IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

Case No. 269/2013

In the matter between:

MFANAWEKHAYA DLAMINI	1st Applicant
THEMBA MAHENGUELA	2nd Applicant
LIZERIO MAHLALELA	3rd Applicant
SIBONANGAYE NTIMBA	4th Applicant
HUA ALBERTO JUVERANCE	5th Applicant
BERNARDO SAMBO	6th Applicant
SAMKELISO MLOTSA	7th Applicant

And

A.G. THOMAS (PTY) LTD	Respondent

NEUTRAL CITATION: *Mfanawekhaya Dlamini & Others v A. G. Thomas (PTY) Ltd (269/2013 [2013] SZIC 16 (31st March, 2023)*

CORAM: N. Nkonyane
(sitting with **S.** Mvubu and G.Ndzinisa
Members of the Court)

LAST HEARD: 05th June 2020

RESPONDENT'S WRITTEN SUBMISSIONS : 16th August 2022

DELIVERED : 31st March 2023

SUMMARY---Labour law---Applicants employed by the Respondent, a civil construction company---Respondent deploying the Applicants to go and work in its project in Botswana---Respondent failing to pay the Applicants certain benefits including out of country allowance---Applicants raising a grievance---Respondent saying it was not legally obliged to pay out of country allowance---Respondent opting to summarily dismiss the Applicants---Applicants instituting proceedings demanding to be paid out of country allowance in terms of Regulation 14 (9) of Regulation of Wages (Building and Construction) Order---Respondent claiming that it has no legal obligation to pay the out of country allowance to the Applicants--- Interpretation of Regulation 14 ---Canons of interpretations restated

Held---The dismissal of the Applicants was substantively and procedurally unfair

Held further---The Applicants are entitled to be paid the balance of the terminal benefits including payment of the out of country allowance

JUDGEMENT

INTRODUCTION

[1] This is an application for determination of an unresolved dispute between the Applicants and the Respondent. The application was instituted by the Applicants against the Respondent in terms of Section 85 (2) of the Industrial Relations Act No.1of 2000 as amended as read together with Rule 7 of the Industrial Court Rules of 2007.

[2] Whilst the matter was awaiting the delivery of judgement, tragedy struck when one of the Court members passed on. The parties were made aware of the incidence and they agreed that the Judge and the remaining member could continue to deliver the judgement.

[3] The Applicants are former employees of the Respondent. The Respondent is a civil construction company with its principal place of business at Matsapha Industrial Site.

[4] The Applicants were employed by the Respondent in various capacities and on different dates. During the month of February 2009, the Applicants were deployed by the Respondent to work in a project in Botswana. Whilst in Botswana, the Applicants raised certain work-

related issues with their supervisors relating to, *inter alia*, payment of out of country allowance and food allowance. The matter could not be resolved by the supervisors in Botswana and was eventually referred to Matsapha to one of the Directors of the Respondent, Mr. Percy Thomas.

[5] The Applicants had occasion to meet Mr. Percy Thomas at the Respondent's workshop in Matsapha. The meeting became heated and did not end well as it resulted in the summary dismissal of the Applicants. After their dismissal, the Applicants reported the matter to the Conciliation, Mediation and Arbitration Commission ("CMAC") as a dispute. The dispute could not be resolved by conciliation and the Commission issued a Certificate of unresolved dispute. The Applicants thereafter instituted the present legal proceedings.

THE CLAIM BY THE APPLICANTS

[6] The Applicants claim that their dismissal by the Respondent was automatically unfair in that it was as a result of their demand to be paid out of country and food allowances during the period when they were assigned by the Respondent to work in Botswana. The Applicants also claim that their dismissal was substantively and procedurally unfair because they were never given an opportunity to be heard by an impartial disciplinary tribunal. Further, the Applicants stated in their application that their dismissal was substantively unfair because they were dismissed for demanding something that they were legally entitled

to and no other reasons were given by the Respondent for their dismissal. The Applicants are therefore now claiming payment of the following; notice pay, additional notice, severance allowance, leave pay, overtime, out of country allowance and food allowance.

[7] **THE EVIDENCE**

The evidence led in Court was largely common cause, the only points of departure being whether or not the Applicants were entitled to be paid the allowances and whether they were in continuous employment or were employed in terms of short-term contracts. The evidence revealed that the Applicants were employed by the Respondent on diverse dates and in different capacities. The Respondent company is involved mainly in the construction of roads. The Applicants were employed either as mechanics, truck drivers or plant operators.

[8] In February 2009, the Respondent deployed the Applicants to work in a project in Botswana. In Botswana they worked under the Respondent's sister company trading under the name of PONESO Holdings (Pty) Ltd.

[9] The Applicants were given a monthly allowance of three hundred Pula (P300). They told the Court that this amount was to cater for breakfast as they were provided with lunch which they shared with the local employees. The Applicants told the Court that supper was not provided and they had to fend for themselves.

[10] The Applicants were required to work even when it was a holiday in Botswana. They were told that the Botswana holidays were not applicable to them. They were, however, also required to work when it was a holiday in eSwatini as they were told that eSwatini holidays were not recognized in Botswana.

[11] The Applicants were aggrieved by the treatment that they were getting and they raised this issue with their supervisors in Botswana but the supervisors failed to bring a solution. The Applicants also raised concerns about the non-payment of out of country allowance and food allowance.

[12] Since the Applicants' grievances could not be resolved by their supervisors in Botswana, they resolved to have an audience with Mr. Percy Thomas. They elected A1 and A7 to be their spokespersons when they present their grievances to Mr. Percy Thomas. The meeting took place in Matsapha. The Applicants' grievances were not properly addressed as the atmosphere at the meeting became emotionally charged and the employer summarily dismissed the Applicants. The Applicants were paid some of their terminal benefits three days later on the 30th June 2011.

ANALYSIS OF THE EVIDENCE AND THE LAW

[13] There was no evidence led before the Court by A4, Sibonangaye Ntimba. The Court was informed that he is still employed by the Respondent and he was therefore no longer pursuing his claim for fear

of victimization. The application before the Court therefore now pertains only to the six Applicants herein.

[14] The Applicants claim that their dismissal was automatically unfair. They claim that they are therefore entitled to compensation up to the maximum of twenty-four months' salary as stated in section 2 (d) of the Industrial Relations Act No.1 of 2000 as amended ("IRA"). That section provides the following;

> " ***'automatically unfair dismissal' means a dismissal where the reason for the dismissal is –***
>
> ***(a)*** .....
> ***(b)*** .....
> ***(c)*** .....
> ***(d) that the employee took action, or indicated an intention to take action, against the employer by -***
> ***(i) exercising any right conferred by this Act; or***
> ***(ii) participating in any proceedings in terms of this Act,"***

[15] The Applicants claim that their employer dismissed them because they demanded to be paid the food and out of country allowances. In the view of the Court however, the Applicants' claim is not properly grounded on section 2 (d) of the IRA. The evidence before the Court revealed that here was a difference of opinions between the parties as

the Respondent was of the view that it was not under any legal obligation to pay the out of country allowance. When the parties failed to reach an agreement, the Respondent decided to summarily dismiss the Applicants.

[16] The fundamental principle in litigation is that each case must be deed based on its own peculiar facts and circumstances. On the facts of this case, the Court is unable to come to the conclusion that the Respondent dismissed the Applicants for exercising their rights in the manner envisaged by section 2 (d) of the IRA. Rather, the facts show that the Respondent's director decided to dismiss the Applicants because he did not agree with them that they were entitled to be paid the allowances, not that he dismissed them for raising the grievance.

[17] The conduct of the Respondent was, however, contrary to the spirit, purpose and objectives of the IRA and therefore unlawful. The dismissal of the Applicants was therefore substantively and procedurally unfair. It was substantively unfair because it was not for any of the reasons stated in section 36 of the Employment Act No.5 of 1980 as amended. Further, the dismissal of the Applicants was procedurally unfair because there was no disciplinary hearing that was held against the Applicants where they would have been afforded the opportunity to be heard before the adverse decision was taken by the employer.

[18] Furthermore, the Court is of the view that the dismissal of the Applicants cannot be characterised as being an automatically unfair

dismissal. The Court says this because the Applicants were demanding to be paid food and out of country allowances, a right or entitlement that is accorded to them by regulation 14 of The Regulation of Wages (Building and Construction) Industry Order, 2010. It is not a right ***"conferred by this Act"*** as envisaged by section 2 (d) of the IRA.

SHORT TERM CONTRACTS OR CONTINUOUS SERVICE

[19] There was a disagreement between the parties on the nature of the Applicants' employment contracts. The Respondent argued that the Applicants were not dismissed but that they stopped working because their fixed term contracts had come to an end. The Applicants argued to the contrary that they were employed by the Respondent on a continuous basis, most of them for more than ten years.

[20] The Applicants in their written submissions stated in paragraph 4 that their dismissal was not in terms of any short-term employment agreement. During the evidence in chief, the Applicants denied that they were employed in terms of fixed term contracts. They denied that they signed the fixed term contracts in the Volume 11 of the Respondent's Documents. They told the Court that even if they may have signed some of those documents, the contracts were not valid because;

20.1 they signed them under duress as they were told by a certain employee of the Respondent by the name of Albert Masilela that if they did not sign, the gate was open;

20.2 they were made to sign documents with blank spaces which were later filled in by the Respondent's staff after they had already appended their signatures.

[21] The Court, taking into account all the evidence before it, will accept the version by the Applicants that they were in continuous employment by the Respondent because of the following reasons;

21.1 When the Respondent calculated the Applicants' terminal benefits, it did so based on the years of continuous service for each of the Applicants and not in terms of any fixed term contract.

21.2 The Respondent paid each of the Applicants severance allowance, the calculations were based the first date of engagement until the last day of employment in June 2011 when they were dismissed. It was not based on any fixed term contract.

21.3 The Applicants were in continuous employment as envisaged by the Regulation of Wages Order which provides in Regulation 2 that;

"Continuous service" means service in the employment of the employee interrupted only by death, retirement, completion of fixed term task or discharge of the employee concerned and an employee who is re-engaged

within 7 days of his discharge shall be deemed to be in the continuous service of that employer"

21.4 The Respondent failed to lead the evidence of Albert Masilela and Bongiwe Dlamini to deny the Applicants' evidence that they were made to sign the documents under duress and that when they signed them, the documents had blank spaces which were later filled in by the Respondent's employees.

21.5 When the Respondent wrote reference letters for the Applicants after their dismissal, the Respondent did not state therein that the Applicants were employed in terms of fixed term contracts, instead the Respondent wrote the date of first engagement and the date of dismissal in June 2011.

[22] It was also argued on behalf of the Respondent that even if the Court were to find that the Applicants were in continuous employment and that they were unlawfully dismissed by the Respondent, the Applicants by accepting the terminal benefits compromised their rights to any claim for unfair dismissal against the Respondent. The case of **Caiaphas Mbingo V Motor Vehicle Accidents Fund**, case No. **574/2010 (H.C)** was relied upon by the Respondent. In paragraph 20 of that case the High Court stated the following;

"Describing a compromise, LTC Harms in his book titled 'Amler's Precedents of Pleadings' 6th edition, Lexis Nexis, Butterworths, Pages 84, puts the position as follows;

> *'A compromise or settlement (transatio) is a contract the purpose of which is to prevent or put an end to litigation whether embodied in an order of Court or not, it has the effect of res judicata.....It is, therefore, an absolute defence to an action based on the original claim."*

[23] The learned author, John Grogan, **'Workplace Law' 11th edition, Juta** was also referred to. At pages 206 to 207 the learned author stated the following on this subject;

> *"If an employer realizes that it has botched a dismissal, nothing precludes an offer of settlement before the matter comes to Court or before an arbitrator. Employees who have accepted settlements cannot normally proceed to litigate against their employer, because acceptance of the offer constitutes a waiver of their rights against the employer. However, the offer must be made and accepted in good faith and the employee must be aware of the consequences of his acceptance."*

[24] The above stated principles of the law are correct. It only remains to be considered whether they are applicable to the facts of the present case. From the evidence led before the Court, these principles find no applicability. The documents showing the amounts paid to the

Applicants have been annexed to the pleadings and are marked "Annexure B" of the Applicants' application. There is nowhere on these documents where the Applicants signed and acknowledged receipt of the payments in full and final settlement of the dispute between the parties. The evidence before Court showed that these amounts were paid to the Applicants' bank accounts. There was no evidence that the Applicants were told, when the money was deposited into their accounts, that they were being paid their terminal benefits in full and final settlement of any dispute that they may have with the Respondent.

[25] The Applicants are, therefore, entitled to claim any outstanding payment that is due to them as the result of the unfair dismissal by the Respondent.

FOOD AND OUT OF COUNTRY ALLOWANCES

[26] The Applicants claim that they were entitled to be paid food allowance and out of country allowance. They base their claims on The Regulation of Wages (Building and Construction) Industry Order. Regarding food allowance, the order provides the following under regulation 14 (4);

"14(4) An employee who is absent on duty overnight away from his normal place of employment shall in respect of each night's absence be provided by his employer with;

(a) free food and accommodation or night allowance of E45.00 in lieu thereof, or

(b) free accommodation and an allowance of E25.00 in lieu of food,

(c) free food and an allowance of E25.00 in lieu of accommodation:"

[27] The Applicants are claiming payment of food allowance at the rate of E25.00. It seems therefore that their claims are founded on Regulation 14 (4) (b) of the Order. The Applicants admitted however that the Respondent was paying them an amount of three hundred Pula (P300) per month. It should follow therefore that whatever amount that is due to the Applicants as food allowance, it must be less than the three hundred Pula (P300.00) per month that they have already received.

[28] As regards the claim for out of country allowance, the Respondent did not pay this allowance because it was of the view that the Applicants were not entitled to it. It was argued on behalf of the Respondent that the Applicants were not entitled to this allowance because they were out of the country for more than five days and were therefore not covered by the Order. The regulation that provides for out of country allowance states the following;

"14 (9) An employee who is absent on duty outside the country for a period not exceeding 5 days at a time shall be provided with free food accommodation and shall be entitled to out of country allowance of E100.00 a day."

INTERPRETATION OF THE ORDER

[29] Regulation 14 (9) calls for interpretation by the Court. On its part, the Respondent was content with the simple argument that since the Applicants were out of the country for a period exceeding five (5) days, they were therefore not entitled to be paid the out of country allowance (See: Paragraph 82 of the Respondent's written submissions). The canons of interpretation provide that it is not only the language employed that must be taken into account, the context and the intention of the drafters must also be considered. The process of interpretation is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. (See: **Natal Joint Municipal Pension Fund V Endumeni Municipality 2012 (4) SA 593 (A).**

[30] It is important to read the document as a whole in order to grasp the intention of the drafters. In this regard the provisions of regulation 14 (5) must also be considered. Sub-regulation (5) provides the following;

> *"An entitlement to free food, accommodation or allowances under sub-regulations 4 and 9 shall not cease until the employee is back to his normal place of employment."*

It is not in dispute that the Applicants were absent from their normal duty station at Matsapha as from February 2009 when they were deployed to work in Botswana. They were therefore "*absent on duty outside the country.*" It is not in dispute that they were outside the

country for more than five (5) days at a time. Sub-regulation five (5) however provides that the entitlement shall not cease until the employee is back to his normal place of employment.

[31] In the view of the Court, the proper interpretation to be given to regulation 14 (9) is that for every period of five days that the Applicants were absent on duty outside the country, they were entitled to be paid the out of country allowance of E100.00 a day. These periods of five days are to be reckoned separately taking into account the language employed in sub-regulation (9) which states that the period must not exceed 5 days *"at a time."* Any other interpretation would result in unfair discrimination against employees who are absent on duty outside the country at the instance of the employer for periods longer than five days at a time. Further, any other interpretation would be illogical and an affront to the principles of equality and fairness at the workplace. It would also lead to absurd results as employers would opt to send employees to perform duties outside the country for periods exceeding five days at a time because they want to avoid the payment of out of country allowance.

[32] The Applicants told the Court that they were out of the country for four hundred and ninety-seven days (497). Since the Applicants were entitled to be paid out of country allowance of E100.00 a day for a period not exceeding five days at a time, it means the number of days that the Applicants were out of the country must be divided by five days 'at a time' in order to comply with sub-regulation (5) which states that

such entitlement *"shall not cease until the employee is back to his normal place of employment"*.

CONCLUSIONS AND ORDER

[33] The Court taking into account all the evidence before it comes to the conclusion that the Applicants were in continuous employment by the Respondent, and that they were dismissed for a reason not stated in section 36 of The Employment Act. The evidence before the Court revealed that no disciplinary hearing was held by the employer before the dismissal of the Applicants, the Court therefore comes to the conclusion that their dismissal was substantively and procedurally unfair.

[34] The Court has also taken into account that the Applicants had a clean disciplinary record at the time of dismissal. Five of the Applicants had worked for the Respondent for ten years or more except for Samkeliso Mlotsa (A7) who had worked for five years.

[35] The Court will accordingly order the Respondent to pay the Applicants who had worked for not less than ten years an amount equivalent to nine months' salary as compensation for the unlawful dismissal. The Respondent is ordered to pay Samkelo Mlotsa (A7) an amount equivalent to four months' salary as compensation for the unlawful dismissal. The Respondent is therefore ordered to pay to the Applicants the following amounts;

35.1 **Mfanawekhaya Dlamini**

a) *Additional notice pay (E189.18 x 4 x 9) E6, 810.48*

b) *Compensation (E4, 161.96 x 9) E37, 457.64*

c) *Out of country allowance (E497 ÷ 5 x E100) E 9,900.00*

d) *Food allowance(E497 x 25)= E12, 425.00 less P300 per month*

35.2 Mahenguela Themba

a) *Additional notice pay (E182.25 x 4 x 10) E7, 290.00*

b) *Compensation (E4, 009.50 x 9) E36, 085.50*

c) *Out of country allowance (E497÷5x 100) E9, 900.00*

d) *Food allowance (E497 x 25)= E12,425.00 less P300 per month*

35.3 Mahlalela Lizerio

a) *Additional notice pay (E170.73 x 4 x10) E13, 658.40*

b) *Compensation (E4, 415.70 x 9) E39, 738.60*

c) *Out of country allowance (E497 ÷5 x E100) E9, 900.00*

d) *Food allowance (497 x25)=E12,425.00 less P300 per month*

35.4 Hua Alberto

a) *Additional notice (E219.15 x 4 x 17) E14, 902.00*

b) *Compensation (E4, 821.30 x 9) E43, 391.70*

c) *Out of country allowance (E497÷5 x 100) E9, 900.00*

d) *Food allowance (E497 x 25)=E12,425.00 less P300 per month*

35.5 *Sambo Bernado*

a) *Additional notice pay (E198.18 x 4 x 14) E10, 818.08*

b) *Compensation (E4, 250.00 x 9) E38, 250.00*

c) *Out of country allowance (497÷5xE100) E9, 900.00*

d) *Food allowance (E497 x E25)=E12,425.00 less P300 per month*

35.7 *Mlotsa Samkeliso*

a) *Additional notice pay (E159.09 x 4x 4) E2, 545.45*

b) *Compensation (E3, 500.00 x 4) E14, 000.00*

c) *Out of country allowance (E497÷5 xE100) E9,900.00*

d) *Food allowance (E497 x 25)=E12,425.00 less P300 per month*

36. The evidence before the Court revealed that the employer dismissed the Applicants summarily without subjecting them to any disciplinary hearing. The conduct of the employer was clearly out of step with the principles of decency at the workplace and good industrial relations. Further, the conduct exhibited by the employer was contrary to the dictates of fairness in a modern state under the era of constitutionalism where the rights of employees are guaranteed under the constitution. The Respondent will therefore be also ordered to pay the costs of suit.

37. The member is in agreement.

N. NKONYANE

JUDGE, INDUSTRIAL COURT OF ESWATINI

For the Applicants: *Mr. B.G. Mdluli*
(Bongani G. Mdluli & Associates)

For the Respondent: *Mr. Kenneth Simelane*
(Henwood & Company)