IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 188/03

In the matter between:

PAUL LINCOLN NGARUA **APPLICANT**

And

SWAZILAND GOVERNMENT **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: JUDGE
DAN MANGO: MEMBER
GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. A.M. LUKHELE
FOR RESPONDENT: MR. J.S. MAGAGULA

JUDGEMENT 12.09.07

[1] The facts of this case are not in dispute. They also received wide press coverage especially the incidence when the former Principal Secretary in the Ministry of Justice, Dr. Hugh Magagula was captured by a surveillance camera in the applicant's office sneaking in during the night and locked out the applicant from his office.

[2] This case also typifies the legendary Frankenstein's monster. This story has it that a man kept a pet monster which when it was fully grown up, turned against the owner. The court says this because applicant was part of a committee whose legal status was questionable called The Special Committee on Justice, commonly

referred to as the 'Thursday Committee' which later turned against him and forced him to resign.

[3] The applicant after his ordeal in the hands of the all powerful Thursday Committee got an international award for standing against the immense pressure that he faced in the execution of his duties as the Director of Public Prosecutions. We do not know however if the world was also told that the applicant was an efficient member of the notorious Thursday Committee whose main function was to put pressure on judicial officers especially Magistrates of the country in direct violation of the rule of law.

[4] The applicant was first employed by the respondent in July 1994 as a Crown Counsel. In 1996 he was appointed Senior Crown Counsel and in 1998 he was appointed to the position of the country's Director of Public Prosecutions ("DPP"). The applicant was working on contracts. His last contract was for five years from the year 2000 to 2005. It was this latter contract that was breached by the respondent in 2003.

[5] The applicant claims that he was constructively dismissed by the respondent and he is now claiming payment of terminal benefits in terms of the contract of employment in the sum of E851,019.29 and payment of compensation for the unlawful dismissal in the sum of E531,146.88.

[6] The applicant had a good working relationship with the senior officials of the Ministry. He actually told the court he was the 'blue eyed boy' of the-Ministry^4iis^oubles^tarted when he charged Prince Duminsa Dlamini, who is popularly referred to as the "sugar tycoon," for contempt of court. Apparently the Prince was not happy about the way that his case was handled by the courts. He then made unacceptable remarks about the court's judgement. He was therefore charged with contempt of court. The Prince was a friend of the then Minister of Justice, the late Chief Maweni Simelane. The Chief

Justice at that time, Justice Sapire was visited at his home with a view to have him to put aside the charge.

[7] The other problem that the applicant faced arose from a decision that he took by not preferring charges against a certain person who had killed the then Headmaster of Lobamba High school. The applicant in his capacity as the DPP was of the view that the crown will not secure a conviction as the deceased was killed in circumstances, which clearly showed that the accused acted in self-defence.

[8] The deceased was also a friend of the Minister, Chief Maweni Simelane. The Minister tried to persuade the applicant to proceed with the case and not to release the suspect. The applicant declined to go against his convictions. The matter took another dimension as the then Attorney-General, Phesheya Dlamini also became involved. The applicant was however still not persuaded. That decision of the applicant seriously affected the relationship" between him, the Attorney-General and the Minister.

[9] At that point the question of the applicant's qualification was brought up. The Attorney General and the Head of the CID Mr. Dumisani Sithole took a trip to India where the applicant obtained his legal qualification to investigate. They did this with the help of Interpol. This question of the applicant's qualification was brought up when he was away in Kenya. He said he was distressed and shocked as he first discovered this on the Internet. He then instructed his attorney about this issue.

[10] The applicant told the court that he was distressed and shocked because the Minister knew very well that he was properly qualified. Secondly, when the delegation returned from India they did not fully report on everything that they had found. The applicant went to talk

to the Police Commissioner Mr. Edgar

Hillary about this. Mr. Hillary confirmed that indeed some people were sent to India to investigate about his qualification, but told him not to worry as it was all done because of political pressure.

[11] The applicant said he felt so stripped and intruded upon about this-as people were talking about this issue everywhere. He said the staff at the office began to shun him. This matter however died a natural death, as it was false and baseless.

[12] The third incidence which finally forced the applicant to bow to ~ thepressure4rappenedHn*0ctober*2002:"' Duririg"this^eri6d[H] there was a habeas corpus application before the High Court involving the Royalty. The then Chief Justice Sapire was visited by the then Attorney General, Phesheya Dlamini in the company of the three security forces' leaders. Dlamini told the Chief Justice to drop the case. The Chief Justice then made a formal complaint to the applicant. The applicant then preferred charges of contempt of court and sedition against Phesheya Dlamini. The charges were filed at the Magistrate's court in Mbabane. Summons were issued but the police failed to serve Dlamini.

[13] The applicant said he then tried to serve Dlamini through a Deputy Sheriff. That attempt also failed. The applicant then approached the Magistrate's Court to appoint someone to serve the summons. The Magistrate for unknown reasons said she could not do so and told the applicant to approach the Minister of Justice. Those were dark days for the applicant. He said he felt frustrated. On the 8 November 2002 three police officers came to the applicant at his home and told him to report at the Prime Minister's office. He went and found the late Paddy O'Connor and Dumisani Sithole the CID Chief. Nothing happened and he went back. He was again summoned on a certain Monday. Again nothing happened. On the 12[th] November 2002 he was again told to come to a meeting at Pigg's

Peak. The police came to his home at about 6:00 p.m. The CID Chief Dumisani Sithole offered to give the applicant a lift; DuThe refused. He went there in a friend s car. Present in that meeting was the Prime Minister Dr. Sibusiso Dlamini, Chief Maweni Simelane, Phesheya Dlamini, Dumisani Sithole, Moi Moi Masilela and another Swazi National Council member whose name the applicant did not recall.

[14] The meeting started at 10:00 p.m. The applicant was told that he had been called because of the charges he had preferred against the Attorney General, Phesheya Dlamini. The Prime Minister was chairing the meeting. The applicant was told to withdraw the charges failing which he should resign. He was not given a choice. He was given until the following day to withdraw the charges.

[15] The applicant said he felt so sick and disturbed. He could not sleep that night. He went to see his doctor who indeed found that he was sick. He called his secretary and asked her to deliver the sick sheet to the Minister and the Secretary to Cabinet.

[16] The applicant was thereafter accused of having come to the Pigg's Peak meeting drunk. The respondent also accused the applicant's wife of being involved in theft of computers from a certain institution. On the night of 19th November 2002 the applicant's office was locked by the Principal Secretary, Dr Hugh Magagula who told the applicant that it was a political decision. A locksmith was hired to change the locks. All. these •nocturnal"activities were ^ cant's surveillance camera. Dr. Magagula later took that gadget to the car park and crushed it.

[17] Dr. Magagula also wrote a Minute for the attention of His Majesty the King through the King's Office in which he made a lot of false accusations against the applicant.

[18] The negotiations of the exit package then ensued. At some point the Attorney-General instructed the office of Maphanga, Howe, Masuku, Nsibande Attorneys to represent the respondent. This office however later withdrew. The process was slow and the Prime Minister was not happy about that. He then instructed the then Acting Minister for Justice Magwagwa Mdluli to deal with the matter. Mdluli called for a meeting at the Mountain Inn during the lunch hour. Also present in that meeting was the Secretary to Cabinet, the applicant and Dr. Magagula. Dr. Magagula was instructed to make sure that the process was quickly brought to finality.

[19] The Accountant-General's staff was also roped in. From the Ministry of Justice Mrs. Simelane, the Under Secretary Mr. Masilela and Mr. Sipho Malinga were also involved in the calculation of the exit package. On the 29th January 2003 the parties reached an agreement on the exit package. Dr. Magagula was supposed to draft the Memorandum of Agreement. Dr. Magagula however delayed until the applicant "decided to do so MmselfT The^pplicmTs^id tHey discussed the document and Dr. Magagula confirmed it. The parties then signed the document on the 14th February 2003.

[20] After signing the document the applicant then wrote his letter of resignation. The applicant has not, however, been paid his terminal benefits as agreed up to this day. The applicant left the country on the 17th February 2003. He left his wife and belongings behind. The respondent continued to harass the applicant by indirect means. Some people were sent by the respondent to go and disconnect the water, telephone and electricity at his house whilst his family was still there. The applicant instructed his attorney to intervene.

[21] The applicant found a job in Arusha, Tanzania two months later. On the 20th November 2002 the applicant's position was advertised. The applicant's position was advertised whilst the negotiations were still going on. The applicant was not informed or consulted prior to

his post being advertised. The applicant reported a dispute. A junior attorney from the Attorney General's chambers was assigned to represent the respondent. That attorney was however withdrawn from the * * matter by the Attorney-General. The conciliation proceeded in the absence of the respondent's representative. The dispute was accordingly certified as unresolved.

[22] During' 'cross-examination the applicant denied that the negotiation process was never cpmpleted. The applicant also denied that Dr. Hugh Magagula did not have the mandate to sign the agreement on behalf of the respondent.

[23] The respondent called only one witness, Dr. Hugh Magagula. Dr. Magagula is now retired. Before his retirement he was suspended for some time on allegations of corruption. He was accused of having committed an act of corruption by colluding with the applicant and signed an agreement to commit government. Dr. Magagula agreed that it was him who locked the office of the applicant. He said he did that as per the instruction of the Thursday Committee. He denied that that constituted harassment of the applicant.

[24] Dr. Magagula also denied that he was mandated to represent the respondent to conclude the exit package of the applicant. He agreed that he attended the meeting at the Mountain Inn. He said at that meeting the Acting Minister Magwagwa Mdluli told them that there was a complaint that the figures were too high. He said the applicant agreed that the figures should be adjusted by subtracting two months' salary that he had received. He denied that the officers from his Ministry who took part in the * "Calculations did so at his instruction. Dr. Magagula told the "court that when he signed the Memorandum containing the terms of the settlement he thought he was signing to approve the applicant's leave.

[25] Durirg the cross-examination Dr. Magagula pointed out that it was the Attorney-General who called the locksmith. When asked if he realized that it was wrong to lockout the applicant from his office he failed to give a clear answer, his response was that that was one part of the picture. Dr. Magagula gave the impression that it was not wrong to do anything even if it was against the law and Government's procedure as long as it was wanted to be done by the Thursday Committee. Dr. Magagula's evidence was shocking and disturbing for a person of his calibre. He pretended not to appreciate that what was being done against the applicant was wrong and unlawful.

[26] When asked why did he sign the settlement, he said he was agreeing to the applicant going on leave. The amount of the settlement is contained in paragraph one and is the sum of E851,019.29. When asked if this paragraph was there when he signed the document. Dr. Magagula said he could not be sure, as he did not focus. When pressed further on this issue his answer was that he did not recall. When asked about the other paragraphs he said he recalled them.

[27] It became clear to the court that Dr. Magagula had suddenly developed a selective memory because he did not want to commit himself to the figure appearing in that paragraph. This reflected badly on him as a witness. He was the Principal Secretary of the Ministry of Justice. He brazenly told the court that he signed the document without having properly read it

[28] Dr. Magagula was clearly not an impressive witness. He was trying very hard to keep a straight face in court. His evidence that he did not know what he was signing when he signed the settlement document is clearly incapable of belief.

[29] The evidence before the court was clear that the respondent had

decided that the applicant should go because he was failing to withdraw the charges against the Attorney-General. The respondent agreed that he should be paid his terminal benefits. The respondent was eager that the process be completed soon as the continued presence of the applicant in the country was embarrassing on the part of the respondent hence the meeting at the Mountain Inn Hotel where Acting Minister for Justice

Magwagwa Mdluli instructed Dr. Hugh Magagula to see to it that the process is finalised quickly.

[30] Dr. Magagula does not dispute the correctness of the figure of E851,019.29. His evidence was only that he was not personally involved in the doing of the calculations.

[31] **As** already pointed out herein, the facts leading to the termination of the applicant are not in dispute. During submissions the respondent's attorney accordingly only addressed the court on two issues, to wit, liability of the respondent and measure of damages

Liability

It was argued that the applicant was never dismissed but he absconded from work and that the respondent is not therefore liable to pay him any amount. This was a very naive submission taking into account the undisputed evidence of harassment against the applicant. Even if it were to be accepted that the applicant absconded, if he did so because of the intolerable treatment that he was getting at the hands of his employer, constructive dismissal is established.

[32] **JOHN GROGAN** in his book **"WORKPLACE LAW" (2005) 8th EDITION AT PAGES 112-113** dealing with the subject of constructive dismissal states that;

"... The employees need not have formally resigned, however;

constructive dismissal can be proved even when the employees simply left their employment in circumstances that would otherwise have amounted to abscondment. To discharge the onus of proving that they were constructively dismissed, employees must prove that it would have been intolerable to remain in employment."

[33] The position of the law therefore is that an employee who is forced to leave his employment because of the unlawful or intolerable conduct of his employer needs not write a letter of resignation and if he does do so, he need not state his reasons for leaving. In the present case, not only did the employer make it intolerable for the applicant to continue in his employment on three occasions, but he was also told to resign. There was therefore a deliberate breach of the contract of employment by the respondent.

[34] It is clear to the court, taking into account all the evidence presented before it, that the applicant has proved on a preponderance of probabilities that he was constructively dismissed by the respondent.

[35] **Relief: -**

The applicant is claiming payment of terminal benefits in the sum of E851.019.29. This amount includes the amount that the applicant would have earned had his contract not prematurely terminated by the respondent. This amount was not in dispute. The respondent's argument was only that Dr. Hugh Magagula ~ had no~ authority to sign the Memorandum on behalf of the respondent. It was also argued that the document was not binding as it is written "without prejudice".

[36] There is no need for the court to deal with the question of the legal implications of this word in document. The court says this

because in this case it is not in dispute that the respondent breached the five-year employment contract between itself and the applicant. The applicant is therefore clearly entitled to payment of the amount he would have earned had the respondent not breached the contract.

[37] The evidence revealed that the applicant managed to find a job two months later. He is now paid more than he used to get in Swaziland. The applicant has a family. At some point he had to come back to the country to face a criminal charge that failed to take off. He is claiming compensation for the unlawful dismissal based on twenty-four months' salary as he claims that his dismissal was automatically unfair.

[38] In terms of SECTION 2 OF THE INDUSTRIAL RELATIONS ACT NO.l OF 2000 (as amended) automatically unfair dismissal means a dismissal where the reasons for the dismissal is

> *"© To compel the employee to accept a demand in respect of any matter of'mutual interest between the employer and employee."*

[39] The evidence in this case revealed that the applicant was dismissed for failure to accede to the demand of the respondent that he should withdrawal the criminal charges against the Attorney-General. Simply put, the applicant was dismissed for doing his job. The dismissal was therefore clearly automatically unfair.

[40] The respondent's attorney asked the court to take into account that the applicant secured alternative employment in two months' time. He referred the court to the cases of BULMER V. WOOLLENS, LTD (IN LIQUIDATION) 1926 TPD 459 and

MYERS **v.** ABRAHAMSON 1952 **(3)** SALR 121 (C) and to Wille and Millins Mercantile Law of SouthAfrica (1975) 17th edition p.272.

[41] These authorities deal with damages for wrongful dismissal. In the present case the applicant is claiming compensation for the unfair dismissal and his position is covered by Section 16 (7) of the Industrial Relations Act which states that;

> ***"The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of twenty-four (24) months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."***

[42] This section provides that the compensation must be just and fair. The court must therefore take into account all the personal circumstances of the applicant and all the circumstances of the case and the interests of justice. The applicant was not just an ordinary servant of the state like a cleaner or a clerk. He was the DPP of the country. He was in charge of a very crucial department of the state. He was in charge of all the Prosecutors in the country. He was tasked with a very crucial task of putting dangerous criminals behind bars. He was undoubtedly a very high ranking government official. To remove such a person from this position in the manner that the applicant was is a very serious matter. He was completely humiliated. To argue that such a person can be compensated by payment of two months' wages representing the period that he was unemployed is a proposition whose untenability has already been demonstrated by the facts of this case. The court will indeed consider that he managed to secure a job two months after his termination and is now paid more than what he used to get in his former position.

[43] As an aside, the court will note that the former Chief Justice who was placed in similar circumstances as the applicant was allowed to exit smoothly. It is not clear to the court why the applicant was not similarly treated. Why did he have to wait for five years to have his terminal benefits paid through the intervention of the court?

[44] This is" therefore a case where the court should make an order for costs on the higher scale to show its disapproval of the manner this matter was handled by the respondent. The court will also take into account that the respondent failed to take part in the conciliation process.

[45] Taking into account all the evidence before court and all the circumstances of this case the court will make the following order;

a) THAT THE RESPONDENT IS TO PAY THE APPLICANT'S TERMINAL BENEFITS OF E85l,0l9.20.

b) THAT THE RESPONDENT IS TO PAY THE APPLICANT COMPENSATION FOR THE UNLAWFUL DISMISSAL CALCULATED AT FIFTEEN (15) MONTHS' SALARY EQUIVALENT TO E331,966.88.

c) THAT THE RESPONDENT IS TO PAY THE COSTS OF THIS APPLICATION ON THE ATTORNEY-CLIENT SCALE.

The members agree:

NKOSINATHI NKONYANE

JUDGE - INDUSTRIAL COURT