

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 284/99

In the matter between:

AMOS GUMEDZE

APPLICANT

and

INYONI YAMI (SWD) IRRIGATION

SCHEME

RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

FOR APPLICANT:

P.R. DUNSEITH

FOR RESPONDENT:

M.SIBANDZE

JUDGEMENT

29/11/02

This application was lodged pursuant to a full report issued by the office of the Commissioner of Labour in terms of Section 41 (3) of the Employment Act No. 5 of 1980. The applicant reported a dispute after he was dismissed on 5th July, 1996.

The applicant was employed by the respondent on the 16th February, 1971 and was in the continuous employ of the respondent until 5th July 1996. On the 5th July 1996 the respondent terminated the services of the applicant. A copy of the letter of termination is annex 'A' of the application. At the time of termination of his services he was earning a monthly salary of E916-50. The applicant avers that such termination of his services was unlawful, wrongful, unfair and unreasonable in all the circumstances.

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According to the particulars of claim the respondent forced the applicant to retire on the basis that he had reached the retirement age of 55 years applicable to junior staff members. A copy of the letter of retirement is Annex "A2" of the application. Applicant had been promoted to the position of weir keeper with effect from 20th December 1994. This position, according to the particulars of claim, was a senior position in terms of which the retirement age was 60 years.

Respondent avers that the applicant was dismissed for a proper reason that he had attained the retirement age which is recognised in respondent's undertaking. The respondent states that applicant's services were terminated in accordance with Section 36 (K) of the Employment Act.

Applicant gave evidence under oath. He told the court that he was employed as a water guard supervisor. That in December 1994 he was called by the chief civil engineer namely Mr. Corsa. Mr. Corsa told applicant that he was going to promote him to the position of weir keeper. According to the applicant Mr. Corsa told him that he (applicant) would receive an increment of 15% and that his position would be

regraded later on.

Applicant did take the position of weir keeper. There were changes that took place. Applicant was given a house for senior staff members. He was given a van and a driver. There was a tractor under his supervision. He had 16 people under his supervision. He had to submit monthly returns to the senior irrigation and drainage engineer. He would attend management meetings together with other senior officers in the department.

According to the applicant before he was promoted the position was held by a certain Mr. Mhlanga. The position was eventually graded and applicant placed in C2 with a salary of E19506- per annum. According to the regrading applicant was in senior staff position.

Applicant expected the new salary at the end of May 1995 but he did not receive it. He wrote a letter of complaint to the chief engineer. The result was that he was regraded once more to become B5C a junior position.

According to the applicant the regrading meant that he would retire at 55 as opposed to 60 years. This was because the grading placed him in a junior position. Junior personnel retire at 55 whereas senior personnel retire at 60.

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Applicant stated that at termination he was not paid his notice pay, additional notice pay, severance allowance and 21 days leave which had accrued to him.

The respondent denies that it unfairly terminated applicant's services and has led evidence that the retirement age applicable to the applicant was 55 years and that the applicant having attained the age of 55 years was fairly terminated in terms of Section 36 (K) of the Employment Act.

Respondent's argument is that the promotion did not place the applicant into senior staff and as such the terms and conditions applicable to applicant were those of junior staff and that this was explained to him in terms of a letter dated 19th December 1994.

RW1 Mr. Derrick Corsa told the court that after the leaving of the applicant's predecessor management had decided that the job of weir keeper should be down graded to a junior position.

According to Mr. Corsa he called the applicant in the presence of Michael Shongwe who was supposed to interpret for applicant. It was at that meeting where the position of weir keeper was offered to the applicant, and where according to Mr. Corsa, applicant was told that the position would be for one year and that it was junior staff position.

The letter dated the 19th December 1994 served to confirm applicant's promotion to the position of weir keeper. This letter was confirming verbal communication between the three wherein the position was offered to applicant. This letter does not state that the position had been changed to junior staff position. All it states is that his salary would be E4.55 per hour and that his position would be re-graded. It does not say that his position would be downgraded.

If this letter was confirmation of earlier verbal communication one wonders why the author of this letter did not mention that the position was a junior position when he wrote to the applicant. This was important to mention if at all it was discussed earlier on. This was a very important term regarding the appointment. It was important for respondent to put it down in writing in order to leave everything beyond doubt.

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The letter reads thus:

"I am pleased to confirm your promotion to the position of weir keeper. Your promotion is with effect from the 20th of December, 1994.

Your new salary will be E4.55 per hour, however, your position is to be regraded ".

This letter does not state that the position is a junior position. It does not state which way would the position be regraded. If the author of this letter had stated that the position would be down graded maybe one would have been in a position to understand that the post had been reduced in its status.

The letter does not help in telling any person reading it that the position of weir keeper was reduced to junior staff position. If this was the case, it was just a decision taken by management and not communicated to applicant.

Mr. Nsibandze has raised very persuasive argument's in his submissions that:

a) When the applicant's letter of appointment promoted him it kept him on an hourly rate whereby he was aware that the previous incumbents of his position as weir keeper was paid according to grade B3 management.

Mr. Nsibandze is losing sight of the fact that the letter of appointment stated that the post had to be regraded. Clearly in the understanding of any person this rate was a temporary one pending the regrading of the post. Applicant therefore could not attract any emphasis to this as he knew that his position was not going to remain as it was but that the E4.55 per hour pay was subject to regrading of the position.
Secondly:

b) That the applicant told the court that even after his appointment in December 1994 he continued to work and claimed overtime. We would believe that this was also due to the fact that management had not regraded the position and as such applicant was still paid hourly.

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According to the evidence of Michael Shongwe and King Masika, soon after the applicant was promoted he was taken by Mr. Ketteringham and a delegation from the respondent to be introduced to the chief of the community in which the applicant would be working.

The evidence of the two is that Mr. Ketteringham told the chief and those present that the applicant would be the weir keeper, but that this would only be for one year. The witness told the court that the applicant was present but did not comment.

Mr. Nsibandze concludes that the reason why the applicant did not react to Mr. Ketteringham's statement was because he was aware that his position did not affect his status as a junior staff and that he would be retiring on attaining 55 years like all junior staff. Mr. Nsibandze might be correct in drawing such conclusions, however, the letter of appointment was supposed to communicate this to the applicant in unequivocal manner.

The letter is conclusive evidence of the new Terms and Conditions of service of the applicant. It is important to note that it does not mention that the position is junior.

Mr. Nsibandze says the court should infer from the conduct of the parties that the position was a junior position. However the applicant says the court should rely on the letter of appointment dated 19th December 1994 which state that he was promoted to the position of weir keeper, (a senior position).

If the company intended to give to the applicant less favourable conditions than those enjoyed by his predecessor this should have been spelled out clearly to the applicant. Applicant was given new accommodation in the senior staff houses. He was given a car. He had added responsibilities such as being in charge of a staff of 16 employees and also preparing monthly reports. All these benefits and

responsibilities went with the position of the weir keeper. All weir keepers who worked before him had the above-mentioned benefits and responsibilities.

It is clear from the evidence before court that the respondent had planned to downgrade the position to a junior position. Likewise it is clear that the respondent had not downgraded the position when applicant was appointed. The position of weir keeper was a senior position at the point in time. This

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was the position into which the applicant was appointed. Clearly the retirement age attached to this position was sixty years.

The issues that arise for determination are as follows:

1. Whether the applicant in terms of Section 42 (2) (a) was dismissed for a reason permitted by Section 36 of the Employment Act.
2. Whether in terms of Section 42 (2) (b), it was just and reasonable taking all circumstances of the case to dismiss the applicant.

Regarding the first issue, the question is whether the respondent has proved on a balance of probabilities that the applicant had reached the age of sixty years when he was dismissed.

The answer to this question is negative, then there is no need to go to the second enquiry.

Clearly when the applicant was retired he was 55 years of age and as such he had not attained retirement age of sixty which is normal retirement age of employees of respondent who are employed as senior staff.

In the result, the dismissal of the applicant was both substantively and procedurally flawed. The applicant's application succeeds accordingly.

In determining the award to grant the applicant the court considers that he was 55 years old with sixteen children from two wives. He had worked for the respondent for 25 years. He had no previous or current record of misconduct at the time of dismissal. He earned a monthly salary of E916-50 at the time of his dismissal. He has remained unemployed to date.

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