

IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 638/2014

In the matter between:-

KING DLUDLU

Applicant

AND

**SUNDAY KHUMALO t/a KHUMA
INVESTMENTS**

Respondent

Neutral citation *King Dlodlu vs Sunday Khumalo 638/2014 [2020] SZIC 53*
(May 07, 2020)

Coram: N.NKONYANE, J
(Sitting with G. Ndzinisa and S. Mvubu Nominated
Members of the Court)

Heard submissions 26/03/2020

Judgement delivered 07/05/2020

SUMMARY---*Labour Law---*Applicant employed by the Respondent as a truck driver---Applicant paid a fixed monthly salary---Respondent arguing that the Applicant was not a permanent employee but a casual employee---

Applicant employed by the Respondent for about two years---No disciplinary hearing held before the Applicant was dismissed---Respondent denying that he dismissed the Applicant.

Held---*There was no evidence that the Applicant was paid at the end of each day and that he was not engaged for a period not longer than twenty-four hours at a time.*

Held further---*As the Applicant was paid a fixed monthly salary and was employed for more than twenty-four hours at a time for an indefinite period, he was clearly a permanent employee.*

JUDGEMENT

1. This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent in terms of Section 85(2) of the Industrial Relations Act N0.1 of 2000 as amended.
2. The Applicant is an adult male person of Msahweni in the Hhohho Region. He is a former employee of the Respondent. He was employed as a truck driver.

3. The Respondent is Mr. Sunday Khumalo of Mayiwane in the Hhohho Region, who is a sole trader under the business style Khuma Investments (Pty) Ltd.
4. The Respondent's business involves block making, sand river, plaster sand and water tanker services.
5. The Applicant claims that he was unfairly dismissed by the Respondent. As the result of the alleged unfair dismissal the Applicant is now claiming payment of notice pay, leave pay, severance allowance, additional notice, underpayments, overtime and maximum compensation.
6. The Applicant's claim is opposed by the Respondent who duly filed a reply denying the Applicant's allegations. In his reply the Respondent stated that the Applicant quit his job on his own because he feared to face a disciplinary hearing after he allegedly committed a dishonest act at the workplace. The Applicant thereafter filed a replication and reiterated his allegations that he was unfairly dismissed by the Respondent because he kept on insisting on being paid the monthly salary that the parties had initially agreed upon when the Respondent hired him.

7. The dispute between the parties was reported to the Conciliation, Mediation and Arbitration Commission (“CMAC”) by the Applicant. The dispute could not be resolved by conciliation and the Applicant thereafter instituted the present legal proceedings.
8. Only two witnesses testified before the Court, being the Applicant and the Respondent. The Applicant told the Court that he was employed by the Respondent as a Truck Driver. He was paid a monthly salary of E1000.00 per month. He said the parties had initially agreed on a salary of E1, 800.00 per month, but the Respondent reneged on that agreement. The Applicant said it was the Respondent that approached him and started negotiations to have him work at his business. The Applicant said the Respondent first got to know him when he was still employed at Unitrans as a heavy-duty mechanic. The Applicant said he knew that the Respondent wanted him to work not only as a truck driver, but also as a mechanic. The Applicant said he indeed fixed and serviced the Respondent’s trucks even though he was employed as a driver.
9. The Applicant told the Court that he reported for duty at 07:00 A.M and would remain on duty until 7:00 P.M or 8:00 P.M. He said he worked for seven days a week but he was never paid for working on weekends. The Applicant said he would, from time to time, remind the Respondent about the issue of the correct salary scale but the Respondent refused to entertain him.

10. The Applicant on a certain day in 2014 approached the Respondent to pursue the issues of not being paid for providing mechanical services and that of the correct salary. The Respondent did not answer him but instead took a piece of paper and wrote that there was no work for the Applicant anymore. The time was about 2:00 P.M. The Applicant indeed went home and returned to work on the following day but the Respondent ignored him. The Applicant realized that he was no longer wanted there, thus he left the Respondent's place.

11. The Applicant reported the matter to the Labour Office. The Respondent was summoned to appear before the Labour Office. He attended and he admitted that he was paying the Applicant E1000.00 per month. The Respondent was advised that he was underpaying the Applicant and was shown the Legal Notice regulating the salaries in the transport industry. The Applicant and the Respondent were advised to go and settle the matter on their own. The Respondent offered to pay the Applicant only E100.00 and the Applicant rejected the offer.

12. The Applicant reported the matter back to the Labour Office. The Respondent was summoned but he failed to show up. The Applicant then reported the matter to the police. The Respondent was called upon to appear at the police station. He came but refused to talk about the matter. The Applicant thereafter reported the matter to CMAC as a dispute. The Respondent refused to attend

and sent his cousin, a certain Mr. Mavuso to represent him. The dispute could not be settled by conciliation and a certificate of unresolved dispute was issued by the Commission.

13. During cross examination the Applicant denied that he was employed by the Respondent not on a permanent basis, but as a casual employee who was asked to help the Respondent from time to time as and when the need arose. The Applicant agreed that when they had gone to deliver water at a Magagula homestead, they were paid E350.00. He said they used that money to pay a fine to the police because the truck was found to be unroadworthy when they were stopped by the police at a road block. The Applicant said it was practice that they would pay the fine and submit the ticket or receipt to the Respondent. The Applicant denied that he demanded to be paid his terminal benefits because he wanted to stop working for the Respondent.
14. The Respondent's version was that he hired the Applicant to drive his truck as and when there was a need. He said it could be two or three times a week depending on whether or not there was a customer who needed the service. The Respondent denied that the Applicant was working on weekends. The Respondent said there was no specific time for the Applicant, to report for duty. He denied that the Applicant reported for duty at 07:00 A.M and knocked off at 5:00 P.M. The Respondent also denied that they agreed on the amount of E1, 800.00 as the salary for the Applicant. The Respondent also denied that he was

underpaying the Applicant. The Respondent told the Court that it was the Applicant who demanded to be paid money due to him so that he could leave the Respondent's employment. The Respondent said he gave him E1000.00 and an additional sum of E2000.00 out of his good heart as appreciation for the services rendered. The Respondent said the Applicant and the truck assistant failed to remit the sum of E350.00 that they received from the Magagula homestead. He said the Applicant left on his own accord after he failed to remit the money that they were paid by the customer. He said the Applicant disappeared on a Friday and returned on Wednesday and demanded to be paid his terminal benefits.

15. During cross examination the Respondent said that the Applicant only came to help him when he was not available to drive the truck as he was also able to drive the truck. The Respondent agreed that the truck assistants who helped to load river sand were paid per truck-load. He said he would classify the Applicant as a casual employee. When asked as to why he did not pay the Applicant at the end of each day if he was a casual employee, the Respondent said they just agreed to have the Applicant paid on a monthly basis. The Respondent denied that he paid the Applicant on a monthly basis because he was a permanent employee. When asked if he enquired from the Applicant about the E350.00, the Respondent said he did not because he is a person who does not like to talk much and that the Applicant demanded to be paid his

money. Again, when the Respondent was asked why he did not deduct the said sum of E350.00 from the sum of E3000.00 that he paid to the Applicant, the Respondent said he was not a person who is given to talking too much.

16. ANALYSIS OF THE EVIDENCE AND THE LAW:-

The Applicant's case is that he was employed on a permanent basis as a truck driver by the Respondent, and that he was underpaid during his tenure with the Respondent and also that he was unlawfully and unfairly dismissed by the Respondent. The burden of proof was on the Applicant to show that he was an employee to whom Section 35 of the Employment Act applied. The burden of proof was on the Respondent to prove that the dismissal of the Applicant was for a fair reason, and that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the Applicant. (See: Section 42 (2) of the Employment Act N0.5 of 1980 as amended).

17. To the contrary, the Respondent's case is that the Applicant was not employed on a permanent basis but was a daily paid employee or casual worker, and that the Applicant was never dismissed but he left on his own accord after he failed to remit the sum of E350.00 paid to him by a customer to whom he had delivered water.

18. EMPLOYMENT STATUS OF THE APPLICANT:

The Applicant told the Court that he was employed by the Respondent in 2002 as a truck driver on a permanent basis and was being paid a monthly salary of E1000.00. The Respondent disputed the Applicant's evidence and told the Court that the Applicant was a casual employee.

19. The Respondent's version on this issue is wanting. In his reply the Respondent stated that the Applicant was a seasonal employee. Again, in the same papers, in paragraph 7 of the reply, the Respondent stated that the Applicant was a casual employee. In Court, when he was giving evidence the Respondent decided to abandon the first version that the Applicant was seasonal employee and adopted the version that he was a casual or temporary employee who would be required to drive the truck depending upon customers' requests.
20. The Respondent agreed that the Applicant was paid a fixed amount of E1000.00 per month. There was no evidence nor was it suggested by the Respondent that the salary of E1000.00 per month was the accumulated amount representing the number of days worked by the Applicant. Clearly, if the Applicant was paid for the days worked per week, the monthly amount paid would not have been uniform, that is E1000.00 per month, as the Respondent told the Court that the Applicant did not come to work every day but would come as and when there was a customer who required services. The evidence before the Court however showed that the Applicant was paid a fixed salary of E1000.00 per month.

21. From the evidence led before it, the Court is unable to come to the conclusion that a person who was paid a fixed salary every month for about two years on a continuous basis, could be regarded as a casual employee. The Court is supported in this conclusion when one has regards to the definition of casual employee under Section 2 of the Employment Act where a casual employee is defined as *“any employee the terms of whose engagement provide for the payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”*
22. In casu, the Applicant was not paid at the end of each day but was paid a fixed monthly salary. As the Applicant was paid at the end of each month, it follows that he was engaged for a longer period than twenty-four hours at a time. There was no evidence that at the end of each month the contract of employment lapsed and the Applicant would be required to enter into a new contract. Instead, the evidence revealed that the Applicant was employed for an indefinite period. The Applicant was not, therefore, a casual employee. To insist that he was casual employee in the light of the clear evidence before the Court is an absurdity.
23. Further, the Applicant was employed for an indefinite period. A casual employee or seasonal employee is employed for a known or agreed fixed period. Dealing with a similar question, this Court in the case of **Sibusiso Mkhonta & Others**

V. Swaziland Government, case number 256/2005 held as follows in paragraphs 13 and 14;

“13.....The mere fact that the letter of appointment states a daily wage rate does not mean that the Applicants were paid at the end of each day. On the contrary, it is common cause that they were paid monthly not daily.

14. We have no hesitation in rejecting the proposition that the Applicants were casual employees. Furthermore, the Applicants were employed for an indefinite period terminable on Notice, not for a fixed period.”

The Court aligns itself fully with the reasoning of the Court in the above cited paragraphs.

24. Taking into account all the observations by the Court in the preceding paragraphs, the Court will come to the conclusion that the Applicant was an employee to whom Section 35 of The Employment Act applied.

25. **WAS THE APPLICANT DISMISED:-**

The next enquiry that the Court will go into is whether the Applicant was dismissed by the Respondent or he left the Respondent's employment on his own accord. The Applicant told the Court that he was dismissed by the Respondent because he was pestering the Respondent by asking to be paid the amount of E1, 800.00 that the parties had initially agreed upon. In his reply, the Respondent denied that the Applicant was dismissed by him but stated in paragraph 5.2 that the Applicant quit his job because he wanted to avoid a disciplinary hearing. The Respondent however changed the version when giving evidence before the Court and stated that the Applicant and the truck assistant disappeared on the Friday that they had gone to deliver water at the Magagula homestead and returned on Wednesday to demand payment of his terminal benefits.

26. The Respondent also told the Court that he paid the Applicant E1000.00 and a further amount of E2000.00 as a token of appreciation when he left. In his papers however, in paragraph 5.2 of the reply, the Respondent stated that he paid the Applicant a sum of E3, 000.00 made up of E1, 500.00 salary and E1, 500.00 notice pay.
27. The essence of the Respondent's case was that the Applicant was not dismissed but he quit on his own accord because he was running away after having committed a crime of theft of E350.00 which was paid to him by a customer.

When asked during cross examination as to why he did not deduct the sum of E350.00, the Respondent said he did not do so because he is a person of few words. The Respondent's version was pregnant with substantial contradictions, and when considered in its totality, it is clearly not reliable. It cannot be said that the Respondent was able to successfully discharge the evidentiary burden that lay on him on this issue. The Court will therefore reject his version as being false and an afterthought. The Court will accordingly accept the Applicant's version that he was dismissed by the Respondent when approached him and requested to be paid the agreed salary of E1, 800.00.

28. The evidence revealed that no disciplinary hearing was held before the Applicant was dismissed. The Applicant was therefore never charged with any disciplinary offence and given the opportunity to state his side of the story. In case of **Muzi Mamba V Cash Security (Pty) Ltd**, case number 435/13 this Court stated the following;

“No dismissal will ever be deemed fair if it cannot be proved by the employer that it was initiated following fair procedures (procedural fairness) and for a fair reason (substantive fairness). The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the employer relies for arriving at the decision that

it longer requires the service of the employee and ultimately terminating his services.”

In casu, no disciplinary hearing was held before the Respondent terminated the service of the Applicant. The dismissal of the Applicant was therefore procedurally and substantively unfair.

29. The evidence led revealed that the Applicant approached the Respondent and complained about not being paid the amount of salary initially agreed upon by the parties. The parties had some misunderstanding. When the Applicant returned on the following day, he did not find the Respondent. The Applicant eventually found the Respondent on the fourth occasion. On that day when the Applicant raised the issue of the pay, the Respondent responded by writing a note on a piece of paper where he told the Applicant that the employment relationship was over. The Court will therefore accept the Applicant's version that he was dismissed for lodging a complaint regarding the underpayment by the Respondent.
30. By lodging the complaint, the Applicant was asserting his legal right and not committing misconduct. It is not clear to the Court how the conduct of the Applicant of being persistent in requesting to be paid the correct amount of

salary could necessarily lead to his dismissal. The observations by this Court in the case of **Kenneth Ngwenya V Eagles Nest, case number 37/2003** at paragraph 13 are instructive in this regard where the Court stated that;

“.....The law requires that the employer must prove that the employee committed an act of misconduct so severe as to warrant dismissal. So that, if an employer cannot prove that the probabilities of the employee being guilty are greater than the probability that the employee is not guilty, the dismissal will be deemed to have been substantively unfair.”

In casu, no disciplinary hearing was held against the Applicant to allow the Respondent the opportunity to establish that the Applicant committed an act of misconduct so severe that it warranted the dismissal.

31. Before the Court, the Applicant explained that the sum of E350.00 that they received from the Magagula homestead was used to pay the fine at the roadblock where the Respondent's truck was found to be unroadworthy. The Applicant was able to specifically give the name of the police officer who issued the ticket and that his name was Reuben Dlamini. The Applicant stated

that it was the practice that they would pay the fine on the spot and submit the ticket to the Respondent.

32. It was not denied by the Respondent during cross examination that the Applicant submitted the ticket. It was also not denied that there is a police officer by the name of Reuben Dlamini who issued the ticket to the Applicant at the road block near Buhleni on the day that the Applicant was from the Magagula homestead. The Court therefore accepts the Applicant's explanation regarding the amount of E350.00.

33. Taking into account all the evidence before the Court, the Court will come to the conclusion that the dismissal of the Applicant was unlawful and unfair, both substantively and procedurally.

34. RELIEF:-

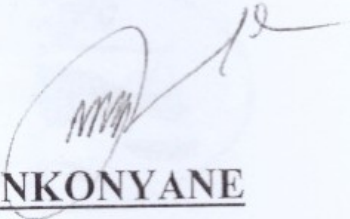
The Applicant is an elderly citizen. Since his dismissal by the Respondent, he has not been able to get alternative employment. He is a former employee of Unitrans where he left on account of retrenchment. He now survives by doing piece jobs doing welding. He has nine children, the last born is still attending school. His wife is employed at the Raleigh Fitkin Memorial Hospital as a laundress. His other source of income is the elderly grant by the Government.

35. In his papers, the Applicant set out an additional claim for overtime. The Respondent raised an objection to this claim as it was not mentioned in the certificate of unresolved dispute, which means that it did not form part of the issues that were addressed during conciliation at CMAC. The objection by the Respondent has substance. The present application not being an urgent application, and it also not being an application for determination of a question of law only, must deal only with those issues that were conciliated upon at CMAC and not resolved, and not any other issue that was not dealt with at CMAC.
36. The Applicant had worked for the Respondent for about two years. He was dismissed without having been charged with any offence. The official statutory salary that the Applicant was entitled to earn in terms of the Regulation of Wages applicable at the time was E1, 603.58 per month. The Applicant was therefore being underpaid by E603. 58 per month. Taking into account that the Applicant is an elderly man and not likely to be employed anywhere else, the Court is of the view that compensation equivalent to five months' pay will be fair in the circumstances of this case.
37. The Court will accordingly order the Respondent to pay the following amounts to the Applicant;

a) Notice pay		E1, 603.58
b) Leave pay		E1, 332.00
c) Additional notice		E 296.00
d) Severance pay		E 740.00
e) Underpayment		E10, 864.44
f) Compensation	(E1,603.58 x5)	<u>E 8, 017.90</u>
	TOTAL	<u>E22, 853.92</u>

38. The Respondent is also ordered to pay the costs of suit.

39. The members agree.



N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. M. Thwala
 (Attorney at Ngcamphalala Thwala Attorneys)

For Respondent: Mr. H. Nhleko
 (Attorney at Dunseith Attorneys.)