IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 254/2000

In the matter between:

JAN VAN STADEN APPLICANT

and

LONRHO MOTORS SWAZILAND (PTY) LTD RESPONDENT

CORAM:

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : P. R. DUNSEITH

FOR RESPONDENT : P. FLYNN

JUDGEMENT

04/02/03

This is an Application for determination of an unresolved dispute in accordance with Section 65 of the Industrial Relations Act No. 1 of 1996 and the Industrial Court Rules 1984.

The dispute was reported to the Labour Commissioner on the 21st March 2000 in terms of Section 57 (1) and 58 (1) thereof and the same was certified unresolved.

The Applicant claims maximum compensation for unfair dismissal and refund of monies deducted from terminal benefits.

In the particulars of claim, the Applicant avers that he was employed on the 10th May 1999 by the Respondent in its Manzini body shop as a manager in terms of a written contract of employment entered into by the parties and signed on the 8th June

1999. A copy of the contract is annexed to the particulars of claim and marked "A".

In terms of the said contract, the initial period of employment was for six (6) months from the 10th May 1999 to 31st October 1999 and the contract was renewable by mutual agreement for a further period of two (2) years per clause 2 of the contract. At the end of the initial period of employment, the contract was not expressly renewed for a further period of two (2) years but the Applicant remained in the continuous employ of the Respondent until the 4th February 2000. The Applicant alleges that on the 20th January 2000, the Respondent's Managing Director Mr. Lyle gave him a letter dated the 30th December 1999 in terms of which the Respondent terminated the Applicant's employment for failure to satisfy the expectations of the Respondent. The letter is annexed to the particulars of claim and marked "B".

The Applicant alleges that the said termination was in breach of the employment contract, was unlawful and unfair.

At the time of dismissal, the Applicant earned E12,800 per month. He was paid terminal benefits upon termination but a sum of E3,500 was deducted to cover unknown sum of telephone bills. He now claims refund of the sum deducted. The certificate of unresolved dispute is annexure "D" to the Application.

On the contrary, the Respondent avers in its reply that the Applicant upon completion of the initial six months contract, was advised that due to his inability to turn the bodyshop around, his contract would not be renewed as provided for in the contract of employment.

That the Applicant requested and was given a further two months period within which to prove himself but he failed to satisfy the expectations of the Respondent i.e. to turn the workshop around as he had promised and his services were terminated by a letter given to him on the 30th December 1999, but not on the 20th January 2000 as he alleges.

The Respondent adds that in view of the above, it was not in breach of the contract nor was the termination of the Applicant unlawful and/or unfair.

The issues for determination are as follows:

(i) was the Applicant an employee to whom Section 35 of the Employment Act applied?

(ii) If so, was he dismissed for a reason permitted by Section 36 of the Employment Act?

(iii) If so, was the dismissal fair and reasonable in the circumstances of the case?

Section 35 (1) reads as follows:

"(1) This section shall not apply to -

(a) an employee who has not completed the period of probationary employment provided for in Section 32;

(b) an employee whose contract of employment requires him to work less than twenty one hours each week;

(c) an employee who is a member of the immediate family of the employer;

(d) an employee engaged for a fixed term and whose term of engagement has expired."

Section 35 (2) on the other hand reads :

"No employer shall terminate the services of an employee unfairly."

The Respondent told the court through its witnesses that the Applicant was not protected by Section 35 (2) of the Act because his employment was terminated by exfflusion of time, in terms of Section 35 (d) in that he had been engaged for a fixed term of six months which had expired and was not renewed. He was subsequently verbally engaged for a two months period at his

insistence to prove himself but had failed hence the letter of termination dated the 30th December 1999.

The Applicant however continued to work up to the 4th day of February 2000.

The question arises as to whether there was a tacit renewal of the Applicant's contract of employment upon the expiry of the initial six (6) months period, and if there was such tacit renewal, on what terms was it? The status of his employment at the time will determine whether he was an employee to whom Section 35 (2) of the Employment Act applied or not, when his employment was terminated.

It is not mandatory for a contract of employment to be in writing, neither is it compulsory that it be evidenced in writing. An oral arrangement coupled with performance suffices. The act in terms of Section 22 only makes it compulsory for a form to be filled stating the terms and conditions of an employee. The form is not a contract of employment.

In this case, it is common cause that the six months written contract commenced on the 10th May 1999 and ended on the 31st October 1999. It is also not in dispute that the Applicant continued in the employment of the Respondent until the 4th February 2000. During the months of November 1999, December 1999 and January 2000, the Applicant received the same salary as he was paid under the six months contract. All other terms of employment as previously arranged remained unaffected. The Applicant was not under probation because no such arrangement had been put down in writing in terms of Section 32 of the Employment Act.

In particular, Section 32 (2) states that no probationary period shall except in the case of an employee engaged on supervisory, technical or confidential work extent beyond three months, while Section 32 (3) reads thus:

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"In case of employees engaged on supervisory, technical or confidential work, the probation period shall be fixed in writing between the employer and employee at the time of engagement."

It is without doubt that the Applicant had no fixed contract of employment that expired on the 4th February 2000 nor was he under probation. It is not disputed that the Applicant worked for more than twenty one hours a week nor was he a member of the immediate family of the employer. Clearly at the time of termination of his employment on the 4th February 2000, he was within the purview contemplated under Section 35 of the Employment Act and he has discharged his onus on a balance of probabilities as required of him by Section 42 (1). The Respondent has failed completely to prove its bald allegations that the Applicant's contract had been on the 31st October 1999 extended for a fixed period of two months which had expired on the 30th December 1999. Indeed the Respondent was unable to satisfactorily explain why the Applicant continued to work on the same terms as provided in the initial contract up to the 4th February 2000, if its allegations of a fixed two months term had any element of truth.

Having found that the Applicant was an employee to whom Section 35 of the Act applied, the two issues that follow is whether he was:

1. Dismissed for a reason provided under Section 36 of the Act.

2. If so, whether it was fair and reasonable to dismiss him under the circumstances of the case.

To answer the first question, we have looked at annexure 'B' to the Application, the letter dated 30th December 1999 written to the Applicant by the Managing Director of the Respondent Mr. A. R. Lyle as follows;

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"Dear Jan, re; Control of Body Shop Operation When we interviewed you for the position of manager of our Manzini body shop operation it was made abundantly clear that the continuation or otherwise of your contract was dependant on there being a material improvement in all aspects of same.

We regret to note that we are still battling to come to terms with running the operation efficiently and

profitably and so it is with regret that we have to advise that we are terminating your services.

In accordance with the contract of employment, we will pay you one months notice pay which will be settled on return of the company car, keys, flat etc.

We regret that this step has had to be taken but your failure to turn the body shop around has put the continuation of the whole exercise in doubt.

Yours faithfully.

A.R. Lyle Managing Director"

It is acknowledged by both parties that at the time the Applicant was employed, the bodyshop was a complete shambles. The assignment of the Applicant was in the Respondent's words "to turn the bodyshop around". This apparently was meant to bring the operations of the workshop to acceptable levels of efficiency and profitability.

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From the various documentation before court, and in particular audit statements, it would appear that by and large, the Applicant had begun to improve the operations of the workshop though there was still a lot to be desired. The Applicant told the court that he found many vandalized motor vehicles in the body shop which he had to deal with and this impacted on his operations. He needed training on the particular system in use at the workshop. The computer itself was defective and he had to do without a secretary for a while.

He explained that there was literally no induction to his work as Mr. Smith the manager at the Manzini branch was not helpful at all. All these factors and more had a bearing at the speed in which he could turn around the bodyshop, but he was confident that was going to happen, if he was given a proper chance and support.

The Respondent was hardly able to counter these assertions by the Applicant. It is the court's view that the environment in which the Applicant took up the management job was not conducive.
Getting back to the letter of the 30th December 1999, the court observes the following:

1. That the Respondent purports therein to terminate the services of the Applicant because there was no material improvement in the operations of the bodyshop.

2. That the Respondent offered to pay the Applicant one month's notice pay in accordance with the contract of employment.

It is not clear whether by 'contract of employment' was meant the written contract that had expired on the 31st October 1999. The written contract provided for a one month's notice pay if the contract was renewed after six months.

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It was argued for the Applicant that the necessary implication of Mr. Lyle's letter was that the employer had already renewed the contract after the six months period.

The other thing to note from Mr. Lyle's letter is that, it was not alleged that the employment of the Applicant had terminated by effluxion of time or that his contract of employment had expired. The letter constituted a clear act of dismissal for failure to meet the employer's expectation. It is in question whether this meant that the Applicant's performance was poor or was not good enough to rejuvenate a dying operation.

Upon receipt of this letter, the Applicant continued working and on the 4th February 2000, he received annexure 'C' to the Application, a letter written by Mr. P. Perry, the Finance Director of the Respondent.

The letter reads thus:

"Dear Mr. Van Staden, re: contract of employment We regret to inform you that we will not be renewing your contract and would refer you to our earlier letter of the 30th December 1999. We therefore are giving you notice of termination of your employment with Leites Motors.

The terms of your contract termination will be as follows:

- You will be paid for February 2000 at the end of the month.
- In addition you will receive one months notice pay.
- You will also receive settlement of any leave pay due.
- You will be entitled to use your company car until 29th February 2000.
- You will be entitled to use your company house until the 29th February 2000.

On the 29th February 2000 your final pay, as ruled above will be given to you in return of the company car, the car keys and the keys to your company house.

Yours Sincerely

P. PERRY

FINANCE DIRECTOR"

This letter is self-explanatory. It simply means that as of the 4th February 2000, the Applicant was still in the employ of the Respondent and the Respondent was then giving him a one month's notice to terminate his employment for reasons contained in the earlier letter of 30th December 1999.

The termination was to take effect on the 29th February 2000. Up to that date, he was granted all the benefits of the contract of employment entered into when he was first employed on the 10th May 1999.

It is a glaring fact that the Applicant was in actual employment of the Respondent up to the date the relationship was terminated on the 4th February 2000. He had therefore worked continuously from the 10th May 1999 to 4th February 2000, a period of ten months. Having found that he was an employee to whom Section 35 of the Act applied, he could only be dismissed for a reason provided under Section 36 of the Act.

There is no suggestion by the Respondent that the Applicant was subjected to any form or manner of disciplinary measure for misconduct or poor work performance. Indeed, the Applicant was not at any time during his ten (10) month's sojourn with the Respondent charged with any disciplinary offence. In the two letters of termination, it is not stated categorically that he was performing poorly. It is only alluded that he was unable to turn the workshop around without clarifying the factors which led to

that. We do accept the evidence of the applicant concerning the various obstacles that militated against the smooth operations of the workshop. We also accept that the workshop had begun to show signs of improvement as testified by the written remarks of Mr. P. Perry in the statements of account.

The evidence of Mr. Lyle and Mr. Perry falls far short of proving on a balance of probabilities that the Applicant was dismissed for a reason provided under any of the subsections of Section 36 of the Employment Act. The letters of the 30th December 1999 and that of the 4th February 2000 exemplify this failure by the Respondent to discharge its onus under Section 42 (2) (a). The two executives were labouring under a misconception that the Applicant's employment relationship with them was of a temporary nature after the 30th October 1999. This was far from the truth since no fixed term contract that was due to expire on the 4th December 2000 existed between the Respondent and the Applicant at the time neither could he have been lawfully on probation as of the 4th February 2000.

As to whether it was fair and reasonable to dismiss him in the circumstances of the case, the court observes the Respondent lured the Applicant to Swaziland to take up the position of bodyshop manager and he had to abandon his business and forego other job opportunities in South Africa.

He had been promised a two year contract that was never to be. He was also promised 25% gratuity after completion of the initial contract which he never got.

He told the court that he had found the workshop in shambles but had "cleaned up the place". All outstanding motor vehicles were delivered, there was not enough work coming thereafter and that was not his responsibility. He acknowledged some complaints from several customers and gave reasonable explanation for the occurrences. He had all the expectation that he would serve at least a two year contract, though he told the court that he was not given a work plan but continued working. He was never advised

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that the contract would not be renewed until he received the letter dated 30th December 1999 on 20th January 2000. He denied he had not turned the workshop around stating he needed more time to start generating profits. Mr. Perry withdrew the letter dated 30th December 1999 that purported to dismiss him and asked him to continue working. He received a salary for January but thereafter received the letter dated 4th February 2000 terminating his services with effect from the 29th February 2000.

The Respondent has further failed to discharge its onus in terms of Section 42 (2) (b) by not showing that it was fair and reasonable to dismiss the Applicant in the circumstances of the case. Though the letter gave him one month notice, he was infect asked to leave immediately on the 4th February 2000. Upon the termination, due to financial difficulties, he lost his house in South Africa and his car. He also had lost his business in South Africa.

The Applicant was presently running his own business of panel beating and spray painting he had opened in the year 2000. For six months after dismissal, he was unemployed, though he did odd jobs from time to time. He has three children dependant on him. He suffered stress due to financial difficulties, especially because he had closed up his work shop to take up the job in Swaziland.

The Applicant claims maximum compensation in terms of the 1996 Act which permitted 24 months salary.

Considering all the factors aforesaid and in particular the severe hardship the Applicant has suffered, we award him fifteen (15) months salary as compensation for unfair dismissal in the sum of E12,800 x 15 = E192,000. In addition, the Applicant is entitled to the sum of E3,500 unlawfully deducted from his earnings upon termination.

Total award will thus be E195,500.

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There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT