply in order to raise a new defence. He requested a postponement to make a formal application for amendment, and he tendered the wasted costs of the day. The trial was postponed without objection from the Applicant.

6. The Respondent duly filed a formal notice of application for amendment. The application is not supported by any affidavit. The application seeks to amend the Reply in the following respects:

6.1. By withdrawing the admission that the Applicant was employed on 23rd April 2002 and alleging that she was employed in terms of a fixed term contract of employment commencing with effect from the 1st July 2002 and terminating on 31st December 2002;

6.2. By alleging that the said contract was subject to a probation clause and that the Applicant's services were terminated before the expiry of the probationary period;

6.3. By alleging that the Applicant was not an employee in respect of whom section 35 of the Employment Act applies.

7. The proposed amendment seeks to introduce an alternative defence, namely that the Respondent was entitled to terminate the Applicant's services without fair reason since she was a probationary employee. A copy of the contract relied upon by the Respondent was attached to the notice of application to amend.

8. The Applicant opposed the application for amendment on the following grounds:

8.1. the proposed amendment involves the withdrawal of an admission;

8.2. the proposed amendment introduces a new issue which means that the Applicants case would have to be re-opened to enable her to refute the new factual allegations raised by the amendment;

8.3. for the above reasons the amendment will cause the Applicant prejudice which cannot be cured by an appropriate order for costs or a mere postponement;

8.4. the application to amend is mala fide. The Respondent has deliberately delayed in raising the proposed alternative defence in order to 'ambush' the Applicant and gain an unfair advantage.

9. The general principles applicable to an application for amendment of a pleading were summarized in our recent judgement in the case of **Phephile Dlamini v Conco Swaziland (IC case No. 64/2004)** and it is not necessary to repeat such principles in this judgement. Mr. Fakudze for the Applicant also referred the court to the case of **Trans-Drakensberg Bank Ltd (under Judicial Management v Combined Engineering (Pty) Ltd & Another 1967 (3) SA 632 (D & CLD)** for a useful exposition of the case law governing applications for amendments.

10. The tendency of the court is not to be over formalistic and to grant an amendment whenever it will facilitate the proper ventilation of a dispute between the parties. In **Whittaker y Ross and Another; Morant v Ross and Another 1911 TPD 1092 at 1102-3** this tendency was described as follows:

"This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which , if some mistake is made, the forfeit is claimed. We were here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of the paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."

11. The same general principles are applicable to amendments involving the withdrawal of admissions.

(see **President Versekeringsmaatskappy Bpk v Moodley 1964 (4) SA 109 (T) at 110H.)** But the withdrawal of an admission is usually more difficult to achieve because:

- *"(i) It involves* a *change of a front which requires full explanation to convince the court of the bona fides thereof, and*

(ii) it is more likely to prejudice the other party."

- Per **Hiemstra J in President Versekeringsmaatskappy Bpk v Moodley (supra at 110H-111A).**

12. In **Amod v South African Mutual Fire and General Insurance Co Ltd 1971 (2) SA 611 (N) at 614H-615A** the position in regard to the withdrawal of an admission was stated as follows:

"The court has a discretion but will require a reasonable explanation both of the circumstances under which the admission was made and of the reasons why it is sought to withdraw it. In addition, the court must also consider the question of prejudice to the other party. If the result of allowing the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him, then the application to amend will be refused."

In **Bellairs v Hodnett and Another 1978 (1) SA 1109 (A) at 1150** the requirements were stated as follows:

"But, as *it has frequently been said, an amendment cannot be had merely for the asking. This is equally, if not especially, true of a proposed amendment which involves the withdrawal of an admission -in such cases the court will generally require to have before it a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it."*

13. Usually, the explanation for an amendment involving withdrawal of an admission should be given on oath in an affidavit:

Swartz V Van der Walt t/a Sentraten 1988 (1) SA 53 (W) at 57.

14. Mr. Sibandze for the Respondent offered an oral explanation for the amendment from the bar. He said that the written contract of employment could not be found at the time he consulted with the Respondent and drafted the Reply. It was only located after commencement of the trial.

15. Mr. Sibandze referred to the Applicant's evidence that Mrs. Ncala, her branch manageress^ left the Respondent's employ before the dispute was reported to the Labour Commissioner. According to Mr. Sibandze, this was a possible cause of the difficulty in locating the contract.

16. On the question of bona fides, Mr. Sibandze argued the improbability of the Respondent deliberately withholding a contract which disclosed a complete defence to the Applicant's claim.

17. The Industrial Court is not bound by the rules of procedure which govern the common law courts, and in an appropriate case the court may accept a credible explanation from the bar, even though this amounts to counsel giving unsworn testimony in his client's cause. The difficulty faced by the Respondent, however, is that its counsel's explanation falls short of explaining why it admitted the Applicant's alleged date of employment in the first instance.

18. On the evidence of the Applicant, the Respondent acquired the Woolworth's business from the previous owner. Applicant's employment with the previous owner was terminated, and she was thereafter immediately employed afresh by the Respondent in the same position.

19. The Applicant alleged that she was employed on the 23rd April 2002, and the Respondent formally admitted this date in its Reply. It is inconceivable that the Respondent had no records, in the absence of the employment contract, from which it could verify whether the date alleged by the Applicant in her particulars of claim was correct. The Respondent must have had wage records for the months of April, May and June 2002. The Respondent must have known on what date it took over the business from the previous owner.

20. The Respondent must be taken to have deliberately admitted the Applicant's date of employment as being 23rd April 2002 in its Reply. Mr. Sibandze has not alleged that such

admission was made in error. No explanation for making or withdrawing the admission has been advanced. The mere fact that the written employment contract purports to have commenced on 1st July 2002 does not necessarily mean that this was the date when the Applicant was first employed by the Respondent. The contract may have been concluded after she commenced her employment

21. The Respondent is seeking an indulgence and it must show good cause for the amendment. In the absence of any satisfactory explanation why it previously admitted the Applicant's date of employment to be 23 April 2002, the Respondent has failed to show good cause for withdrawing such admission. In the exercise of our discretion, we are not prepared to grant the amendment in so far as it purports to deny that 23rd April 2002 was the date of Applicant's employment.

22. In terms of section 32 of the Employment Act 1980, no probationary period shall exceed 3 months, except in the case of employees engaged on supervisory, technical or confidential work. In the latter case, the probation period shall be fixed, in writing, at the time of engagement.

23. The employment contract which the Respondent relies upon purports to provide for a six months probationary period. Such period should have been fixed at the time of engagement, namely 23rd April 2002, and not on 2nd July 2002, as appears ex facie the date of signature of the contract.

24. If the court were to permit the Respondent to introduce its new defence (as set out in 6.2 and 6.3 above), this would render the Reply excipiable. Such an amendment ought not to be allowed.

Cross v Ferreira 1950 (3) SA 443 (c) at 450

R M van de Ghinste & Co v Van der Ghinste 1980 (1) SA 250 (c) at 256H-257B.

Tengwa v Metrorail 2002 (1) SA39 (C) 746.

25. In the premises, the application for amendment cannot succeed and it is dismissed with costs.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT