



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO 369/19

In the matter between:

ALEX MDLULI

Applicant

And

NGIFUNAKWENTEKILE INVESTMENTS (PTY) LTD

Respondent

Neutral Citation:

Coram:

X HLATSHWAYO– ACTING JUDGE

(Sitting with Miss. N Dlamini & Mr. D. Mmango)

(Members of the Court)

Heard : 12 May 2020

Delivered : 27 May 2020

JUDGEMENT

1. The Applicant has applied to Court for determination of an Unresolved Dispute,
claiming from the Respondent dues emanating from constructive dismissal. Attached to the application is a Certificate of Unsolved Dispute dated the 30th September 2019.
2. The application was opposed and pleadings closed. The matter was to be heard
on the **11th and 12th May 2020**, however on the **11th May 2020** there was no appearance for the Respondent. There had been service of the Notice of Set Down of the matter on the **5th May 2020**. The Applicant's representative submitted that she was advised by the Respondent's representative that he intended to withdraw his services but she had not received the Notice of Withdrawal as Attorney of Record until the matter was called. She postponed the matter to the second day allocated for the trial, after stating that her calls went unanswered by the Respondent's representative.
3. On the **12th May 2020**, there was no appearance for Respondent when the matter was called, consequently, the Applicant successfully applied to have the trial proceed *ex parte*.
4. The Applicant was led in evidence as "**AW1**", and was the only witness. He testified that he is a Mozambican nation who was employed by the Respondent in **September 2011**, as an interstate truck driver. He was a legal resident in Eswatini, having entered the country using his passport at the border. His duties included transporting goods to and from South Africa for the Respondent. He testified that there was no written contract of employment between him and his employer, but an oral one.

5. He testified that during his employment, it was undertaken by Respondent that he would acquire the Applicant's work permits to enable him to work. Two (2) work permits were attached to the Applicant's pleadings, marked "**E1**" and "**E2**". The Applicant confirmed them to be his work permits acquired for him by Respondent. The permits had expiration dates of **2013** and **2015**, whereas he testified that he worked for Respondent until **2019**.
6. His testimony was that when he advised the Respondent in **2015** that his permit had expired, the Respondent told him that the Respondent did not have money for the same then but promised to renew it. His testimony was that he continued in Respondent's employ until 2019.
7. He also testified that upon engagement his salary was E3 500.00 (Three Thousand Five Hundred Emalangeni) per month which rose through the years, until he earned E7 000 (Seven Thousand Emalangeni) per month.
8. His testimony was that in **February 2019** he received a salary of E1000.00 (One Thousand Emalangeni) and enquired from the Respondent about the same. The Respondent is said to have sought indulgence as he was having financial difficulties then. The Applicant testified that the following few months he was paid sums ranging from E1000.00 (One Thousand Emalangeni) to E200.00 (Two Hundred Emalangeni). He testified that he was not sure of the length of the period that the situation obtained, however, he guessed that it was about five (5) months.
9. He further testified that when he complained about the state of affairs to his colleagues in Respondent's employ, none said he was encountering the same problems, but they said that they were getting their full salaries.
10. He testified that he then tried to engage the Respondent but the Respondent told him that she (Respondent) would not hear from Applicant how to run the company. Further, the Applicant testified that the Respondent advised that if the Applicant was not content with the manner in which things were done in the company, he was best advised to resign.

11. He testified that he was ill-treated and there were unpalatable utterances by the Respondent whenever the Applicant asked for money.
12. The Applicant testified that he accordingly resigned from the Respondent's employment through the letter annexed as dated **14th August 2019** and annexed **"A"** to Applicant's papers.
13. Further testimony was that when the Respondent was served with the resignation letter, he gave the Applicant two (2) cheques which were handed in Court as part of his evidence. The cheques are dated **"1 September 2019"** and **"1 October 2019"**. The Applicant testifies that the cheques were not honoured by the bank due to insufficient funds.
13. The Applicant's further testimony was that he returned to the Respondent after the banks would not honour the cheques but he was not given any "good response" so he approached the Conciliation Mediation Arbitration Commission (herein after referred to as CMAC.)
14. He testified that at CMAC, the Respondent advised that she had given Applicant a motor vehicle to sell and recover his dues. It came out in his evidence that when he attempted to sell the motor vehicle, it turned out that it was unsellable because it did not have registration documents/ blue book. The Respondent is said not to have it too, as she bought it from Manzini and was not in possession and never got it from the owner of the vehicle. The Applicant testified that the motor vehicle is lying idle in his yard, and has not been sold.
15. His further testimony was that the vehicle was to settle dues which were over and above the amount in the dishonoured cheques. These included;

-	Unpaid salaries	E25 209.15
-	Notice Pay	E7 000.00

-	Additional Notice	E6 456.00
-	Severance Pay	E16 414.00
-	Leave Pay	E3 228.00
-	Maximum compensation for constructive dismissal	<u>E84 000.00</u>
	TOTAL	<u>E142 307.15</u>

16. The Applicant submitted written submissions. The Applicant submits two issues

for the Court's determination being;

- (i) if he remained in employment after the expiry of the work permits or not
- (ii) Whether Applicant was constructively dismissed by Respondent in August 2019

17. As mention before, the Respondent was not in Court and as such, there was no cross-examination. The evidence of the Applicant went untested and uncontroverted. There are denials are contained in the Respondent's Reply to which, the Applicant filed a Replication.

18. The Respondent, in the Reply, denies employing Applicant beyond 2012, and even then, he employed him as a mechanic, who did piece jobs. This was refuted in Replication, to which salary advice slips specifically paying him as a "senior driver" were attached. These slips span up to **7th March 2018**.

19. To the Replication was also attached the work permit "**E2**" which was permitting him to enter Eswatini to work as a driver for Respondent. The Respondent was not there to examine what that meant, how he got that permit or why he was never questioned by Respondent about it.

20. The Applicant, though unsophisticated and not too eloquent in our siSwati language, came across as a reliable and consistent witness. His testimony tied with the pleadings, and the Court had no cause to doubt his testimony, especially in the absence of cross-examination.

21. Owing to the shoddy job of his representative, the only evidence he did not address in testimony were the attachments to his Replication, which the Court has considered because it stands unchallenged.
22. From the pleadings and the evidence led at the trial, it is evident that the Applicant was employed by the Respondent for the period from September 2011 until February 2019.
23. It is also evident that the Respondent was indebted to the Applicant in a sum unascertainable from the evidence, however, the Court has determined it to be the sum claimed, because the Respondent, did not, at CMAC or in its pleadings, dispute the sum stated by the Applicant, being E142 033.15 (One Hundred and Forty Two Thousand and Thirty Three Emalangenzi Fifteen Cents).
24. It also goes unrefuted either in the pleadings nor at trial, that the Applicant resigned from Respondent's employ, nor that the resignation was caused by the conduct of the Respondent nor that such conduct rendered it such that Applicant could not be reasonably expected to continue in the employment.

S37 of the Employment Act 1980 (as amended) provides

“when the conduct of an employer towards an employee is proved by that employee to be such that the employee can no longer reasonably be expected to continue his employment and accordingly leaves his employment, with or without notice, then the services of the employee shall be deemed unfairly terminated by the employer” (own emphasis)

25. Constructive dismissal is not inherently unfair. The Court has to look at the circumstances to establish whether the conduct of the employer was justified. On the other hand, once the constructive dismissal is proved, the onus shifts to the employer to prove that the dismissal was fair. The central question is whether the conduct of the employer that prompted the employee to resign was fair or unfair.
26. In *casu*, the Respondent has failed to assist the Court in that regard and shirked the onus placed on it. It is left to the Court to determine if the

Applicant has **“proved”** that the **“conduct of the employer”** was such that he could not be **“reasonably expected”** to continue in the employ of the Respondent, and thus left.

Nkonyane J in **Lincoln Ngarua v Swaziland Government IC 188/03** quoted **JOHN GROGAN** in his book **"WORKPLACE LAW" (2005) 8th EDITION AT PAGES 113** dealing with the subject of constructive dismissal states that;

"... To discharge the onus of proving that they were constructively dismissed, employees must prove that it would have been intolerable to remain in employment."

27. Even when the Court looks at **Glory Hlophe v SNIP Trading Centre 69/2002** that;

"mere unreasonableness or illegitimate demands by the employer according to this approach do not amount to constructive dismissal as long as the employee retains a remedy against the employer's conduct short of terminating the employment relationship"

The Applicant, from the unrefuted oral evidence and resignation letter, seems not have had an alternative remedy except to resign.

28. This Court holds that the Applicant has satisfied all the requirements and proved on a balance of probabilities that he was constructively dismissed by the Respondent.

29. Therefore, Applicant's prayers are accordingly granted as follows;

- Unpaid salaries	E25 209.15
- Notice Pay	E7 000.00
- Additional Notice	E6 456.00
- Severance Pay	E16 4140 ✓
- Leave Pay	E3 228.00

- Maximum compensation for constructive dismissal E84000.00
- Costs at the ordinary scale.

Members agree.



XOLISA HLATSHWAYO

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : *MABILA ATTORNEYS IN ASSOCIATION WITH N
NDLANGAMANDLA & S. JELE*

For Respondent : *S. MABILA ATTORNEYS IN ASSOCIATION WITH TL
DLAMINI & CO.*