IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE Case No 204/2021

In the matter between:

LUNGILE MAMBA Applicant

And

NJ ENGINEERING (PTY) LTD Respondent

Neutral citation: Lungile Mamba v NJ Engineering (Pty) Ltd [204/21) [2022] SZIC 76 (17 June, 2022)

Coram: **NGCAMPHALALA AJ**
(Sitting with Mr.M.P.Dlamini and Mr. E.L.B. Dlamini, Nominated Members of the Court)

DATE DELIVERED: 17th June, 2022

SUMMARY: ***Application-payment of arrear salary-employment status-Respondent alleges Applicant was on probation and not retained-no need to give the Applicant notice.***

Held – ***Application dismissed-dispute of facts arise from matter-no order as to costs.***

JUDGMENT

[1] The Applicant is Lungile Mamba an adult Liswati female of Matsapha, in the District of Manzini.

[2] The Respondent is NJ Engineering (Pty) Ltd, a company duly registered in terms of the company laws of Eswatini, it has its principal place of business at Police College Road, Matsapha, Eswatini.

BRIEF BACKGROUND

[3] The present proceedings seek to direct the Respondent to pay the Applicant's arrear salary from December, 2020 to June 2021. Further to direct the Respondent to declare Applicant's employment status. It is on this basis that the Applicant has approached the Court seeking an Order in the following terms:

3.1 That the Respondent pay the salary of the Applicant from December 2020 to June, 2021, being salary arrear due for the aforementioned period;

3.2 The Respondent be ordered to declare my employment status;

3.3 Costs of application;

3.4 Further and/or alternative relief.

[4] The Applicant's Application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by Mr. Aldor Parker the Respondent's Operations Manager. The Applicant thereafter filed its Replying Affidavit.

[5] The matter came first before this Court on the 3rd February, 2022 wherein the Applicant applied for a two weeks postponement of the matter, and same was accordingly granted and the matter was set down for the 28th February, 2022. On the said date the Applicant applied that the matter be removed from the roll as the parties were currently engaged in an out of Court settlement of the matter. The matter resurfaced on the 11th May, 2022 wherein the Court was advised that negotiations had failed and the parties now wished to argue the matter. The 24th May, 2022 was allocated by the Court for argument of the matter. It was agreed in the interim that the parties would proceed to the filing of pleadings and heads of arguments. On the 24th May, 2022 the matter was accordingly argued and judgment reserved.

ANALYSIS OF FACTS AND APPLICABLE LAW

[6] It was the Applicant's submission that she was employed by the Respondent in 1998 as an Account Clerk and was eventually promoted to Accountant. It was her evidence that on or about the end of October, 2020, management informed them that the business was being sold, and new management would be taking over the Respondent. The employees were advised that even with the company under new management, nothing would change with regards to

their employment status. The previous management proceeded to pay the Applicant her gratuity, and the contents of the letter read as follows:-

"Dear Employee,

As of November, 2020, NJ Engineering will be under new management.
As verbally communicated to you, the new management will keep you employed.
Also, as a gratuity for your service, the previous Directors have decided to give you a package.
Signature: _____
Name: Lungile
ID: 7308241100184."

[7] It was the Applicant's submission that she worked under the new management for a period of a month, and on the 30th November, 2020, she was verbally advised by the Respondent to go back home. Since the said date she has not heard from her employer regarding her employment status. It was her averment that the Respondent did not engage her or give notice of the termination of her employment.

[8] In closing it was her argument that she is still an employee of the Respondent, as a valid employment relationship subsist between herself and the Respondent, and no formal notice of termination of her employment was given to her. Therefore, it was her prayer that she be paid her arrear salary

from November, 2020 to June 2021, and further that the Respondent be ordered by the Court to clarify her employment status.

[9] The Respondent in rebuttal, argued that the Applicant was no longer under its employ as she was advised that her services would not be retained, after failing to meet their expectations as the new management after a three-month probationary period. It was its submission that upon the take over by itself a meeting was held with all employees including the Applicant wherein they were advised that they would be put under probation for a period of three months, thereupon they would be advised whether they would be retained or not within the period of probation.

[10] It was the argument of the Respondent, that the Applicant remained under probation for a period of not more than two months, thereafter a meeting was called, wherein she was advised that her services would not be retained. The Applicant is therefore no longer an employee, and all amounts due to her were accordingly paid in full. It was the Respondent further submission that currently in our jurisdiction unlike in neighboring South Africa, there is statutory provision that talks to the automatic takeover of a company. It was its submission that currently in our jurisdiction common law is applied in such instances.

[11] It was Respondent submission that **The Employment Act, 1980**, in particular **Section 33(bis)** provides:-

"(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 employee at the time of such sale or takeover.

(2) ***Notwithstanding subsection (1) if the person who is buying the business or taking 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 agreed in writing and approved by the Commissioner of Labour, subsection (1) shall not apply.***

(3) ***An employer who fails to comply with subsection (1) shall, upon conviction, be liable to a fine not exceeding six thousand Emalangeni or to imprisonment not exceeding two years or both."***

The intention of the Legislature in this section was to protect workers when a takeover takes place. It was to ensure that wherein parties intended to pass ownership of a business to another, workers are protected and their benefits are taken care of and paid either by the old proprietor, or an undertaking is made by the new proprietor to pay such benefits.

[12] The Respondent averred that in the present application, the previous administrator of the business paid up all terminal benefits owed to all employees including the Applicant. It was its averment that the payment of the benefits *in casu* terminated the Applicant's employ with the previous owner, and after the takeover the new management reemployed the Applicant. In support of this argument the Court was referred to the case of **RUDOLF BLOCK V SIYEMBILI MOTORS SWDLID, 99 2004.**

[13] In closing, it was the Respondents argument that as submitted on page 16 of the book of pleadings in particular paragraph 4.3 the Applicant was under probation for a period of two months, and in December, 2020 she was called to a meeting wherein she was advised that she would not be retained by it, and that her services were no longer required. It was further its submission that unlike South African law, the labour law in this jurisdiction does not require notice of termination of an employee's employment status whilst they are on probation. The Court was referred to **Rycroft, A.J and Jordaan, Barney A Guide to South African Labour Law, 2nd edition page 5.**

[14] It was its averment therefore that the Applicant seized being an employee of the Respondent in December, 2020, and that this was evident in that she has not rendered her services since the said date; further since seizing work she is in the process of claiming her balance of the terminal benefits from the previous company owner. This proves that she was on probation when she was dismissed by the new owners, and she was aware that she was not a permanent employee, hence she accordingly reported a dispute against her previous employer and not the Respondent, and as a result thereof the present application should be dismissed.

[15] The law, in our jurisdiction dictates that if as Court is unable to decide an application on paper it may dismiss the application or refer it to oral evidence or refer the matter to trial. Overreachingly, unless the application is dismissed, the Court should adopt the procedure that is best calculated to ensure that justice is done with the least delay. In every case the Court

should examine the alleged dispute of facts and determine whether there is a real issue of facts that cannot be satisfactorily resolved without trial. The emphasis is on proper examination of facts as it stands on paper, it may dismiss the application. The decision is not taken lightly. A robust approach may be employed to avoid fastidiousness and abuse of procedure. The approach, must be applied within reason and the advantages of oral evidence must be carefully weighed to prevent the setting of facts on probabilities. The manner in which *viva voce* evidence would disturb the balance of probabilities is the yard stick and whether a factual dispute exists is not a discretionary decision, it is a question of fact.

[16] In the **ROOM HIRE CO (PTY) LTD V JEPPES STREET MANSION (PTY) LTD 1949 (3) SA, 1155 (T)**, it was stated that (except) in interlocutory matters, it is undesirable for the Court to attempt to settle dispute solely on probabilities disclosed in contractionary affidavits, this was denounced 90 years ago by Tindall, J in **SAPERSTEIN V VENTER'S ASSIGNEE 1929 TPD 14 P.H AT (71)** and it is still the law. This law has been given full judicial effect in this jurisdiction, the principal having been stated in **DINABANTFU KHUMALO V THE ATTORNEY GENERAL CIVIL APP NO. 31/2010** and **HLOBSILE MASEKO (NEE SUKATI) AND OTHERS V SELLINAH MASEKO (NEE MABUZA) AND OTHERS NO. 3815/2010.**

[17] Further **Section 14 (6)(a) and (b)** of the Rules of the Industrial Court, prescribe that where no dispute of fact is reasonably foreseeable in the sense that the application is solely for the determination of a question of law, the procedure laid down in **Part VIII of the Industrial Relations Act,2000 (as amended)** can be dispensed with. The inherently level form

and nature of evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit, because there are factual disputes which cannot or should not be resolved on paper in the absence of oral evidence. The various provisions of **Rule 14** of the **Industrial Court Rules,** takes cognisance of this reality. **Rule 14(5)** requires the Applicant to set out the material facts in the Founding Affidavit with sufficient particularity to allow the Respondent to reply to them. While **Rule 14(8)** expects the same on the part of the Respondent.

[18] Even though not raised by the Respondent, it is evident from the submission of both parties that there are material disputes of fact. The difficulty that the Court is now faced with, is to attempt to settle a dispute solely on probabilities disclosed in contractionary affidavits. Applicant alleges that she is still an employee of the Respondent having been advised to go home, and awaiting to be recalled by the Respondent. Whilst on the other hand the Respondent argued that the Applicant was verbally dismissed whilst on probation, so no notice was required to be given it terms of the law.

[19] The Respondent submitted that the Applicant is no longer under its employ, which *prima facie* means the Applicant's services were terminated. From the arguments raised, if the Court was to grant the orders sought by the Applicant, it would be effectively be reviewing the decision of the employer, of dismissing the Applicant, without it having conducted an enquiry into the lawfulness or fairness of the employer's conduct. The proper route in such instance is provided for in **Part VIII of the Industrial Relations Act, 2000 (as amended).**

[20] Having total regard to the submissions made by the parties, and for the reasons articulated by the law above, the Court considers that there is little value if any to be gained, by referring the matter to oral evidence, as opposed to directing the Applicant to start afresh using **Part VIII,** of the **Industrial Relation Act, 2000 (as amended).** Further it is the Courts view that this course of action should have been adopted by the Applicant from the very onset, since it must have foreseen or at the very least, should have foreseen the numerous disputes of facts, which have arisen. It is evident now that the application cannot be resolved by way of motion proceeding. As a result of these reasons, the application is dismissed. Applicant is directed to file fresh proceedings, using the provisions of Part VIII of the **Industrial Relations Act, 2000 (as amended).**

[21] This is the Order of Court:

1) **The application is dismissed.**
2) **There is no order as to costs.**

The Members Agree.

B. NGCAMPHALALA
ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT : Ms. S. Dlamini.
(Magagula Attorneys)

FOR RESPONDENT : Mr. N. Maseko
(Masina Mzizi Attorneys)