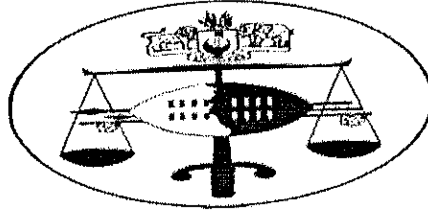


IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.221; 222/2016
296/2017

In the matter between:-

HEDWING SIGWADHI	1ST Applicant
OBERT MUCHAKAZI	2nd Applicant
MUNYADZI NHARE	3rd Applicant
GOODWIN HUNGWE	4th Applicant

And

ARHAST INVESTMENTS (Pty) Ltd T/A
METROPOLITAN INTERNATIONAL COLLEGE
(SWD CAMPUS) Respondent

Coram : **THWALA - JUDGE.**
(Sitting with Mr. M. Mtetwa and Mr. A.M. Nkambule - Nominated Members of the Court)

Delivered : 7th March 2023

JUDGMENT

BACKGROUND

[1] This judgement constitutes the final episode of the above-cited matters which, though launched on different dates, were consolidated at the instance of this Court and heard as one. When the matters were first called before us, we

directed the parties' representatives to retreat to Mr Maseko's office and thereat agree amongst themselves on the appropriate method for conducting these proceedings.

[2] The results of this meeting helped because they helped crystilise Applicants' case to be as follows:

> **"that, initially they were employed by the Respondent on a three year fixed-term contract which contract was allegedly unlawfully varied by the Respondent prior to its natural date of expiration; that such variation was not only unlawful but also *void ab initio*".**

And in answer to the Applicants' contentions, Respondent confirmed the existence of the employer/employee relationship between the parties, but placed under contention the period of employment, viz; whether it was for one year and/or for three years. For its part, Respondent denied that it had ever entered into and/or concluded a three year fixed-term contract with the Applicants.

[3] On the 9 June 2022, this Court sat to hear arguments on a single point, i.e the duration of Applicants' fixed-term contract. From this, the Court made a ruling that Respondent's offer of a three year fixed-term contract to the Applicants through the letters of employment which Respondent issued to each of the Applicants and was accepted during the first week of January 2014, constituted a binding and enforceable agreement between the parties. There was nowhere, in all the three replies that Respondent filed, where it was averred that these 3 year fixed-term contracts had been terminated.

CONDUCT OF THE PROCEEDINGS

[4] During the pre-trial conference that was held in-chambers in terms of Rule 10 (1), of the Rules of this Court, the parties' agreed that Applicants were to lead only one witness in evidence, viz; Hedwig Sigwadhi whilst Respondent was to lead the evidence of its Managing Diretor, Colbert Kwancho.

[5] And so the trial began with Ms Hedwig Sigwadhi (AWI), whose testimony was mainly undisputed i.e that Respondent issued an advertisement for educators for a school which it intended to establish at Mhlume. It was common knowledge that AWI together with the other Applicants responded to this advert by filing their applications after which they were called for interviews, whose results returned positive, hence the letters of offer of employment. AWI testified that having signed the necessary documentation for the conclusion of the employment contract, she worked as an educator until round about October 2014, when they (teachers) spotted yet another advertisement by Respondent, which advert was essentially re-advertising the very posts that were held by the Applicants. AWI told the Court that the Teachers made efforts to engage the Principal in order to ascertain the purpose and intention of the Respondent's actions.

[6] Unfortunately, no satisfactory answers were forthcoming from Respondent's representative, instead the Principal gave the teachers new application forms which they were asked to promptly complete and return to the office or else face disciplinary action. AWI told the Court that the teachers obliged and completed the re-application forms and were further re-engaged for the 2015, academic year. There is an issue which deserves to be mentioned in respect of

the re-application forms, viz; that these were served twice upon the Applicants, first, in October 2014, and then again towards the end of the 2015, school calendar. It was also AWI's evidence, on this point that each application form was served upon the Applicants by a certain Mr Joseph for the 2015, school calender and a certain Mr Ivor for the 2016, school calendar. Both these gentlemen served as Principals of the school and acted on behalf of the Respondent.

[7] AWI told the Court, further that whereas in October 2014, the 'new application forms' had come back with positive letters of're-engagement', this was not repeated for the 2016, school calendar. Instead, sometime in November 2015, each one of the Applicants received an 'sms text' advising them that their services were no longer needed. It was this text which formed the basis of each of the Applicant's relief as contained in their respective claims.

[8] In cross-examining AWI, Mr Maseko's questions were towards getting the witness to concede that:

8.1 whereas there was a three (3) year fixed-term agreement that had been entered into between Respondent and each of the respective Applicants, same was, however consensually varied in October 2014, when Applicants signed the socalled 'new application forms'. For her part, AWI was steadfast in maintaining that the said form was not freely signed by the Applicants. In essence, Mr Maseko in his cross-examination of Applicant tried to show –

8.1 That, a variation of the parties' three (3) year fixed-term contract took place sometime in October 2014.

8.2 That, such variation took place with the free will and consent of each of the Applicants. Apparently, the inference of free will and volition was drawn, by Respondent, from the fact that Applicants were afforded sufficient time to reflect on Respondent's new terms and conditions of service, as contained in the socalled 're-applicantion form' which was served upon them in October 2014. It was not in dispute that Applicant received the 'new offer' of a one (1) year fixed-term contract in October 2014, whilst the signing of their contracts only occurred in February 2015.

8.3 It was Counsel for the Respondent's contention, whilst cross-examining AWI, that Applicants had all the time to either accept and/or reject such contract if they were of the view that it was offering less favourable terms of service than those that they previous enjoyed.

[9] Then came in Respondent's Chief Executive Officer, Colbert Kouatcho (RWI) whose relevant evidence was as follows:

9.1 That, Metropolitan College was a school situated in the north-eastern part of Eswatini and it formed part of a group of schools some of which were located in South Africa.

9.2 That, the Respondent company, Arhast Investments (Pty) Ltd, took over ownership of the institution from the Eswatini Royal Sugar Corporation in January 2014.

9.3 That, upon completion of the takeover of the school from its previous owners, Respondent embarked upon the process of re-aligning the school's system of management with that of the Metropolitan group in

the region, including the introduction of one (1) year fixed-term contracts for the members of its teaching staff.

9.4 That, the nature of Applicants' engagement by the Respondent, was explicitly explained by management at a briefing that was held between management and the Applicants prior to the commencement of the 2014, school calendar year. Specifically, RWI testified that Respondent's management drove all the way from Head Office in South Africa, firstly, for the purposes of briefing the teachers about Respondent's intention to introduce the one year contracts. Secondly, in order to deliver the socalled 'new one-year fixed-term contracts to the Applicants for their perusal and signature (if so minded).

9.5 That, the staff briefing was held on or about August 2014, at Mhlume, where each Applicant was given his/her own copy of the 1 year contract which they were to go through and sign and return within 14 days. RWI confirmed that all 4 Applicants attended the said briefing.

9.6 That, the contracts that management brought along with them to the staff briefing in August 2014, was subsequently signed by each of the Applicants and returned to Respondent's Headquarters for RWI's signature. Herein, we pause to record though that during his evidence, RWI kept on referring the Court to the copy of a document which was found at page 27-33 of the Book of Pleadings. However, this document was clearly not in sync with the events as narrated even by RWI himself. We say this because same purports to have been signed by the parties at Metropolitan College, i.e Mhlume, on the 13th February 2015. More of this will be said in the analysis of Respondent's evidence later on in this judgement.

9.7 That, RWI himself was not present on the ground, i.e from the date of the briefing up to the so called return/submission of the one year fixed-term contracts. Therein, Respondent was represented by the school's Principal, being the person who had issued the adverts.

RWI closed his evidence in-chief by refuting any element of undue influence being exerted upon the Applicants prior to their signing the February 2015, contracts. He testified though that having issued the adverts in 2013, there was no time to prepare either the application forms nor the one year fixed-term contracts for the year 2014.

[10] Under cross-examination, RWI conceded:

10.1 That, Applicants' recruitment was done by Joseph, who was Metropolitan's Principal at the material time;

10.2 That, in doing such recruitment, Joseph 'omitted' to seek and obtain for authorization from the school's head office;

10.3 That, the fact of Applicant's recruitment only came to the knowledge of RWI around March 2014;

10.4 That, despite RWI's knowledge of Applicants' recruitment in March 2014, nothing was done, by the Respondent to ascertain the terms and conditions of Applicants' engagement.

10.5 That, Respondents' state of indifference regarding Applicants' terms and conditions of engagement subsisted from March 2014, up to February 2015, when the 'new contracts' were purportedly signed by the parties.

10.6 That, management did not keep an attendance register nor a record of the issues that were deliberated in the briefing meeting that was held in August 2014.

10.7 That, whereas, the said briefing was convened via a memorandum that was allegedly posted in the school's notice board, management was, however now not in a position to tender the said copy as part of its evidence to the Court;

10.8 That, RWI was responsible for the authorization of all payments of monthly salaries for Respondent's personnel, including the Applicants. To this extent, RWI conceded that he authorized the payment of Applicants' salaries right from January 2014;

[11] Then at some point along the cross-examination, Mr Shabangu, Counsel for the 1st Applicant referred RWI to a letter purportedly from Respondent, and authored by RWI, to Second Applicant, Obert Muchakazi. In this letter, Second Applicant like all the other Applicants, was being offered, by the Respondent's Chief Executive Officer, a three (3) year fixed-term contract. In answer to this obvious anomaly, RWI attributed this letter to some alleged forgery. Indeed, RWI conceded that the letter of employment was way before management's briefing meeting of August 2014. RWI also confirmed, whilst still under cross-examination, that it was high-handed of Respondent to neglect to check the terms and conditions of service which Joseph had offered to Applicants in the letter of offer of employment or to properly engage Applicants prior to the introduction of the so called 1 year fix-term contracts of 2015. RWI went on to further concede, quiet correctly, that during the recruitment of the Applicants, Joseph acted for and on behalf of the Respondent, including during the course of the signing of the 1 year fixed-term contracts.

[12] On re-examination, RWI appeared to have regained some conviction that there was nothing untowards that was done by Respondent in causing Applicants to sign the socalled 'new 1 year fixed-term contracts'. RWI's confidence was attributable to the fact that Applicants had the draft contracts for almost three (3) weeks before they signed and returned them to RWI for signing. It was RWI's further contention that not only did Applicants sign these one year fixed-term contracts, but they proceeded to render their services, to Respondent, under the terms of the new contract. By this we understood Respondent to be arguing some element of acquiescence. RWI closed the Respondent's case by denying any knowledge of threats of loss of employment to any one not inclined to sign the new 1 year fixed-term contract.

[13] Our analysis of the evidence presented during the course of the trial must, as of necessity, commence from the premise that from the judgement delivered on the 23 June 2022, this Court held that a three (3) year fixed-term contract had been concluded between the Respondent and each of the Applicants. This 3 year contract commenced in January 2014, and was to expire, unless lawfully terminated earlier, on the 31 December 2016. We agree with Counsel for the First Applicant that it was Respondent that had the onus to prove that the terms of the 3 year contract were either lawfully terminated and/or varied. Of course, our law of contract, of which the law of employment is a part, provides for the termination of any contract by one party, upon reasonable notice to the other. The other method for the termination of a contract is by mutual consent, e.g. through variation.

[14] In an attempt to discharge the onus placed upon the Respondent, RWI testified about the socalled 'briefing' that Respondent's Management purportedly held

with Applicants at Mhlume in August 2014. RWI's story was very hard to believe, firstly, because it was denied by AWI who testified on behalf of the Applicants, and secondly because Respondent failed to produce a record of the minutes of such a very crucial meeting. It is needless to state that if such a meeting was held, then it was very key to Respondent for it represented a major shift from the then Royal Swaziland Sugar Corporation's management style. One would have expected Respondent's senior management, who were coming from Respondent's Head Office in South Africa, to have come prepared to comply with all the legal requirements on termination and/or variation of contracts of employment in Eswatini. Perhaps RWI, and the Respondent's major let down was their failure to follow up on their serving staff's existing terms and conditions of service. This was the Respondent's down fall because in evidence it was established that Applicants started working for the Respondent in January 2014, not August 2014. In fact, it was RWI's evidence that Respondent's management became aware of Applicants' recruitment in March 2014, and they did nothing about it save to rebuke the school's Principal for such conduct.

[15] The simple fact is this; that it was Respondent's legal duty to ascertain the total extent of Applicants' terms and conditions of service as they obtained from January 2014 upto the date of the briefing. In fact, the Employment Act, 1980, states clearly that an employer has no legal right to unilaterally vary the terms and conditions of service of its employees – **<u>See Section 26</u>**. Indeed, in this case Respondent breached the aforegoing section in several respects, firstly, by failing to ensure that a formal notice of its intention to vary the terms and conditions of service is given to each of the Applicants. Perhaps most importantly, Respondent failed to rebutt AWI's oral evidence to the

effect that Applicants did verbalize their dissatisfaction with the intended variation of their 3 year contracts. It is conceded – as RWI strongly argued – that Applicants did, however omit to take the issue of their dissatisfaction with him and/or the Labour Commissioner as per the provisions of Section 26 (2). The aforegoing sub-section has, however received interpretation from our courts which have held that the non-pursuit of the complaint with the Labour Commissioner does not debar an aggrieved employee from taking the matter up with the courts.

[16] In the case of Amos Mabuza v Swazi Plastic Industries (15/2011) [2014] SZIC 20 (30 April 2014), the Court there had this to say:

> **"20. Even if the employee fails to challenge the introduction of the new terms in the employment contract within the 14 days provided in Section 26 (2), the legislature has left the door open for an aggrieved employee to challenge those unilateral changes in his employment contract by lawful means other that Section 26 of the Employment Act. Section 26 (1) of the Employment Act creates a rebuttable presumption that the new terms in the employment contract have been lawfully incorporated. It is upto the employee to rebutt that presumption by challenging the employer's conduct in Court. This is the approach that the Applicant has adopted".**

Then there is the case of Thando S. Dlamini v Swaziland Liquuor Distributors Ltd[1], which is 'on all fours' with the present case before Court. The case of Thando Dlamini affirms the duty of the Court to protect employees from employers who seek to deprive them of the protection provided by Section 35

1 IC Case No. 240/2002

(2) of the Employment Act. This protection is there, by operation of law, to all those employees that do not fall under Section 35 (1) of the Act. This protection obtains whether or not the employee(s) had concerted to the new relationship.

[17] The summary of this case therefore boils down to this;

17.1 That, Applicants were employed by the Respondent on a 3 year fixed-term contract commencing in January 2014, and was to run upto the 31 December 2016.

17.2 That, having completed serving their three (3) month period of probation, each of the Applicant's services could only be lawfully terminated in terms of Section 36 of the Act.

17.3 That, Respondent had the duty not only to prove to this Court that the termination of Applicants' 3 year contracts were for one or more of the reasons spelt out under Section 36, but also that it was also fair and reasonable for the Respondent to do so under the circumstances.

17.4 That, to the extent that Respondent sought to allege that Applicants had freely and voluntarily consented to the change and variation of their terms and conditions of employment, then such purported consent was a nullity at law and therefore *void ab initio*.

17.5 That, Applicants' application for unfair dismissal is therefore well founded as Respondent's actions for the unilateral variation of Applicants' 3 year fixed-term contract was not permitted by Section 36. In fact, same was a transgression of Section 27 of the Employment Act.

[18] Respondent's conduct was devoid of any basis at law. In fact, even RWI could not, in his evidence, give a plausible explanation for the manner that

Respondent's management handled the unilateral variation of Applicants' 3 year contracts.

[19] Regarding the issue of the grantable reliefs, Section 16 of the Industrial Relations Act (IRA), grants this Court the discretion to, grant various orders amongst which is an order for compensation award equivalent to 12 months' remuneration. The extent of compensation under this sub-section must, however be just and equitable bearing in mind the peculiar circumstances of each individual case. In the matter before us, the provisions of Section 16 (6) of the IRA appears not to be relevant, apparently because Applicants' claims were premised upon Respondent's breach of the terms of their 3 year fixed-term contracts. Indeed, the certificates of unresolved dispute of each of the Applicants lends support to this conclusion. There is one aspect which, however deserves our mention, which is the non-systematic manner in which Applicants' claims were captured in their respective certificates of unresolved dispute. There were claims which lacked any legal basis, e.g. the claim for the socalled gratuity; overtime and entry permit. To the extent that such claims had not been incorporated in the offer of employment that was written by Respondent to each of the Applicants, then such claims are not sustainable under our law of contract. Applicants cannot be allowed to posthumously factor-in benefits that were not part and parcel of the original benefits as made by the Respondent and subsequently accepted by them.

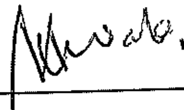
[20] To that extent therefore, and in exercise of the discretionary powers that are vested in this Court under Section 16 (9), this Court is prepared to grant to the Applicants those payments to which they were entitled in terms of Respondent's Letter of Offer of Employment. The award to be paid by

Respondent to each of the Applicants shall include the outstanding monthly remuneration upto the 31 December 2016; any unlawful deductions made by Respondent upon each Applicant's monthly remuneration, and lastly compensation for loss of residence as per the provisions of Section 18 (2) of the IRA.

[21] Counsel for the parties are hereby directed to compute the above awards in respect of each Applicant and bring it to the attention of the Court for endorsement within seven (7) days of the delivery of this judgement.

There shall be no order as to costs.

The members agree.



Manene M. Thwala

Judge of the Industrial Court of Eswatini

For 1st Applicant : **Mr. P Shabangu.**

For 2nd – 4th Applicant : **Mr. M Dlamini.**

For Respondent : **Mr. W Maseko.**