



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 88/09

In the matter between:

ELIJAH DLAMINI

Applicant

And

**ROYAL SWAZILAND SUGAR
COMPANY LIMITED**

Respondent

Neutral citation: *Elijah Dlamini v Royal Swaziland Sugar Company Limited (88/09) [2013] SZIC 33 (OCTOBER 25 2013)*

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard : 27TH SEPTEMBER 2013

Delivered: 25TH OCTOBER 2013

Summary:

The parties signed a Form of Agreement in terms of Section 13 of the Workmens Compenstion Act of 1983, in terms of which the Respondent agreed to pay the Applicant a sum of E28,426.55 as compensation for an employment accident. The Respondent however failed to pay the Aplicant despite several demands until the Applicant decided to bring the matter to court. In its opposition to the application the Respondent filed a counter application seeking the setting aside of the agreement on the basis of fraudulent misrepresentation.

Held—the counter application ought to be dismissed as the Respondent failed to act within the three months’ period stipulated under Section 13 (3) of the Workmens Compensation Act.

Held further—the Respondent failed to prove *justus error* or any fraudulent misrepresentation which could justify the court in setting aside the agreement.

**JUDGMENT
25.10.13**

[1] The Applicant is an adult Swazi male person of Lobamba and a former employee of the Respondent

[2] The Respondent is a limited liability company duly registered in terms of the company laws of Swaziland having its principal place of business in the Lubombo Region.

[3] The Applicant has instituted the present legal proceedings by way of Notice of Motion in terms of **Rule14 of the Industrial Court’s Rules of 2007.**

The Applicant is seeking an order in the following terms:-

- “1. *Compelling the Respondent to pay to the Applicant the amount of E28,426.55;*
2. *Interest on the said amount at 9% per annum calculated from the 9th August 2007;*
3. *Costs of suit on Attorney and own client scale;*
4. *Further and or alternative relief.”*

[4] The Applicant’s application is opposed by the Respondent which duly filed an Answering Affidavit deposed thereto by Muhawu Maziya who stated in paragraph 1.1 thereof that he is the Company Secretary of the Respondent. The Respondent in its Answering Affidavit also filed a counter application in which it is seeking an order that the Form of Agreement as to Compensation to be Paid, Annexure “ED 6” of the Applicant’s Founding

Affidavit, signed by Dumisani Dlamini on behalf of the Respondent be set aside.

[5] The Applicant thereafter filed his Replying Affidavit. The matter was finally argued in court on 27.09.13.

[6] It was agreed in court that the Respondent having raised a Counter Application, the Respondent's attorney would be the one to address the court first, dealing with the Counter Application filed.

[7] The evidence before the court revealed that the Applicant was employed by the Respondent in 1992 as a labourer. On 10th July 1992, the Applicant and other employees were assisting in moving a certain machinery when the Applicant slipped and fell down onto the floor. The Applicant said he was severely injured. This was denied by the Respondent. According to the Respondent, the Applicant fell onto the floor and suffered minor lacerations. The Respondent further stated in paragraph 5 of the Answering Affidavit that the investigations carried out immediately after the accident revealed that the Applicant had not suffered any serious injuries.

[8] The Applicant said the accident was duly reported to the Commissioner of Labour under Accident Report Number 32550 in terms of the **Workmen's**

Compensation Act of 1983. This was denied by the Respondent in paragraph 6 of the Founding Affidavit. The Respondent stated that the matter was referred to the Workmen's Compensation Board by it in order to resolve the dispute whether the Applicant was injured on duty or not. The Respondent said the incident was never reported in terms of the Workmen's Compensation Act.

[9] The Applicant appeared before the Workmen's Compensation Medical Board on 29th July 1993. The Board's finding was that the Applicant had not suffered any loss of earning capacity as the result of the accident. As a result of this conclusion by the Board, the Respondent resolved that it was not going to pay any compensation to the Applicant.

[10] The Applicant however insisted that he was seriously injured whilst on duty in circumstances that warrant that he should be compensated by the employer in terms of the **Workmen's Compensation Act**. After the findings of the Workmen's Compensation Medical Board that he had suffered no loss of earning capacity as the result of the injury on duty, the Applicant approached the Department of Labour for its intervention. The Applicant's matter was handled by a certain Labour Officer by the name of A.M. Simelane. Mr. A.M. Simelane started negotiations between the parties. At that point the Applicant had launched civil proceedings against

the Respondent at the High Court of Swaziland. The Applicant was being represented by Mlangeni and Company Attorneys. As part of the negotiations process the Applicant agreed to withdraw the legal proceedings pending before the High Court of Swaziland.

[11] In the meantime the Applicant on 18th September 2001 was examined by Doctor F. Molnar who thereafter issued a disablement report which showed that the Applicant was permanently disabled as the result of the injury on duty, and that the percentage loss of earning capacity arising from the disablement was seventy five percent.

[12] The negotiations between the parties, being facilitated by Mr. A.M. Simelane, culminated in the parties signing an agreement as envisaged by **Section 13 of the Workmen's Compensation Act of 1983**. In terms of this agreement, the Respondent agreed to pay the Applicant a sum of E28,426.55 as compensation. The agreement was signed by the parties on 09th August 2007.

[13] It is this agreement that the Respondent is now refusing to be bound by, hence the present application before the court by the Applicant for an order to compel the Respondent to abide by the agreement.

[14] **Respondent's Arguments:-**

On behalf of the Respondent it was argued that;

14.1 *There were certain misrepresentations made to Dumisani Dlamini who signed the Form of Agreement on behalf of the Respondent inducing him to sign the agreement.*

14.2 *There were facts that were not brought to the attention of the doctor who conducted the assessment in 2001. Had the doctor been made aware that the Medical Board had already dealt with the matter in 1993 and ruled that there were no injuries sustained by the Applicant, he would not have made the finding six and a half years later that there were injuries.*

14.3 *The whole process leading to the signing of the form was fraught with irregularities.*

14.4 *The Form of Agreement contains fundamental factual errors, which render the agreement to be a nullity.*

[15] **Applicant's arguments:-**

On behalf of the Applicant it was argued that;

15.1 *The agreement is valid and enforceable for all intents and purposes.*

15.2 *The agreement was a compromise between the parties reached after the Applicant agreed to withdraw the legal proceedings against the Respondent from the High Court.*

15.3 *The Respondent is bound by the agreement taking into account the principle of the law that caveat subscriptor.*

15.4 *The Respondent failed to take action in terms of **Section 13(3) of the Workmen's Compensation Act of 1983** entitling any party to the agreement to cancel it within three months after the date of the agreement.*

[16] **Analysis of the Evidence and the Law Applicable**

The evidence before the court shows that it is not in dispute that the Applicant was injured at work on 10th July 1992. There is a dispute only as to the extent of the injury. The Respondent says the Applicant was slightly injured. The Applicant says he was seriously injured and

that the injury deteriorated to such an extent that he currently uses crutches to walk. Because of the Applicant's insistence that he suffered serious injury, the Respondent referred the matter to the Workmen's Compensation Medical Board. The decision of the Board is final in such matters. This is in terms of **Section 32 (2) of the Workmen's Compensation Act which provides that;**

“The Board shall give a decision in writing to the Labour Commissioner on any matter or dispute referred to the Board by him and that decision shall be final and binding on the Labour Commissioner and on the parties concerned.”

[17] The Respondent argued that the Department of Labour had no right to resuscitate the matter, the Medical Board having made its decision on it.

[18] The evidence revealed that the Applicant thereafter launched a civil suit at the High Court. The evidence also revealed that the parties engaged each other in negotiations about the issue of compensation. Mr. A.M. Simelane was facilitating the negotiation process. On 13th October 2003 Mr. A.M. Simelane wrote to the Applicant's erstwhile attorneys advising them to withdraw the aspect of the compensation from the

legal proceedings pending between the parties at the High Court. The letter appears as follows:-

Workmen's Compensation claim – Elijah Dlamini Vs Mhlume Sugar Co.

In response to your letter TM/td/B 325 dated 6th February 2002 I would like to state as follows:-

- (i) I, Elijah and the company have had several meetings in trying to resolve this issue.*

- (ii) After lengthy discussion on the issue of compensation the company agreed in principle that they would consider paying Elijah his compensation as calculated by myself – provided they get a written assurance that the issue of compensation does not form part of the issues in dispute that are still pending in the High Court.*

It is therefore appreciated that you liaise with the company on behalf of your client to have this issue withdrawn from the list of issues pending before the High Court before I could persue it from their side.

Yours faithfully

A.M. SIMELANE

For: COMMISSIONER OF LABOUR”

[19] The importance of this letter is that it shows that indeed there were negotiations between the parties which culminated in the signing of the Form of Agreement in terms of **Section 13 of the Workmen’s Compensation Act.**

[20] Again on 20th March 2006 Mr. A.M. Simelane wrote a letter to the Respondent’s Manager. It is also important to reproduce this letter in full as it proves that there was communication between the parties about the compensation of the Applicant. The letter is Annexure “ED3” of the Applicant’s Founding Affidavit and it appears as follows;

The Manager

Mhlume Sugar Co.

P. O. Box 1

Mhlume.

Dear Sir/Madam

Employment Accident – Elijah Dlamini ROA NO. 32550

The above-named workman was injured on duty in your employment in the year 1992.

*The accident was duly reported to Commissioner of Labour under accident report No 32550 in terms of the **Workmen's Compensation Act 1983.***

The workman was referred to various medical specialists both locally and abroad for treatment.

The injury has now aggravated to the point that the workman cannot walk unsupported.

In the meeting we had with your Personnel Manager in July 2003 it transpired and the company agreed in principle that it would consider the

issue of compensation payment provided that it was withdrawn from the other issues in dispute that are presently pending before the court.

I therefore requested his Attorneys, Mlangeni and Company in Manzini to separate and withdraw the issue of compensation from the other issues that were before the court because the matter of Workmen's Compensation was still being dealt with by the office of the Commissioner of Labour and the company.

Instead of communicating their response to you, they wrote back to me. See attached copy of their letter.

I strongly believe that the company and my office are capable of resolving this matter amicably.

Your consideration towards resolving this issue is appreciated.

Yours faithfully

A.M. SIMELANE

For: COMMISSIONER OF LABOUR”

[21] Indeed, the Applicant's erstwhile attorneys filed a Notice of Withdrawal of Action of case No. 2335/95 at the High Court dated 10th May 2006.

[22] The negotiations between the parties culminated in the signing of the Form of Agreement, Annexure "ED6" of the Applicant's Founding Affidavit. After the signing of this agreement the Respondent failed to pay to the Applicant the agreed sum of E28,426.55, hence the present application.

[23] The Applicant demanded the payment through its current attorneys. In response to the demand, the Respondent never denied liability. The Applicant's Attorneys wrote the letter of demand to the Respondent on 13th August 2008.

In response thereto the Respondent wrote a letter on 20th August 2008 stating the following:-

"Re: Elijah Dlamini – Workmen' Compensation claim"

1. *We refer to your letter dated 13th August 2008 and more especially, to the telephone conversation with our Ms Masango and Ms Magongo on the 15th august 2008.*
2. *As was explained to yourself, we are unable to trace the correspondence in connection with this matter hence, we require that you furnish us with Mr. Dlamini's employment Number and the department he was attached to.*
3. *We will be in a position to progress the matter once we have received the said information.*
4. *We look forward to hearing from you shortly.*

Yours faithfully

LUNGILE MASANGO

ASSISTANT COMPANY SECRETARY

[24] The Applicant's Attorneys again wrote to the Respondent on 29th September 2008. The Respondent responded by letter dated 14th October 2008, Annexure "ED8" of the Applicant's Founding Affidavit. Again in

their response the Respondent did not deny liability. The letter in part appears as follows:

“Re: Elijah Dlamini/Workmen’s Compensation claim

1. *We kindly refer you to the above matter.*
2. *We note the contents of your letters dated 2nd, 11th and 22nd September 2008.*
3. *As you are aware that this is a long standing and contentious issue, we are currently resolving working on ascertaining the reasons for the delays in this matter and also gathering supporting documents to ensure finalization.*
4. *Your patience is appreciated and we will revert to you shortly.*

Yours faithfully

LUNGILE MASANGO

ASSISTANT COMPANY SECRETARY

[25] Again, the evidence revealed that at no point after the signing of the Form of Agreement by the parties on 09th August 2007, did the Respondent ever deny liability, or challenge the validity of the agreement.

[26] The Respondent's Attorney argued that the Respondent did challenge the validity of the assessment which stated that the Applicant had suffered seventy five per cent permanent disablement through the letter that they wrote to the Commissioner of Labour dated 12th December 2001, Annexure "MM6" of the Answering Affidavit. Paragraph 5 of this letter states the following:-

"5. A period of eight years have since lapsed since the initial assessment and the employee himself left our client's employ at lease (sic) some six and a half years ago, we are uncertain as to whether this latest assessment which was apparently carried out in September 2001 is valid and enforceable."

[27] As already pointed out in this judgment, the evidence revealed that there were negotiations between the parties that culminated in the signing of the Form of Agreement, Annexure "ED6" of the Founding Affidavit. This letter by the Respondent's Attorneys was written on 12th December 2001. The agreement was entered into between the parties on 09th August 2007.

The Respondent or its Attorneys never challenged the validity or enforceability of this agreement after it was signed in 2007.

[28] Looking at the evidence before the court as a whole, the court will therefore come to the conclusion that there were negotiations between the parties facilitated by the Department of Labour through its officer Mr. A.M. Simelane, and that the negotiations led to the signing of the Form of Agreement on 09th August 2007.

[29] The agreement signed by the parties was in terms of **Section 13 of the Workmen’s Compensation Act. Section 13 (3)** of this Act provides that:

“The Court may, notwithstanding that an agreement made under sub-section (1) has been made an order of the Court, on application by any party to the agreement within three months after the date of the agreement, cancel it and make such order (including an order as to any sum already paid under the agreement) as it may think just, if it proved

(a) that the sum paid or to be paid was or is not in accordance with sub-section (1) or sub-section (2) (a); or

(b) that the agreement was entered into by mistake or in ignorance as to the true nature of the injury; or

(c) that the agreement was obtained by fraud, undue influence, misrepresentation or other improper grounds for avoiding it.”

[30] The Respondent failed to approach the court within the three months period stipulated in **sub-section 3** to have the agreement cancelled.

[31] There was no explanation in the papers before the court by the Respondent as to why it did not challenge the agreement signed on 09th August 2007 within three months if it was of the view that the agreement was not valid as it now claims.

[32] There was also no application for condonation of late filing of the Counter Application as it was filed outside of the three months' period stipulated by the Act. Even if the Respondent had applied for condonation for late filing, it is not clear whether the court has a discretion as the time frame was fixed by the Legislature. The court has discretionary powers only in as far as the court Rules are concerned.

[33] From the evidence before the court it was clear that the Counter Application was an afterthought on the part of the Respondent in a bid to avoid the payment as agreed to on 09th August 2007. If the Respondent honestly believed that it was not bound by the agreement, it could have applied to court to set aside or cancel the agreement in terms of Section 13 (3) when the Applicant started to demand payment.

[34] It was argued on behalf of the Respondent that the agreement should be set aside because there was a misrepresentation which induced Dumisani Dlamini to sign the agreement on behalf of the Respondent. The cases of **Novick V. Comair Holdings Ltd 1979 (2) SA. 116**; and **Musgrove and Watson (Rhod) (Pty) Ltd V Rotta 1978 (2) SA 918** were relied on in support of this argument. These cases laid down the principle that when a person signs a document as a result of being fraudulently deceived by another as to its contents and character, no valid contract comes into effect.

[35] Each case however must be judged in accordance with its own peculiar facts and circumstances. In the present case the court is unable to find evidence that that there was any fraudulent act that induced the Respondent's employee Dumisani Dlamini to sign the Form of Agreement. The agreement was as a result of protracted negotiations between the parties.

[36] Mr. Mhawu Maziya, the Company Secretary who deposed to the Answering Affidavit stated in paragraph 10.3.5 thereof that Dumisani Dlamini had no prior dealing with the matter and that the Applicant took the Form to Dumisani Dlamini in a calculated move to avoid the officials that were familiar with the background of the matter. In paragraph 10.3.4 Mr. Muhawu Maziya stated that the officials who were dealing with the matter were himself, Lwazi Kunene and Thuto Shongwe. In response to this, the Applicant in his Replying Affidavit stated in paragraph 21 that in fact he submitted the document to Lwazi Kunene, and that it was Lwazi who took the document to Dumisani Dlamini to have it signed on behalf of the Respondent. The Respondent did not apply for leave to file further papers to dispute this evidence.

[37] There was no evidence before the court that Dumisani Dlamini was tricked into signing the Form of Agreement. The evidence showed that he simply did not read the document as he was called out of a meeting that was taking place at the Respondent's workplace. If there was any error, it was clearly not a *justus error*. **(CF. Du Toit V. Atkin's Motors BPK 1985 (2) S.A. 893 (A).** Furthermore, if there was any error, it was a unilateral error caused by his own fault by not giving himself enough time to read the document. The Respondent cannot escape the consequences of the contract

on the basis of a unilateral error taking into account the principle of *caveat subscriptor*. (See:-**Zandile Ntshangase V. Pasada Restaurant case No. 211/07 (IC); George V. Fairmead (Pty) Ltd 1958 (2) SA 465 (A)**).

[38] In any event, and as already pointed out in this judgment, if the Respondent wanted to resile from this agreement, the Respondent should have done so within the period of three months as stipulated by Section 13 (3) of the **Workmen's Compensation Act**. The Respondent failed to do that. This inaction was fatal to its case.

[39] Taking into account all the evidence before the court, and also taking into account all the circumstances of this case, the court will dismiss the Respondent's Counter Application and grant an order in terms of prayers 1, 2 & 3 of the Applicant's Notice of Motion. The court having decided to grant interest on the amount in terms of prayer 2, the Applicant would be adequately compensated for the inconvenience caused by the delay in payment. The court will therefore make an order that the costs in prayer 3, be costs on the ordinary scale. The court will accordingly make the following order:

- a) **The Respondent's Counter Application is dismissed.**
- b) **Order compelling Respondent to pay to the Applicant the sum of E28,426.55 is granted with interest at 9% calculated from 09th August 2007.**
- c) **The Respondent is to pay the costs of suit based on the ordinary scale.**

[40] The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR. M. NKOMONDZE
(NKOMONDZE ATTORNEYS)**

**FOR RESPONDENT: MR. Z.D. JELE
(ROBINSON BERTRAM)**