



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 232/2013

In the matter between:-

MUSA MAGONGO

APPLICANT

AND

MATSAPHA TOWN COUNCIL

1ST RESPONDENT

Neutral citation : *Musa Magongo v Matsapha Town Council*
SZIC 54 (13 October 2015)

CORAM : **DLAMINI J,**
(Sitting with D. Nhlengetfwa & P. Mamba
Nominated Members of the Court)

Heard : **03 August 2015**

Delivered : **13 October 2015**

Summary: *Labour law – Contract of employment – Applicant seeks orders for the payment of remuneration from the commencement date of the contract and also for the payment of gratuity in terms of the provisions of the contract of employment. Held – Operation of the contract commences when the parties have agreed to its essential terms. Held – Employer judiciously exercised its discretion in declining to pay the Employee gratuity in the circumstances of the matter.*

1. Musa Magongo, the Applicant in this matter, is a former employee of the Matsapha Town Council, the Respondent. The background of his story goes thus; in October of 2011, he stumbled upon a newspaper advertisement for a vacancy of Town Treasurer at the Matsapha Town Council. At the time he was employed by the Family Life Association of Swaziland (FLAS) as a Finance Administration Manager. He was keen on the advertised position and as such he expressed his interest by filing a formal application for same. He was shortlisted and subsequently called in for a formal interview. He must have fared very well in the oral interview because he then received a call from the Town Clerk, Gciniwe Fakudze, informing him of the good news that he had been chosen for the position. As such, according to the Town Clerk, his name had been submitted to Cabinet for endorsement. In the meantime the Town Clerk directed that he finalizes his personal paper work, ie police clearance, and such incidental processes in readiness for his new employment.
2. The Town Clerk again called the Applicant early in the new year, January 2012 to be exact, now confirming that Cabinet had approved his appointment into the position of Town Treasurer. He was therefore

advised that he was to resume duties in this new position the very next month, February 2012. On the strength of this directive from his new boss, the Town Clerk, the Applicant then formally resigned from his position at FLAS and immediately started serving his one month notice period in anticipation of starting at the new position of Town Treasure with Matsapha Town Council. Whilst still serving his statutory month long notice period, he received another call from the Town Clerk, this time around advising him that there was a slight delay with the endorsement of the Minister's signature on his appointment letter. The Town Clerk though promised to keep him in the loop of how the issue was progressing.

3. This turn of events must have worried the Applicant because he says he immediately engaged the Town Clerk on what he calls 'unwanted ramifications' of the delay, especially since same could not be attributed to him. It turns out that this delay persisted until 19 March 2012, when he was finally able to start at his new place of employment. On assumption of duty he was signed a three years contract backdated to 01 February 2012 to the end of January 2015. In this regard therefore, the Applicant contends that he is entitled to be

paid for the months of February and part of March 2012, since he resigned from his previous job in anticipation that he was to start with the Respondent in February 2012, as discussed with the Town clerk, Ms. Fakudze, only to start on 19 March 2012. At the hearing of the matter the Respondent's Counsel, Attorney Mr. Phiri, conceded that indeed the Applicant should have been paid from February 2012, since he had been informed by the Town Clerk that he was to start at the beginning of February 2012, and that as a matter of fact his contract was backdated to the same period. The issue of the payment of the Applicant therefore for the months of February and part of March 2012 no longer became a contentious one, and the points of law on raised accordingly fell away.

4. Just slightly more than a year after signing the 3 year contract with the Respondent, in April of 2013 to be exact, the Applicant then terminated his employment contract with Matsapha Town Council. For that purpose he duly gave the Town Board the one month written notice as required by clause 17 of the contract of employment of the parties. And in response to his resignation, the town Clerk accepted

his resignation and further appreciated his commitment to his duties during his 14 month tenure with the Town Council.

5. The Applicant though felt he ought to have been paid gratuity at the judicious exercise of the Respondent's discretion, hence his claim for the payment of 25% gratuity of the 3 year cumulative total basic remuneration in terms of the contract of employment. The Respondent though felt that despite his sterling service, his service period was rather too short and the fact that he had breached the contract by terminating it, hence it declined his request for the payment of gratuity. The Court therefore has to determine whether indeed the Applicant is entitled to payment of the 25% gratuity he is claiming.
6. For this purpose the contract of employment is regulating authority. The payment of gratuity is regulated at clause 10 of the contract of the parties. Clause 10.1 provides as follows;

“In addition to the basic monthly salary, the Employer shall pay, to the Employee, at the end of the contract period, a gratuity of 25% of the Employee's 3 year cumulative total basic salaries... (Court's emphasis).

7. This clause above is unambiguous. It means that the payment of the gratuity of 25% of the Employee's 3 year cumulative total basic salaries is principally at the end of the 3 year contract period. However, in terms of clauses 10.3 and 10.4 should either the Employer or the Employee terminate the contract before the 3 year period, then the gratuity payable to the Employee will be; a) on a pro rata basis up to the date of such early termination for a termination by the Employer and b) where the Employee terminates the contract, then no gratuity will be paid, unless the Employer, in its sole discretion, decides to pay same by considering issues such as performance, long service and loyalty to the Board. (Court's emphasis).

8. As pointed out and outlined above, the provisions of the contract of employment regulating the payment of gratuity are quite clear, and it is that; a) the payment of gratuity is at the end of the contract period and b) same is calculated at 25% of the Employee's 3 year cumulative total basic salaries. But, in a situation such as the present one of Mr. Musa Magongo, where the Employee elects to terminate employment by giving notice, then no gratuity is payable. That is the starting point. However, the Employer, in its sole discretion, may consider and

determine if the Employee in question deserves to be considered for the payment of any gratuity even though such Employee has terminated the contract prematurely. And in making such determination the Employer considers such factors as performance, long service and loyalty. The assumption here is that the employer will also consider how much it is to pay as gratuity, because surely it cannot pay the 25% of the Employee's 3 year cumulative total basic salaries when the Employee has not served for the whole 3 years.

9. Now, the evidence before Court indicates that the Applicant wrote to the Respondent requesting that he be considered for the payment of gratuity. This request was considered at, not one but two, of the Council's sittings, on 14 March and 08 April, 2013. In determining Mr. Magongo's request, the Council considered his 14 month service with it, which it appreciated. However, despite his sterling service during this 14 month period, Council felt it was 'rather too short' to warrant him being paid gratuity. Over and above that, Council declined to accede to his request because it decided that by terminating the contract early he breached its terms and conditions. Indeed in terms of clause 4.1, the duration of the contract of the

parties was 36 months. In fact, considering that the Applicant actually started rendering his services for the Respondent on 19 March, 2012, it means he served the Employer for just more than a year.

10. It is accordingly a finding of this Court that the Respondent in this matter, Matsapha Town Council, exercised its discretion judiciously in considering whether to pay the Applicant, Musa Magongo, gratuity, and that the final decision not to pay him the gratuity cannot be faulted by the Court. Just because the Employer was happy with the Employee's work does not then mean, in considering his entitlement to gratuity payment, it had to close its eyes to his length of service. The issue of the length of service is very much a relevant factor in this consideration. In effect, it means that the Employer found that the Applicant's length of service outweighed his sterling performance in the consideration of payment of gratuity, and this a decision this Court finds no reason to interfere with. For that reason therefore, the Applicant's claim for payment of gratuity fails.
11. The Court accordingly makes orders as follows;

- a) The Respondent is hereby ordered and directed to pay the Applicant his remuneration for the month of February, 2012 and for work days between 01 and 18 March 2012, forthwith.*
- b) The claim of the Applicant for payment of gratuity be and is hereby dismissed.*
- c) The Respondent is ordered to pay half of the Applicant's costs of suit.*

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 13th DAY OF OCTOBER 2015

For the Applicant: Attorney Mr. S. Simelane (S.P.Mamba Attorneys)

For the Respondent: Attorney Mr. S. Phiri (Thwala Attorneys)