



IN THE INDUSTRIAL COURT OF SWAZILAND
JUDGMENT

CASE NO. 591/2006

In the matter between:-

CYPRIAN MABUZA

APPLICANT

And

CARITAS SWAZILAND

RESPONDENT

Neutral citation: Cyprian Mabuza v Caritas Swaziland
(591/2006) [2012] SZIC 35 (28th January 2013)

CORAM: **D. MAZIBUKO**

(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Heard: 14th October 2012

Delivered: 28th January 2013

Summary: *Labour Law: Contract of employment varied by the parties. Variation increased the workload. Remuneration*

for extra work agreed upon and an oral contract concluded. Employee starts extra work and receives remuneration. A few years later employee seeks to unilaterally increase remuneration. Subsequent unilateral change in remuneration not allowed. Parties are bound by the terms of their contract.

1. The Applicant Mr Cyprian Mabuza has approached the Court by way of Notice of Motion and Founding Affidavit for relief as follows:

- “1. Directing the Respondents to pay to the Applicant the sum of E310 156 .00 being in of arrear of salary due to the Applicant calculated from September1999 to January 2006 and which is attached to the position of National Director.*
- 2. Interest thereupon at the rate of 9% per annum taking into account the yearly cost of living adjustments and inflation rate.*
- 3. Cost*
- 4. Further and or alternative relief ”.*

2. The Respondent is Caritas Swaziland, an organization ancillary to the Roman Catholic Church which is based at Manzini, Swaziland. The Respondent has opposed the application. The Respondent’s affidavit is deposed to by a certain Bishop Ndlovu

- who described himself (in the same affidavit) as the Bishop for the Diocese of Manzini.
3. The Respondent as a unit within the Roman Catholic Church operates an office which caters for the needs and welfare of refugees in Swaziland. By the year 1999 the Applicant was already working for the Respondent as coordinator for the refugee section of the Respondent's activities. The Applicant was paid a monthly salary for this service. The parties have not indicated whether their employment contract was oral or written. Also the terms of this particular employment contract have not been stated in the affidavits before Court.
 4. During the year 1999, the Applicant was appointed a director of the Respondent, (the Applicant prefers to refer to this position as National Director). This appointment was communicated to the Applicant by letter dated 18th October 1999. The appointment was signed by Bishop Ndlovu. This letter was attached to the Respondent's answering affidavit and is marked annexure LND 1.
 5. The Applicant began serving the Respondent as director on the 1st October 1999. While serving as director the Applicant continued with his normal duties as Coordinator for Refugees and drew a salary for the latter position. On the 31st January 2006 the Applicant was relieved of his duties both as director and coordinator.
 6. On the 28th March 2006 the Applicant received payment from the Respondent in the sum of E51,130-00 (Fifty One Thousand One Hundred and Thirty Emalangeneni). This payment allegedly represented full and final settlement of all terminal benefits due

to the Applicant. A written acknowledgement of payment was signed by both parties. This document was attached to the Respondent's affidavit and is marked annexure LND5.

7. The Applicant is claiming from the Respondent payment of arrear salary for services rendered as a director for the period September 1999 to January 2006. According to the Applicant, he began serving the Respondent as a director in September 1999. The Applicant has no claim against the Respondent for arrear salary in relation to work done as Coordinator for Refugees.
8. The Applicant has calculated his claim for arrear salary for the period September 1999 to January 2006 at E310,156-00. (Three Hundred and Ten Thousand One Hundred and Fifty Six Emalangeni). According to the Applicant, his predecessor (in the office of director) earned a salary of E4,081-00 (Four Thousand and Eighty One Emalangeni) presumably per month. The Applicant has calculated his claim for E310,156-00 based on the salary of his predecessor. The Applicant added that his predecessor earned a reasonable salary for that position.
9. It is necessary for the Court to look at the nature of the agreement that was entered into by the parties in October 1999. The parties did not conclude an employment contract in October 1999. An employment contract was already in existence between the parties in terms of which the Applicant worked for the Respondent as Coordinator for Refugees and was paid a monthly salary. As aforementioned, the terms of that employment contract have not been presented before Court. However the existence of that Contract is not in dispute. That employment contract pre-dates 1999.

10. It is common cause that when the Applicant began serving the Respondent as a director, he was allowed the benefit of the Respondent's motorvehicle for personal use. The motorvehicle is described in the Applicant's annexure C as: a Toyota Venture, 2.4 litre diesel engine, a 1998 model.

11. The Applicant conceded that he was appointed by letter – annexure LND1 to serve as a director. Annexure LND1 contains some of the terms of the Applicant's appointment as director. The other terms are found in the affidavits of the parties. The Applicant has not added to or denied the contents of annexure LND1. The Court therefore is confined to the contents of annexure LND1 and the affidavits in examining the terms on which the parties agreed to in October 1999.

12. Annexure LND1 was signed only by the Respondent duly represented by Bishop Ndlovu. The absence of the Applicant's signature in annexure LND1 means that it is not a contract in itself, though its contents are relevant to this enquiry. A written contract is defined as follows;

“A written contract is one which is recorded in writing and which bears the signatures of the parties”

GIBSON JTR: WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW
(Juta & co), 6th edition 1970, at 315.

13. The Court therefore finds that the parties entered into an oral agreement or contract in October 1999 in terms of which the Applicant was appointed a director of the Respondent.

14. It is helpful at this stage to reproduce annexure LND 1 which reads as follows;

*“Mr Cyprian Siphon Mabuza
UNHCR
Catholic Centre
MANZINI*

18.10.99

Dear Cyprian,

APPOINTMENT TO THE POST OF DIRECTOR, CARITAS-SWAZILAND

Subsequent to the various discussions we had have [have had] on the above matter, I am very happy to find that you are willing to accept the above office. It , therefore , gives me great pleasure to officially offer you the position of Director of Caritas Swaziland, which offer [is] to take effect from 1 October 1999.

Your experience in this area will be of great benefit to the organization and I am sure that, despite the added burden of this new office, you will handle the responsibility with the same competence you have shown in other areas.

I am also happy that there has been a happy resolution of your dual [dual] role with UNHCR.

I wish you every success in your new position.

Sincerely,

15. There is no indication in annexure LND1 that the parties agreed to any form of remuneration payable to the Applicant for services to be rendered as director. An obligation to remunerate the Applicant does not arise at all in annexure LND1. The use and possession of the motorvehicle aforementioned is the only remuneration that was agreed to by the parties. The Applicant has not denied that he enjoyed the benefit of the Respondent's motorvehicle for his personal use together with its accessories in his capacity as director.
16. The Court further finds that the parties did not agree on a monthly salary payable to the Applicant for his services as a director. The evidence before Court does not support the Applicant's claim.
17. The Applicant must have realized that the terms of the oral agreement aforementioned do not support his claim for payment of a monthly salary. As an alternative, the Applicant established his claim on what he calls an "*implied intention*" that he would be paid a monthly salary. The Applicant states as follow in paragraph 13 of his founding affidavit;

"At the time I was appointed to act as National Director it was impliedly intended that I would assume the duties and responsibilities and be paid a salary commensurate to my predecessor and/or a reasonable sum according to the custom and practice of the industry and its locality"

18. It is not clear to the Court what the Applicant meant when he referred to an *"implied intention"*. The Applicant did not explain the meaning of this term both in his affidavit and submission. The Applicant could be saying that, at the time he agreed to serve as a director he had a hope and an expectation that he would be paid a monthly salary for his services. The difficulty with that statement is that the hope and expectation existed in the Applicant's mind. The Applicant did not communicate his hope and expectation to the Respondent, though he had an opportunity to do so. As a result, that hope and expectation of a salary did not reach the Respondent before and during the time that agreement was concluded. There was therefore no meeting of the minds on that particular issue. As a result there was no agreement relating to payment of a monthly salary in any amount, to the Applicant.
19. It is essential in a contract, including a contract of employment, that each party must communicate to the other his intention and that both parties must be of the same mind as to the subject matter. The learned author Gibson JTR defines a contract as follows;

"A contract is a lawful agreement, made by two or more persons within the limits of their contractual capacity, with the serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject -matter, to perform positive or negative acts which are possible of performance."

(Underling added)

GIBSON JTR: SOUTH AFRICAN MERCANTILE AND COMPANY LAW (Juta & co) 1997, ISBN 0 7021 4021 40589 at page 9.

20. The Applicant did not communicate with the Respondent his intention to receive a monthly salary in addition to the motorvehicle benefit. The parties therefore were not of the same mind regarding this particular subject matter- the monthly salary. As a result the agreement between the parties does not entitle the Applicant to payment of a monthly salary for his services as director.
21. The definition of a contract which has been given by Gibson JTR (supra) has been followed by other authors in the context of employment law when defining an employment contract. The learned authors AC Basson et al, have defined a contract of employment as follows;

“Stripped to its essence, the contract of employment as we know it today can be defined as an agreement between two parties in terms of which one party (the employee) works for another (the employer) in exchange for remuneration.

AC BASSON, MA CHRISTIANSON, C GARBERS, PAK le ROUX, C MISCHKE, EML STRYDOM: ESSENTIAL LABOUR LAW, 4TH combined edition, 2005 (Labour Law Publications) ISBN 0-62033723-0 at page 20.”

22. The learned authors have expanded on their definition of an employment contract by stating the following;

“Firstly, it is important to note that the employment contract is based on an agreement. ...

Another implication of the fact that the employment contract is based on an agreement is that it is a contract, and, as such, it has to comply with the requirements of our law for a valid contract. If the employment contract does not comply with these requirements, it will not be regarded as binding and enforceable in law.”

(Underlining added)

AC Basson et al at page 20.

23. The definition and emphasis given by the authors require inter alia, that the one party (Respondent) must agree at the time of the contract that he is creating an obligation which he is bound to fulfil. In this case that obligation (if it had been agreed to), would have been payment of a monthly salary to the other party (Applicant) for his services as a director. If the one party did not agree to pay a monthly salary, then the obligation to pay that salary does not arise. The Applicant’s claim to payment of a monthly salary fails to meet the requirements of a contract. The effect of the Applicant’s claim is a unilateral variation of the remuneration that was agreed to between the parties in October 1999. Such variation has no legal justification. The claim is therefore, unenforceable in law.

24. The evidence indicates that in October 1999 the parties, by consent, varied the terms of their employment contract. The Applicant took on an additional responsibility of serving the Respondent as a director. In return, the Applicant received from the Respondent a motorvehicle which he used for his personal benefit. The use of the Respondent’s motorvehicle was the

Applicant's remuneration for the added responsibility of being director. The Applicant agreed to this remuneration either orally or by conduct.

25. Annexure LND1 clearly indicates that the appointment of the Applicant into the position of director had been discussed and agreed to between the parties. The letter, (LND1) confirms some of the terms of that agreement.

The Applicant was therefore at liberty to refuse either being appointed a director or the motorvehicle which was offered as a remuneration, if he was not satisfied with any of the terms of that agreement. When the Applicant accepted the appointment as director and the motorvehicle which had been offered as remuneration, an agreement came into existence. It is not open to the Applicant to receive the motorvehicle in October 1999, enjoy its use and turn back six years later and claim that it is not adequate remuneration for services rendered.

26. If the Applicant had genuinely believed that he was also entitled to a monthly salary, he should have expected his first payment end of October 1999. The Respondent did not pay a salary end of October 1999 or at all. The Applicant did not raise a complaint against the Respondent for failing to pay salary (that was allegedly due). If indeed the Respondent had failed to perform his contractual obligation as alleged by the Applicant, logic and commonsense dictate that the Applicant could have taken the necessary steps to address the issue of non payment immediately or soon thereafter. The Respondent continued working and receiving remuneration aforementioned as if everything is in order.

27. According to the Applicant he addressed this issue for the first time on the 13th September 2001. The Applicant wrote the Respondent a letter which is marked annexure A. It is proper at this stage to reproduce the letter;

"13th September, 2001

Mr T. Jele

Chairperson

Caritas Swaziland Board

P.O.Box 19

Manzini

Dear Mr Jele

RE: REQUEST FOR AN ALLOWANCE

This is a humble request for an allowance for the extra work I do on behalf of the National Directorate of Caritas Swaziland. Bearing in mind the financial position of the organization, I have no defined figure to suggest to the board but would be grateful to receive an amount they deem reasonable under the circumstances.

As I mentioned it to you during our telephone conversation this morning, the allowance will help me liquidate the debt accrued with Swaziland Electricity Board on behalf of the Former National Director of Caritas who stopped paying his bills months before vacating the house at Coates Valley which was previously occupied by me. S.E.B have taken me to debt collectors (DSM & Associates) who in turn have written to say that they are now

handing over the matter to the lawyers. I hasten to say that this no doubt is causing me a lot of emotional stress.

I would be most grateful if whatever approved amount would be back- dated to October 1999.

Thanking you in anticipation of your favourable consideration.

Yours sincerely

Cyprian S. Mabuza

Director

cc: Louis N. Ndlovu – Caritas Swaziland Bishop President.

28. The Court has noted certain salient features in annexure A which deserve attention and are dealt with below.

28.1 Firstly, the Applicant is not demanding or requesting payment of salary arrears in his letter. Instead, the Applicant is making a proposal to be paid an allowance for work done as a director. If the Applicant believed that he was entitled to payment of a salary for services rendered, it is not clear as to why he failed to address that specific claim in his letter. A demand or request for payment of a salary that is due (or long overdue) is different from a request for payment of an allowance which is yet to be considered and either be accepted or rejected by the Respondent.

- 28.2 Annexure A clearly indicates that the issue of payment of a salary was not in the Applicant's mind when he wrote annexure A. The Applicant's state of mind when writing annexure A, indicates that the parties had not agreed on the payment of a monthly salary to the Applicant in their October 1999 agreement.
- 28.3 Secondly, the Applicant is not referring to the salary of his predecessor , namely E4,081.00 per month, as a monthly rate of payment to which he claimed to be entitled (in his notice of motion). Instead the Applicant has given the Respondent authority to determine whether or not the Applicant should be paid an allowance, and if so, to further determine the amount payable. The Applicant remained with hope that the Respondent will make a favourable determination on the allowance issue.
- 28.4 Thirdly, the Applicant does not mention any agreement subsisting between the parties which has created an obligation on the Respondent to pay a monthly salary for work done as a director. Instead, the Respondent is being asked to consider a request for an allowance and further appreciate the Applicant's need for an extra income or remuneration. At the time the Applicant wrote annexure A, he could not have forgotten that he had concluded an agreement with the Respondent in October 1999, which entitles him to payment of a monthly salary calculated at an agreed rate of E4,081-00 per month, (if that claim was correct).

- 28.5 The Applicant's claim for a salary is mentioned for the first time in correspondence written in 2006 (annexure LND 1). With the foregoing the Court is satisfied that the Applicant's claim for a salary is an afterthought.
29. The Applicant must have realized, about two (2) years after the October 1999 agreement, that he should have negotiated a better remuneration for his service than the personal use and enjoyment of the Respondent's motorvehicle. The financial pressure that the Applicant found himself in, in September 2001, may have created an urgent need for him to earn extra income. The Applicant felt the need to re-negotiate with the Respondent his remuneration for services rendered as a director. Annexure A, therefore, amounted to an offer to the Respondent to re-open negotiation. The Respondent did not accept that offer. That meant that the October 1999 agreement was still binding on the parties.
30. The Applicant continued to work for the Respondent on the terms of the October 1999 agreement, until he received a letter dated 20th January 2006 (annexure LND 3) which relieved him of his duties. As his settlement package the Applicant took ownership of the aforementioned motorvehicle and a sum of E51,130.00(Fifty One Thousand One hundred and Thirty Emalangeni).
31. For reasons stated above the Court finds that the Applicant's claim has no basis in law. It is therefore dismissed. Under normal circumstances costs follow the event. In this case the

Court will exercise its discretion and order each party to pay its costs.

32. It is accordingly ordered as follows;

(a) The application is dismissed.

(b) Each party is to pay its costs

Members agree.

D. MAZIBUKO
INDUSTRIAL COURT JUDGE

For Applicant :Mr. M. Mkhwanazi
Mkhwanazi & Associates:

For Respondent :Mr S. Maphanga
Maphanga & Associates