

**IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI**  
**JUDGMENT**

**HELD AT MBABANE**

Case No. 11/2019

In the matter between

**MANDLA MAMBA**

**APPELLANT**

**And**

**ESWATINI CIVIL AVIATION AUTHORITY**

**RESPONDENT**

Neutral Citation: *Mandla Mamba v Eswatini Civil Aviation Authority (11/19)*  
*[2019] SZICA - 17 (16 October 2019)*

**Coram:** T Mlangeni S Maphanga D Tshabalala AJJA

For Appellant : Mr. Z Jele of Robinson Bertram

For Respondent : Adv Kennedy instructed by Musa Sibandze Attorneys

Heard : 2<sup>nd</sup> October 2019

Delivered : 16<sup>th</sup> October 2019

Summary: *Labour law and employment contract - the appellant, employee of the respondent was suspended for alleged misconduct with full pay and benefits. A separation settlement agreement was signed by the parties and registered with the Industrial Court in terms of clause 10 of the agreement. About three months after the effective date of the separation agreement and a few days after it was executed by the appellant appending his signature, and before payment of the settlement package, the employer sent a letter to the employee communicating purported revival of employment relationship. This was after and despite the employee's unequivocal rejection of such proposals made to him verbally prior. The employer went ahead and made monthly payments to the employee which were equivalent to his erstwhile monthly salary. The issue for determination on appeal is twofold: firstly, whether the employee can rightly claim such payments separately as salary in addition to the agreed settlement amount? Or whether the amounts paid form part of the exit package that was due in terms of the settlement agreement?*

*Held: appellant's employment terminated on the effective date set by the parties in terms of the settlement agreement. The purported unilateral revocation of the settlement agreement and reinstatement of the appellant were of no legal consequence, therefore there could be no payment of appellants salary outside employment.*

*Held: The decision of the court a quo that appellant's case did not meet the requirements of rectification for settlement contract is upheld.*

*Evidence – The respondent sought in a cross-appeal repayment by the appellant of amount it allegedly paid as tax on behalf of the appellant on the settlement package it paid to him. Held: The respondent's failure to prove to the court a quo payment of such amount and how it was computed was fatal to its case on appeal as well.*

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## JUDGMENT

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## INTRODUCTION.

[1] This is an appeal against the decision of the Industrial Court dismissing the appellant's claim that certain payments made by the respondent to the appellant between November 2012 and April 2013 be treated as salary or remuneration of the appellant. The four grounds of appeal are:

- (1) The court a quo erred in law and misdirected itself and ought to have found that the agreement to revive the employment agreement suspended the settlement agreement and that the payments received by the appellant were remuneration per the new revived contract.*
- (2) The court a quo erred in law in failing to appreciate that the respondent and the appellant were ad idem in that the contract of employment between them had been revived. The payment of the amounts totalling E522, 220.91 by the respondent were for wages. In labour matters it is impermissible for the employer although the agreement is void to pay wages then renege and claim that the agreement was void and claim the repayment of such wages*
- (3) The Court a quo erred in law and ought to have found that the amounts aforementioned were wages or remuneration as the parties were ad idem that they had revived the contract of employment between them. Alternatively, the court ought to have found at the very least that the respondent's conduct in paying the amounts and classifying them as remuneration waived its right to then claim the amount, or ought to be estopped from claiming same.*
- (4) The Court a quo erred in law in converting the amounts paid as remuneration to the appellant as part payment of settlement agreement. The amounts were paid pursuant to agreement between the parties to revive the employment contract....*

[2] The respondent opposes the appeal and in a cross appeal claims reimbursement from the appellant of E228, 151.78 alleged to be tax paid to the Eswatini Revenue Authority in respect of the settlement pay-out<sup>1</sup> that the respondent made to the appellant and from which the former allegedly mistakenly omitted to deduct the tax.

## FACTUAL BACKGROUND

The appellant was employed by the respondent on a five-year term contract which ran from the 1<sup>st</sup> October 2010. Two years into the job<sup>2</sup> he was suspended for alleged misconduct on full pay and benefits. Between June and December 2012, the two parties negotiated and subsequently agreed on separation which entailed an *ex gratia* payment package to the appellant, to the tune of E1, 344, 298.75. After a few counter offers and proposals by each side the settlement agreement with an effective date of 10<sup>th</sup> October 2012 was eventually signed by the appellant on the 16<sup>th</sup> January 2013.<sup>3</sup> Prior to appending his signature to the agreement the appellant had declined attempts at revival of the employment relationship made by the Minister<sup>4</sup> purportedly on behalf of the respondent. Proposals for revival of employment contract were made in two meetings convened by the Minister,<sup>5</sup> which proposals the appellant unequivocally rejected. To further signify non acceptance of employment revival the appellant did not resume duty on the date advised by

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<sup>1</sup> To the tune of E1 344 298.75.

<sup>2</sup> On the 30<sup>th</sup> May 2012.

<sup>3</sup> The respondent had already signed the agreement in December 2012.

<sup>4</sup> Minister in the ministry responsible for the respondent.

<sup>5</sup> 10<sup>th</sup> and 16 January 2013 meetings with the Minister.

respondent to do so.<sup>6</sup> Furthermore appellant's attorney sent a clear letter to the respondent's attorney to the effect that the appellant's employment had been terminated. Despite the appellant's rejection of the offer to revive employment, the respondent went ahead and unilaterally paid monthly "salary" to the appellant up to the total amount of E522, 220.91.

- [3] On the 21 January 2013 the appellant sought a court order declaring the settlement agreement an order of court in terms of clause 10 of the agreement. The order was granted on the 29 May 2013. It was after the filing of appellant's court application that the respondent informed the appellant in a letter about the Minister's instruction for lifting of appellant's suspension and his reinstatement, and a further assertion that the settlement agreement had fallen through. The letter also informed the appellant that he would be paid all salary arrears and benefits due from the time of suspension. The appellant was also expected to resume work by the 4<sup>th</sup> February 2013. As aforesaid appellant's attorney sent a letter to the respondent stating that appellant's employment had been terminated. Nonetheless the respondent went ahead and paid the said amount of E522, 220.91<sup>7</sup> purportedly as salary for the period from October 2012 to June 2013.

- [4] Having obtained the court order<sup>8</sup> the appellant issued a writ of execution for attachment of the respondent's movable assets in satisfaction of the

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<sup>6</sup> On the 4<sup>th</sup> February 2013.

<sup>7</sup> Paid in monthly tranches.

<sup>8</sup> The court order declaring the settlement agreement an order of court.

settlement agreement amount of E1, 344,298.75. The writ was subsequently set aside and the respondent paid to the appellant two cheques to the tune of E822, 077.84 pursuant to the May 29 2013 court order declaring the settlement agreement an order of court thus confirming its validity. The respondent asserts that with the latter payment it had discharged its obligation under the settlement agreement. I now proceed to deal with the grounds of appeal<sup>9</sup> and thereafter the cross appeal.

- [5] The first ground of appeal: *that the agreement to revive the employment agreement suspended the settlement agreement and that the payments received by the appellant were remuneration per the new revived contract.* This court is asked to find that the court a quo erred in upholding the 10<sup>th</sup> October 2012 as the effective dated of the agreement when the employment contract legally terminated, as opposed to the 29 May 2013 contended by the appellant. The appellant's argument is that the latter date is the correct date because that was when the Industrial court made the agreement an order of the court. The appellant further relies for this contention on the respondent's letter extending his suspension on full pay until such time that the matter had been finalized. He argues that the matter was finalized when the Industrial court made the agreement an order of court. An extract from the letter reads, "*Kindly be advised that your suspension from duty with full pay and benefits is extended pending finalization of the on-going process.*"<sup>10</sup>

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<sup>9</sup> Grounds of appeal are captured at paragraph [1] of this judgment.

<sup>10</sup> See page 95 of the record.

[6] The learned Judge a quo in dealing with the appellant's claim that the effective date of the agreement should be rectified from 10 October 2012<sup>11</sup> to be the date of the Industrial court's judgement<sup>12</sup> is well articulated. He found that the court's declaration of the agreement as an order of court neither added nor changed any provision of the agreement. The court merely endorsed what already existed, being the valid agreement with an effective date as the 10 October 2012 as deemed by the parties' agreement. I agree with the court a quo's analysis in finding that the words "*pending finalization of the ongoing process*" meant the negotiations which the parties were engaged for the purpose of reaching exit settlement agreement. Further that the envisaged settlement agreement was reached and the purpose fulfilled on the 10 October 2012. The argument on rectification presented before this court was aptly addressed by the court aquo which interpreted it by reference to relevant authorities. Rectification is defined as, "*...where the parties to a written agreement are at idem but the document does not conform to the terms of their antecedent verbal agreement, application may be made to court for a rectification of the document.*"<sup>13</sup> The court a quo found, correctly so in my view, that the appellant had not presented any requisite evidence for invocation of rectification. I make an observation that there is no such proof on the papers filed indicative of any departure in the signed agreement from any prior verbal agreement between the parties. Importantly the court a quo noted that, in the absence of concurrent application to vary the court's

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<sup>11</sup> Per the terms of the Settlement Agreement.

<sup>12</sup> Of the 29 May 2013.

<sup>13</sup> Gibson JTR, South African Mercantile Law and company Law, 7<sup>th</sup> Ed Juta 1997.

judgment<sup>14</sup> any attempt to alter the terms of the settlement agreement would infringe on the validity of that judgment.

- [7] The second ground of appeal is *that the respondent and the appellant were ad idem in that the contract of employment between them had been revived. The payment of the amounts totalling E522, 220.91 by the respondent were for wages...*; the third ground can conveniently be dealt jointly with the second. The former is that *...the amounts aforementioned were wages or remuneration as the parties were ad idem that they had revived the contract of employment between them. Alternatively, the court ought to have found at the very least that the respondent's conduct in paying the amounts and classifying them as remuneration waived its right to then claim the amount, or ought to be estopped from claiming same.* The appellant appears to probate and reprobate in so far as it is common cause that he rejected the proposal for revival of employment contract in no uncertain terms and actions. For instance, his attorney wrote to the respondent reiterating that appellant's employment contract had terminated. Furthermore, the appellant never reported to work<sup>15</sup> when called upon do so by the respondent. He therefore cannot be heard to say he and the respondent were *ad idem* on revived employment contract. It is not permissible for the appellant to claim revival or existence of employment contract that never was. By the time the payment of the amount of E522, 220.91 was made the employment had legally terminated. It is my considered view that the court a quo adequately and

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<sup>14</sup> Judgment of the 29 May 2019 declaring the settlement agreement an order of court.

<sup>15</sup> On the 4<sup>th</sup> February 2013.



properly dealt with this issue and its decision rejecting the claim that the payment was for wages, cannot be faulted.

- [8] The last ground of appeal is that *the Court a quo erred in law in converting the amounts paid as remuneration to the appellant as part payment of settlement agreement. The amounts were paid pursuant to agreement between the parties to revive the employment contract....* The court a quo noted that there was sufficient evidence before it that the payment of the amount of E522 220.91 was made to the appellant. It is my considered view that in the circumstances of the case the court a quo reached a logical and legal conclusion in finding for the respondent that this payment should form part of the amounts paid under the settlement separation agreement. As already stated in this judgment the employment of the appellant ended on the 10 October 2012. There could not be wages payable thereafter.

#### RESPONDENT'S CROSS APPEAL

- [9] The respondent states in a counter appeal that it mistakenly failed to deduct income tax to the tune of E228, 151.78, from the settlement pay-out it made to the appellant and claims repayment of that amount from the appellant. The claim is contested by the appellant. The respondent avers that the court a quo erred in finding that the respondent had not presented proof that the appellant had such liability with the tax man at the stated period; there was no indication of how the amount was reached; the appellant was not afforded opportunity

to contest or negotiate the alleged tax liability with the tax authority, there being no proper claim filed by the tax authority.

[10] The respondent states in its heads of argument that, appellant's pleadings<sup>16</sup> did not contain a denial that the respondent paid the claimed amount to the Revenue Authority on his behalf, and that the appellant only pleaded that owing taxes were paid; that the respondent had not attached Tax authority's demand letter for payment; and that the appellant denied liability to reimburse the respondent with any amounts. For any claim for payment of a debt that is contested, regardless of how it arose, the onus lies on the claimant to prove its claim before court. It is not clear why the respondent merely alleged the appellant's indebtedness for the alleged tax without presenting relevant documentation to support its claim. In the absence of proof acceptable to the court a quo, it follows that the respondent failed to make a case. It is also glaring that the respondent did not involve the appellant at the time that the liability arose, as the court a quo noted, to afford the appellant to interrogate the amount claimed. The respondent's cross appeal accordingly fails.

[11] Wherefore it is ordered that:

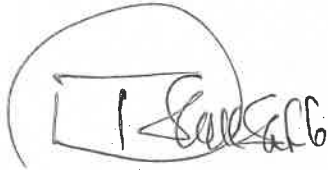
11.1 The main appeal is dismissed and the Industrial court's decision up held.

11.2 The cross appeal is dismissed and the Industrial court's decision up held.

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<sup>16</sup> In the court a quo.

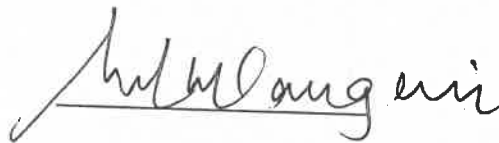
11.3 Each party to bear its own costs.

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D Tshabalala

Acting Judge of The Industrial Court of Appeal

I agree

A handwritten signature in black ink, appearing to read 'T Mlangeni', is written over a horizontal line.

T Mlangeni

Acting Judge of The Industrial Court of Appeal

I agree

A handwritten signature in black ink, appearing to read 'CS Maphanga', is written over a horizontal line.

CS Maphanga

Acting Judge of The Industrial Court of Appeal