

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 329/03

In the matter between:

THOMAS MAPHOSA

Applicant

and

MAX ENTERPRISES (PTY) LTD

Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: MBUSO DUBE

FOR RESPONDENT: MUSA SIBANDZE

**JUDGEMENT ON APPLICATION FOR ABSOLUTION
FROM THE INSTANCE - 04/06/2008**

1. The Applicant has applied to court claiming compensation for unfair dismissal and ancillary relief.

2. The Respondent raised a special defence in its Reply, namely that the Applicant is a citizen of Mozambique and at all relevant times during his employment he was not in possession of a valid entry permit allowing him to be employed in Swaziland as required by the Immigration Laws of the Kingdom. In these circumstances the Respondent pleads that the contract of employment between the Applicant and the Respondent was unlawful and/or *contra bonos mores* and therefore void *ab initio* in terms of the *ex turpi causa* rule.

3. The Respondent pleaded further that in any event, the termination of the Applicant's services was substantively and procedurally fair and reasonable in all the circumstances.

4. At the close of the Applicant's case, the Respondent's representative applied for absolution from the instance. He argues that:

4.1. the Applicant has failed to establish that he is a Swazi Citizen and entitled to work in Swaziland without a work permit;

4.2. it is common cause that the Applicant did not have a valid work permit at the time of his employment with the Respondent;

4.3. Sections 14 (2) (f) and (g) of the Immigration Act of 1964 penalizes the employment of a migrant who does not have a valid work permit;

4.4. the purported contract of employment between the Applicant and the Respondent is impliedly prohibited by the penal provisions of the Immigration Act and thereby rendered illegal;

4.5. the maxim *ex turpi causa non oritur actio* applies to contracts of employment. If the contract is illegal, then it is void and of no force and effect.

4.6. In the premises, the Applicant's contract of employment with the

Respondent is null and void and the Applicant is not an employee to whom section 35 of the Employment Act 1980 applies.

4.7. If the applicant is not an employee to whom section 35 applies, he is not protected against unfair dismissal and he has no cause of action based on unfair dismissal.

5. The enquiry that arises on the Respondent's application for absolution at the close of the Applicant's case is: *is there evidence upon which a reasonable person might find for the Applicant?* In other words, is there such evidence before the court in the present matter upon which a reasonable person might (but not should) find that at the time of his dismissal the Applicant was a person to whom section 35 of the Employment Act applied?

Gascoyne v Paul Hunter 1917 TPD 170.

6. Section 35 of the Employment Act 1980 provides that *"no employer shall terminate the services of an employee unfairly."*

7. It is trite law that in the determination of a complaint of unfair dismissal the employee bears the burden of proving that at the time his services were terminated he was an employee to whom section 35 applied. If the employee succeeds in discharging this burden of proof, the burden shifts to the employer to prove that the termination of his services was fair and reasonable - see section 42 of the Employment Act 1980.

8. If the Applicant has failed to establish at the close of his case that *prima facie* he was an employee to whom section 35 applied, then he has failed to establish a *prima facie* right to protection against unfair dismissal. There is no need to determine whether his dismissal was fair, and the Respondent is entitled to absolution from the instance.

9. The Applicant testified as to the circumstances of his employment by the Respondent and the termination of his employment. He stated that he was employed by the Respondent as a security guard from 1991 to 1996. In 1997 the Respondent approached him and requested him to return to its employ. He was re-employed on 26 May 1997. The Respondent asked him to work in Swaziland. He gave the Respondent his graded tax receipt and a letter from the Swaziland Immigration Department dated 8th September 1992. A copy of the letter was exhibited in court. It is

addressed To Whom It May Concern, and states :

"This is to certify that Thomas Maphosa has applied for a Temporary Resident/ Work Permit with the Immigration Office. The said Permit is still being processed and you will be notified in writing of any changes in due course."

10. This letter is not a Work Permit, it merely records that the Applicant applied for a permit. A reasonable employer presented with such a letter in 1997 would have been aware that the Applicant required a permit to work in Swaziland; that such permit had not yet been granted; and that the likelihood of the application still being processed after the elapse of nearly five years was remote, to say the least. Nevertheless, the Respondent proceeded to employ the Applicant, and caused him to sign a document headed "Written Particulars of Employment and Official Contract Form." This document was also signed on behalf of the Respondent.

11. *Prima facie*, and notwithstanding the provisions of section 25 of the Employment Act, the document purports to be a written contract of employment.

12. The Applicant testified further that he was given permission to proceed on sick leave, but when he returned after three months he was told that he had been dismissed in his absence. He was subsequently afforded a hearing, but denied representation by his Works Council representative. His dismissal was confirmed.

13. It is not necessary for purposes of this judgement to analyze the evidence of the Applicant and his witness Ngcina Mavuso regarding his dismissal, since this judgement is concerned with the question whether the Applicant established a *prima facie* case at the close of his evidence that he was an employee to whom section 35 applied.

14. Under cross-examination, the Applicant was closely questioned as to his nationality and origins. He said he was born in Swaziland but he grew up and schooled in Mozambique. He produced a copy of a Swazi birth certificate which certifies that he was born at Mangwaneni, Swaziland on 6th May 1954. According to the certificate, both his parents were Swazi and they were married according to Swazi law and Custom.

15. The Applicant testified that his parents died in Mozambique whilst he was still a child. He returned to Swaziland in 1991 looking for work. Unaware that he was Swazi by birth, he applied for a work permit. Later he met a relative of his late father, who

told him of his origins and assisted him to obtain a Swazi birth certificate. The Applicant "khontaed" to a local chief and he was allocated land on which he built his homestead.

16. The Applicant denied the suggestion that he obtained his Swazi birth certificate fraudulently. He admitted however that he was currently using an emergency travel certificate issued by the Republic of Mozambique on 6th July 2007. The certificate represents that the Applicant was born at Inhambane, Mozambique on 6th May 1954. The Applicant agreed that he had not informed the Mozambique authorities of his discovery that he was born in Swaziland.

17. A person born in or outside Swaziland prior to 1992 is a citizen by birth if one of his parents was a citizen of Swaziland at the time of his birth - see section 6 (1) of the Swaziland Citizenship Act, 1992 read with section 140 of the Constitution.

18. A Swazi citizen does not require a permit to take up employment in Swaziland.

19. *Ex facie* the birth certificate produced by the Applicant, he is a Swazi citizen by birth. Section 28 (1) of the Births, Marriages & Deaths Registration Act 1983 provides that a birth certificate signed by a registration officer "*shall be prima facie evidence of the particulars set forth therein in all courts of law and public offices.*"

20. The Applicant's Mozambican accent and inability to speak fluent Siswati is consistent with his evidence that he grew up and schooled in Mozambique.

21. Mr. Sibandze for the Respondent submits that the birth certificate was fraudulently obtained. There is no direct evidence to support such an allegation, and the corrupt procurement of a false birth certificate is not something to be lightly inferred - see **Gates v Gates 1939 AD 150 at 155.**

22. Mr. Sibandze asks the court to infer that the Applicant's birth certificate is false because the applicant continues to use a Mozambican travel document, and he has continued to allow the Mozambican authorities to believe that he was born in Mozambique.

23. The Applicant testified that he has continued to renew his Mozambican travel document to enable him to travel to Mozambique, where he lived for 38 years. We do not consider it unreasonable that he wishes to visit his former home or that he is reluctant to alter his status as a Mozambican national.

24. Mr. Sibandze submits that the Applicant's failure to secure a Swazi travel document, and his ignorance of the whereabouts of the "uncle" who helped him acquire his birth certificate, render his version implausible.

25. These factors do give rise to a degree of suspicion, but in our view not sufficiently to render the Applicant's version inherently improbable or incredible.

26. Courts have frequently emphasized that absolution from the instance should not be granted at the end of the plaintiff/applicant's evidence except in very clear cases, and that questions of credibility should not normally be investigated until the court has heard all the evidence which both sides have to offer.

Siko v Zonsa 1908 T.S. 1013

27. Taking into consideration the evidence lead by the Applicant and giving due weight to the factors and improbabilities referred to by the Respondent's counsel, the court is of the view that a reasonable person might be prepared to find, in the absence of any further evidence, that the Applicant is a Swazi citizen by birth; that the employment contract he entered into with the Respondent was lawful and valid; and that he is an employee to whom section 35 of the Employment Act 1980 applies.

28. In view of this finding, it is not necessary for the court to determine at this stage the merits of the legal argument advanced by the Respondent, namely that a foreign migrant who works illegally in Swaziland without a work permit is not entitled to the protection of Part V of the Employment Act 1980.

29. The application for absolution is refused.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT

SIDENT OF THE INDUSTRIAL COURT

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