

In the matter of: Case No. 21/83

PETROS ZWANE Applicant

and

D. MOREIRA (PTY) LTD. Respondent

ISSUE IN DISPUTE

Applicant claims severance allowance for the period 1971-1978.

The Applicant was represented by Mr. Petor Diamini, Attorney.

The Respondent was represented by Mr. Peter Dodds of the Federation of Swaziland Employers.

AWARRD

The Applicant was employed by the respondent company as a bricklayer in 1971. In 1978 his work was stopped due to reduction in respondent's business. When the business improved, the applicant was re-employed and he worked from 1979 until 1983 when his services were terminated. He received E350 per month as wages. The respondent did not deny any of these facts.

According to the respondent, they took control of the company only in 1980 and therefore they were not responsible for any liabilities including payments prior to that year. However there is no evidence to that effect except for a bare statement from the Bar.

The applicant in his evidence produced a certificate (Exhibit B) issued by the respondent company to him, that proved that he was in their services from 1971 to 13th April, 1983. This was neither challenged by the respondent nor did it give any justifiable explanation as to how and why this certificate was issued to applicant. Therefore the only reasonable inference that could be drawn from this is, that the respondent accepted the position that the applicant was in their service during the period mentioned in the Certificate.

According to the evidence, the applicant was paid the severance allowance for the period February 1979 to March 1983. Then how did the respondent company come to pay the allowance for the year 1979

2

of they had acquired the business only in 1930? This lends support to the fact that this company was in existence prior to 1930.

Section 35(1) of Act 5 of 1980 reads "subject to subsections 2, 5 and 6, if the services of an employee are terminated by his employer other than under the provisions of Section 36, the employee shall be paid as part of the benefits accruing under his contract of service, a severance allowance amounting to ten working days wages for each completed year in excess of one year that he has been continuously employed by that employer".

Continuous employment is defined in Section 2 of the Act to mean a period of unbroken service with the same employer, including a period of unbroken service as a casual employee with the same employer, and for the purposes of this definition the following shall not constitute a break of service.

(c) absence from work due to a temporary cessation of work in the undertaking.

I have left the others which are not relevant to the present matter.

Temporary cessation is defined in Section 2 to mean a situation in which a business or part of a business

has temporarily ceased or diminished, but where the employer/employee relationship subsists and where it is the intention of the employer to resume normal working as soon as possible.

As soon as possible held to mean as soon as reasonably practicable - see 1945 HPD 460 and 1934(3) SA 629.

Therefore in my view when the applicant's work was stopped in 1978, it was only a temporary cessation of work due to temporary reduction of business. However it appears that the relationship between the applicant and the respondent subsisted because it was the intention of the respondent to resume normal work as soon as possible and re-engage the applicant to continue his employment in his establishment.

3

In the circumstances I hold that the applicant was in continuous employment from 1971 to 13th April, 1983 with the respondent company.

Mr. Dodds stated that under Section 8 of the Industrial Relations Act 4/1980 this Court has no jurisdiction to make an order retroactive to 1st July, 1982. I do not agree with Mr. Dodds on this because the applicant was in continuous employment from 1971 to 1983. Therefore in my view this Court has jurisdiction to hear this application.

It is not in the interest of good industrial relations that employers should raise legal objections especially relating to payment of legitimate statutory dues.

On the totality of the evidence, I am satisfied that the applicant is entitled to severance allowance for the year 1971 to 13th April, 1983 less an amount already paid to the applicant by the respondent and I make the award accordingly.

If any dispute arises as regards the amount to be paid to the applicant, the parties may refer this matter to this Court for a ruling.

J.A. HASSANALI

JUDGE PRESIDENT

I consent.

ASSESSOR

I consent.

ASSESSOR