IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 583/06

In the matter between:

SMITH RAMBOCUS **APPLICANT**

and

MOUNTAIN INN **RESPONDENT**

CORAM:

S. NSIBANDE ANDREAS NKAMBULE **PRESIDENT**
MATHOKOZA MTETWA **MEMBER**
MEMBER

MR. B. MAGAGULA MR. M. SIBANDZE **FOR APPLICANT FOR RESPONDENT**

J U D G E M E N T - 28th JULY 2009

1. The Applicant has applied to the Industrial Court lor the determination of an unresolved dispute arising from the termination of his employment by the Respondent on 18th May 2004. The Applicant alleges that the termination of his services was substantively and procedurally unfair in that:

1.1 the Applicant was never consulted by the Respondent prior to his termination: and

1.2 the Applicant was never subjected to any disciplinary hearing prior to the Respondent's decision to terminate his employment.

The Applicant is claiming payment of his statutory terminal benefits, leave days due and twelve months compensation for unfair dismissal.

The Respondent opposes the application and alleges that the Applicant's position was never permanent, that he was employed as a training chef who would only be employed until the Respondent's staff had been trained; that on the 18th May 2004 he had fulfilled that mandate and his employment was terminated by effluxion of time.

In the alternative the Respondent pleaded that the post of training chef was abolished and Applicant's services were terminated by reason of redundancy.

The dispute was reported to CMAC but conciliation was unsuccessful and a certificate of unresolved dispute was issued.

The Applicant testified that he was employed in October 2001. It is common cause that he remained in the Respondent's continuous employ until 18th May 2004. At the time of his termination he earned E8000 per month and the Respondent paid for accommodation at the rate of E3900.00 per month.

1.3 The Applicant testified that he was employed as head chef responsible for training the kitchen staff, upgrading the standard of hygiene in the Respondent's kitchen and supervising Respondent's kitchen in all aspects.

1.4 The Respondent alleges that Applicant was a training chef responsible primarily for training the kitchen staff and showing them proper methods of upgrading the kitchen.

1.5 The Applicant's written conditions of service which were handed in as part of his evidence, indicate that the Applicant was employed as an instructor chef. Applicant testified that Respondent's kitchen staff learnt through practical experience in the art of preparing food and running the kitchen. It seems to us that the Applicant did not want to admit being an instructor chef so as to bolster his claim. It is our view that the written conditions of service correctly set out his position.

1.6 The Applicant testified that his initial employment with the Respondent was to last a period of six (6) months from November 2001 until June 2002. After June 2002 he testified his employment would be for an indefinite period. Both Applicant and

Respondent made much of the allegation that Applicant's employment was tied to his work permit i.e. that he would continue to be engaged by the Respondent for the duration of his work permit.

1.7 Applicant in his final submissions stated that at the time of his dismissal the work permit he had was valid for a further twelve months. He therefore expected that he would work for at least the last twelve months of the permit.

1.8 In its final submissions the Respondent seems to agree with the Applicant's assertion but differs in that it alleges that it applied for the Applicant's work permit to be renewed for a period of 1 year from May 2003. It submits therefore that the parties could not have expected that Applicant's employment would extend beyond May 2004. The Respondent had asked for only a year's extension and therefore the Applicant could not have expected to be employed after that year.

1.9 The folly of this submission is that the Respondent's witness Mr. Ward testified that firstly, when he hired the Applicant he did not have a date when his services would be terminated in mind, secondly that he would not link the Applicant's employment to his work permit other than that the work permit was a legal requirement; thirdly that he had never indicated that Applicant had a timed contract and that his employment would be terminated at the end of the training *"once we decided it was over."*

1.10 It would appear that in the Respondent's mind, the Applicant would be employed on a temporary basis in order to undertake and complete the task of training of its kitchen staff and upgrading its kitchen. There was no fixed term of employment and the Respondent would assess the progress and decide when the need for training would end.

1.11 In the matter of **Sarah Ndwandwe vs The Principal Secretary of the Ministry of Works & Construction Court of Appeal, Court Case No. 6/1997,** the Swaziland Court of Appeal held that there is nothing in the Employment Act or in any other law which makes it illegal-for a person to be employed on a temporary basis in order for a specific job to be undertaken.

1.12 This court in the matter of **Nkosinathi Dlamini vs Tiger Security (Pty) Ltd I.C. Court Case No. 287/2002** quoted with approval the Swaziland Court of Appeal in the **Sarah Ndwandwe** matter (supra) but added that *"such employment must however be for a specific period, otherwise if not, upon the 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 (The Employment Act)." This position was confirmed by the Industrial Court of Appeal in the matter of **Swaziland Meat Industries v Mduduzi Nhlabatsi & Nine Others Industrial Court of Appeal Case No. 142/2005.**

1.13 The Concise Oxford Dictionary ninth edition defines 'specific' as meaning clearly defined; or definite. Mr. Ward's evidence stated clearly that there was no specific period set for the termination of the Applicant's employment. Applicant worked continuously for a period exceeding three (3) months without a break. The court can only conclude thai he was an employee entitled to protection under section 35 (2) of the Employment Act 1980. Applicant became a permanent employee on the expiry of three months.

1.14 We now turn to the Respondent's alternative defence, that the position of training chef was abolished, consequently Applicant was redundant. The redundancy was both procedurally and substantively fair. The court was told that Applicant had been consulted in December 2003 and again in March 2004 prior to his taking extended leave.

1.15 The Applicant denied ever being consulted either in December 2003 or March 2004 about his employment coming to an end. He testified that the first time he was advised by the Respondent that his employment was being terminated was on 18 May 2004 when he received a letter dated 17th May 2004.

1.16 The Respondent's evidence that the position of training chef was abolished in 2004 and that since that time there has been no such position at Respondent was not challenged. We accept that the position was abolished in 2004 and that no one has been appointed training chef since that time. However it seems to us that the need to abolish the post arose out of the Respondent's dissatisfaction with the Applicant's work. Mr. Ward for the Respondent indicated that when he spoke to the Applicant in December 2003 he discussed among other things the Applicant's failure to improve the quality of food at the restaurant as well as his failure to introduce new dishes. He further testified that the Respondent had at some point in time taken over the Cultural Village in Mantenga and the Applicant had been expected to assist there. According to Mr. Ward, the Applicant had to be withdrawn from the Cultural Village because his services were not adding any value.

1.17 When Mr. Ward was asked if he was unhappy about the Applicant's work his answer was that the Applicant did not seem to work well with the people at the Cultural Village and that the Respondent was getting nothing more from him. The decision to terminate the Applicant, Mr. Ward testified, was influenced by whether there was any improvement in the kitchen and Respondent didn't think there was. We are of the view that Mr. Ward's stated unhappiness with the Applicant's insistance on taking paternal leave when he was not legally entitled to do so also influenced the decision to terminate his services.

1.18 Mrs. Mhlongo for Respondent, testified that the kitchen staff complained that they were no longer learning anything from the

Applicant four months after he was employed. It is our view, improbable that the Applicant would have been kept on by the Respondent for more than 2 years had such complaints been made. What is more likely is that the complaints about the menu and lack of new innovations which Mrs. Mhlongo confirmed had been raised by some customers, influenced the termination of Applicant's employment.

1.19 In the circumstances we hold that the reasons for the redundancy was not bona fide and that such redundancy was substantively unfair.

1.20 With regard to the consultations that are said to have taken place, it is our view that such were flawed. There is no indication that Applicant was given a time frame when the said redundancy would occur, when he met Mr. Ward in December 2003.

1.21 While section 40 (2) of the Employment Act 1980 enjoins ***m*** sm^ov^fc who contemplates terminating the contracts of employment of 5 or more employees for reasons of redundancy to give not less than a month's notice to the Labour Commissioner and to the organization (if any) with which he is a party to a collective agreement, there is no reason why an employer contemplating the same for only one employee should not give such notice to the employee. It can only be fair to the employee to know his position will become redundant and to know when that is likely to happen. **(See Lonhlanhla Masuku vs K. K. Investments (Pty) Limited IC Case No. 341/03).**

1.22 In the matter of **Hlongwane & Another v Plastix (Pty) Ltd (1990) 11 ILJ 17 (IC),** the court had this to say about the duties of an employer in the case of a redundancy,

> *"The employer must firstly carefully and earnestly consider ways of keeping the employee in his employ. After all, he can afford it financially as this is not £ case of retrenchment due to financial difficulties. In this regard the employer could consider the following alternatives: Firstly to offer the employee alternative employment with the employer. This position should preferably be on a par with the employee's old position, but if that is not possible, then alternative employment in a subordinate position could be offered. It is imperative that alternative employment should not be offered on unreasonable terms. One would inter alia have to consider the facts in order to decide whether such an offer is reasonable or not. Secondly, to train the employee for a different position within the business. Thirdly, if the employer is part of a group of companies, to endeavour to find alternative work in the other companies. Fourthly, to try to find alternative employment for the employee with other companies."*

27. Turning to the matter at hand, while the court will not use the list set out above as a check list, what it does is speak to the need to try and avoid a redundancy at all costs. We are not told what the Respondent did to avoid the redundancy of the Applicant in this matter. To this extent we find that the redundancy exercise was procedurally unfair.

28 For the above reasons, the termination of the Applicant's services was substantively and procedurally unfair. The Applicant would therefore be entitled to his statutory terminal benefits being notice pay, additional notice pay and severance allowance. However, he was paid notice of one month and additional notice of 10 days. In the circumstances those two claims fall away.

29. With regard to the leave days we accept the Respondent's evidence that Applicant took more days than he was actually entitled to. His

1.23 With regard to the leave days we accept the Respondent's evidence that Applicant took more days than he was actually entitled to. His evidence that he was entitled to the days as compensation for extra hours worked is unsustainable in the face of denials by the Respondent. The claim for leave days is therefore dismissed.

1.24 The court takes into account the Applicant's personal circumstances, his dismissal at a time when his wife had just given birth to their baby and his *2Vz* years service with the Respondent's and contrasts it with the Respondent's payment of the Applicant's salary for June and 11 days in July as weil as the fact that Applicant was able to get employment in June at relatively the same rate of remuneration. We award compensation equivalent to four (4) months remuneration.

1.25 Judgement is entered against the Respondent for payment of:

(1)	Severance allowance	E 5 409.10
(ii)	Compensation for unfair dismissal	E47.600.00
	TOTAL	E53,009.10

Respondent is to pay the Applicant's costs.

The members agree.

S. NSIBANDE _____—

PRESIDENT OF THE INDUSTRIAL COURT