



IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO18/00

In the matter between:

NKULULEKO FREEMAN DLAMINI

APPELLANT

VS

THE GOVERNMENT OF SWAZILAND

RESPONDENT

CORAM

:

BROWDE JA

:

STEYN JA

:

BECK JA

FOR THE APPELLANT

:

MR. S.C. DLAMINI

FOR THE RESPONDENT

:

MR. SIGWANE

JUDGMENT

Steyn JA:

Appellant is a civil servant. On the 12th July 1996 he applied for a study leave with pay. He informed his employer that his application was made to study a course described as the Chartered Association of Certified Accountants on a full time basis at the Zambia Centre of Accountancy studies. According to his application this was a three year course.

Appellant's application was granted. The study loan agreement signed by him states that the amount of US\$30,456 was made available to him to enable and assist him to pursue a study course entitled "Chartered Association of Certified Accountancy" at the Zambia Centre of Accountancy Studies for a period of three years commencing on the 8th July 1996.

The Rules governing the study loan formed part of the agreement. These provided *inter alia* that appellant is "to proceed to the place of the course of study and to diligently and faithfully

begin, continue and complete the course.” It also provides that he “may not change from the course to another course.” He was obliged upon completion or cessation of his participation in the course to notify the Principal Secretary of his of his postal residential address.

It is common cause that the appellant did not complete his course. Indeed the reports from the institution in Zambia indicates that appellant was far from being a diligent student. His examination results for the December 1996 session reflect that he failed the exams in respect of the two courses he wrote. The report for the period of February to March 1997 recorded that he was absent at both the examinations he was supposed to write and that he only completed two of the eight assignments he had to do in one subject, and did one out of three in another. The centre commented that he “is not participating” and was not completing his assignments. For the period March to April 1997 he failed to sit for any of the examinations he was supposed to write and his absences are categorised as a “blot on his performance.” He also failed to participate in the “mock” or practise examinations offered by the centre.

In a letter from the Zambia Centre dated the 14th August 1998, the Deputy Director wrote to the Swaziland Government in the person of the Principal Secretary of Education as follows:

“Thank you for your letter dated 30th July 1998 regarding the above named person. Mr. Dlamini was last enrolled on the ACCA Certificate Stage programme in January 1997 for the June 1997 examination diet. He has not been on any other programme since then.”

On the 2nd July 1998 and acting on behalf of the Principal Secretary of Ministry of Education, the Accountant General of the Treasury Department was instructed to stop payment of appellant’s salary. The letter reads as follows:

“Please stop salary payment of the above named officer forthwith. This officer was granted study leave with pay for three years in 1996. In 1997 the Scholarship Secretariat received results that he failed and stopped his scholarship.

Our office was made to understand that Mr. Dlamini returned to school in Zambia and is paying fees out of his own pocket. However, we have just received a report that he is in the country not pursuing his studies. He never reported for work as a result he has been overpaid.”

It is not clear exactly when appellant abandoned his studies in Zambia. The inference to be drawn from the letter from the Centre dated 14th August 1998 would indicate that it must have been around the middle of 1997. It is common cause that appellant at no stage advised his employer that he had ceased his studies and had returned to Swaziland. It is also common cause that he did not return to work but continued to receive his emoluments as an employee of the State.

It was appellant's contention in his application to the High Court for the "release" of his monthly salary "including arrears" that the Principal Secretary had no authority to stop his pay. No substantiation for this contention was ever advanced. It was respondent's contention that the Principal Secretary was authorised to act as he did as the Ministry's controlling officer.

The High Court (Sapire CJ) dismissed the appellant's application with costs. Unfortunately it gave no reasons for doing so. We have in our judgment in **MASUKU N.O. V MERIDIEON RECOVERIES (CIVIL APPEAL 24 OF 2000)** also delivered at this session, commented on the unacceptability of the practice of not giving reasons for judgment in matters adjudicated upon in the High Court. We, as well as the parties in this appeal are obliged to speculate upon which basis and for what reasons the High Court dismissed the application.

Mr. S.C. Dlamini who appeared for the appellant conceded that the matter was one which depended upon the terms of the contract entered into between the respondent and the appellant. It is abundantly clear that appellant did not comply with the terms of that contract. The payment of the loan and of his salary was dependent upon his performing his obligations under the contract. The termination of his studies at the centre in Zambia and his failure to advise his employer of this fact was in clear breach of his obligations. To continue to collect his monthly stipend which was being paid to him, despite the fact that he was not doing any work, was not only unlawful but dishonest. Indeed the government would have been entitled to claim back any emoluments paid to him from the time he abandoned his studies in Zambia until he returned to work.

The attitude of the Government has been most reasonable. Despite appellant's unacceptable conduct it has adopted the following view of the matter.

“The Ministry remains prepared to accept him (appellant) back as soon as he reports for duty. Until that happens payment of his salary will remain suspended on a no work no pay basis.” (The quotation is from the opposing affidavit)

I should add that appellant was, according to this affidavit, advised that he should report for duty forthwith and that his salary for the following month would be released once he returned to work.

I summarise our views as follows:

1. Appellant’s right to a salary whilst on study leave was dependent upon his compliance with the contract between him and his employer referred to above;
2. He was in breach of his obligations under the contract and accordingly not entitled to its benefits, including the right to remuneration, whilst not attending at work.
3. His employer was therefore entitled to withhold his remuneration until such time as he was prepared to render the services for which he was employed.

As pointed out above there was a dispute of fact concerning the question of the authority of the Principal Secretary to withhold appellant’s pay. This dispute must be resolved in favour of the respondent in view of the fact that no evidence of the absence of authorisation was tendered and the bald allegation made in this regard was denied by the respondent. See **PLASCON EVANS PAINTS V VAN RIEBEECK PAINTS (PTY) LTD 1984(3) SA 623(A)**.

For these reasons the appeal is dismissed with costs.

J.H. STEYN JA

I AGREE : J. BROWDE JA

I AGREE : C.E.L. BECK JA
Delivered on this day of December 2000.