

# **IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 134/2011**

In the matter between:

**THEMBA DLAMINI**

**APPLICANT**

**AND**

**MALOMA COLLIERY LIMITED**

**1<sup>ST</sup> RESPONDENT**

**THE KING'S OFFICE**

**2<sup>ND</sup> RESPONDENT**

**CORAM:**

**THULANI A. DLAMINI:                    ACTING JUDGE**

**JOSIAH YENDE                    :                    MEMBER**

**NICHOLAS MANANA                :                    MEMBER**

**FOR APPLICANT:                    D. JELE**

**FOR RESPONDENT                :                    M. SIBANDZE**

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## **RULING ON POINTS RAISED IN LIMINE - 13 MAY 2011**

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[1] The Applicant herein has instituted an urgent application on notice of motion in which he seeks an order as follows;

*"1. Dispensing and condoning the applicant for the non compliance with the usual normal requirements relating to*

*the method of service, time limits, forms and enrolling this matter to be heard as one of urgency*

*2. That a rule nisi do hereby issue calling upon the first Respondent to show cause, on a date to be determined by the above Honourable Court, why an order in the terms should not be made final;*

*2.1 The withdrawal of the Applicant's salary by the first Respondent for the period from the 28<sup>th</sup> day of February 2011 up to date is hereby set aside and declared unlawful;*

*2.2 The first Respondent is ordered to pay the Applicant his remuneration and travel claims (which at present is the sum of E74 136.72 for the period from the 28<sup>th</sup> day of February 2011) and for subsequent months until the employment status of the Applicant is resolved;*

*2.3 The first Respondent is ordered to pay the costs of the application at attorney and own client scale or alternatively at party and party scale;*

*2.4 Granting the Applicant further and/or alternative relief."*

[2] The 1<sup>st</sup> Respondent is a company that is duly registered in terms of the company laws of the Kingdom of Swaziland, and conducts coal mining business at Big Bend.

- [3] The 2<sup>nd</sup> Respondent is The King's Office. However no order is sought against the 2<sup>nd</sup> Respondent.

### **BACKGROUND**

- [4] The Applicant states in his founding affidavit that he was employed by the 1<sup>st</sup> Respondent as a Public Relations Officer in October 1993. This position changed to that of Government Liaison Officer in February 1996 when he was so appointed by His Majesty King Mswati III. He avers further that he has been continuously employed in the latter position to date.
- [5] Since his employment in 1993 he has been continuously receiving a monthly basic salary and travel allowance and these were paid by the 1<sup>st</sup> Respondent at the end of every month from the date of his engagement.
- [6] However, at the end of February 2011 he was not paid. Upon enquiry he was advised by the Chief Operations Officer (a Mr. Sekhokho) that he (Sekhokho) would investigate and come back to him (Applicant). Apparently nothing came out of Sekhokho's promise until the Applicant sent him follow-up emails towards the end of March 2011. The Chief Operations Officer eventually responded at the end of March 2011 requesting the Applicant to provide him (COO) with a letter from His Majesty King Mswati III appointing him as Government Liaison Officer, which the Applicant did by return.
- [7] Upon receipt of the letter confirming the Applicant's appointment by His Majesty the King, the COO wrote to the Applicant, also using the same mode of communication, acknowledging receipt of the requested appointment letter and further advising him that his issue

would be deliberated by management and that he would thereafter revert back to him. That was to not be until the Applicant approached his attorneys for advise and action, hence the present application.

[8] The 1<sup>st</sup> Respondent opposed the application raising two (2) preliminary points of law namely;

8.1 Jurisdiction and

8.2 Dispute of fact.

[9] The 1<sup>st</sup> Respondent's Chief Operations Officer states in his answering affidavit that he joined Maloma Colliery Ltd at the beginning of February 2011 in the capacity aforesaid. According to him, in July 2010 the mine was taken over in terms of its shareholding by Chancellor House Holdings (CHH) Swaziland in the sense that CHH owns all the shares of Point Blank 192 (Pty) Ltd and the said Point Blank in turn acquired 75% of the shares in Maloma Colliery Ltd. The remaining 25% shares are held by the Ingwenyama in Trust for the Swazi Nation duly represented by Tibiyio Taka Ngwane.

[10] He further states that upon his arrival at the Mine it emerged that it was a misnomer to consider the Applicant to be an employee because of the following reasons;

a) he had no contract of employment,

b) he did not carry out any substantive duties on the Mine,

c) he did not have any hours of work,

d) he was not required to be on the Mine or to report to any person  
and

e) his position did not exist on the Mines organogram.

- [11] The Chief Operations Officer further submitted that the position of the Applicant as Government Liaison Officer did not amount to an employment relationship and as such this court did not have the requisite jurisdiction to entertain the present application.
- [12] The second point in limine, as raised by the Chief Operations Officer in his answering affidavit is to the effect that: Since the Applicant is well aware that the 1<sup>st</sup> Respondent disputes that he is an employee, therefore there exists a dispute of fact which he (Applicant) ought to have anticipated which in essence means that application proceedings are not suitable for his matter and as such it should be dismissed.

### **DISPUTE OF FACT**

- [13] Arguing on behalf of the 1<sup>st</sup> Respondent, Mr. Sibandze stated that the Applicant is well aware that the 1<sup>st</sup> Respondent disputes that he is an employee in its undertaking. He referred the Court to the Chief Operations Officer's answering affidavit where at paragraph 11 he (COO) states that in discussions with the Applicant the COO made it clear that he could not establish what relationship the Applicant had with it (company). Hence the request for him to obtain a letter of appointment from the office of the 2<sup>nd</sup> Respondent.
- [14] The court was further referred to paragraph 12 of the COO's answering affidavit where he reveals that there was a discussion between the Acting Board Chairman and a Mr. Sabela Dlamini (a practicing attorney and relative of the Applicant) on the issue of his status with the 1<sup>st</sup> Respondent.

[15] From these interactions, it was therefore clear that there was a dispute about the Applicant's status, Sibandze further argued. And the Applicant should have reasonably foreseen the existence of such dispute and ought not to have brought the present application in the manner he did. In this regard the court was referred to the case of ***Vivian Hammond V Brent Hammond and Another IC case No. 635/08.***

### **JURISDICTION**

[16] This was the second point in limine argued by the 1<sup>st</sup> Respondent's counsel. Basically the argument here is that; the initial letter of employment gives rise to an employer/ employee relationship. However when the Applicant was appointed by His Majesty the King, he ceased to be an employee of the 1<sup>st</sup> Respondent. And the mere fact that his salary continued to be paid by the 1<sup>st</sup> Respondent does not mean that he was still its employee. In support of the assertion above, the Court was referred to the cases of:

- **Michael Koekemoer V Usuthu pulp Company Ltd t/a Sappi Usutu case No. 257/06**
- **Derek Charles McMillan and Another V Usuthu Pulp Company t/a Sappi Usuthu case no. 187/2006.**

[17] Sibandze further submitted that the Applicant was in fact rendering a service to the 1<sup>st</sup> Respondent, but argued that such service fails short of an employer/employee relation. Counsel's argument in this regard was that the key indicators of the existence of an employer/employee are 'control, authority and discipline'. He referred the Court to annexure 'TD6' which is a letter from the 2<sup>nd</sup> Respondent's office addressed to the Chief Operations Officer crafted as follows;

**“Appointment of Mr. Themba Dlamini as his representative and Liaison officer at Maloma Colliery Limited.**

***We have it In Command to inform you that Mr. Themba Dlamini as been appointed by His Majesty King Mswati III as his representative and Liaison Officer at Maloma Colliery Limited. This appointment shall stand until further notice which will come from the King’s office ...”  
(sic)***

- [18] Sibandze reiterated his earlier submission that when the Applicant was appointed to be His Majesty the King’s representative and Liaison Officer in 1996, he ceased to be an employee and assumed the new status of King’s representative. He accordingly prays for a dismissal of the application on the basis of these points in limine.
- [19] Mr. Jele, for the Applicant, submitted that the Applicant did not reasonably foresee that his employment status would be in issue. His contention herein being that since 1993 the Applicant has continuously rendered his services at the 1<sup>st</sup> Respondent’s undertaking and that the only thing that changed in 1996, following his appointment by His Majesty, was the title of his position. He further submitted that there was never a termination letter given to the Applicant nor was he paid his terminal benefits before assuming the new position. This, he stated, goes to prove that he has always been regarded, and in fact is, an employee of the 1<sup>st</sup> Respondent.
- [20] Jele further submitted that from the discussions on the issue, a dispute that manifested itself was of the appointment of the Applicant by His Majesty the King, hence the request of proof to that

effect from the 2<sup>nd</sup> Respondent. According to Jele there was never a dispute about the Applicant's employment status and as such he could not reasonably foresee the existence of such. The court was referred to 'TD2' which is the Applicant salary advice slip. This document exhibits the Applicant's 'start date' (date of employment), as 01 October 1993 and his 'employee no' as 0008. It also spells out his earnings and deductions. These, Jele further submitted, go to prove that he is an employee and as such there is no dispute on his status as such.

[21] Arguing on the point in limine relating to this court's jurisdiction to hear and decide on this matter Jele stated that the Applicant satisfied the requirements of an employee as articulated on the **Koekemoer and McMillan** cases. These requirements as stated in the two cases above are that;

- 21.1 The employee must render his services to the employer,
- 21.2 There must be a written contract,
- 21.3 Employee must be paid a monthly salary
- 21.4 Employee does not render service to any other employers,
- 21.5 The employee is subject to the direct control, authority and discipline of the employer.

Jele further disputed Sibandze's submission that the Applicant is kind of liaison referred to in the code of practice in the Industrial Relations Act 2000 (as amended), arguing that those are specifically known as boNdabazabantu (liaison officers) and their role and functions are to promote culture, customary values and harmony in industries – as opposed to the Applicant who was appointed by His Majesty the King through the 2<sup>nd</sup> Respondent. Jele finally submitted that there was no



merit in the 1<sup>st</sup> Respondent's points in limine and accordingly prayed for their dismissal.

[22] The first question for determination by this Court is on the existence of the alleged dispute as raised by the 1<sup>st</sup> Respondent. It is a trite rule of practice that it is certainly not proper that an Applicant should commence proceedings by motion with knowledge of the probability a protracted enquiry into disputes facts not capable of easy ascertainment. The crucial question in such circumstances is whether there is a real dispute of fact. So that an opposing party's mere allegations of the existence of the dispute of fact does not suffice as conclusive proof of such.

***See: Room Hire Co. (Pty) Ltd V. Jeppe Street Mansions 1949 (3) SA 1155.***

[23] The duty of this Court is to examine the alleged dispute of fact and thereafter make a decision as to whether in truth there is a real issue of fact which can not be satisfactorily determined on the affidavits and documentary evidence before it, without the aid of oral evidence.

[24] The 1<sup>st</sup> Respondent herein denies that the Applicant is an employee. On the other hand the Applicant maintains that he is an employee and in support of this assertion annexed **'TD1'** and **'TD2'** respectively. These documents are his letter of employment, which supports his assertion that indeed he was employed as Public Relations Officer for the 1<sup>st</sup> Respondent with effect from the 1<sup>st</sup> October 1993. **'TD2'** - the pay slip - indicates that his start date was indeed the 1<sup>st</sup> October 1993. The pay slip further indicates that his occupation is Government Liaison Officer. This gives credence to the assertion that his position changed from that of Public Relations

Officer to Government Liaison officer. He was also allocated an employee number (0008). We are therefore certain that the established probabilities in favour of the applicant's case should be accorded more weight than assertions to the contrary. **(see: Decro Paint and Hardware (PTY) LTD V Plascon-Evans Paints (TVL) LTD 1982 (4) SA 213)**. The court is not persuaded that the authority of the **Hammond** case (supra) supports Mr Sibandze's contentions on the issue of dispute of fact in relation to this case. Clearly these two cases are, in our view, distinguishable.

- [25] The Industrial Court of appeal recently dealt with a similar issue in the case of **Lynette Felicity Groening V Standard Bank of Swaziland Ltd and Another case no.2/2011** where the court per Masuku A.J.A. stated as follows at para 22;

***“...the Industrial Court Rules permit the launching of matters on motion proceedings provided that no dispute of fact is reasonably foreseen. In this regard, the applicant must fully consider the matter on the information available; its merits and demerits and cast his eyes ahead on the probabilities whether a dispute is likely, given all the facts at hand, to arise.” (Courts emphasis)***

- [26] The facts at hand in this case all indicate that the 1<sup>st</sup> Respondent has, through out the Applicant's close to 18 years with it, always regarded and treated him as an employee. Even after the take over by the new majority shareholders, Chancellor House Holdings Swaziland, he continued to be regarded as such until the 1<sup>st</sup> Respondent stopped his salary. Having considered all the merits and demerits of his case, the Applicant cannot, in the Court's view, be said to have reasonably

foreseen that the 1<sup>st</sup> Respondent would turn around and dispute that he was an employee. It is our view and finding that the alleged dispute of fact herein is determinable on the evidence before this court and in favour of the Applicant. Accordingly the point in limine on dispute of fact is dismissed.

[27] Having dismissed the point in limine on dispute of fact it should follow that the point of law on the jurisdiction of this court should also be dismissed. The success of this second point depended on a finding to the contrary by this court on the first one since they are intertwined. Suffice to state however that the court has had regard to the realities of the parties' relationship and the definition of employee in both the Employment Act, 1980 and the Industrial Relations Act, 2000, (as amended). There is no doubt to the Court that the Applicant is an employee of the 1<sup>st</sup> Respondent.

[28] Taking into account the foregoing the Court comes to the conclusion that it does have jurisdiction to hear and determine the present application before it. The point in limine therefore on the jurisdiction of this court must accordingly fail as well.

[29] It is the ruling of this Court therefore that both points in limine be and are hereby dismissed. There is no order as to costs.

The members agree.

**THULANI A. DLAMINI**  
**INDUSTRIAL COURT - ACTING JUDGE.**