

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO: 202/2016**

In the matter between:

**THERESA NCAMSILE ZITHA**

**APPLICANT**

And

**GKR NESTAR (PTY) LTD t/a ALTECH NETSTAR**

**RESPONDENT**

Neutral citation : Theresa Ncamsile Zitha v GKR Nestar (PTY) Ltd t/a  
Altech Netstar (202/2016) [2017] SZIC 124

**CORAM**

**SIPHO L. MADZINANE : ACTING JUDGE**

**DAN MMANGO : MEMBER**

**ARTHUR S. NTIWANE : MEMBER**

HEARD : 17/10/2017

DELIVERED : 01/11/2017

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**J U D G M E N T**

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1. This is an application for registration of a Memorandum of Agreement as an order of court and the payment of a sum of E25,465.47 (Twenty Five Thousand Four Hundred and Sixty Five Emalangenzi Forty Seven Cents).
2. The Applicant is a former employee of the Respondent. The Applicant was employed by the Respondent as General Labourer. Her duties as a General Labourer was being a Messenger, Cleaning and Tea Lady at the Respondent's offices. Whilst employed as the General Labourer by the Respondent, the Director of the Respondent also directed her to do domestic duties for two days a week at his house at Dalrich in Mbabane.
3. The Applicant was aggrieved by the doubling up of duties of being a General Labourer at the company offices and also doing domestic work at the Respondent's Director's home in Dalrich. The Applicant first wrote a letter to the employer complaining about the manner she was caused to work (doubling up of duties as a General Labourer and domestic duties).
4. The Court has not been told whether Applicant got a response to the letter she wrote to the employer. After that letter, the Applicant sought the

intervention of the Commissioner of Labour. At the Commissioner of Labour's offices, instead of addressing the issue for which the parties had been invited, they entered into a Memorandum of Agreement in terms of which the Applicant's services were terminated.

- 4.1. The employer agreed to comply with all due terminal benefits provided for by the Employment Act.
  - 4.2. To pay also the whole salary for July 2015 notice pay and severance allowance.
  - 4.3. The Memorandum of Agreement makes reference to calculations which were allegedly attached.
5. The Memorandum of Agreement between the parties was entered into on 23<sup>rd</sup> July 2015. On the 27<sup>th</sup> July 2015, it appears the Commissioner of Labour made calculations which were for a period from the 1<sup>st</sup> August 2001 until July 2015. The calculations were now inclusive of leave pay and SNPF contributions which had to be updated and alleged take over period.
  6. On receipt of the calculations, it appears Respondent raised an issue with these contending that it employed Applicant in February 2011 not in August 2001. As such, it disputed liability to pay Applicant's terminal benefits for the period from 2001 Respondent had no issue with the terminal benefits calculated from February 2011 to July 2015.

As a result of the position taken by Respondent, the latter paid Applicant severance allowance, additional notice calculated from February 2011, allegedly being the date Respondent employed the Applicant and the salary for July 2015.

7. The Applicant is unhappy about the non-payment of terminal benefits from 2001 up to the date the Respondent allegedly took over the business being February 2011. As a result of that, Applicant has commenced these proceedings against the Respondent seeking to make the Memorandum of Agreement an order of court because on the alleged partial compliance with same by the Respondent.
8. The Respondent has opposed the proceedings on the basis that it has no legal duty to pay the Applicant terminal benefits for a period it had not employed her. Respondent further argued that Altech Netstar was liquidated so they are not trading in that name nor do they have any relationship with it. Respondent argues that it has complied with the agreement in so far as it (agreement) relates to the Respondent. It employed Applicant on the 16<sup>th</sup> February 2011 as more shown in its letter of employment, which appointment was accepted by the Applicant not in 2001 as the calculations suggest.
  - 8.1. Secondly, Respondent contends that when it signed the agreement, there were no calculations attached to the agreement.

9. The Court notes that the Memorandum of Agreement was signed on the 23<sup>rd</sup> July 2015 but the calculations attached to the application are dated the 27<sup>th</sup> July 2015. The Court has not been told nor is there any explanation which are those calculations that the agreement is making reference to when the parties signed the agreement. Actually, the parties are clearly far apart in this regard. The letter of calculations is not signed by the parties but by the Commissioner of Labour only. No explanation has been put forward why the parties did not sign the letter of calculations if indeed its these calculations they agreed on.
10. In terms of the **Employment Act 1980** as amended, in particular **Section 33 (bis)** provides as follows:

**Payment of all benefits before selling business**

**S33bis (1) “ An employer shall not-**

**(a) Sell his business to another person; or**

**(b) Allow a take over of the business by another person**

**Unless he first pays all the benefits accruing and/or due for payment to the employees at the time of such sale or take over.**

**(2) Notwithstanding subsection (1), if the person who is buying the business or taking it over, makes a written guarantee which is understood by and acceptable to each employee that all benefits accruing at the termination of his previous employment shall be paid by him within 30 days and by**

*mutual agreement in writing and approved by the  
Commissioner of Labour, Sub Section (1) shall not apply”*

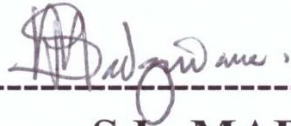
11. The Court finds that there was no signed agreement that was entered into between the Applicant, former employer and the Respondent whereat the latter, at the time she was allegedly taken over from the old employer, Respondent undertook to shoulder responsibility for all her benefits that had accrued to Applicant at the time of termination (with old employer) and were to be paid by the Respondent. The Court also finds that Applicant was offered employment by the respondent by letter dated the 16<sup>th</sup> February 2011 signed by a Director of Respondent one R.G. Conradie. The Applicant accepted the offer and signed in acceptance on even date. The Applicant also acknowledged the date of employment as alleged by Respondent as 1<sup>st</sup> February 2011 in annexure “TN2 being her letter of grievance to the employer.
12. In view of the fact that this dispute arises out of a Memorandum of Agreement entered into between the parties, this court would be loath to leave the parties with no remedy as it appears the parties are capable to deal with the matter on their own. The Court, however will not register the agreement nor order payment of the money as the amount arises out of the disputed calculations.
13. It is the considered view of the court to refer the matter of the Memorandum of Agreement to the Commissioner of Labour to convene both parties regarding the calculations. The Commissioner of Labour is advised to pay

attention to the law in particular **Section 33 bis of the Employment Act of 1980** as amended when dealing with the matter.

Accordingly, the court makes the following order.

- (i) The application to register the Memorandum of Agreement as an order of court and to direct payment of the sum of E25,465.47 is dismissed.
- (ii) The Commissioner of Labour is directed to convene the parties to the Memorandum of Agreement regarding the calculations.
- (iii) Both parties are granted leave to approach court for remedy after that stage if they deem it necessary.
- (iv) There is no order as to costs.

The Members agree.



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**S.L. MADZINANE**  
**ACTING JUDGE – INDUSTRIAL COURT**

For Applicant : Mr. L. Malinga  
(Malinga & Malinga Attorneys)

For Respondent : Mr. Z. Hlophe  
(Magagula & Hlophe Attorneys)