

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL NO.6/97

In the matter between:

SARAH NDWANDWE APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY OF

WORKS AND CONSTRUCTION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CIVIL SERVICE BOARD 3RD RESPONDENT

MASTER OF THE HIGH COURT 4TH RESPONDENT

CORAM : LEON J A

: STEYN J A

: TEBBUTT J A

FOR THE APPLICANT : MR. DLAMINI

FOR THE RESPONDENTS : MR. SIMELANE

JUDGEMENT

Leon J A:

The appellant was the unsuccessful applicant in the court a quo. She brought proceedings against the respondents in the High Court in which she sought the following relief:-

"1. Directing the Civil Service Board to confirm Timothy N. Maseko in his appointment in the Swaziland Civil Service posthumously.

2. Directing the Accountant General of Swaziland Government to pay the death gratuity of Timothy N. Maseko in full."

There followed a prayer for alternative relief and costs.

The application was dismissed and it is against that order that this appeal is brought.

Timothy N. Maseko died on the 9th December 1992 and the appellant brought the application in

her capacity as executrix in his estate.

In her founding affidavit she alleges that the deceased was employed by the Swaziland Government starting as a labourer but rising through the ranks to the post of builder Grade 11 within the Ministry of Works and Construction. The deceased held this post at the time of his death which post was paid on grade 12 of the previous Government salary scales. At the time of his death the deceased was earning a monthly salary of E874. On the 8th March 1995 the appellant, in her capacity as executrix, received E2,562.72 being the death gratuity which was paid by the Government. The appellant alleges that this amount is far below what should have been paid. She has been advised that in terms of Government Regulations the death gratuity shall at least have been equal to the annual salary of the deceased which was E10,488.00.

Her enquiries at the Ministry revealed that the deceased had received such a "meagre" amount because his appointment in the civil service had not been confirmed.

The appellant alleged that Section 32(2) of the Employment Act 1980 (as amended) provides that, save for a certain category of employees, into which the deceased did not fall, no probationary period shall exceed three months. Reference is also made by her to Regulation 30(2) of the Civil Service Board (General Regulation) relating to officers who are on probation.

I pause to observe that the relevant meaning of "probationer" given in the Shorter Oxford Dictionary is "a person on probation or trial."

From the answering affidavits of Florence Makhube, the Senior Assistant Secretary in the Ministry of Works and Construction, and Eric Vilakati, the Secretary of the Third Respondent, it appears that:-

1. The deceased was employed as a labourer on a temporary basis for a specific project and his employment was only valid until the project was completed.

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2. The deceased was never employed on probation and that therefore there was no question of his appointment being confirmed: that only applied to employees under probation occupying an established pensionable post.

3. The only people eligible to be paid a death gratuity equal to their annual salaries are those civil servants who have been confirmed in a pensionable post which the deceased at no stage occupied.

4. Section 32(2) of the Employment Act 1980 (as amended by Act No.5 of 1997) is not applicable because the deceased was not under probation.

5. The records relating to the deceased, "annexure "R2", reveal that the deceased was paid wages and not a salary.

6. The deceased was only employed on a temporary basis as a labourer who did not hold any pensionable or anticipated pensionable post.

7. On the 15th July 1995 the deceased was appointed builder Grade 11 under Grade 12 of the previous Government scales but still remained an employee on a temporary basis.

The document confirming that appointment states under the heading 'Terms of Service

(probation) contract etc) "TEMPORARY."

In fact the appointment endured for another seven years until the deceased died.

In the judgement of the court a quo the learned Judge said that he was unable to find anything in the Regulations which revealed a basis for the entitlement of the deceased to be confirmed or to be paid the death gratuity claimed. He held further that Section 32 of the Employment Act 1980 did not apply as the appellant was never employed on a probationary basis but engaged on a temporary basis for a specific project. Although the result was inequitable there was no basis upon which the application could succeed.

In the argument on behalf of the appellant it is contended that there is no legal provision which empowers the Government of Swaziland to employ a person for some eight years on so-called temporary basis. In this regard it is submitted that all acts of administration must have their foundation in law. (LAWSA VOL.1 FIRST RE-ISSUE PAGE 5).

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Reliance is also placed on Section 32(2) of the Employment Act No.5 of 1980 that no probationary period may exceed three months. In this regard it is contended that the Employment Act No.5 of 1980 binds the Government of Swaziland (See Section 5 thereof).

Finally it is submitted that contracts of employment are not to conflict with the law and that the terms of service relied on by the Government are illegal. Reference is made to Section 27 of the Employment Act No.5 of 1980. Section 32(2) of the Employment Act No.5 of 1980 provides that: -

"No probationary period shall, except in the case of employees engaged on supervisory, technical or confidential work, extend beyond three months."

That section does not assist the appellant because the deceased was not employed on probation at all; he was employed on a temporary basis for a specific project. When that project was completed his employment would cease.

I am unable to discern anything illegal or improper or contra bonos mores in such a contract of employment. Firstly, employment is offered and endured for eight years, employment is a vital part of life and its absence can lead to incalculable problems including crime and violence. Secondly, it is by no means unusual or uncommon for a person to be employed in order to undertake a specific project. The building of a road readily springs to mind. Such an undertaking may well take several years and such an activity is commonplace and indeed world wide.

The respondent contends that a contract of employment which depends upon the completion of a specific task can legally exist. Reliance is placed upon the case of BON ACCORD IRRIGATION BOARD VS BRABVE 1923 AD 480 In that case (which was decided on another point) Innes CJ said this at page 486: -

"I think that paragraph 1 of the letter means that the appointment of Resident Engineer was to be for the specified period and was to continue until the job had been concluded. The parties were reciprocally bound until such conclusion - through the arrangement was terminable by mutual consent and on special legal grounds...."

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That passage makes it clear that there is nothing illegal, immoral or contrary to public policy for

an employee to be employed to undertake a specific project.

The appellant however relies upon Section 27 of the Employment Act of 1980 (as amended) which provides: -

"No contract of employment shall provide for any employee any less favourable condition than is required by any law. Any condition in a contract of employment which does not conform with this Act or any other law shall be null and void and the contract shall be interpreted as if for that condition there were substituted the appropriate condition required by law."

I have been unable to find anything in the Act or in any other law, which makes it illegal for a person to be employed on a temporary basis in order for a specific job to be undertaken and concluded. Indeed, as I have stated above, in the case of a road such a project may well take several years.

Accordingly, I am of the view that: -

1. The deceased was not employed on probation;
2. It follows that any provision of the Employment Act dealing with probationary periods does not apply to this case;
3. The employment of the deceased as a temporary labourer was not against public policy;
4. There is no basis upon which the application could have been granted. In my judgement the appeal must be dismissed with costs.

I would add only this. On the material before the learned Judge he had no alternative but to dismiss the application. But, as he correctly observed, the result is inequitable. This is indeed a very hard case in which the deceased's estate received a meagre sum of money after eight years labour. When we put this aspect of the case to Mr. Simelane for the Respondents he very kindly agreed to approach the authorities in order to see whether they would reconsider this matter in order to avoid or reduce the inequity to which I have referred.

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R.N. LEON J A

I agree:

J. H. STEYN J A

And so do I:

P.H. TEBBUTT J A

Delivered in open Court on this.....day of September 1998.

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