

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

TIMOTHY MAKHATHU

Appellant

Vs

J.D. GROUP OF COMPANIES t/a SCORE FURNISHERS

Respondent

Civ. Appeal No. 37/2001

Coram
SAPIRE, JP
MATSEBULA, JA
MAPHALALA, JA

For Appellant A. SHABANGU

For Respondent P. FLYNN

JUDGMENT

(22/04/2002)

The appellant was the successful plaintiff or claimant in the Industrial Court. In that Court after citing the parties the appellant stated that in or about 1st August 1988 he and the respondent entered into an oral agreement of employment in terms of which the applicant was the employee and the respondent was the employer. His employment was in the capacity of Branch Manager for the respondent's Nhlanguano shop. His monthly salary was E4 077.75 payable on or before the end of each month. During the subsistence of the agreement the applicant's normal working hours exceeded 40 hours each week. He completed his probationary period in 1993. He was engaged for a fixed term and his term of engagement has since expired. It is undisputed that the applicant was at all material and relevant times an employee to whom the Employment Act of 1980 applied.

2

The appellant stated in his particulars that on or about the beginning of March 1993 the respondent represented by General Manager one Chris Viljoen stopped the applicant from reporting for work until he was informed of the outcome of investigations into alleged financial irregularities that had allegedly been brought to the respondent's attention. The appellant further states that following the suspension from work by the respondent, the appellant has waited anxiously to be told of the outcome of the investigations and to be allowed to resume his duties as manager of the respondent's Nhlanguano branch. The appellant was not paid during this whole period after the suspension. He claims that he has neither been given notification of his dismissal nor dealt with in accordance with the disciplinary code and procedures at the respondent's shops. Paragraph 10 of the particulars of claim is of crucial importance. It reads:-

"In the premises the applicant avers that the conduct of the respondent towards him is not only repudiatory of the employment agreement but amounts to unfair termination in terms of section 37 of the employment Act, 1980. "

The applicant made a complaint and having received a certificate of unresolved dispute instituted action in the court a quo. His claim was for:-

1. Payment of the applicant's wages from April, 1993 to date of judgment and reinstatement to his job with all benefits. Alternatively,

2.1 An order declaring the employment agreement terminated with effect from date of judgment

2.2 An order directing the respondent to pay to the applicant unpaid salary due to applicant from April, 1993 to date of judgment.

2.3 Payment of one month's salary in lieu of notice.

2.4 Payment of additional notice pay in terms of Section 33 (1) © of the employment Act 1980 calculated at the rate of an

3

equivalent of four days salary prorata for each completed year of service excluding the first twelve months.

2.5 Payment of severance allowance in terms of section 34 of the employment Act, 1980 calculated at the rate of an equivalent of ten (10) days prorata salary for each completed year of the subsistence of the employment agreement excluding the first year.

2.6 Payment of an equivalent of twenty four months salary by the respondent to the applicant as statutory compensation totalling to E97 866.00 (ninety seven thousand eight hundred sixty six emalangeneni).

2.7 Payment of an equivalent of twelve months salary as special award in the event the respondent is unable to reinstate the applicant such amount totalling E48 933.00 (forty eight thousand nine hundred and thirty three emalangeneni).

The court a quo after considering all the circumstances which were heard in evidence awarded him six months compensation for unfair dismissal in the sum of E24,466.50, one month's notice pay in the sum of E4 077.75, additional notice and severance allowance to be calculated in terms of the Employment Act and presented to court for approval, within 14 days from the date of judgment. The basis of the appeal against this judgment by the successful applicant is that the court a quo erred in law in holding that the agreement of employment between the appellant and the respondent terminated on the date of the suspension which was March, 1993. In the judgment it is states:-

"The court finds in the circumstances that the agreement of employment was terminated on the date of such suspension which was in March, 1993. "

This was quite a proper finding to make in view of the allegations in the particulars of claim. The appellant himself stated that the conduct in March 1993 amounted to a

4

constructive dismissal. This was the basis of the claim and this was the basis on which the award was made.

It is strange that he should now claim additional salary after the date of termination. The basis of the appellant's claim in this court is based on Section 37 of the Employment Act, which reads:-

"TERMINATION OF SERVICES DUE TO EMPLOYER'S CONDUCT.

37. When the conduct of an employer towards an employee is proved by that employee to have been

such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by the employer. "

The point made by Mr. Shabangu who appeared for the appellant is based on the words "when the conduct of an employer towards an employee is proved by that employee....." From this Mr. Shabangu wishes to argue that the unfair dismissal only takes place after the matter has been proved and the court has given judgment. This is clearly an untenable proposition. The unfair dismissal takes place immediately the conduct of the employer makes it impossible for the employee to continue work. In the present case that happened when he was suspended without pay. The fact that he waited until several years later to place a claim for the unfair dismissal does not detract one bit from the fact that the unfair dismissal took place at the time of the suspension. It is also clear that the award made is inconsistent with a continuation of the contract after 1993 and the award made is aimed at fully compensating the appellant for not being in employment for the time that he was suspended.

The appellant was in fact faced with an election at the time and he cannot claim both termination benefits and arrear salary for the period after the termination. The facts in this case are to be distinguished from those in Themba Mdluli and others, Jabulani Dlamini and 67 others v Emaswati Coal (Proprietary) Ltd. Appeal 18/96 Swaziland

5

Court of Appeal. The point of difference is that in the case cited it was found that the employer had never terminated the employee's services. In this case the Appellant's case is that there was a constructive dismissal.

In the circumstances the appeal will be dismissed.

SAPIRE, JP

MATSEBULA, JA

MAPHALALA, JA