

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 412/2015

In the matter between:

STEVEN DAVID MAGAGULA

Applicant

AND

MASHABA'S TRANSPORT

Respondent

Neutral citation: Steven David Magagula v Mashaba's Transport
412/2015 [2023] SZIC 33 (21 April 2023)

Coram: **L.L. HLOPHE-JUDGE**

*(Sitting with Mr. M.P. Dlamini and Mr. EL.B. Dlamini –
Nominated Members of the Court)*

LAST HEARD: 03 April 2023

DATE DELIVERED: 21 April 2023

SUMMARY: *Labour Law- Unfair dismissal claim-Applicant moved this application claiming unfair dismissal-he claimed to have been employed as a Clerk- Respondent denied ever employing the Applicant- whether the Applicant can be said to have been employed as a result of*

the work he did for Respondent -Respondent denied having employed the Applicant- but stated that he was a service provider whom he used for renewing permits for his buses- and that he paid him a monthly salary for that work for over 10 years.

Held: The Applicant was an employee of the Respondent- there was sufficient control of the Applicant by the Respondent as he reported for work on a daily basis -he received a salary monthly to show that he worked for a sufficiently long hours a week as envisaged by the employment Act-it was not shown in evidence that the employer did not exercise control over him.

Held: held accordingly that the Applicant was unfairly dismissed.

JUDGMENT

BRIEF HISTORY

[1] The matter was concluded on 05 December 2022 where upon both parties were called upon to file closing submissions by 14 December 2022 and 16 December 2022 respectively. This was not done, until on the 30th of January 2023 when the Applicant filed its closing submissions. Respondent submitted his closing submissions on the 23rd of March 2023, hence the delay in finalizing this matter.

[2] The Applicant, one David Steven Magagula moved the present application in this Court claiming to have been unfairly dismissed by the Respondent who

he claims was his employer. He further alleged that the Respondent had employed him as a clerk.

- [3] The Respondent is Mashaba's Transport, a sole Proprietor, carrying on business in the Lomahasha area.
- [4] The Respondent disputes having employed the Applicant as a Clerk or in any capacity, it claims that the said Applicant was only a service provider who would from time to time renew permits for its transport business and for other transport operators.
- [5] The Applicant alleges that he was employed by the Respondent on the 30th August, 2002 as a clerk in his papers filed in Court. He had allegedly been in the employment of the Respondent for a period of about twelve (12) years when the Respondent allegedly dismissed him by an (SMS) message without a hearing in December 2013.
- [6] At that time the Applicant alleges that he was earning a salary of E1668.00. 00(one thousand six hundred and sixty Emalangeneni Only) per month. This salary he claims was an underpayment as he alleges he was supposed to be paid a sum of E2410.00 as a Clerk and in line with the minimum wages prescribed by the Gazette, which was attached to his papers.

[7] The matter went through the Conciliation, Mediation and Arbitration Commission (CMAC) process as per the prescripts of the law. The matter could not be conciliated upon hence the issuing of a Certificate of Unresolved Dispute.

[8] Relying on the certificate of an unresolved dispute Applicant instituted these proceedings claiming to have been unfairly dismissed and therefore that he should be paid the following amounts;

8.1 Notice pay	E2 410.76
8.2 Additional Notice Pay (12yrs x 469.05 x 4)	E3 708.80
8.3 Severance allowance (12yrs x 469.05 x 10)	E9 272.00
8.4 Underpayments from July 2012 to December 2013	E7 393.68
8.5 Maximum compensation	E28 920.00
	<u>E53 374.20</u>

[9] The applicant called two witnesses in support of his case. These were himself and a Mr Mduduzi Shongwe.

[10] Testifying as the first such witness the Applicant contended that he was employed on the 30th August 2002, as a Clerk. In this position he alleged that he used to apply for permits for the Respondents vehicles. He would also do various other duties such as cleaning the Respondents yard, act as a security guard on certain occasions and also fuel the Respondents vehicles. There were

also moments he testified to when he would accompany the Respondent to attend to break downs suffered by the respondent's vehicles. In some instances they would do this at night. We noted significantly when he said they had been friends with the Respondent although he would pay him a monthly salary of E1668.00.

[11] To some extent the Applicant's version was supported by his only witness, one Mduduzi Shongwe. A notable feature in this witness's testimony was when he confirmed that although their terms of his employment/engagement with the Applicant were not the same they were both paid together monthly by Joyce Dlamini, who worked for Mashaba's business. He confirmed further that the applicant would report for duty on a daily basis and perform all the duties he mentioned including the renewal of buss permits. He confirmed that Mashaba transport and Peters transport shared a yard and he would be assigned duties pertaining to both businesses.

[12] To prove its own case the Respondent led two witnesses namely the proprietor of the business, Mr Mashaba and one Joyce Dlamini. The version of the Respondent and its witness was a denial that the Applicant was ever employed by the respondent. This concerned his employment as a Clerk or even in any other position. He testified that in line with the size of his undertaking he had only one person employed as a clerk and said that was the witness Joyce Dlamini. Applicant could not therefore have been his Clerk as well.

[13] He told the Court that the applicant was a service provider whom he engaged for purposes of attending to his permit renewals as and when it became necessary to do so. Other than making a blatant denial of the Applicant performing the other duties he testified he would perform alongside attending to the vehicle permit issues, Mr Mashaba did not specifically deny each of the other tasks allegedly mentioned by the Applicant. There was a strong denial by Mashaba that Applicant was a Clerk. He mentioned there was only one office where a Clerk worked and that Clerk he said, was Joyce Dlamini.

[14] Respondent did not deny that some time in December 2012 he sent the Applicant an (SMS) message, in terms of which he told him to go and look for something better. The background to this SMS was revealed as being that the applicant had grown a tendency of complaining about his salary or remuneration or retainer as being too small.

[15] The Respondent's version was corroborated by that of Joyce Dlamini who denied that the Applicant was an employee of the Respondent in a position of Clerk. She confirmed that she was the only Clerk to the Applicant's business and as proof of that fact there was only one small office in that undertaking which was occupied only by her.

[16] She knew the Applicant as one engaged to attend to the transport or vehicle permit issues of the Respondent. This was in fact a line of business for the Applicant as he performed that function for other transport operators. She denied that the Applicant performed any further task for the Respondent. She

was the one who paid the Applicant his monthly retainer which she distinguished from a salary.

- [17] What one can decipher from the two versions is that there are two questions to answer in this matter is whether or not the Applicant was an employee of the Respondent and if so what his position was. Further whether the Applicant was unfairly dismissed if the latter is answered affirmatively.
- [18] We note the following from the facts of this matter: the Applicant stated that the Respondent had been his friend. This makes sense and explains a number of things. There is no other way one could explain their relationship particularly how it lasted that long if it was run like an employment one. The mixing up and concentration of so many tasks in one person without appearing to be stable in one such task, is not consistent with that of an employed person. For instance at one point she was running with clerical duties when the next morning she was feeding dogs, watching over the premises at night and later refuel the vehicles or even attending to the breakdowns at night in the company of the respondent. In a normal work environment that would have been corrected within the shortest possible time as it is completely unworkable except where there was an understanding between the role players. One is therefore justified to conclude that from the facts it is apparent the relationship of the two was founded more on an understanding than an employment setting. Here the Applicant was obviously more providing menial tasks for a friend than performing duties as an employee. The problem maybe that whilst the said provision of menial tasks for a friend started up well with the friend

being paid more of a tip than a salary, it ended up lasting or enduring much longer than was bearable over the years in the eyes of the law.

[19] It is the only reason one would be able to explain why a person who handles what would normally be files or Clerk work, handling transport permit files or issues, would on other occasions be found looking after dogs and ensuring they had been fed or on other occasions be found providing security services looking after the premises at night and on other occasions be found refueling vehicles as well as attending to brake-downs as he attested in court. Although all these tasks are so vast in between themselves in terms of profile and status, particularly in distinguishing a Clerk from a common labourer, they would in a period of ten years spark a controversy or at least a notable dispute or misunderstanding between the Applicant and the Respondent.

[19] It probably was a result of this friendship that resulted in the relationship lasting so long in its ill-defined perimeters. If the relationship started off as a casual matter between friends it was unlikely that all the formalities involved in starting an employment relationship between parties would be observed. It would be for this reason that although there is **Section 22 of the employment Act ,1980 (as amended)** which obliges the filing in of a form clarifying among other things the status , notice required, salary and position occupied by a person employed which was ignored in this matter.

[20] Section 22 of the Employment Act, 1980 (as amended) prescribes that all employers are compelled to complete and keep a written particulars of

employment form, for all employees. This form has to be given to each employee within Two (2) months of his employment.

[21] Whilst it is not clear why it cannot after 10 years be said that a man who wakes up every day to go to a certain place to perform certain duties, for an indefinite period at a fixed monthly remuneration is not employed. It can not necessarily follow that he is employed as a clerk in the context of a transport business.

[22] According to the Oxford Languages dictionary, a clerk is, "a person employed in an office or bank to keep records, accounts and undertake other routine administrative duties". Whilst the applicant is shown as having had contact with files when he took vehicle permits for renewal, he is not shown a shaving kept records or accounts nor is he shown to have undertaken other routine administrative functions. For instance we cannot agree that the looking after dogs ensuring they had been fed, the re-fueling of vehicle, the provision of sporadic security or night watchman duties or even the casual cleaning of the yard can ever be seen as "routine administrative duties". On the other hand, all these tasks can be performed by a labourer.

[23] A labourer is defined as follows in the Oxford Languages Dictionary obtained on line; a labourer is "*a person doing unskilled manual work for wages*". A casual attendance to the removal of transport is a duty that can be performed by a labourer, just like the provision of cleaning the yard at the Respondent's premises, the looking after and feeding of dogs for a specific monthly fee including attending sporadic break-downs with the proprietor of the business.

[24] It is not hard why the applicant found it more appropriate to want to categorise his ill-defined position as that of a clerk. It is because it would be convenient for him to clarify himself as a clerk given that that position has a fixed minimum position in terms of the Gazette governing the salaries in the transport industry.

[25] A person who is required to wake up on a daily basis, attend at a certain business to perform certain defined, various duties for a specified monthly salary cannot in our view be said not to be an employee envisaged in terms of **Section 35 of the Employment Act**. We are convinced that such a person should be construed as an employee who in the given undertaking was more akin to a labourer.

[26] The reality is that in this jurisdiction other than for these instances mentioned in the **Section 35 of the Employment Act**, every other employment is protected from arbitrary termination of service or from the unfair dismissal of an employee.

[27] **Section 36 of the Employment Act of 1980** read together with **Section 42(2)** of the same Act, clarify when it would be fair to terminate the services of an employee. Of course the consideration of these two Sections to determine the fairness or otherwise of a dismissal is incremental. By this we mean that **Section 36** as first point of call before getting to **Section 42 (2) (a) and (b)** of the same Act. Of course the whole enquiry could end in **Section 36** if it were to be found that there was no fair reason for termination justified in that

Section, where however it was found that the dismissal is shown to be for a ground covered under Section 36, the next enquiry would be whether taking into account all the circumstances of the matter it was fair and reasonable to dismiss the employee.

[28] On the other hand **Section 42 (a) and (b)** provides as follows:

“The services of an employee shall not be considered as having been fairly terminated unless the employer proves—

- (a) That the reason for the termination was one permitted by Section 36; and*
- (b) That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.”*

[29] Other than the foregoing provisions the position is long settled in our law that for a dismissal to be fair, there should be proved both the procedural and substantive elements of fairness.

[30] It has been established beyond doubt that when his services were terminated, the applicant was only sent an SMS message which informed him that he should try his luck elsewhere for a better salary. The message to the Applicant was couched in the following manner:- *“sala uyotifunela embili lakuncôno khona”*. In this sense there was no meeting the procedural element because he was not charged with any offence. He was not called to any disciplinary hearing and he was never heard before his dismissal. In other words it was never alleged nor shown that he had committed a dismissible offence. For

these reasons his dismissal was in these circumstances not fair both procedurally and substantively. In the case of *Laison Ntini v Emtfuntini Investment (Pty) Ltd Case No.220/2018* the Court had this to say about such instances:

"it is unacceptable that at this contemporary age we still have employers who can still dismiss employees at a whim." The Applicant in the Laison Ntini's case (supra) had been dismissed without a hearing such as in the present case, with the employer alleging that he took a "business decision" to dismiss its employee.

[31] The Court in *Laison Ntini's case* (supra) also cited with approval the case of *Mphikeleli Shongwe v Principal Secretary Education Case No. 207/2006*. Where Dunseith JP (as he then was) stated the following:-

"An employee who faces dismissal for alleged misconduct should be given the opportunity to state his case and answer to the charges against him." The Court further stated that '...the requirement of a fair disciplinary hearing is so fundamental in the context of labour relations that it will be enforced by the Industrial Court as a matter of policy, even where the case against the employee appears to be unanswerable."

[32] Further in *Nkosinathi Ndzimandze and another v Ubombo Sugar Limited IC Case No.476/2005* the Court upheld the above sentiments and said that:-

42 "Even in situations where management is convinced of the guilt of the employees, it is still obliged to ensure that a fair disciplinary process is observed. The disciplinary process is not merely a means to enable management to establish the facts and impose an appropriate disciplinary sanction. It is also essential as a means to achieve fair and equitable labour relations. Irrespective of the merits of the disciplinary changes, the requirement of a fair disciplinary hearing is an end in its own right."

43. To echo a phrase from criminal jurisprudence, fairness must not only be done, it must be seen to be done. An employee who is dismissed without a fair disciplinary process is likely to feel aggrieved, no matter how fair and reasonable the grounds may be for his dismissal. His fellow employees may perceive the dismissal as arbitrary. Such dismissals reinforce the perception of the subordination of labour to the whims of management. They create discontent and disharmony at the workplace, and spawn unnecessary labour disputes and litigation. That is why this Court has observed that the requirement of a fair disciplinary hearing is an end in its own right, as a means to achieve fair and equitable labour relations.'


[33] In the circumstances the propriety of the dismissal of the applicant fails on the first point of enquiry, namely it was not for a reason governed by **Section 36 of the Employment Act 1980 (as amended)**. When taking into account all the Circumstances of the matter, it was not fair and reasonable to dismiss the applicant.

[34] The conclusion we have come to therefore is that the dismissal of the applicant was not fair procedurally and substantively.

[35] Although the applicant had, over and above the usual claims that come with an unfair dismissal, claimed for what he termed underpayment, and /or a short fall to his remuneration, we have come to the conclusion that claims relating to underpayment or short payment on the basis of his not being paid like a Clerk, cannot succeed. We have found that he was not engaged as a clerk but as a general labourer and that the amount he was paid was in keeping with that position. Accordingly, whatever amounts are to be paid to him in this matter would have to be calculated at the rate he was being paid or the amount he was earning monthly; that is the sum of E1, 668.00 (One Thousand Six Hundred and Sixty Eight Emalangenani only).

[36] For the foregoing reasons the applicant's case succeeds. He shall be paid for the under listed items in terms of calculations to be computed by the Applicant and served on the Respondent and the court for endorsement within seven days from date of this judgment. Notice pay, additional notice, severance allowance and compensation for 12 months.

The Members agree.



L. L. HLOPHE

JUDGE- INDUSTRIAL COURT

FOR APPLICANT: Mr. M. Ndlangamandla
MLK Ndlangamandla Attorneys

FOR RESPONDENT: Mr. M. Magagula

Zonke Magagula Attorneys