

IN THE INDUSTRIAL COURT OF SWAZILAND

In the matter between:

Case No. 225/2001

STEPHEN MAZIBUKO

Applicant

And

EAGLE'S NEST (PTY) LTD

Respondent

CORAM:

NSIBANDE S. : Acting Judge

THWALA P. : Member

NKAMBULE A.M.: Member

NDLANGAMANDLA M.R. : For Applicant

JELE D.: For Respondent

JUDGEMENT- 16th SEPTEMBER, 2008

- 1] This is an application for determination of an unresolved dispute in terms of **Section 85 (2) of the Industrial Relations Act 2000.****

2] The Applicant in his particulars of claim seeks reinstatement (with arrear monthly wages) to the employ of the Respondent from which he was terminated on 22nd May, 2001, having been employed as a chicken feeder on 20th February, 2001 and having worked continuously until his dismissal.

3] In the alternative Applicant seeks maximum compensation for unfair dismissal, payment of notice pay and payment in lieu of outstanding leave.

4] The Applicant gave evidence in court and testified that he had been verbally employed by one Elijah Dlamini on 20th February, 2001. He was directed to his work station and shown what was expected of him. He testified that his terms and conditions of employment were not discussed with him but he was paid E20 (twenty emalangeni) at the end of each day for the duration of his employment by the Respondent. He would also receive a tray of eggs from the employer every Saturday.

5] He testified that he worked from Monday to Saturday every week from 20th January, 2001 until 22nd May 2001 when he was dismissed. He worked 8V2 hrs a day.

6] As regards to his dismissal, he testified that at the end of the day on 22nd May 2001 when he was receiving his pay for that day, one Vusi Khumalo, his supervisor told him he was not needed the next day, and that he should not come back to work. He was told that he would be called back when needed in the future. He has never been called back since. He was paid only his wage on the day he was dismissed.

7] He testified further that as far as he knew the work he was doing was not seasonal and was still being performed by someone who was hired in his place.

8] The Respondent's case was that the Applicant was not an employee to whom **section 35 of the Employment Act of 1980** applied. This was because Applicant was according to the Respondent, a casual employee who was engaged on a series of fixed term contracts of one (1) day each.

9] The Respondent called one Vusi Khumalo who told the court he had been in the employ of the Respondent since 1994. His evidence was that the Respondent hired casual employees almost daily and had done so in 2001 when the Applicant was hired. He told the Court that the Respondent hired employees on a permanent basis in which case such employees would be paid on a monthly basis, would be entered into the payroll system of the Respondent and would have easy access to the premises of the Respondent on a daily basis. Casual employees hired by the

Respondent are not recorded or entered into the payroll system, they are picked from a group at Respondent's premises daily, and they are paid at the end of each day. They are told each day that their employment is for that particular day only and that as a consequence they will be paid at the end of that day.

10] Vusi Khumalo further testified that the same system as set out above regarding the daily recruitment of casual employees was in use in 2001 and remained in use, at the time of his testimony in 2008.

11] While he couldn't say that the Applicant was told specifically by himself of the nature of his contract of employment, the witness Khumalo, stated that Applicant would have had to wait to be picked each day for the four months that he spent working for the Respondent and that he would have been told by Mr. Chester that his employment was for each specific day only and that he would be paid at the end of each specific day. The witness and one Elijah Dlamini would translate for Mr. Chester and put whatever he said to the casual employees in Siswati so that everyone understood their position.

12] The Respondent also called one Pieter Van Vuuren who is employed as Farm Manager by it and who has been so employed since late 2003. He confirmed Khumalo's evidence regarding the treatment of casual employees. He could not assist the court much with regard to the Applicant's case as he was not in the Respondent's employ in 2001. He could only say that he could not find any record of the Applicant in the Respondent's payroll records/system for 2001.

13] The Applicant's case was that he was an employee to whom **section 35 (e) of the Employment Act of 1980** applied, whereas this assertion was denied by the Respondent. It is common cause that;

13.1. Applicant worked for the Respondent from 20^m January, 2001 until 22nd May, 2001, a period of four (4) months.

13.2. Applicant was paid at the end of each day a sum of E20.00 for the duration of his employment with the Respondent.

13.3. The terms of the Applicant's employment were not reduced to writing.

14] **Section 35 of the Employment Act 1980** reads thus;

"35 (1) This section shall not apply to;

(a) an employee who has not completed the period of probationary employment

provided for in Section 32;

(b) an employee whose contract of employment requires him to work less than twenty-one hours each week;

(c) an employee who is a member of the immediate family of the employer;

(d) an employee engaged for a fixed term and whose term of engagement has expired;

35 (2) No employee shall terminate the services of an employee unfairly."

15] The Applicant in his argument states that because he was engaged continuously from 20th January, 2001 to 22nd May, 2001, he completed his probationary period successfully and was therefore a permanent employee at the time of his dismissal. He relies on section 32 subsection 2 of the Employment Act No.5 of 1980 which states; *"No probationary period shall, except in the case of employees engaged on supervisory, technical or confidential work extend beyond three months."*

16] He argued that, having become a permanent employee, he was protected by **Section 35 (2) of the Employment Act No. 5 of 1980.**

17] Section 35 (1) recognizes that an employee who is engaged for a fixed term and whose term has expired does not have recourse to **section 35 (2) of the Act.** Such employment must, however be for a specific period, otherwise, if not upon expiry of the statutory permissible period in which an employee may be kept on probation the employment becomes permanent and subject to protection by **section 35 (2) of the Act.**

18] The employment Act further recognizes casual employees and states at Section 2 that a "casual employee" means any employee the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than 24 hours at a time.

19] Although the Applicant worked continuously for four months (20th January, 2001 up to 22nd May 2001), the evidence adduced in court is that he was employed on a series of fixed term contracts of one day each. The Applicant, himself confirms that he was paid at the end of each day that he was employed.

20] The Court finds that he has failed to prove that he was an employee entitled to protection under **section 35 (2) of the Employment Act**. The provisions of **section 36 and 42 (2) (a) and (b)** did not apply to him.

21] The application is dismissed and there is no order as to costs.

S. NSIBANDE
ACTING JUDGE