



IN THE INDUSTRIAL COURT OF SWAZILAND
JUDGMENT

CASE NO.

145/2010

In the matter between:-

CHRISTO KEEVY

APPLICANT

And

KOMATI BASIN WATER AUTHORITY

RESPONDENT

Neutral citation: Christo Keevy V Komati Basin Water Authority
(145/2010) [2013] SZIC 5 (28th February 2013)

CORAM: **D. MAZIBUKO J**
(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Heard: 1st August 2012

Delivered: 28th February 2013

Summary: *Labour Law; employee entitled to payment of bonus in terms of contract of employment, calculation of bonus dependent on appraisal, employee ordered to appraise employee's performance;*

Disagreement between employer and employee on appraisal procedure, Labour Commissioner directed to intervene to assist the parties in securing a fair and balanced appraisal;

Payment in lieu of notice upon termination of contract, employer contractually bound to give notice, sufficient notice given by employer, employee therefore not entitled to payment.

1. The Applicant Mr Christopher Keevy, is a former employee of the Respondent. The Applicant has filed an application seeking relief as follows;

“1. Declaring that the Respondent is in breach of clause 10 of the Applicant's Contract of Employment.

2. Directing the Respondent to pay Applicant three months notice as per the employment contract.

3. Payment of the Applicant's performance bonus based on the average performance and bonus of all staff for the year 2007/2008 and 2008/2009.

4. *Granting cost of this application on the scale as between attorney and own client scale, in the event the Respondent opposes the application in part or **in toto***

 5. *Further and/or alternative relief.”*
2. The Respondent is Komati Water Basin Authority a body corporate with power to sue and be sued operating as such in Piggs Peak, Swaziland.

 3. By written contract dated 30th January 2006 the Respondent employed the Applicant as chief executive officer for a period of three (3) years. This contract commenced 1st February 2006 and was to terminate 31st January 2009. A copy of the contract has been attached to the Applicant’s founding affidavit and is marked CK1.

 4. About the 5th December 2008 the Respondent offered the Applicant an extension of the contract from the 1st February 2009 to 30th April 2009. This offer was communicated orally to the Applicant. The Applicant accepted the offer. As a result the Applicant worked for the Respondent until 30th April 2009.

 5. The dispute between the parties centers on the interpretation of clause 10 in the employment contract (CK1). This clause reads thus;

“TERMINATION OF EMPLOYMENT

Termination of employment by KOBWA may be initiated by giving 3 (three) calendar month’s notice in writing. This will also apply at the end of the contract period”

(Underlining added).

6. The Applicant has alleged that the Respondent has failed to give him the requisite three (3) months notice provided for in clause 10 of the employment contract. He argued that there was no notice given in respect of the initial contract which was due to end 31st January 2009. He further claimed that there was also no notice given in respect of the extended date of termination viz 30th April 2009.

7. The Applicant further argued that the extension of the date of termination did not amount to notice as required in the contract for two (2) reasons:
 - 7.1 The extension of the contract from the 31st January 2009 to 30th April 2009 was communicated to him orally, yet the contract requires a written notice. An oral notice is invalid.

 - 7.2 Though the extension of the contract was communicated to the Applicant, it did not convey the requisite notice.

8. According to the Applicant, he expected a notice in writing in which the Respondent will confirm the relationship of the parties after the date of termination of the contract. In short, that notice must indicate whether or not the existing contract will be renewed or extended. Also, if there is neither renewal nor extension, the notice must clearly convey that message. The required confirmation must be communicated to the Applicant in writing not less than three (3) months before the date of termination.

9. The application is opposed. The Respondent has filed an answering affidavit in which he raised a three (3) pronged attack on the application.
 - 9.1 Firstly, the Respondent challenged prayers 1 and 2 of the notice of motion. The Respondent argued that they have complied with their contractual obligation in that they gave the Applicant the requisite notice in writing. A copy of that notice is attached to the Applicant's founding affidavit marked CK 2.

 - 9.2 Secondly, the Respondent challenged prayer 3 of the notice of motion. The Respondent argued that the Applicant is not entitled to payment in lieu of notice. In the event the Court finds that the Respondent has failed to give the requisite notice, the Applicant would be entitled to claim damages for breach of contract.

9.3 Finally, the Respondent has challenged the validity of clause 10 in the employment contract. The Respondent argued that clause 10 was inserted into the contract by the Applicant without their (Respondent's) knowledge. The Respondent finds the latter part of clause 10 offending. This part reads as follows;

“This will also apply at the end of the contract period”.

The Respondent added that had the offending portion of clause 10 been brought to their attention, they would not have signed the contract.

10. According to the Respondent, the Applicant was given sufficient notice in writing that the employment contract will not be renewed automatically when it terminates. The Applicant was invited to apply for that position if he was interested. The notice is contained in annexure CK2.
11. Annexure CK2 is a letter dated 30th November 2008, written by the Respondent to the Applicant. The letter reads thus;

“Chairman
KOBWA

30th November 2008

CEO
KOBWA

Dear M. Keevy

RE: Contract of Employment between Yourself and KOBWA

The above matter refers.

According to your employment contract with KOBWA you can see that the term of contract will end 31 January 2009.

However, in the interest of transparency and in order to test what is on market in general, the Board has decided to advertise the position to the public. That is why the Board communicated to you and in particular at its Board Meeting of 4 November 2008 it was clarified to you that your employment contract with KOBWA will not be renewed automatically. But if you are still interested to continue working for KOBWA you are welcomed to apply.

If there is any other clarification that you may require please let us discuss it.

*Yours Faithfully
Dr. BL Mwaka”*

12. The Court has noted the following salient features in annexure CK2;
 - 12.1 The Applicant was reminded that his contract of employment (annexure CK1) ends 31st January 2009. That meant that after the 31st January 2009 the Applicant would have no reason to assume that he was still employed by the Respondent.
 - 12.2 The Applicant was further informed that his position will be advertised to the public. The contract (CK1) will not therefore, be automatically renewed.
 - 12.3 If the Applicant was interested in working for the Respondent after the 31st January 2009, he was advised to make an application for employment. That statement clearly indicated that the employment contract will terminate 31st January 2009.
13. The Court is satisfied that annexure CK2, sufficiently conveyed to the Applicant the requisite notice as stipulated in clause 10 of the employment contract. The Applicant was given a clear and unequivocal notice that the employment contract (annexure CK1) will terminate 31st January 2009. It is however noted that clause 10 of the contract imposed a time limit within which the notice was meant to be conveyed to the Applicant. The contract required a three (3) months notice.

14. The Applicant conceded that the notice (annexure CK2) was served on him on the 30th November 2008. The Applicant states as follows in paragraph 7 of his affidavit:

“On the 30th November 2008, the Respondent’s Board Chairman informed me, in writing that, as I could see, my contract would end 31st January 2009 and inviting me to apply for the position if I was interested. A copy of the letter is attached marked “CK2”

15. The three months notice that was required in the contract would be the period December 2008, January 2009 and February 2009. That meant that the last day of the notice (annexure CK2) was 28th February 2009. The Respondent could only be considered to have complied with her contractual obligation in terms of annexure CK2 after the 28th February 2009.
16. About the 5th December 2008 the parties, by mutual consent, varied one of the terms of their contract (annexure CK1) in particular the termination date. The variation extended the termination date of the contract from 31st January 2009 to 30th April 2009. That meant that if the contract were to terminate by effluxion of time, the new date of termination would be the 30th April 2009.
17. In the circumstances the requirement for a three (3) months notice was satisfied. The last day of the notice (annexure CK2), being 28th February 2009 fell within the duration of the contract as varied.

The variation of the contract as aforementioned, enabled the Respondent to comply with its contractual obligation namely of giving the Applicant a written three (3) months notice of termination of the contract. Had the parties failed to extend the termination date of their contract, the Respondent would have failed to meet the three (3) months deadline.

18. The variation did not create a new contract between the parties. The other terms of the contract (save for the termination date) remained unaltered and were binding on the parties. The relationship between the parties was governed by the same contract, annexure CK1, (subject to the variation of the termination date). As a result of the variation, the Applicant had been given five (5) months notice of termination of the contract, namely December 2008 to April 2009.

19. The variation did not create an obligation on the Respondent to serve the notice afresh. When the parties agreed on the 5th December 2008 to vary the date of termination of their contract, the Applicant had already been made aware by written notice (annexure CK2) that the employment contract will not be renewed. If the Applicant required a fresh notice to be served, he had options available which could have put him in the same position he was in before the variation.

19.1 The Applicant could have insisted on a variation of clause 10 of the contract, so that it created an obligation on the Respondent to serve him (Applicant) a fresh notice in line with the extended date of termination.

19.2 The Applicant could also have insisted on the withdrawal of the existing notice (annexure CK2). The effect of that would mean that the Respondent would then have an obligation to serve a notice at least three (3) months prior to the 30th April 2009.

20. The purpose of the requirement for a three (3) months notice was to give the Applicant a warning ahead of time that his employment contract will not be renewed or extended after the agreed date of termination. That warning was meant to enable the Applicant time to look for alternative employment or consider other future options available to him while he was still working for the Respondent. That purpose was served in this case. By the time the employment contract terminated, namely 30th April 2009, the Applicant had already been informed five (5) months earlier (30th November 2008) that the employment contract would terminate on a specific date agreed to by the parties, and that a renewal was not automatic.

21. The Applicant appears to have misunderstood the purpose and effect of the variation. The Applicant expected the Respondent to serve him another notice which should be delivered three (3) months before the 30th April 2009, addressing the same issues as in annexure CK2. However, the contract as well as the variation agreement does not provide for delivery of a second notice. Annexure CK1, sufficiently addressed the requirement of clause 10 of the employment contract. The Court finds that the contract required the Respondent to serve one notice on the Applicant.

The Respondent did comply by delivering annexure CK2. The Respondent therefore discharged its contractual obligation regarding service of notice.

22. The Respondent has further challenged clause 10 in annexure CK1, on the basis that it was covertly incorporated into the employment agreement by the Applicant. It is alleged that this particular clause did not exist in the previous contract which had been signed by the parties. The attention of the Respondent was not drawn to that clause before and at the time of signing. As a result the Respondent signed the employment contract in ignorance of clause 10, especially the latter portion therein.

23. The Applicant has stated in his replying affidavit that the contract of employment (annexure CK1) was preceded by another contract between the parties which was subsequently amended. The amendments were incorporated into an addendum which was signed by the parties on the 16th January 2006. The addendum has been presented to Court by the Applicant and is marked annexure C. The Respondent was represented by a certain Mr. Nxumalo when the addendum as well as the employment contract (annexure CK1) was signed.

24. Clause 2 in the addendum (annexure C) reads exactly the same as in clause 10 of the employment contract (annexure CK1). The Respondent became aware of this clause on or before the 16th January 2006.

If the Respondent had difficulty in accepting the offending clause, he should not have signed the employment contract. The Court finds that the Respondent, duly represented by Mr Nxumalo, signed the employment contract with full knowledge and understanding of the terms contained therein especially clause 10. The employment contract is accordingly binding on the parties.

25. There is another technical difficulty that the Respondent is facing in its quest to challenge clause 10 of the employment contract. The manner in which the Respondent seeks to introduce its evidence is irregular. It is common cause that the Respondent was represented by Mr Nxumalo in the signing of the employment contract. The Respondent's answering affidavit is deposed to by the chairman of the Respondent's board of directors Dr Beason Mwaka. According to Dr Mwaka, the Respondent was not aware of the contents of clause 10 of the employment contract prior to and at the time of signing.

26. Mr Nxumalo (the signatory to the contract and addendum), has not denied that he read and understood the terms and conditions of the employment contract before signing. There was no explanation given for failure by Mr Nxumalo to file a supporting affidavit to explain his understanding of clause 10 of the contract. It amounts to hearsay, alternatively speculation for Dr Mwaka to allege or imply that Mr Nxumalo was not aware of, or did not understand the contents of clause 10 when he signed the contract. That portion of Dr Mwaka's affidavit is legally inadmissible and factually incorrect.

27. The Respondent has further challenged the Applicant's rights to claim payment in lieu of notice. The Respondent argued that the Applicant's case is based on a breach of contract and as a result his remedy lies in damages for breach of contract. When interpreting a contract of employment the Court is enjoined as far as it may be practicable, to apply relevant legislation dealing with employer/employee relationship which includes The Employment Act No. 5 of 1980 as amended, and The Industrial Relations Act No. 1 of 2000 as amended.

28. In terms of section 33 (5) of The Employment Act, an employee whose contract of employment has terminated, who is entitled to notice of termination and who has not been given notice, is entitled to payment of salary in lieu of notice. On the facts of this case, the Court has found that the Applicant was given proper and timeous notice in annexure CK2. The Applicant is therefore not entitled to claim payment in lieu of notice. Although the Applicant is correct in principle nevertheless he has failed on the facts. For the reasons stated above, prayers 1 and 2 of the notice of motion should fail.

29. The Applicant has further claimed payment of a bonus for the financial year 2007/2008 and 2008/2009. The employment contract provides for an annual review of the Applicant's remuneration. The salary review is based on the Applicant's work-performance. The Applicant's performance is subject to an appraisal. An appraisal for the Respondent's employees for the year 2007/2008 was undertaken.

The Applicant was awarded a certain grade for his performance as a result of which he was paid a bonus. The Applicant accepted the payment of a bonus with certain reservations.

30. The Applicant has challenged the 2007/2008 appraisal as being irregular and unfair in that his input was not sought when his work-performance was assessed. As a result he was awarded a lower grade than his subordinates. According to the Applicant this low grade was an anomaly in that as chief executive officer he was responsible for the overall performance of the organisation (Respondent). Since the organisation had performed well for the year 2007/2008, he should have been credited for that successful performance.

31. The Respondent has defended the appraisal of the Applicant's performance, and has further denied that it was defective and unfair. The Respondent has further denied that the Applicant's input was not sought, as alleged by the Applicant. The Respondent has failed however to give details of how and when was the Applicant's input sought and whether or not it was obtained. The Applicant's response to this allegation is a bare denial.

32. The purpose of an answering affidavit is to give the Respondent an opportunity to state his defence and also supply the necessary evidence to support that defence. A bare denial is not a defence but a tactic employed in order to avoid the issue. A bare denial in response

to a damning allegation made by the Applicant means that the Respondent has no defence to counter the allegation made.

The Courts have accordingly adopted the principle that a bare denial is an admission by the Respondent that the Applicant's allegation is correct. The Learned author Erasmus HJ states as follows on this issue.

“An affidavit is not a pleading. A respondent cannot contend himself in his answering affidavit with bare or unsubstantiated denials. A statement of lack of knowledge coupled with a challenge to the applicant to prove part of its case does not amount to a denial of the averments of the applicant”

ERASMUS HJ: SUPERIOR COURT PRACTICE (Juta and co) 1994, ISBN 0 7021 3231 6 at page B1-44

33. The Court takes the view that the Respondent has failed to deny the Applicant's allegation that he was not consulted when his work-performance was assessed. In addition, the Respondent has not denied that the Applicant's input was vital for the appraiser to arrive at a fair and balanced appraisal. The Applicant has accordingly made out a case in challenging the 2007/2008 assessment of his performance. Under the prayer for *“other, or alternative relief,”* the Court hereby sets aside the 2007/2008 appraisal.

34. The Applicant has further alleged that there was no appraisal done on his performance for the year 2008/2009. As a result he was not paid a bonus for that year. It is common cause that the calculation of bonus is dependant on the performance grade that is awarded a particular employee. The appraisal for the year 2008/2009 is therefore a vital process to arrive at a performance grade for that period.
35. The Respondent has denied the Applicant's allegation concerning the 2008/2009 appraisal. According to the Respondent, the Applicant was invited to an appraisal meeting for the year 2008/2009, but he declined. Instead, the Applicant declared that he no longer trusted the truthfulness of the appraisal. The Applicant has admitted that he resisted the appraisal meeting since at that point the parties were no longer in good terms. In the Applicant's opinion the Respondent was not in a position to give him a fair appraisal. For the Reasons stated above, the Court is satisfied that the 2008/2009 assessment of the Applicant's performance was irregular.
36. In order to remedy the defect complained of in the 2007/2008 appraisal and the absence of an appraisal for the year 2008/2009, the Applicant has prayed before Court that he be paid a bonus. The calculation of that bonus should be *“based on the average performance and bonus of all staff for the year 2007/2008 and 2008/2009.”*

37. The Court has some difficulty with the Applicant's prayer 3. The Court is being asked to award the Applicant a performance grade based not on the Applicant's performance but on the performance of other employees of the Respondent. In effect the Court is being asked to usurp the power and authority of the appraiser. The Court is further being asked to use an arbitrary method of awarding the Applicant a performance grade. If the Court were to accede to the Applicant's prayer, it would be interfering with the work of the appraiser. Any performance grade that the Court could award would be based on conjecture rather than fact.
38. It is in the interest of justice and fairness that the parties be called to a meeting in order for the 2007/2008 assessment to be redone. Once that exercise is done and the Applicant's performance grade declared, the Respondent will take into consideration the amount already paid the Applicant when calculating the value of bonus payable to him on the revised assessment. In the appraisal meetings aforementioned, the Applicant should be given a chance to make a meaningful input in the assessment. The Respondent will also have a chance to undertake the assessment of the Applicant's performance for the year 2008/2009.
39. In order to maintain neutrality and order in the performance assessment aforementioned, the Labour Commissioner is hereby directed to assist the parties in their meetings with a view to speedily resolve the dispute. The Labour Commissioner is empowered by section 8 and 9 of the Employment Act No.5/1980 as

amended, inter alia, to perform the duty it is assigned by Court in this judgment. Section 8 provides as follows;

“8 In addition to any powers or duties given him under this Act or any other law, the Labour Commissioner shall-

(a) have all the powers of an Inspector under the Act;

(b) receive, investigate and where requested, conciliate on any question, dispute, complaint or grievance arising out of an employer/employee relationship, whether or not it specifically falls to be dealt with under this Act;

(c) provide information and advice to employers and employees on the application of this Act or any other law relating to employment;

(d)

(e)

(f)”

40. Taking into consideration the wide powers which the Labour Commissioner is vested with in terms of section 8 and 9 of The Employment Act, the Court is satisfied that the Commissioner has the ability and authority to assist the parties to resolve the matter. As a result the Court has issued an order directing the Commissioner to intervene in this matter.

41. It is hereby ordered as follows;

(1) Prayers 1 and 2 of the Notice of Motion are dismissed.

(2) The 2007/2008 appraisal of the Applicant's performance is hereby set aside.

(3) The Respondent is directed to undertake the appraisal of the Applicant's performance for the years 2007/2008 and 2008/2009.

(4) The Labour Commissioner is directed to supervise the appraisal meetings and to render the parties the necessary assistance to fulfill the objectives of this judgment. If it becomes necessary, the Commissioner shall exercise the power accorded him/her by law including the provisions of sections 8 and 9 of the Employment Act No. 5/1980 as amended.

(5) The appraisal referred to in order (3), should be completed within 21 (twenty one) Court days from the date of this judgment. The Labour Commissioner as well as either of the parties may apply to the Court for extension of time, should the need arise. The application for extension of time should be on notice accompanied by affidavit.

(6) Within thirty (30) Court days from the date of this judgment the Labour Commissioner shall file a report with the Court regarding resolution of this matter