



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 462/06

In the matter between:

RUFUS VILAKATI

Applicant

And

PALFRIDGE (PTY) LTD

Respondent

Neutral citation: *Rufus Vilakati v Palfridge (Pty) Ltd (462/06) [2013]*
SZIC 21 (July 31 2013)

Coram: NKONYANE J,
(Sitting with P. Thwala & S. Mvubu
Nominated Members of the Court)

Heard submissions on: 11 July 2013

Judgment delivered on: 31 July 2013

Summary:

The Applicant employed by the Respondent in July 2005 and terminated in January 2006. The Respondent denied that it terminated the Applicant and argued that he was on fixed term contract that expired on 31st December 2005. The court found that version of the Applicant that he was not employed in terms of a fixed term contract was more reliable than that of the Respondent as the Respondent's evidence was fraught with inconsistencies and therefore unreliable. Dismissal of the Applicant accordingly found to be unfair.

JUDGMENT
31.07.13

[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, 2000.**

[2] The Applicant is an adult Swazi male of Logoba area in Matsapha, Manzini District.

[3] The Respondent is a public company duly incorporated in terms of the company laws of Swaziland carrying on business at Matsapha Industrial Sites, Manzini District.

- [4] In his papers the Applicant stated that he was employed by the Respondent as a Machine Operator on 15th July 2005. He said he remained in employment with the Respondent until 05th January 2006 when he was wrongfully, unlawfully and unprocedurally dismissed by the Respondent on allegations that his seasonal contract of employment had expired. He stated that he was earning E465.00 per fortnight. He further stated that his dismissal was unlawful because he was never given any warning; he was not given the opportunity to present his side of the matter at the hearing; and that the Respondent undertook to employ him on a permanent basis because he got injured whilst on duty and was not going to find alternative employment.
- [5] Following his dismissal, the Applicant reported a dispute to the Conciliation, Mediation and Arbitration Commission, CMAC. The dispute could not be resolved and the Commission duly issued a certificate of unresolved dispute. The certificate of unresolved dispute is annexed to the Applicant's application and is marked "RV1."
- [6] The Respondent duly filed its Reply. In its Reply the Respondent denied that the Applicant was unfairly dismissed. The Respondent stated in its

Reply that the Applicant's seasonal contract of employment came to an end and it was not renewed.

[7] **Applicant's Evidence:**

In court the Applicant told the court that he was employed by the Respondent on 15th July 2005 as a Machine Operator. He said he was dismissed on 05th January 2006 and was told that his contract of employment had expired. He said he got injured whilst at work on 25th July 2005 when he had his right hand cut. The injury was certified as permanent and was described by the Medical Doctor as "*deep laceration on palm of right hand involving all tendons and neurovascular bundle to 4 fingers.*"

[8] The injury resulted in stiffness to all joints of the four fingers with loss of grip and loss of sensation on the palm and fingers. Surgery was performed on the hand and the Applicant was given forty two days off duty as sick leave. The Doctor recommended that he be given light duty when he returned to work. This recommendation was complied with by the Respondent as the Applicant was thereafter transferred to work in the Sub-Assembly Department. He returned to work on 16th September 2005 and worked until 23rd December 2005 when the Respondent closed for the Christmas Holidays.

[9] The Applicant said when the Respondent opened on 05th January 2006, he reported for work but he was prevented from resuming his duties by a Security Officer who denied him entry at the gate. The Applicant said he was told on that day by the Human Resources Officer, Adelaide Zondi that he has been terminated. The Applicant said he worked continuously from 16th September 2005 until 23rd December 2005. The Applicant denied that he signed any fixed term contract of employment. He said the signatures on the contracts presented by the Respondent were forged.

[10] The Applicant also told the court that when he was on sick leave the Respondent continued to pay his salary. The Applicant said whilst at the gate of the Respondent he talked to his Supervisor, Eric Mthethwa and asked him what he was supposed to do as he was injured on duty. Eric Mthethwa said he could not help him. On 10th January 2006 the Applicant went to the Doctor for a follow up procedure. After examination, the Doctor wrote a report, Exhibit "A" in which he recommended that the Applicant be permanently re-deployed to a light duty not requiring heavy manual grip or heavy lifting.

[11] The Applicant said he was told by Adelaide Zondi to come back on 25th January 2006. He said he did show up on this day and a misunderstanding

ensued between him and Adelaide Zondi. The Applicant said he stayed at the Respondent's gate until 12:00 hrs. He said Adelaide Zondi later called him to her office and told him that he was being a problem to the Respondent. Another Manager by the name of Roy Singh also came to try to solve the problem. He told the Applicant that there was nothing that he could do to assist because the Applicant's Supervisors did not want to work with someone whose hand was not functioning properly as they had to meet certain targets. The Applicant insisted that the only document that he signed was on the 15th July 2005 when he was first employed by the Respondent. He said he never signed any other contract thereafter.

- [12] During cross examination the Applicant insisted that he signed only one document on 15th July 2005. He further stated that after his injury on the right hand he was unable to sign with his right hand, but used his left hand. He said he signed the document on 15th July 2005 in the presence of Bheki Gama who was the Human Resources Manager at that time. He said he never signed any document before Adelaide Zondi. The Applicant admitted that he was paid compensation for the injury on duty.

Respondent's Evidence:

[13] On behalf of the Respondent, RW1 Roy Singh told the court that he is employed by the Respondent as a Technical Director. He said he was employed by the Respondent in 2002. He said the Applicant was employed as a Casual in July 2005 because it was a busy period and they required more labour. He said the Applicant was employed on a month to month basis. He denied that the Applicant was employed on a full time basis. During cross examination RW1 admitted that he did not employ the Applicant. Again when asked as to how many contracts did the Applicant sign, he said he did not know. RW1 also said he did not recall what he said to the Applicant in January 2006 when he reported for work at the Respondent's place. RW1 denied that he promised to employ the Applicant.

[13] RW2, Eric Mthethwa told the court that he was employed by the Respondent on contract basis as a Supervisor. He said he signed the Applicant's last contract on 02nd December 2005 on behalf of management. He said the Applicant also signed the contract. He denied that the Applicant's signature was forged. He said as far as he was aware the Applicant was not re-engaged in 2006.

[14] During cross examination RW2 told the court that when the Applicant got injured he was under his department. He said the Applicant's immediate supervisor was Jeremiah Mangwe. RW2 denied that he refused to take back the Applicant in 2006.

[15] RW3, Adelaide Zondi told the court that she was employed by the Respondent as the Human Resources Manager in November 2005. She said she left the Respondent's employment in 2010 to pursue other interests. She said the Applicant was not dismissed but his contract expired in December 2003. She said she was present when the Applicant signed the last monthly contract in December 2012. She said she also signed the document in approval. She said there was no need for any disciplinary hearing to be held as the Applicant's contract had expired. She denied that she promised to employ the Applicant on a permanent basis. She agreed that the Applicant did go to the Doctor on 10th January 2006.

[16] During cross examination RW3 confirmed that she was employed by the Respondent in November 2005. When asked as how many contracts did the Applicant sign, she said she did not recall and would have to refer to the files. Again when she was asked as to when was the Applicant employed,

she said she did not have that information ready with her. She said however she recalled the contract signed in December 2005 by the parties. She said when Doctor M.S. Jere made the recommendation on 10th January 2006 that the Applicant be assigned light duties, he was not aware that the Applicant was no longer in the employment of the Respondent.

[17] RW4, Dr. M.S. Jere told the court that he is now based at the Mbabane Clinic and that it was him who treated the Applicant after he got injured at work. He told the court that when he wrote the medical report on 10th January 2006, Exhibit “A” recommending light duties for the Applicant, he was not aware that the Applicant was no longer employed by the Respondent.

[18] During cross examination RW4 said he did not remember how many medical reports did he write concerning the treatment of the Applicant’s injury. He told the court that when the Applicant came to him on 10th January 2006, he assumed that he was still under the employ of the Respondent.

[19] **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-**

The Applicant's case before the court is that he was unlawfully, wrongfully and unprocedurally dismissed by the Respondent. His evidence was that he was in continuous employment with the Respondent. He denied that he signed the monthly employment contracts produced by the Respondent in court. He said when he was employed on 15th July 2005 the Human Resources Officer was Bheki Gama. He said he signed only one form and did not thereafter sign any one month employment contracts. The evidence revealed that Bheki Gama is now deceased.

[20] The evidence before the court also revealed that the Applicant was in employment with the Respondent for less than a year when he was dismissed. He is therefore not entitled to claim payment of additional notice and severance allowance. The Applicant can therefore only claim notice pay and compensation for unfair dismissal. This was also conceded by the Applicant's attorney in the heads of argument. The evidence also revealed that he was paid an amount of E662.00 on 07th August 2006 for fourteen days sick leave after the parties agreed before a CMAC Commissioner in terms of Annexure "R5".

[21] In a claim based on allegations of unfair dismissal by the employer, the burden of proof is on the employer to prove on a balance of probabilities 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 for the employee.

(See: Section 42 of the Employment Act No. 5 of 1980).

[22] However, before the Respondent discharges the burden of proof resting on it, the Applicant must prove that at the time his service was terminated, he was an employee to whom section 35 applied. The Applicant told the court that he signed only one contract when he was employed on 15th July 2005. He denied that he signed any monthly employment contract thereafter. He said he signed one form when he was employed on 15th July 2005 and thereafter worked continuously until he was dismissed in January 2006. The Respondent in a bid to counter the Applicant's evidence produced three documents "R1", "R2" and "R3" which showed that the Applicant signed a one month employment contract in October, November and December 2005. The Respondent failed to produce employment contracts for July, August and September 2005. It may be that no contract was signed during August 2005 because the Applicant was still on sick leave as he was given forty two days sick leave. The evidence however revealed that the Applicant went back to work on 16th September 2005. There was no evidence that he signed an employment contract for one month's period.

[23] The Applicant's evidence was that he returned to work on 16th September 2005 and was re-deployed to do light duty at the Sub-Assembly. There was no evidence that he signed a one month contract in September 2005. This was in line with his evidence that he was not employed on a month to month basis as contended by the Respondent.

[24] The Applicant told the court that the document that he signed was kept by the Respondent. The Applicant was not discredited during cross examination. Having come out unscathed during cross examination, the court has no reason not to accept his version that he signed only one document when he was employed in July 2005.

[25] The burden of proof then shifted to the Respondent to prove on a preponderance of probabilities that the Applicant from the first date of engagement he signed a one month contract. It was not denied that the Respondent is the one that has the records of the Applicant's employment history. It would have been easy for it to simply produce the one month contract that the Applicant signed when he was employed on 15th July 2005. The Respondent failed to do that when it was within its power to do that.

[26] The court will therefore accept the Applicant's version to that of the Respondent because of the following reasons;

26.1 When RW1, Roy Singh was asked as to how many contracts did the Applicant sign, he said he did not know as that was the duty of the Human Resources Manager, but in the same breath he insisted that the Applicant was hired on a month to month basis. He was therefore telling the court about something that he was not sure of.

26.2 RW2, Eric Mthethwa told the court that he was present when the last monthly contract was signed by the parties and that he signed "R1" on behalf of the Respondent. There was no explanation however as to why did he not sign "R3" on behalf of the Respondent.

26.3 RW3, Adelaide Zondi told the court that the contracts would sometimes be signed after a day or two after the employee had already started working. Indeed this was evident from "R1" which shows that it was signed on 02/12/05. There was no explanation however as to how did Adelaide Zondi get to sign "R2" which shows that it was signed on two different dates being 03/10/05 and 06/10/05, as she said she was employed by the Respondent in November 2005.

- 26.4 This lack of consistency in the way that the documents were executed lends credence to the Applicant's evidence that he never signed these documents but they were manufactured by the Respondent in order to create the impression that he was employed on a month to month basis.
- 26.5 When RW2 was asked as to where were the other contracts that the Respondent says he signed, RW2 said the documents are kept by the Human Resources Officer. These documents were however not produced in court.
- 26.6 RW3, Adelaide Zondi, who was supposed to be the star witness failed dismally to assist the court. When it was put to her that the Applicant signed an employment Form when he was employed and not a fixed term contract, RW3 said she was present when the Applicant was employed and that he never signed an employment Form except the fixed term contract. When she was asked as to when was the Applicant employed by the Respondent, she said she could not recall because the Applicant was a seasonal employee.

26.7 During cross examination RW3 said she kept the records of employees in their personal files. The Applicant having denied that he signed a month's contract when he was employed by the Respondent in July 2005, it was important that the contract that the Applicant signed in July 2005 be produced in court. The Respondent failed to do that when it was within its power to do so.

[27] The court will therefore come to the conclusion that it will accept the Applicant's evidence that he never signed the one month fixed term contracts, but that he was in continuous employment with the Respondent. It follows therefore that he was unfairly dismissed by the Respondent both substantively and procedurally as he was terminated without a disciplinary hearing.

Relief:

[28] The evidence before the court revealed that the Applicant worked for the Respondent from 15th July 2005 to 23rd December 2005. He did not work for forty two days when he was on sick leave following his injury. He was paid an amount of E15,246.90 as compensation for the injury under the auspices of the Department of Labour in terms of the Workmen's Compensation Act. He earned E465.00 per fortnight which translates to E930.00 per month. He is married and has three children who are still at

school. He presently survives by doing piece jobs. He said his brother helps him with school fees for the children. From the Doctor's report, the Applicant will never be able to do hard manual labour with his right hand. Taking into account all these factors the court will make an order that the Respondent pays to the Applicant an amount equal to twelve months' salary as compensation for the unfair dismissal.

[29] The court will accordingly make an order that the Respondent pays to the Applicant within fourteen days from the date of judgment the following amounts;

a) Notice pay	E965.00
b) Compensation (E965.00x12)	E11,160.00
Total	<u>E12,125.00</u>

[30] There was no prayer for costs in the Applicant's application. The court will therefore make no order as to costs.

[31] The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

**FOR APPLICANT: MR. T.N. SIBANDZE
(NZIMA & ASSOCIATES)**

**FOR RESPONDENT: MR. W. B MAGAGULA
(MAGAGULA ATTORNEYS)**