

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 153/2002**

In the matter between:

NOMSA MAMBA**Applicant**

and

CHRISOVIK HAIR & BEAUTY HOME**Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : S. DLAMINI****FOR RESPONDENT : B. FAKUDZE**

J U D G E M E N T – 4/12/2006

1. In her particulars of claim the Applicant avers that she was employed by the Respondent as a hair braider on the 14th January 2002 earning E100.00 per month in wages. On 30th March 2002, whilst she was still on probation, the Respondent terminated her services. She is not contesting her dismissal, but she wishes to

claim for unpaid overtime worked, and underpayment of wages. Her total claim amounts to E7601-49.

2. In its Reply, the Respondent denies that it ever employed the Applicant, and avers that she was a trainee. The Respondent alleges that the monies it paid to the Applicant were a gratuitous travelling allowance. The Respondent also pleads that the Applicant is owing a sum of E1000.00 in respect of training fees, but no counterclaim was filed and this claim may be disregarded.
3. In her testimony, the Applicant stated that she completed her 'o' levels in 2001 and wished to obtain employment. On 7th January 2002 she saw an advertisement placed by the Respondent seeking a qualified hairdresser and braider for immediate employment. The Respondent is a hairdressing salon in Mbabane city. The Applicant had an interview with the Respondent's proprietor Mrs. Margaret Sokuu. She conceded that she had no qualification as a hairdresser but she knew how to braid cornrows. According to the Applicant, Mrs. Sokuu employed her on the spot and promised to pay her E150.00 per month. She was instructed to report for work on Monday 14th January 2002.
4. The Applicant denied that she was only accepted as a trainee. She said there was never any discussion about training or the payment of training fees.
5. At the end of January 2002, the Applicant was paid E100,00 because she did not work the full month. At the end of February 2002 she was paid E150.00. On 30th March 2002, there was a

disagreement between the parties. According to the Applicant, her employer complained that she was eating lunch whilst everyone else was working. She said the Applicant was not serious, and she told her take her bags and leave. She did not pay the Applicant for the month of March 2002.

6. According to the Regulation of Wages (Retail, Hairdressing, Wholesale and Distributive Trades) Order, 2000 the basic minimum wage for a Hair Braider in an urban area is E632.05 per month and the normal hours of work consist of 48 hours per week.
7. The Applicant said she worked seven days a week without a break, from 8.00 a.m. to 6 p.m. Monday to Saturday, and 10 a.m. to 5 p.m. on Sundays. The Applicant claimed payment of 242 hours overtime in the sum of E5882.46, and underpayment of wages in the sum of E1,719.03.
8. Mrs. Margaret Sokuu testified on behalf of the Respondent. She confirmed that the Applicant applied for a job, but she said she explained to the Applicant that she had no qualifications and she could not employ a person who only knew how to braid cornrows. She offered to train the Applicant at a cost of E1200.00, but the Applicant said she had no money. Mrs. Sokuu said she took pity on the Applicant and agreed to train her without payment. She said she had also been shown kindness and trained without charge by a hairdresser when she was desperate to find a vocation in 1991, and she decided to show the same kindness to the Applicant. She told the Applicant that when she finished her training she would be salaried and she could then arrange payment of the training fees to get a certificate.

9. According to Mrs. Sokuu, the Applicant thereafter came to the salon for training. She did not wash or braid customers hair because she was not qualified to do so. She learned how to clean the salon, prepare chemicals, wash, style and braid hair by observing and assisting the other hairdressers. She did not generate any revenue for the business. She was expected to keep the same hours as the employees.
10. Mrs. Sokuu agreed that extended hours were worked when the salon was busy, and that the salon was open on Saturdays and Sundays. She stated that employees took off one day during the week as on off-day. She said that she gave the Applicant gratuitous gifts of E100.00 in January and E150.00 in February 2002 because the other workers were being paid and she felt sorry for the Applicant who also had to travel to the salon every day.
11. Mrs. Sokuu complained about the Applicant's attitude and conduct. She said she often had to reprimand her for poor time keeping. On the Applicant's coming to work at 1 p.m. without explanation and then having her lunch, she lost patience. She felt the Applicant was undermining the work ethic at her salon. When she reprimanded the Applicant, the latter replied rudely. She then told her that she was under no obligation to put up with her and she should leave.
12. The Applicant demanded payment of E150.00. Mrs. Sokku responded that it was the Applicant who was owing her training fees.

13. Under cross-examination, Mrs. Sokuu was asked why the last entry in the Clocking Register for Applicant showed that the Applicant reported at 8-25 a.m., not 1 p.m. as alleged. The witness replied that the Applicant did not clock in on her last day when she came at 1 p.m., so the 8-25 a.m. entry must be for the previous day.
14. The Respondent called Ncamsile Bhembe as a witness. She worked for the Respondent in 2002. She corroborated the evidence of Mrs. Sokuu that the Applicant was a trainee; that she did not braid or work on customers hair but was learning by observing and assisting the hairdressers; and that she never spent 7 days at the salon without a day off.
15. The Respondent also called Phindile Dube as a witness. She said she is currently a trainee at Respondent's salon. She agreed to pay a training fee of E1500.00. She attends work as a trainee from 8.00 a.m. to 5.30 p.m., with one day off per week. She is not paid, but the Respondent sometimes gives her tips or gifts at the end of the month. She has completed one year of training and is now "polishing up". She learned customer relations; how to clean the salon; and washing and styling hair. She was not allowed to braid customers hair whilst training.
16. The Applicant bears the burden of proving that she was an employee to whom the Regulation of Wages Order applied.
17. The definition of an employee in both the Wages Act, 1964 and the Employment Act 1980, is as follows:

employee means *“any person to whom wages are paid or are payable under a contract of employment.”*

18. Whereas “contract of employment” is defined under the aforesaid Acts to include a contract of traineeship, the qualifying condition to be an employee is the entitlement to be paid wages.
19. In this regard, the versions of the Applicant and the Respondent are mutually destructive. The Applicant’s case is that she was employed for a wage, whilst the Respondent asserts she was engaged as a trainee with no entitlement to any wages.
20. The Applicant and Mrs. Sokuu held to their respective versions under cross-examination. The version of Mrs. Sokuu was however corroborated in all material respects by Ncamsile Bhembe, who may be regarded as an independent witness. The evidence of Phindile Dube also confirms the nature and terms of the traineeship arrangement at Respondent’s salon.
21. Looking at the probabilities of the parties’ respective versions, the court makes the following observations:
 - 21.1 the Respondent advertised specifically for a qualified hairdresser and braider. It is unlikely that the Applicant would have been employed without qualifications or experience.
 - 21.2 no matter how desperate a person may be to earn money, it is unlikely that an educated and bright person such as the Applicant would agree to work

seven days a week for a mere E150.00 per month.

22. The court also notes the discrepancy between the wages of E100.00 pleaded in the Applicant's particulars of claim and the E150.00 to which she testified. This discrepancy is consistent with a variable "gift" as testified by the Respondent's witnesses.
23. The court was also struck by the sincerity of Mrs. Sokuu's outrage that her provision of free training was being twisted by the Applicant to justify a demand for wages.
24. Taking all these considerations into account, the court accepts the version of the Respondent, namely that the Applicant was a trainee and there was never any agreement to pay wages to her as an employee. In the premises, the Applicant's claim must fail.
25. The court has had occasion to peruse the Industrial and Vocational Training Act No. 16 of 1982. The Act makes provision for the employment of trainees, but contains no provision for the protection of trainees who are not employed. The potential for exploitation of such trainees is manifest, since in the name of training they may be expected to render all kinds of menial and other services without remuneration. In the present case, it appears to be the norm that trainee hairdressers act as unpaid cleaners and assistants for a period of a year. Infact, they are expected to pay for the privilege. Such trainees require the protection of the law even more than trainees and apprentices who are employed for a wage.
26. The Registrar of the Industrial Court is directed to forward a copy of this judgement to the Chairman of the Industrial and Vocational

Training Board for the attention of the Board.

27. The application of the Applicant is dismissed. There is no order as to costs.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT