IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 249/03

In the matter between:

ABANTU MAPHALALA	**APPLICANT**
And	
SIDUMO VALENTINE MDLADLA	**1st RESPONDENT**
S.V.MDLADLA& ASSOCIATES	**2ND RESPONDENT**

CORAM:

NKOSINATHI NKONYANE :	**JUDGE**
DAN MANGO :	**MEMBER**
GILBERT NDZINISA:	**MEMBER**
FOR APPLICANT:	**IN PERSON**
FOR RESPONDENT:	**MR. S. MDLADLA**

RULING (ABSOLUTION FROM THE INSTANCE)

14.05.2007

[1] The applicant is a former Articled Clerk of the 1st respondent.

[2] He instituted the present proceedings because he claims that he was unlawfully, wrongfully

and unfairly dismissed by the 1st respondent on the 2nd April 2003.

[3] He gave evidence before the court relating how the dismissal came about. At the close of the applicant's case, the 1st respondent made an application for absolution from the instance. The applicant opposed the application and thus the court must now make a ruling thereon.

[4] The evidence led before the court revealed that the applicant first entered into a contract of Clerkship with Mr. Elvis M. Maziya, an attorney of the High Court of Swaziland on the 11th February 2002.

[5] On the 20th September 2002, the said contract or Articles of Clerkship was ceded to the 1st respondent, who duly accepted the cession.

[6] From the date that the contract was entered into, the period of service was supposed to end on the 11th February 2003. The applicant however did not stop serving in the offices of the 1sl respondent, but continued until the 02nd April 2003 when he was dismissed.

[7] The details of the events that led to the dismissal of the applicant are not necessary for the purposes of this ruling. The court will deal with the details when writing the judgement at the end of the trial.

[8] In support of the application for absolution the 1st respondent submitted that the applicant has failed to establish that he was an employee to whom Section 35 of the Employment Act, 1980 applied.

[9] He argued that the relationship between the parties was guided by statute, to wit, The Legal Practitioners Act No.15 of 1964. He submitted that the relationship was for one year and had expired on the 11th February 2003.

[10] The applicant argued to the contrary that he was an employee to whom section 35 of the Employment Act applied. He argued that although the contract of Clerkship had expired on the 11th February 2003, he however remained in the employ of the 1st respondent until he was dismissed on the 2nd April 2003.

The applicant submitted therteven after the lapse of the one year period of serving the articles, the Principal, that is, the 1st respondent, continued to give him instructions and he continued to carry out those instructions. The evidence showed that even on the day of the dismissal, the applicant was in process of carrying out instructions issued to him by the 1st respondent.

The court is therefore faced with the task of making a decision whether or not the applicant was an employee of the 1st respondent. If the court finds that he was, *cadit questio.*

The ruling is important not only to the present applicant, but also to the legal profession as a whole.

(See: **EXPARTE KUNENE 1979 -1981 SLR 79 AT p. 80)**

It is not in dispute that the relationship between the parties was that of articled clerk and Principal. In terms of section 2 of the Legal Practitioners Act

"Articled clerk" means a person duly bound to serve under articles of clerkship. Further "articles or articles of clerkship means:-"Contract in writing whereby a person is duly bound to serve an attorney for a specified period in terms of this Act."

Mr. Mdladla argued that such a contract was a contract *sui* generis and not a contract of employment, and consequently not subject to the provisions of the labour laws, in particular the Employment Act.

We do not agree with Mr. Mdladla's submissions. From the definition of the word articles of clerkship, it is clear that it is a contract of service. The articled clerk is bound to serve the Principal for a specified period.

In terms of the contract, the clerk is bound to promptly execute all lawful instructions from his

Principal. The Principal is in turn entitled to summarily dismiss the clerk if he fails to carry out the instructions. This right of the principal is however subject to any right that the clerk may have in law.

The rendering of personal service is one of the six hallmarks of the contract of employment pointed out in the case of **SMIT** V.

WORKMAN'S COMPENSATION COMMISSIONER 1979 (1) S.A. A.51 (A).

Further, in the case of **MASHABA V. CUZEN & WOODS (1998) 19**

ILJ 1486 (L.C.) the court had occasion to deal with a similar question, that is, whether articles of clerkship constitute a contract of employment. The court there found that the relationship between a Principal and a candidate attorney is an employment relationship. Zondo J. pointed out as follows at page 1493:-

"Anyone who is familiar with the side-bar will know that the reality is that many attorneys take on candidate attorneys primarily because they need the services of someone in their firms who will do a lot of the work which the attorney would have had to do himself- of course after some training."

The learned judge accordingly made a finding that article of clerkship constituted a contract of employment and therefore subject to the Labour Relations Act of 1955. Our Industrial Relations Act defines an employee as a person who works for pay or other remuneration under a contract of service or any other arrangement involving control. Our Employment Act defines a contract of employment as a contract of service, apprenticeship or traineeship whether it is express or implied.

It is therefore clear from the definitions above that the relationship between the parties in this case was that of employer and employee. The fact that the contract was entered into in terms of the Legal

Practitioners Act, did not change the fact that it was a contract of employment in terms of which the applicant rendered his service to the 1st respondent and was under the control and

supervision of the 1st respondent.

The next question is; what happened after the period of one year, and what was the relationship of the parties thereafter before the applicant could write the examinations?

Clearly after the specified period of one year, the articles of clerkship lapsed. .The applicant ceased to be an articled clerk. He was no longer bound to serve under the articles. The reality however is that the applicant continued and remained in the service of the 1st respondent. The 1st respondent is therefore presumed to have tacitly extended the service of the applicant. The applicant was no longer an articled clerk, but was allowed to continue to render his services to the Vst respondent.

The applicant continued to be paid a salary, and he continued to carry out the instructions given to him by the 1st respondent. As already pointed out, on the date of his dismissal, the applicant was in the course of his duty carrying out the 1st respondent's instructions. The 1st respondent was not happy about the way that the applicant had carried out some instructions given to him and he dismissed him.

Mr. Mdladla supported his submissions that the applicant was not an employee to whom section 35 applied with the case of

MSOMBULUKO MAHLALELA & 15 OTHERS v. **ROYAL SUGAR CORPORATION CASE NO. 239/99 (I.C.).**

In that case the respondent had also made an application for absolution form the instance on a similar ground that the applicants were not employees to whom section 35 applied. The application was upheld in that, case as the court found that the applicants, who were seasonal workers, had riot signed contracts of re-engagement for the new harvesting season.

The above case is however clearly distinguishable from the present one. In the present case the applicant had signed the one-year contract and was allowed to carry on working even after the lapse of the agreed period.

Mr. Mdladla also argued that the articles of clerkship having lapsed on the 11th February 2003, the applicant having been dismissed on the 2nd April 2003 had not finished a period of three months' probation and was therefore not an employee to whom section 35 applied.

[29] There is no provision in the Employment Act that a probationary period shall be three months. The Act only provides that probationary period shall not exceed three months, except for supervisory, technical or confidential work. A probation period therefore may be one week, two weeks or one month or any period depending on the agreement of the parties. The question however does not arise in this case the court having found that articles of clerkship constitute a contract of employment and that there was a tacit agreement that the applicant continues to render his service to the 1st respondent beyond the one year period.

[30] Taking into account all the above, it follows that the application must be dismissed, and that is the order that the court makes.

[31] The respondents, jointly and severally to pay the costs.

[32]The next trial date to be fixed in court.

[33] The members agree.

NKOSINATHI NKONYANE
JUDGE- INDUSTRIAL COURT