



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 83/06

In the matter between:

AUBREY SHONGWE

Applicant

And

**NATIONAL AGRICULTURAL &
MARKETING BOARD**

Respondent

Neutral citation: *Aubrey Shongwe v National Agricultural & Marketing Board (83/06) [2013] SZIC 26 (September 18 2013)*

Coram: NKONYANE J,
*(Sitting with P. Thwala & S. Mvubu
Nominated Members of the Court)*

Heard submissions on: 16 August 2013

Judgment delivered on: 18 September 2013

Summary:

The Applicant whilst still working for the Ministry of Agriculture and Co-operatives was seconded to work for the Respondent as its Executive Secretary on a fixed term contract of three years. The contract was renewed for a further three-year period and thereafter for six months. During the duration of the second fixed term contract the parties agreed to certain written terms and conditions of employment. The agreement was not however backdated to 1st September 1988 when the Applicant first joined the Respondent. The Applicant in the present application claims benefits which were not however covered by the terms and conditions agreed to by the parties.

Held: The parties having not agreed that the terms and conditions agreed to in 1993 would be backdated to 1st September 1988, the Applicant's claims have no legal basis.

Held Further: There being no provision for the payment of a maid and a garden boy in the terms and conditions agreed to by the parties, such claims have no legal basis and ought to be dismissed by the court.

**JUDGMENT
17.09.13**

[1] The Applicant is a retiree. He is a former civil servant and used to be employed by the Ministry of Agriculture and Co-operatives.

[2] During his time of employment he was seconded to work for the Respondent as its Executive Secretary. This appointment was in terms of a

letter dated 5/10/88 and marked Exhibit “A”. The appointment was for a period of three years with effect from 1st September 1988.

[3] The Applicant duly accepted the appointment in writing. After the three year period had come to an end, the Applicant’s secondment was extended for a further three year-period by letter dated 21st August, 1991, Exhibit “D”. After the lapse of this period, it was again extended by six months to expire on 28th February 1995. Effectively, the Applicant’s secondment to the Respondent lasted for six years and six months.

[4] The Applicant claims that at the expiration of his secondment to the Respondent, he was not paid all his benefits. He accordingly reported a dispute to the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute was not resolved and a certificate of unresolved dispute was issued by the Commission.

[5] The Applicant thereafter instituted the present application for determination of an unresolved dispute and he is claiming payment of the following benefits;

- *housing allowance*

- *Leave*

- *household expenses*
- *thirteenth cheque*
- *gratuity*
- *short payments*

[6] The Applicant's application is opposed by the Respondent. The Respondent stated in its reply that the Applicant was duly paid all his benefits when he was de-seconded.

[7] Two witnesses testified in court. It was the Applicant and Gladys Masuku who testified on behalf of the Respondent.

[8] **The Applicant's Evidence**

The Applicant told the court that when he was first appointed on secondment to be the Executive Secretary of the Respondent, there were no written terms and conditions of employment. He agreed however that he was paid a higher salary when he was with the Ministry of Agriculture and Co-operatives. He told the court that the de-secondment affected him because he was not given a chance to state his grievances. He said at his former employment his colleagues got promoted and they had become senior to him. He said from 1988 to August 1992 he did not have a house in Manzini and was therefore staying with his wife at Zombodze. He said

during this period he did not get any housing allowance. He said he built a house in Fairview North in Manzini and started to reside there in June 1993. He stayed there until his de-secondment. He said he was not paid gratuity when he was de-seconded.

[9] During cross examination, the Applicant agreed that he did accept the secondment to the Respondent in writing and that there was no document that he signed specifying the terms and conditions of service. He also agreed that written terms and conditions of service were only introduced during his second term of secondment, being Exhibit "C". The Applicant also conceded that prior to the introduction of Exhibit "C" there was no provision for a housing allowance. He agreed that in 1991 the Respondent did provide him with a house and that whilst he used the Respondent's house, he was not entitled to get housing allowance. He agreed that he did get paid housing allowance when he moved out of the Respondent's house. The Applicant also agreed that after requesting to be paid gratuity, the Respondent did pay him the sum of E25,244.75. The Applicant said he hired his own security person when asked how much did he pay, he was unable to say. He only said he used to hire someone from time to time when he was away from home.

[10] **The Respondent's Evidence:-**

On behalf of the Respondent RW1, Gladys Masuku told the court that she used to work for the Respondent as an Accountant from 1987 to 2009. She told the court that there is no payment due to the Applicant from the Respondent. She confirmed to the court that the Applicant was paid housing allowance by the Respondent which was E1,950.00. This amount increased from E1,950.00 to E2,100.00 and finally to E2,310.00. She said she did get an instruction from the Respondent to pay gratuity to the Applicant, and it was indeed paid.

[11] During cross examination RW1 told the court that the schedule of particulars of employment (Exhibit "C") was discussed with the Applicant who signed thereon on page two. She said the Applicant got all the benefits listed in Exhibit "C". She said the security company that was hired by the Respondent was Swaziland Security Guards and later Guard Alert. She said the new terms and conditions of employment were as a result of a consultant company that was engaged by the Respondent. She told the court that the housing allowance was not paid when the Applicant was residing in the Respondent's house.

[12] **Analysis of the Evidence:-**

The evidence before the court shows that the Applicant abandoned three of the claims that he had against the Respondent. This is also contained in the minutes of the pre-trial conference held by the parties dated 17th March 2011. The remaining claims therefore are: housing allowance, household expenses and gratuity.

[13] When the Applicant was first seconded to the Respondent, there were no written terms and conditions of employment that were in place. From the evidence before the court, it seems that the Applicant was content with the salary as it was more than that which he earned when he was a civil servant.

[14] The evidence also revealed that in June 1993 the Respondent engaged Lwati Training Institute, to review the Respondent's salaries and conditions of service and make recommendations. A special board meeting was held on 16th November 1993 to discuss the findings of the consultant. The Applicant was present in that meeting. The minutes, (Exhibit "R1") also show that the Respondent had also formed a sub-committee on the terms and conditions of service, and the Applicant was a member of that sub-committee which also presented its report on that day. In that meeting the payment of housing allowance was approved by the Board. The Board also approved the salary scales suggested by the consultant. The salary

scales were to be backdated to 2nd January 1993. The new conditions of service were however to be effective from January 1994.

[15] In the terms and conditions of service however, there was no provision for a gratuity. The Applicant however did write to the Board of the Respondent requesting to be paid gratuity. The Respondent paid the sum of E25,244.75 to the Applicant. The Respondent pointed out that although there was no legal basis for the payment of the gratuity, it was going to pay just to compensate the Applicant for the loss he suffered by being outside the government payroll.

[16] **The law Applicable:-**

The present case is distinguishable from the case of **Magalela Ngwenya v. National Agricultural Marketing Board, case No. 59/2002 (IC)**. In that case the Applicant who was employed by the present Respondent complained that the non-renewal of his fixed term contract was not renewed in circumstances that amounted to unfair dismissal. The present application is for payment of outstanding benefits following the expiration of the secondment contract. In the present case therefore the Applicant had to establish the legal basis upon which the benefits that he claims ought to have been paid to him.

[17] The enquiry before the court therefore is; what were the terms and conditions of service that the parties agreed to during the six and a half years of the secondment contract. Secondly, did these terms and conditions of service provide for the payment of the benefits that the Applicant is now claiming.

[18] There was no evidence before the court as to what were the terms and conditions of service that the Applicant and the Respondent agreed to during the first three-year secondment period. The letter of appointment, Exhibit “A” merely stated that the Applicant *“will also be expected to be guided by instructions and regulations of the National Agricultural Marketing Board during the period of your secondment.”*

[19] The evidence by RW1 that there were no written terms and conditions of employment of the Respondent when the Applicant joined the Respondent was not disputed. The evidence revealed that it was only in 1993 that a consultant was engaged and came up with the written terms and conditions of employment for the Respondent’s employees.

[20] In the document containing the terms and conditions of employment, Exhibit “C”, there is no provision for the payment of a maid and a garden boy. There is therefore no legal basis for the claim of household expenses covering payment of the maid and garden boy. The Applicant also argued that the claim for household expenses included payment of a security person. In terms of Exhibit “C” however, the security benefit of E500.00 per month was payable directly to a security company, and not to the Applicant. Further, the Applicant told the court that he used to hire a security person from time to time when he was away from the house. The Applicant was unable to tell the court how many times did he hire the security person. The Applicant also failed to tell the court as to how much did he pay the security person that he hired.

[21] The evidence revealed that the Applicant was paid his housing allowance. Pages 9 to 16 of Exhibit “R2” show the payments by cheques by the Respondent. Confronted with this evidence, the Applicant then argued that he was claiming the housing allowance due from the time that he joined the Respondent. There was clearly no legal basis for this argument as there was no evidence that the parties agreed that the Respondent would pay a housing allowance to the Applicant when he joined the Respondent in 1988. Any claim that the Applicant has against the Respondent must be

based on the contract between the parties. The court must not impose upon the parties a different contract to that which the parties entered into.

(See: Malandoh v S.A. Broadcasting Corporation [1994] 18 ILJ 544 [LC]; Cyprian Mabuza v Caritas Swaziland case No. 591/2006 (IC).

[22] From the evidence before the court, there is no outstanding amount due to the Applicant. The Applicant was seconded to work for the Respondent in terms of a written instrument dated 5/10/88, Exhibit “A”. There is no mention in that document of any of the benefits that the Applicant claims in this application. The benefits only came into place in 1993 and they were not backdated to 1st September 1988 when the Applicant joined the Respondent. As already pointed out, the instrument of appointment merely stated that the Applicant was going to be guided by the instructions and regulations of the respondent. There was no evidence before the court that the instructions and regulations of the Respondent did provide for the payment of the benefits that the Applicant is claiming prior to 1993.

[23] There was no agreement between the parties that the benefits that the Applicant is claiming would be paid to the Applicant. It was not the Applicant’s case before the court that these terms were tacitly incorporated. Even if the Applicant had argued that the terms were tacitly incorporated, he would still have had to prove facts and circumstances

from which the court could infer that indeed the terms were tacitly incorporated.

[24] For the reasons stated above, the court finds that the Applicant's claim cannot succeed. It is accordingly dismissed. Ordinarily, costs follow the event. Taking into account that the Applicant is now a retiree, the court will exercise its discretion on the question of costs and order that each party is to pay its own costs.

[25] The court will accordingly make the following order;

- a) **The application is dismissed.**
- b) **Each party is to pay its own costs.**

The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR. M. MKHWANAZI
(MKHWANAZI& ASSOCIATES)**

**FOR RESPONDENT: MR.S. DLAMINI
(SIBUSISO B. SHONGWE & ASSOCIATES)**