IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CASE NO. 358/03

SAMUEL M. DLAMINI APPLICANT

And

VILAKATI AND PARTNERS

MEDICAL SERVICES (PTY) LTD RESPONDENT

CORAM

NKOSINATHINKONYANE: ACTING JUDGE

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR THE APPLICANT: MR. DAVID MSIBI

FOR THE RESPONDENT: MISS LORRAINE ZWANE

JUDGEMENT - 23.11.2005

This is an application for determination of an unresolved dispute in terms of Section 85(2) of the Industrial Relations Act No. 1 of 2000 (as amended).

The applicant is a former employee of the respondent, a medical practice based in Manzini.

The applicant claims that he was constructively dismissed by the respondent. He now seeks an order that the respondent pays him terminal benefits and compensation for the dismissal which he says was unfair and unlawful.

The applicant in his statement of claim stated that he was employed by the respondent as a Chief Radiographer on 15 July 1992. He said he was earning E4,820:00 per month. He said he was in continuous employment by the respondent until 22 May 2003. He stated that on or about 30 October 2002 he got a letter of dismissal on grounds of dishonesty. He said he appealed and was successful. On appeal it was ordered that the hearing be re-opened to allow him to cross-examine the main witness. He said he was never notified about the results of the second hearing. He stated that the respondent terminated the lease agreement of the house that he was occupying. He further said his post was advertised and that all these acts by the respondent showed that he was no longer wanted there and thus he resigned.

The respondent in its replies denied that the applicant was constructively dismissed. The respondent stated that the applicant was dismissed after sufficient evidence of dishonesty was led against him.

It is not in dispute that the applicant was the employee of the respondent. The applicant therefore was an employee to whom Section 35 of the Employment Act No.5 of 1980 applied. Consequently, the service of the applicant could only be terminated for reasons permitted by Section 36 of the Employment Act or on any other acceptable common law ground.

The burden of proof is on the respondent to show that the reason for the termination was one permitted by Section 36, and that, taking into account all the circumstances of the case, it was reasonable to terminate the service of the applicant.

The evidence led before the court revealed that the applicant was employed as a radiographer on 13 July 1992. He resumed his duties on 15 July 1992. He was promoted to be the Chief Radiographer during that same year.

In terms of his job description, (annexture "VP 2") he was the head of the radiology department of the respondent. During 1996 and 1997, the practice was taken over from Dr. Vilakati by RW1 Dr. Joseph Zama Gama and Dr. B.L. Shabangu. The practice was transferred to the two doctors as a going concern.

The workers continued to work as normal under the new management. The workers were not involved in the take over process. They were just told later that new management had taken over. There were told to seek their terminal benefits from Dr. Vilakati. When they approached him, he referred them back

to the new management.

The court will deal with this issue of the take over later in this judgement.

The evidence before the court also revealed that the applicant was dismissed by letter, dated 30th October 2002. It is important to note that in that letter of dismissal, the respondent advised the applicant that if he wished to appeal he could do so within three working days. The applicant indeed lodged an appeal.

The respondent therefore was not entitled to treat the applicant as dismissed at that stage before the outcome of the appeal hearing. On appeal, the chairman made an order that the disciplinary hearing be reconvened to enable the applicant to cross-examine the key witness. The effect of the ruling of the appeal chairman, though the decision was clearly not elegantly drafted, was that the disciplinary hearing chairman's decision was set aside.

At the reconvened hearing the key witness failed to appear. No further evidence against the applicant was led. The applicant was never notified of the outcome of the reconvened hearing. Up to the date that he appeared before the court, the verdict of the reconvened hearing was not available.

After the decision of the appeal, the respondent did not allow the applicant to continue with his work. The respondent however paid the applicant's salary for November, December 2002 and January 2003.

The applicant was however not paid his salary for February, March, April and May 2003.

The applicant said during that period the relationship between him and the respondent turned sour. The applicant said during that period the respondent terminated the lease agreement with the landlord at the place where the applicant was staying. No alternative place of residence was offered. The applicant was not paid his 13th cheque. Furthermore, the position of the applicant was advertised, obviously to replace him. The applicant said that because of this conduct by the respondent,, it became clear to him that he was no longer wanted, and he resigned on 22 May 2003.

On behalf of the respondent RW1 denied that the applicant was forced to resign. RW1 said the applicant was dismissed because of the misconduct of which he was found guilty by the disciplinary hearing chairman. RW1 said the lease agreement was cancelled after a verbal agreement between the parties. RW1 further said that the applicant's post was advertised because it was agreed between the parties, as it seemed that they were going to reach an agreement on the exit package of the applicant.

It is not clear to the court why the respondent was negotiating a settlement with the applicant in this matter. If, as the respondent defence was, the applicant was dismissed for misconduct, why was there any need to negotiate an exit package of the applicant? Secondly, it is not clear why did the respondent pay the applicant's salary for November, December 2002 and January 2003, if according to it, the applicant was dismissed on 30th October 2002.

The above conduct of the respondent points at one direction, and one direction only, namely, that the respondent knew that pending the outcome of the appeal, the applicant was still its employee and entitled to his salary.

The court will reject RWl's story that the termination of the lease agreement and the advertising of the applicant's post was done by mutual agreement. The evidence before the court showed that the relationship between the parties was at its lowest ebb. The respondent was just keen on getting rid of the applicant in any other way it could after it failed to locate its key witness. It is highly unlikely therefore that he could have consented that his post be advertised or that the lease agreement be terminated as he still considered himself to be the respondent's employee.

From the manner the negotiations were going on, it is clear to the court that the respondent was not fully committed. The only conclusion that the court can come to is that the respondent only wanted to frustrate the applicant. The court comes to this conclusion because of the letter dated 11 December 2002 (annexure "RW1" B) which was written to the respondent requesting that a meeting be held to find an amicable solution. The respondent did not respond to that letter.

On 04/02/2003 the respondent wrote a letter to the applicant's representative wherein it reaffirmed its position that the applicant was dismissed on 30 October 2002, and also made an offer.

On 7 May 2003 a letter (exhibit "RW1"C) was again written to the respondent by the applicant's representative. That letter reads in part as follows verbatim:-

"We have made several attempts to meet you by coming to your surgery and by telephone as we write the unpaid salaries for our client had accumulated to May 2003.We are instructed by our client that the only way to cut the issue of salary and rent is when we sign the memorandum of agreement, which was drawn by the two parties. May we once again request to meet yourself on Thursday 8 May 2003 at a

time convenient to you. The purpose of the proposed meeting is to go through the draft of the settlement and sign same."

The contents of this letter clearly support the applicant's evidence that the conduct of the respondent towards him was non-committal.

RW2 and RW3's evidence did not help to advance the respondent's case. These were junior staff members, that is, a receptionist and a cleaner respectively. They told the court evidence relating to the accused's conduct at work. They said that he would leave his office with his friends sometimes without reporting. RW2 said sometimes he would come back to work after lunch smelling of liquor and exhibited conduct that suggested that he was drunk. The applicant was however never called to a disciplinary hearing for the said conduct.

There were other misdemeanors alleged to have been committed by the applicant. Again that evidence was not relevant to the present enquiry. The applicant was never disciplined for those alleged acts of misconduct.

Furthermore, even at the pleadings stage the respondent failed to dispute material allegations by the applicant. In paragraph 4 of the applicant's statement of claim the applicant said "the applicant was in continuous employment of the respondent until 22 May 2003." In response thereto the respondent said,

"Save to state that the applicant decided to resign as appears on annexture "SM3" of his application, the allegations contained herein are admitted."

If the respondent did not dispute that the applicant was in continuous employment until 22nd May 2003, it is not clear why then did it say in court that he was terminated for misconduct on 30 October 2002.

Again, in paragraph 8 the applicant said, "The respondent refused to allow applicant to return to work although he was paid November, December, 2002 and January 2003 salaries." In response the respondent stated that-

"During that period of time, that is, November 2002 to Januarys 2003 the respondent tried to offer a consensual termination package, which however was rejected by the applicant. It is worthy of mention at this point in time, that the respondent had all the reasons to terminate the services of the applicant but due to failure to locate the key witness in the matter, it was considered appropriate to offer him a package, so that he would leave the company amicable (sic)."

This response showed, as the evidence in court also revealed, that the applicant's reason to leave the company was not as a result of the letter of termination dated 30th October 2002. After the applicant succeeded on appeal, and the appeal chairman having ordered a re-hearing, the respondent failed to locate the key witness. The respondent then had to find another way to get rid of the applicant as its efforts to get rid of him through lawful means had failed.

The chairman of the reconvened hearing having failed to bring those proceedings to finality, that is,

hand down his judgement, the respondent was not entitled to debar the applicant from carrying on with his duties. The respondent was also not entitled to withhold his salary and advertise his post as the hearing had not been finalized.

The court will therefore accept the applicant's evidence that it was the respondent's conduct of refusing him to resume his duties after the disciplinary hearing, the cancellation of the lease agreement and the advertising of his post that forced him to resign. This treatment of the applicant by the respondent was such that the applicant could no longer reasonably be expected to continue in his employment. The court will accordingly come to the conclusion that the applicant has proved on a preponderance of probabilities that he resigned as the result of the employer's unlawful conduct. He was therefore unfairly dismissed.

REMEDY:-

It was argued on behalf of the respondent that even if it were to be found that respondent was liable, the liability could only cover the period from 1996 when the new directors took over the practice. The evidence revealed that between 1996 and 1997 the medical practice was sold to the new directors as a going concern. The respondent's attorney relied for her argument on section 33 bis of the Employment Act. That section provides that:-

"(1) An employer shall not

(a) Sell his business to another person; or

(b) Allow a take over of the business by another person,

Unless he first pays all the benefits accruing and or due for payment to

the employees at the time of such sale or take over. " The evidence showed that there was no written guarantee approved by the Commissioner of Labour, that the new partners were going to pay all the terminal benefits of the employees, as required by section 33 bis subsection (2). That subsection reads as follows:

"Notwithstanding subsection (1) if the person who is buying the business or taking it over makes a written guarantee which is understood by and acceptable to each employee that all benefits accruing at the termination of his previous employment shall be paid by him within 30 days and by mutual agreement agreed in writing and approved by the Commissioner of Labour, subsection (1) shall not apply. "

Subsection (3) states that -

"An employer who fails to comply with subsection (1) shall upon conviction, be liable to a fine not exceeding six thousand Emalangeni or to imprisonment not exceeding two years or both. "

The evidence in this case revealed that the business was transferred to the new management as a going concern. By "going concern" is meant that the business is not closed down on sale but remains active and operating before, during and after the transfer to new ownership (See NEHAWU V. UNIVERSITY OF CAPE TOWN & OTHERS (2000) 4 BLLR 311 (LAC) at pages 325 - 327 and the cases referred to

therein.).

The employees continued to work as normal and in terms of the employment contracts that they had entered into with the previous management. There was no break in the operations of the business. The transfer of the contracts of employment in this case was never an issue. The new management is therefore estopped from now saying it is not bound by the contracts of employment that the workers entered into with the company prior to its taking over as it never entered into new contracts with the employees.

The respondent cannot therefore in the circumstances of this case invoke the provisions of section 33 bis (1) against the applicant. This is moreso because the workers were never involved or consulted during the take over negotiations. The workers are not parties to the contract of sale. The terms and conditions of the contract are not binding on them.

Dr. Gama in his evidence in chief said there was a written undertaking to pay the terminal benefits by the seller as from the date that each of the employees were engaged by the company. Such document was never presented to the court. The respondent's attorney during submission relied on clause five of the memorandum of sale of shares (exhibit RW1 "A"), for her argument that the respondent was not liable to pay any terminal benefits to the applicant arising prior to the take over by the new management.

Clause five of the agreement of sale states:-

"The seller undertake to pay any amount due by the company in respect of income tax, rates and any

other known liabilities or claims arising to the date of the payment of the aforesaid E696,288:00 (six hundred and ninety six thousand two hundred and eighty eight Emalangeni) and form that date onwards ...."

The precise meaning of this clause is not clear to the court. The rest of the contents were not legible. However, even if this clause was meant to absolve the respondent from any liability from the payment of terminal benefits, this was a contract between the new management and the erstwhile management. How can it be held against the employees who were not parties to it and were not involved in the transfer process?

The contract of sale of the shares is valid only as between Dr. Gama and his partner (the buyers) and Dr. A.M. Vilakati and his wife (the sellers). Nowhere in this agreement are the workers mentioned.

The evidence showed that when the new management told the workers that they had taken over the business, the workers wanted to know about their fate. They were assured that they were not going to lose their employment.

The evidence also showed that Dr. A.M. Vilakati failed to pay the terminal benefits and the matter was taken to court. It is presently pending at the High Court. The new management also told the workers to go and claim their terminal benefits from Dr. A.M. Vilakati. Dr. Vilakati refused to pay and referred them to the new management. That was the chance for the new management to take action and set the record straight about the status of the employment contracts of the employees.

The new management cannot approbate and reprobate. On the one hand they were telling the workers

to go and claim their terminal benefits from Dr. Vilakati, whilst on the other hand they continued to benefit from the services of the employees on the basis of the employment contracts that the employees entered into with the previous management.

Furthermore the applicant was hauled to a disciplinary hearing and was charged with misconduct. He was found guilty and a letter of dismissal was written to him. Dr. Gama said such was in line with clause 16 of the applicant's contract of employment. This contract of employment was entered into between the applicant and the respondent when the respondent company was being run by the previous management.

The new management cannot now say it is not bound to pay the terminal benefits as from 1992 when the applicant was first employed by the company as it never entered into a new contract of employment with the applicant when it took over the company in 1996. It relied on the terms of that contract of employment when it dismissed the applicant for misconduct. It cannot in the same breath say it is not bound by that contract of employment when it comes to the payment of the applicant's terminal benefits.

It seems to the court therefore, that section 33 bis can be invoked by the respondent only if the workers were consulted during the process of the transfer. In the present case that was not done and the workers did not have a chance to resign if they did not want to work under the new management.

Secondly, the section can be relied upon by the respondent if after the take over it entered into new contracts of employment with the workers.

The new management having acquiesced to the taking over of the business with the existing staff, it is estopped from denying that it is bound by the contracts of employment of the staff that were in place when they took over.

Furthermore, the business retained its identity. It was taken over by the new management to carry out the same or similar activities on the same premises.

From the aforementioned observations the court will come to the conclusion that the respondent is liable to pay the terminal benefits (additional notice and severance allowance) calculated as at the date of the contract of employment between the applicant and the respondent company.

In considering the appropriate compensation the court will take into account that the applicant is presently self-employed. He is 42 years old and is married with four children. He did not however tell the court how old these children are. He had worked for the respondent for ten years.

In terms of the certificate of unresolved dispute, eight issues were in dispute. These were; arrear wage, 13th cheque, notice, severance, annual leave, compensation, medical aid re-imbursement and pension fund re-imbursement. The court will therefore not consider the additional claims that now appear in the applicants particulars of claim namely, additional notice and rent/accommodation compensation as they do not appear in the certificate of unresolved dispute. The amounts claimed by the applicant were not in dispute. Taking all these factors into account the court will make an order that the that the respondent pays to the applicant the following terminal benefits:-

1. AREAR SALARIES FOR FEBRUARY

MARCH, APRIL AND MAY 2003(E4,820:00 x 4) E19,280:00

2. 13th CHEQUE E 4,820:00

3. NOTICE PAY00 E 4,820:00

4. SEVERANCE ALLOWANCE

(90 DAYS X E158:47 PER DAY) E14,262:00

5. ANNUAL LEAVE E12,050:00

6. MEDICAL AID RE-IMBURSEMENT E 750:00

7. PENSION FUND RE-IMBURSEMENT E 750:00

The court will also order the respondent to pay an amount equal to six months salary as compensation for the unfair dismissal amounting to (E4,820:00 x 6) =E28,920:00.

The total amount payable to the applicant therefore will be E85,522:30.

There will be no order as to costs.

The members agree.

NKOSINATHI NKONYANE A-J

INDUSTRIAL COURT