

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 176/2000

In the matter between:

WILLIAM DLAMINI

1st APPLICANT

MANDLENKOSI MASEKO

2nd APPLICANT

and

ATTORNEY GENERAL

1ST RESPONDENT

PRINCIPAL SECREATRY

MINISTRY OF WORKS & TRANSPORT

2nd RESPONDENT

CORAM

NKOSINATHI NKONYANE:

ACTING JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

FOR APPLICANT:

MR. N. MTHETHWA

FOR RESPONDENT:

MR. V. DLAMINI

RULING ON APPLICATION FOR ABSOLUTION

FROM THE INSTANCE

17/11/06

1. The two Applicants brought an application for determination of an unresolved dispute in terms of Section 41 (3) of the Employment Act No. 5 of 1980 (as amended).

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2. The Applicants claim that they were constructively dismissed by the Respondent on the 6th September 1999.

3. The application is opposed by the Respondent.

4. After the 1st Applicant had testified the Applicants closed their case. The Respondent thereafter moved an application for absolution from the instance arguing that the Applicants have failed to establish a prima facie against it to which it must answer.

5. The court therefore is at present called upon to make a ruling on that application.

6. The evidence led before the court revealed that the Applicants were pursuing an electrical course at a certain Vocational Training Centre at Sidwashini. The Vocational Training Centre is under the Ministry of Home Affairs. It is a training centre that largely caters for disabled persons.

7. At the end of the course the Applicants were attached to the Public Works Department in order to gain the necessary practical experience in order to undergo a trade test at the Swaziland College of Technology (SCOT).

8. The 1st Respondent further revealed that the Clerk of Works one Sam Dlamini came to the Training Centre at the invitation of the administrators there to recruit them. He said they were posted to Nhlangano.

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9. The 1st Applicant said they were working without being paid until Mr. Moses Shongwe, the Inspector of Works enquired why they were not paid. The Applicants told him that they did not know. Shongwe then told them to go to Mbabane to make further enquiries.

10. In Mbabane the Clerk of Works showed them a letter written by the Senior Placement Officer, Mr. M. A. Dlamini as the reason for the non-payment. The letter was handed to court and is marked annexure "AT.

11. The letter addressed to the Clerk of Works contains the following:

"RE APPRECIATION OF SERVICE TO OUR ELECTRICAL TRAINEES:

We wish to thank you and your staff for the assistance rendered to our trainees in the electrical field. We believe they have gained and benefited from this attachment.

Their period of training has elapsed and we will therefore recall them back to the institution and discharge them accordingly. We are now hoping to find some sort of employment for those who may be found capable until such time that they go for their grade testing. We also appeal to you Sir, should any employment opportunities be available.

Finally, I would like to request you to submit a brief report on the progress during the period of attachment. Information contained in their anonymous calls with insults will help to determine their future programme. I however regret for any inconvenience caused during this arrangement."

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12. The 1st Applicant in his evidence in chief said he did not know the writer of the letter Mr. M. A. Dlamini. During cross examination however he changed his evidence and admitted that he knew that person.

13. Further, the 1st Applicant first denied that there was a relationship between Sidwashini Production Centre and the Vocational Training Centre. During cross examination he conceded that the two centres were related as they both cater for disabled persons and they are under the Ministry of Home Affairs.

14. It was clear to the court why the 1st Respondent contradicted himself. He was trying very hard to distance himself from the contents of the letter that was written by Mr. M. A. Dlamini (annexure "A1") because that letter puts everything beyond doubt that the two applicants were trainees attached to the Ministry of Works for the purpose of getting practical experience.

15. The burden of proving that the applicants were employees to whom Section 35 of the Employment Act applied is on the Applicants. The burden of proof that the Applicants were lawfully dismissed is on the Respondent.

16. The Respondent submitted that the Applicants were not its employees, but were placed on attachment to enable them to get practical experience. It was submitted on behalf of the Respondent that the Applicants having failed to show that they were the employees of the respondent, the application

ought to be dismissed.

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17. The Respondent's attorney referred the court to numerous authorities in support of the application. The locus classicus in such applications is the case of *Gascoyne v Paul & Hunter* 1917 TPD 170. In that case De Villiers JP stated that:

"At the close of the case for the plaintiff therefore, the question which arises for consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff.....".

18. It was clear to the court from the evidence before it that the Applicants were trainees attached to the Ministry of Works in order to get practical experience in the training that they were undertaking at the Vocational and Rehabilitation Centre. The placement was arranged between the Vocational Centre and the Clerk of Works in the Ministry of Works. (See annexure 'SMD1').

19. What is clear to the court however is that the placement was not done properly as envisaged by the Industrial and Vocational Training Act No. 16 of 1982. In terms of this Act the placement must be in terms of a written contract.

20. Section 2 of the Act states that a trainee means:

"a person, other than an apprentice, who is bound by a written contract to serve an employer for a period stipulated in the contract but not exceeding an aggregate of three years, with a view to acquiring knowledge of a trade or occupation in which the employer is reciprocally bound to instruct that person",

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21. In section 17 (1) (a) the Act provides that:

"No person shall employ trainees without having first obtained the written permission of the Director so to do."

The Director is defined under Section 2 as "the Director of Industrial and Vocational training appointed under section 5 ."

22. In terms of Section 14 of this Act there shall be established a Fund to be known as the Industrial and Vocational Training Fund. The purposes of this Fund is to, inter alia, pay maintenance and traveling allowances to persons attending training courses.

23. The fact that the Vocational Training Centre and the Respondent acted outside the provisions of the Industrial and Vocational Training Act does not however advance the Applicant's case any further. The Applicants knew that they were trainees and not employees.

24. That the Applicants knew that they were trainees can also be deduced from their conduct of failing to take up the issue of non-payment of salaries immediately.

25. It was not clear as to how the applicants went back to work at the Respondent's place after the trade test.

26. The Applicant's case however is not that they were employees of the Respondent as from 1997 when they became qualified after the trade test. Their case is that they were employed by the Respondent in September 1995 until the 6th September 1999. The evidence showed that that was not the case.

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27. The Applicants did not attempt to amend their papers.

28. From the evidence before the court, it is clear that the Applicants were attached a trainees with the Ministry of Works in September 1995.

29. The Applicants having failed to show that they were the employees of the Respondent, the application for absolution will be upheld by the court.

30. The court will accordingly make the following order;

1. The application for absolution from the instance succeeds.

2. No order for costs is made.

The members are in agreement.

N.NKONYANE A - J

INDUSTRIAL COURT