IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CASE NO. 125/2002

HUMPHREY MAGAGULA APPLICANT

and

PAUL FRIEDLANDER

T/A AMANDLA FINANCIAL SERVICES RESPONDENT

CORAM

N. NKONYANE ACTING JUDGE

G. NDZINISA MEMBER

D. MANGO MEMBER

FOR THE APPLICANT: MR. B. MDLULI

FOR THE RESPONDENT: MR. S. NSIBANDE

J U D G E M E N T 30.09.05

The applicant is a former employee of the respondent. He brought an application for determination of an unresolved dispute before the court in terms of Section 85 (2) of the Industrial Relations Act No. 1 of 2000.

The respondent is a money lending business situate at Suite 203, Nedbank Centre at the Swazi Plaza.

In his statement of claim the applicant stated that he was employed by the respondent in June 2001 as a Marketing Consultant. He said he was verbally dismissed on the 2nd November 2001 for alleged poor performance. He said no written warning was issued to him and that no hearing

was held before the termination of his employment. He said at the time of termination he was earning E3,500.00 per month. He said he was not paid any terminal benefits. He is praying for an order for the payment of 12 months wages as compensation, one month wages in lieu of notice and 5 days leave pay.

The application is opposed by the respondent. The respondent in its papers denied that it employed the applicant but said that he was engaged on an agency basis. The respondent said it was agreed that the applicant would undergo a three months' trial period. The respondent said that the understanding was that after the three months trial period the applicant's performance would be reviewed and if satisfactory, a one-year agency contract was going to be entered into.

The respondent averred that at the end of the three months trial period the applicant's performance was below expectation and the respondent chose not to offer the applicant the one-year agency contract.

Four witnesses testified before the court. The applicant was the only witness for his case. Three witnesses testified on behalf of the respondent.

It is not in dispute that the applicant was engaged by the respondent from June 2001 until 2nd November 2001. The issue that is in dispute is whether the applicant was an employee to whom Section 35 of the Employment Act No.5 of 1980 applied.

It was argued on behalf of the respondent that the applicant was not an employee to whom Section 35 applied because; he was engaged for a fixed term of three months, which was extended by consent of the parties. It was further argued that the three months period was a trial period, after which a one-year contract was going to be entered into.

On behalf of the applicant it was argued that the applicant having been employed for more than three months, he was an employee of the respondent as on the 2nd November 2001 when he was terminated, after having been five months in the respondent's employment.

The evidence before the court revealed that the applicant was hired by the respondent verbally. The applicant's job was to get clients from companies to sign contracts with the respondent. The respondent was engaged in money lending activities. The applicant said he was told that he was on three months' probation. RW2 Paul Friedlander denied that the applicant was on probation. He said that the applicant was on three months trial period. During cross-examination RW2 however conceded that the said trial period meant the same thing as a probation period.

RW1, Andrew Bongani Magagula told the court that he was an employee of the respondent. He told the court that he was also first made to undergo a three months probation period.

RW3, Sam Mnisi told the court that he worked for the respondent at some point, and that he was no longer employed there presently. He told the court that he did hear RW2 telling the applicant to put more effort in his work. He said he could hear RW2 talking to the other employees because they were sharing the same office space.

RW2 told the court that he dismissed the applicant for poor work performance. He said he did tell the applicant towards the end of the three months period that he was not happy about his performance. He said the applicant asked for a month's extension and he agreed. During that month's extension the applicant was involved in an accident and was hospitalized for two weeks. RW2 said during the last month of October 2001, the applicant was still recovering at home so he spent more time at home than at work. RW2 said he could not terminate the applicant before he could fully recover, as that would have been inhumane.

During his evidence the applicant said that he was told by RW2 that he was going to be employed as soon as he secured the first deal. He said he got the first deal before the expiry of the three months.

It is clear to the court that that evidence was incorrect. The applicant's case is that after the three months' period he considered himself to have been automatically employed, as he was not terminated at the expiration of the probation period. If it were correct that there was an agreement that he would be confirmed as soon as he clinched his first deal, he clearly would

have based his cause of action on those allegations. Furthermore, there was no evidence that after he had clinched the first deal, he approached the employer with a view to have him hired and sign the one-year employment contract.

The question that the court must consider is whether the applicant was an employee to whom Section 35 applied. If he was not, the court will hold that after the expiration of the three months' period, he automatically became an employee of the respondent and that the respondent was bound to follow the provisions of the law in order to lawfully terminate his service.

Section 35 of the Employment Act provides that; "(1) *This section shall not apply to* -

(a) ....

(b) ...

(c) ...

(d) *An employee engaged for a fixed term and whose term of engagement has expired."*

During the trial it became clear to the court that the problem was that of choice of words. The applicant said he was on probation and the employer said the applicant was on a three months' trial period. The employer was referring to the period as a trial period because he wanted to escape the legal consequences of employing someone for about five months without confirming that person into permanent staff.

It was argued on behalf of the respondent that the applicant was a consultant, and that his position was similar to that of an agent. It was argued that the applicant paid tax on his own and was not deducted by the company making him an independent agent for the respondent.

It became clear to the court during the trial that the word consultant was being used in a less formal fashion than what it normally means. **THE CONCISE OXFORD OF CURRENT ENGLISH (1995) 9th EDITION** at page 287 defines the word consultant as;

"1. A person providing professional advice etc., especially for a fee."

It was not stated what professional advice was the applicant providing to the respondent. On the contrary the evidence revealed that the applicant was advised by the employer to work closely with RW1 in order to learn the skills of the trade.

The evidence also revealed that the employer would tell the applicant to put more effort in his work. That showed an element of control by the employer the evidence also revealed that the employer told the applicant which companies to approach. Furthermore, the applicant was paid a fixed salary.

It seems to the court therefore that in this case the employer was in control of what work had to be done and the manner in which that work had to be done. (See **ALAN RYCROFT AND BARNEY JORDAAN "A GUIDE TO SOUTH AFRICAN LABOUR LAW** at page 30).

The Employment Act defines an employee as *"any persons to whom wages are paid or are payable under a contract of employment".* The act also defines wages to mean

"Remuneration or earnings including allowances, however designated or calculated capable of being expressed in terms of money and fixed by mutual agreement or by law which are payable by an employer to an employee for work done or to be done under a contract of employment or for services rendered or to be rendered under such contract. "

From the foregoing observations it is clear to the court that the applicant was not a consultant properly so called, but an employee of the respondent. After the three months probation period, the employer was entitled to terminate the service of the applicant. The employer did not do that however. The parties decided to extend the probation period.
The question that then arises is whether the parties acted lawfully when they decided to extend the probation period. Section 32 of the Employment Act which deals with probationary period states in subsection (2) that;

"No probationary period shall, except in the case of employees engaged on supervisory, technical or confidential work, extend beyond three months "

The wording of the subsection is peremptory. The parties therefore have no discretion in the period of probation.

Section 32 (3) states that;

"In the case of employees engaged on supervisory technical or confidential work, the probation period shall be fixed in writing between the employer and employee at the time of engagement."

The applicant in this case was clearly not engaged on supervisory technical or confidential work. The evidence revealed that the period of probation was fixed verbally for a period of three months. Section 32 (3) therefore has no applicability in this case.

This court had occasion to deal with a similar question in the case of **JERRY DUNGAZELA DLAMINI vs. CARGO CARRIERS SWAZILAND (PTY) LIMITED (I.C.) CASE NO. 194/99.** In that case the applicant had worked for four months when he was terminated. The court after dealing with the provisions of Section 32 of the Employment Act, held on page 3 of that judgement that;

"Respondent was supposed to either confirm or terminate the services of applicant at the end of this period. An agreement entered into between the two outside the scope of the written contract and also outside the purview of Section 32 is ultra vires and as such of no force or effect."

The court having already pointed out that the applicant was an employee of the respondent, and that he was on three months probation, the parties had no authority to extend the statutory period of probation.

It follows therefore that the respondent could only lawfully dismiss the applicant for reasons permitted by Section 36 of the Employment Act. Furthermore, the respondent was expected to follow all the procedural steps before dismissing the applicant. The respondent said that the applicant was dismissed for poor work performance. In this regard Section 36(a) provides that the termination must be preceded by a written warning. The employer in this case never gave the applicant a written warning. The termination was therefore not one permitted by Section 36 of the Employment Act.

The termination of the service of the applicant was therefore both substantively and procedurally unfair.

RELIEF:

The applicant is claiming

12 months wages as compensation	*E42,000.00*
One month's wage in lieu of notice and	*E 3,500.00*
Five days' leave pay	*E 807.60*

The evidence led before the court showed that before the expiry of the three months, the employer told the applicant that his performance was not satisfactory. The applicant asked for one more month to prove himself and said there were some deals that were going to come through. During that extension period the applicant was involved in an accident. He was hospitalized for two weeks. After his discharge, he was at home most of the time as he was still recuperating.

The applicant was paid his salary even though he was not at work most of the time in September 2001. The applicant was also paid his salary even though he was not at work in October 2001.

The respondent's conduct of agreeing to give the applicant another chance to prove himself, and to continue to pay him his salary even though the was not at work clearly showed that there were no ill-feelings between the parties. The conduct of the respondent further showed that the respondent was a reasonable and considerate employer, who was not eager to get rid of the applicant even though he was not performing well. In his magnanimity, the respondent unwittingly breached the provisions of the Employment Act.

The respondent therefore does not fall within the class of employers who deliberately violate the rights of employees at the workplace. This case therefore is one where only the minimum compensation should be ordered. The applicant said he was thirty-two years old and has two children but is not married. He has a degree in administration.

Taking into account all these factors into account, the court will make an order that the respondent pays the applicant the following amounts of money;

1. ***ONE MONTH'S SALARY AS NOTICE PAY*** ***E3,500.00***

2. ***ONE MONTH'S SALARY AS COMPENSA TION***

FOR THE UNFAIR DISMISSAL ***E3,500.00***

3. FIVE DAYS LEAVE PAY ***E 807.60***

TOTAL ***E7,807.60***

No order for costs is made. The members agree.

N. NKONYANE

ACTING JUDGE - INDUSTRIAL COURT