

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE WITH

CASE NO. 115/2001

In the matter between:

MUSA GAMA APPLICANT

AND

SUPREME FURNISHERS RESPONDENT

CORAM

K.P. NKAMBULE : JUDGE

DAN MANGO : MEMBER

GILBERT NDZINISA : MEMBER

FOR APPLICANT : MBUSO SIMELANE

FOR RESPONDENT : G. ANNANDALE

JUDGEMENT 1/06/04

The applicant has brought this application in terms of Section 41 (3) of the Employment Act 1980. He seeks re-instatement, alternatively maximum compensation for unfair dismissal and terminal benefits in the form of leave pay and wages in lieu of notice.

Applicant's particulars of claim state that the applicant was employed by the respondent as branch manager on 2nd January 1999. He was entitled to a monthly salary of E9,075-

In August 2000 the respondent entered into an agreement, inter alia, with all branch managers in terms of which agreement the branch manager who would record the highest sales over turnover for the three months period ending in October 2000 would be awarded a Fiat Uno

1

motor vehicle. The applicant, according to the particulars of claim earned an entitlement to be awarded the Fiat Uno in accordance with the terms of the aforesaid agreement and same was communicated to him by Annexure MG1 of the application. However, respondent has failed and/or neglected to deliver to the applicant the said motor vehicle which applicant won by recording the highest sales for the store for which he was branch manager.

According to the particulars of claim, on about November 2000, the respondent constructively dismissed the applicant from employment by refusing to grant the applicant sick leave despite a doctor's recommendation that the applicant stay away from work. This conduct by the respondent forced the applicant to resign from his employment in order to attend to his health.

The respondent pleads that it initiated Annexure MG1 based on the limited information available at the time regarding total sales that the applicant achieved over the period of measurement. Only after some time and a more detailed scrutiny of the actual sales results, it emerged that all was not well with the applicant's reported sales and the respondent delayed the delivery of the said motor vehicle pending further investigation.

According to the respondent the applicant tendered a resignation letter on 7th November 2000, resigning with immediate effect and not fulfilling the contractual and statutory obligation of notice placed on the applicant.

The applicant gave evidence under oath. No departure was made by the applicant in so far as his particulars of claim are concerned. The applicant confirmed that the respondent constructively dismissed him by

2

refusing to grant him sick leave, thus resigning in his employment in order to attend to his health problems. He further stated under oath that this was his only reason resigning.

The applicant produced a sick note relieving him from duty as from the 6th November 2000 to the 12th November 2000. During this period the applicant was not at work. He did not report for duty on 13th November 2000.

From the forgoing it is quite clear that the applicant utilised all his sick leave days. The court is aware of the telephonic conversation which took place between the applicant and his immediate supervisor, the respondents regional manager, during applicant's sick leave. The applicant stated that he was threatened with dismissal if he did not return to work immediately. The respondent's regional manager denies any such threats. The applicant, however, did not return to work. He was aware of his rights regarding sick leave.

It is strange as to why the applicant failed to use the grievance procedure of the organisation. One would have expected him as the branch manager responsible for administration to be familiar with the document regarding grievance procedure. In cross-examination applicant told the court that he was familiar with this document.

Constructive dismissal in our law is governed by Section 37 of the Employment Act. The Section provides as follows:

"Where the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer be reasonably expected to continue in his employment and accordingly leaves his employment, whether with or without notice,

3

then the services of the employee shall be deemed to have been unfairly terminated by the employer".

It is therefore clear that there are three elements on the law of constructive dismissal;

- a) There must be some conduct by the employer;
- b) Such conduct must be of such a nature that the employee can no longer reasonably be expected to continue in his employment, and
- c) The employee must leave his employment either with or without notice.

Unlike the ordinary case of unfair dismissal, elements of constructive dismissal have to be proved by the applicant. In the case of *ALDENDORFF V OUTSPAN INT, LTD* (1997) ICCMA 6,13,1 (GA 1571) it was held that the mere resentment by an employee at the employer's conduct does not warrant the conclusion that the employment relationship is intolerable. In *Mbalane V S.A. Breweries* (2001) 10 CCMA 6.13.1. (NW 16832) the exhaustion of the grievance procedure to resolve complaints rather than resigning was emphasised.

Andre Van Niekerk in *Unfair Dismissal*, 2002 page 20 states

"It is not the employee's say-so or perception of events that establishes intolerability, or even the employer's state of mind. What is relevant is the conduct of the employer in an objective sense... This implies not only that the test should be objective but that it should be not at a high standard, and that the act of

4

resignation should be an act of final resort when no alternative remain."

In the instant case the conduct of applicant's immediate supervisor could be reported to the head office. It is therefore clear that by resigning the applicant put the cart before the horse.

I am not going to deal with the issue regarding the competition, save to mention that from the evidence of the respondent's internal audit manager who gave evidence under oath it is clear that the winning by applicant was marred with a host of irregularities. This witness made examples and then went further and stated that the irregularities were so serious that they would have resulted in disciplinary action taken against the applicant if he did not resign. If found guilty of committing the irregularities, it was highly likely that the applicant would have been summarily dismissed in terms of the respondent's disciplinary code.

When an employee resigns to prevent disciplinary proceedings against him running its course the resignation does not amount to duress, nor can it be said that it amounted to unfair or unlawful conduct of the employer. See the case of Civic Obo Moreli V Glass Centre Obo Rudy

(1999) 8 CCMA 6.13.1 (NM 16832)

Under circumstances can it be said the applicant has been successful in proving constructive dismissal in terms of Section 37 of the Employment Act? It is the opinion of this court that the applicant has not proved that the conduct of the employer was such that he could no longer reasonably be expected to continue in his employment. In the circumstances, and for the above reasons and conclusions, the application fails.

5

No order as to costs. Members agree.

K.P. NKAMBULE

JUDGE.

6