



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 352/2012

In the matter between:

SIBUSISO SIFUNDZA

APPLICANT

And

MINISTRY OF AGRICULTURE

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

Neutral citation : *Sibusiso Sifundza v Ministry of Agriculture and Another (352/2012) [2017] SZIC 120*

CORAM:

XOLISA HLATSHWAYO : ACTING JUDGE

MUSA P. DLAMINI : MEMBER

NICHOLAS R. MANANA : MEMBER

DATE HEARD : 23 OCTOBER 2017

DATE DELIVERED : 31 OCTOBER 2017

JUDGEMENT

Background

The Applicant is a civil servant based in the Ministry of Agriculture. The application was filed in October 2012 seeking the following prayers;

“1. That the 1st respondent be directed to immediately promote the applicant to the position of “Heavy Duty Driver”;

2. That the 1st respondent pay to the applicant, a sum of E178 458.20 (One hundred and seventy eight emalangeneni, four hundred and fifty eight emalangeneni twenty cents),(sic) this being the total and that the applicant was underpaid for the period September 2007 to August 2012 when the applicant occupied the position of “Heavy duty driver” but was remunerated as a labourer.;

3. That the respondents pay the costs of this application, these costs to include the costs consequent upon the employment of counsel;

4. Granting to the applicant further and/or alternative relief.”

The Respondent opposed the application.

The Applicant's case

The Applicant was employed as a labourer by the Respondent. It is said that whilst he worked as a labourer he obtained a “code J” drivers licence, which is a licence for heavy-duty vehicles. A copy of the licence is attached to the Founding Affidavit. He obtained the licence and allegedly brought the fact to the attention of the respondent in September 2007.

The Applicant argues that upon submission of the “code J” licence, he was deployed to Unit 1, whereat he was allocated new responsibilities of driving heavy-duty vehicles being used at the construction of earth dams.

He alleges that he got further training on the operation of heavy plant machinery, water tanks and heavy-duty trucks. Further to such training, he alleges that he received a Swaziland Government Drivers Identity Card, which he attached to his Founding Affidavit.

The Applicant alleges that he has worked as a heavy-duty driver, operating the heavy-duty vehicles and machinery from September 2007 to date. The Applicant attached a few authority documents in proof of the duties he alleges he was assigned to do, at the new position as heavy-duty driver.

The applicant attached a Confirmatory Affidavit of the clerk responsible for issuance of authority documents to drive the respondent's vehicles.

The gravamen of the Applicant's complaint is that he is still salaried as a labourer despite his performance of the duties of a heavy-duty driver. He attached to his Founding Affidavit the salary scales for civil servants and illustrated that, as a labourer, he is salaried at E2 287.83 (Two Thousand Two Hundred and Eighty Seven Emalangeneni Eighty Three Cents) per month, at scale A1. He claims that heavy-duty drivers are salaried between E4 739.08 (Four Thousand Seven Hundred and Thirty Nine Emalangeneni Eight Cents) to E5 333.83 (Five Thousand Three Hundred and Thirty Three Emalangeneni Eighty Three Cents) at A5. The result of not having been paid at the scale of other heavy-duty drivers sees the Applicant claiming short-payment of the sum claimed, being E178 458.20 (One Hundred and Seventy Eight Thousand Four Hundred and Fifty Eight Emalangeneni Twenty Cents).

Respondent's Argument

The Respondent admits that the Applicant was engaged as a labourer but vigorously disputes that there was any change from being labourer to being a heavy-duty driver. The assertion is that the Applicant was at all times, whilst working at Unit 1, still a labourer under training for driving heavy-duty vehicles.

The Court sought clarification on the work generally done at Unit 1, and the specific tasks to be performed by the Applicant. The Respondent averred that Unit 1 is one of the many depots of the Ministry of Agriculture from where heavy-duty vehicles and machinery are dispatched and controlled.

The respondent argued that the Applicant acquired both the “code J” licence and the Swaziland Government Drivers Licence whilst being trained at Unit 1, these being attached as SS2 and SS3 respectively, to the Founding Affidavit.

The respondent also submitted that the applicant continued to do all the work he was assigned to do at Unit 1 even after the issuance of both licences. The Respondent submitted that, even though the Applicant continued working at Unit 1, there were no authorising document for him to be said to be a heavy-duty driver.

The respondent emphasised that there was nothing presented as proof of Applicant having driven the heavy-duty vehicles in 2007, hence the assertion, still remained refuted.

The respondent’s response to the averments contained in the Confirmatory Affidavit was that of denial of the deponent being the Applicant’s supervisor, who in any case was not working but was training.

Rule 18 application

At some point whilst the matter was still pending in court, a Notice in terms of Rule 18, which is an application for referral of the matter to arbitration, was filed. It was however, later withdrawn after being allocated a date of hearing.

The Heads of Arguments were filed and the parties sought that they be referred to as their submissions, without any actual hearing of presentations.

The Applicant further filed a Notice of Withdrawal of prayer one, which was that he be promoted from being a labourer to being a heavy-duty driver, since he had already been promoted to.

Both Heads of Argument are brief and basically reiterate the pleadings, well enough to be considered as submissions.

The Applicant submitted that he was entitled to a salary commensurate to the job performed. His submission that he started working at Unit 1 as a heavy-duty driver in 2007 cannot be borne by any of the documents filed.

The Respondent also could not disprove it because it also lacked any informing documents.

It is trite in law that the allegor must prove on a balance of probabilities, which Applicant has failed to do.

The parties were in agreement about the Applicant being stationed at Unit 1 but the capacity of his engagement there is where there is a point of departure. On

one hand the Applicant alleges to having worked as a heavy-duty driver, having submitted his code J licence and thus assigned work in which he could use his new skill, and further being given a Swaziland Driver's Licence in line with government procedures for employees expected to drive government vehicles.

On the other hand, there is the Respondent who submits that the Applicant was engaged as a labourer, taken to Unit 1 to be trained, during which time he obtained the code J drivers licence and was subsequently issued with Swaziland Drivers Licence. The Respondent has no documentation in support of any of the claims of their training assertion, be it in a form of grades, mentor's report or any report of any kind.

The code J licence was issued on the 3rd June 2008.

The Swaziland Driver's Identity Card was issued on the 30/11/2004 but it was signed on the 12/01/2009. The document is attached as "SS3" on page 23, and it also has a Date of Engagement of 10/01/2008.

The Date of Engagement seems to have unlocked the matter, as it is the date on which he was engaged as a driver since he was already a government employee (labourer) hence it cannot be said that it is the date on which he was first engaged by the government.

The Applicant has proven his work as a government driver from 2008, by annexing travel authorities stating the dates of assignments to drive and the

purposes of the journeys including authority to draw fuel. Since there is no contradicting evidence by the Respondent, but mere denial, the Applicant seems to have proved his assertion on a balance of probabilities.

In **LAWSA Vol 9 paragraph 635** it is stated that *“the balance or onus of proof determines the result if at the end of the trial, the evidence is so evenly balanced that the court is unable to come to a definite conclusion. The party bearing the burden on any particular issue then fails to establish its claim or defence, as the case may be. This burden, which is a matter of substantive law is determined by the pleadings, must be distinguished by purely evidential burden of combating the opponent’s evidence”*.

In casu, although this not being a trial, the parties have two parallel version, it was then left to them to bring evidence to support their respective supporting evidence to their mutually defeating pleadings.

It is, correctly, stated by the Applicant, in the Supplementary Heads of Arguments that equal work entitles one to equal pay, failing which, there is an unfair labour practice. A practice is said to be unfair when the employer fails to follow its own procedure, which may be from statute, collective agreement, policy or established practice, as was stated at page 88 **JW Du Plessis A Practical Guide to Labour Law (8th ed)**.

The court is inclined towards the submission that *“to pay an employee less for performing similar work...clearly constitutes less favourable treatment...”*

There was an objection to the filing of the Supplementary Heads of Arguments because the pleadings were closed. The court accepted them nonetheless because they are meant to assist the court in reaching an equitable, just and fair decision.

In **Gideon Gama v Peter Masango Appeal Case 20/1997** the court stated that *“rules governing procedure such as Rules of Court are not made to enable the lawyers representing parties to a dispute to score points off on another, without advancing the resolution of that dispute in any way they are guidelines aimed at obliging the litigants to define the issues to be determined, within a reasonable time, enabling the court, as a consequence to organize their administration as quickly, effectively and fairly as possible”* (own emphasis)

Conclusion

The court is satisfied that the Applicant has been working as a heavy-duty. However, it is not convinced that he started working as such in 2007, as there is no supporting evidence.

The Respondent is to compensate the Applicant for work done, as follows;

1. The difference between his monthly earnings and notch 1 of A5 (heavy-duty driver's scale) from January 2008 (Date of Engagement) until the month when he was correctly salaried.
2. The Respondent to pay costs at ordinary scale.

The Members agree.



XOLISA HLATSHWAYO
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR THE APPLICANT : MR. K. MAGAGULA
(SITHOLE MAGAGULA
ATTORNEYS)

FOR THE RESPONDENT : MR. M. DLAMINI
(ATTORNEY GENERAL'S
CHAMBERS)