IN THE INDUSTRIAL COURT OF APPEAL

HELD AT MBABANE

SWAZILAND MEAT INDUSTRIES

Applicant

And

MDUDUZI NHLABATSI AND NINE OTHERS

Respondents

Appeal Case No. 142/2005

Coram	ANNANDALE JP
	MATSEBULA JA
	MAPHALALA JA
For the Appellant	MR. Z. JELE
For the Respondents	MR. D. MSIBI

APPEAL JUDGMENT

(19th September 2006)

Maphalala JA:

[1] The appeal before us is against a decision of the Industrial Court to dismiss a preliminary point of law. The grounds of appeal thereof are as follows:

(1) The court *a quo* erred in holding that the fixed term contract concluded between the parties was not valid and enforceable;
(2) The court *a quo* erred in holding that the provisions of Section 35 of the Employment Act applied to the Respondent; and
(3) The court *a quo* erred in holding that a certificate of service constitutes a variation of a short-term contract.

[2] The Appellant has applied for leave in this court against the ruling of the Industrial Court since it was interlocutory in nature. In this regard the Appellant has filed an affidavit of one Lenhle Mango which is attached to a Notice of Motion. It appears to me that the Appellant in this aspect has demonstrated good cause why this court should grant leave to appeal on the basis of the affidavit of Lenhle Mango read with the Notice of Motion as stated above. In this respect Appellant should accordingly be granted leave as afore-mentioned.

[3] The brief facts of this case are these. The Respondents (Applicants in the court *a quo*) were engaged on short term fixed casual contracts of employment. Copies of the contracts are annexed to the application for leave to appeal. The contracts were also submitted to the court *a quo*. The short-term contracts did not exceed a period of one (1) month at a time, and if demand dictated, a new contract would be entered into between the parties. The Respondents concluded several fixed term contracts before they had their service terminated when their contracts expired.

[4] On or about the 29th April 2005, the present Respondents instituted proceedings against the Appellant seeking payment of terminal benefits and compensation. The Appellant filed a reply in terms of which it raised a preliminary point of law as follows:

> "1.1 The applicants were engaged by the Respondent on a casual basis and on fixed term contracts.
>
> 1.2 By virtue of the nature of their employment, the provisions of Section 35 of the Employment Act do not apply to the Applicants.
>
> 1.3 In the circumstances, the claim before the court is incompetent and the Respondent pray that it may please the Honourable Court to dismiss the application".

[5] The matter was argued on the preliminary point of law and the court *a quo* delivered a ruling on the 15th June 2005 wherein it dismissed the Appellant's preliminary point on the following basis at page 3 thereof:

> "In the Regulations of Wages (Manufacturing and Processing Industry) Order 2004, casual labourer is also defined as an employee who is not employed for more than twenty-four (24) hours at a time.
>
> From these two definitions, it is clear that the Applicants were not casual employees or casual labourers as they were employed for more than twenty-four hours at a time. The copies of the annexed contracts indicate that each Applicant was engaged for a period of two months".

[6] In view of the above conclusion the court *a quo* dismissed the preliminary point of law and the matter was thus expected to proceed to trial on the merits.

[7] The point of law is crisp and it seeks to determine whether the Respondents were in fact employees to whom Section 35 of the Employment Act of 1980 applied. According to the Appellant, an employee who has been engaged on fixed term contract and whose

contract has expired does not have recourse to Section 35 (2). (See *Nkosinathi Dlamini vs Tiger Security (Pty) Ltd – Industrial Court Case No. 287/2002*). It is contended for the Appellant in this regard that the court *a quo* erred in holding that Section 35 (i) (d) of the Employment Act was applicable to the Respondents. According to the Appellant the issue of casual employees and their status have occupied the courts for a period of time and have been effectively decided by the Court of Appeal in the case of *Sarah Ndwandwe vs The Principal Secretary Ministry of Works and Construction and others, Appeal Case No. 6 of 1997* where Leon JA stated the following in that judgment:

> "I have not been able to find anything in the Act or any other law, which makes it illegal for a person to be employed on a temporary basis in order for a specific job to be undertaken and concluded. Indeed, as I have stated above, in the case of a road such a project may well take several years".

[8] According to the Appellant, in the present case, the employees were engaged on a fixed term contracts as evidenced by the annexures filed in the papers. In the evolution of law relating to casual employees and for the practical effect of not having to carry large sums of money to pay employees on a daily basis, employers have contracted casual employees on fixed term contracts as per Section 35, which fixed term contracts must be for a period of less than three (3) months at any one time. The Appellant has likewise engaged the employees on such fixed term contracts.

[9] On the other hand it was contended for the Respondents that the court *a quo* did not err in finding that the Respondents were neither casual labourers nor employed on fixed term contract and that the Respondent's services were protected by Section 35 of the Employment

Act. Therefore, it was argued, that the Respondent's services were protected by the said section and also by that of Section 124 of the said Act. In support of the Respondent's position the court was referred to the Industrial Court cases of *Magalela Ngwenya vs Namboard – Industrial Court Case No. 59/2002, Thando S. Dlamini vs Swaziland Liquor Distributors (Ltd) – Industrial Court Case No. 240/2002* and the textbooks by *Stephen D. Anderman, The Law of Unfair Dismissal* and that by *John Grogan, Dismissal.*

[10] The offers of causal employment are found from pages 15 to 37 of the Book of Pleadings filed of record, and for ease of reference I proceed to reproduce one letter at page 15 thereof which is similar to the others in the subsequent pages up to page 37, as follows:

"To .....

Company No. .....

Department .....

Date .....

GTX .....

OFFER OF CASUAL EMPLOYMENT

SMI has pleasure in offering you employment as a casual Labourer with effect from ..... to .....

You will be paid either on a commission (or) per ton produced basis.

This commission will be at a rate of E200-00 per ton produced and divided by the number of employees working in the process department.

OR

You will be paid a rate of E3.08per hour over an eight-hour working day. WHICHEVER IS THE GREATER.

Your terms and conditions of employment are that you are not a member of our permanent daily paid labour force. Your service may be terminated at or before the end of the date mentioned above and you will be paid at the termination of your service in accordance with the custom pertaining to casual employment within Swaziland Meat Industries Ltd.

As a casual labour your service with the company will not exceed one month. Your service may be terminated by the giving and receiving of a 24 hours notice.

During the period of this casual employment you will not be provided with accommodation by the Swaziland Meat Industries Ltd.

Yours faithfully,

.....

FOR: SWAZILAND MEAT INDUSTRIES LTD

(Signed)

I ..... hereby accept the above offer of employment.

SIGNED ..... DATE ....."

[11] As it has been stated earlier on at paragraph [7] *supra* the point of law is well defined and seeks to determine whether the Respondents were in fact employees to whom Section 35 of the Employment Act of 1980 applied.

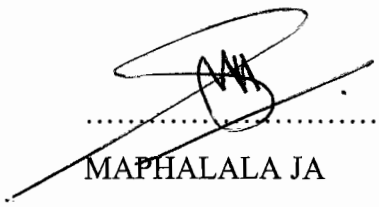
[12] Section 35 (i) (d) provides for employees' services not to be unfairly terminated and does not apply to (d) an employee engaged for a fixed term and whose term of engagement has expired. Therefore the said subsection recognises an employee who is engaged for a fixed term and whose term of engagement has expired does not have recourse to Section 35 (2) of the Act.

[13] In the case of *Sarah Ndwandwe (supra)* the Swaziland Court of Appeal held that there is nothing in the Employment Act or in any other law which makes it illegal for a person to be employed on a temporary basis in order for a specific job to be undertaken.

[14] Such employment must however be for a specific period, otherwise, if not, upon expiry of the statutory permissible period in which an employee may be kept on probation, the employment becomes permanent and subject to protection by Section 35 (2) of the Act.

[15] It appears to me from the papers filed of record that the Respondents were employed for fixed terms from time to time, and did not work continuously for more than three (3) months without a break. The Respondents have failed to prove that they were employees entitled to protection under Section 35 (2) of the Employment Act. In this regard I find that the reasoning in the Court of Appeal in the case of *Sarah Ndwandwe (supra)* and that by the former Judge President in the case of *Nkosinathi Dlamini vs Tiger Security (Pty) Ltd – Industrial Court Case No. 287/2002* is apposite to the facts of the present case.

[16] In the result, for the afore-going reasons the appeal succeeds and the judgment of the court *a quo* is accordingly set aside. I make no order as to costs. It is so ordered.



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MAPHALALA JA

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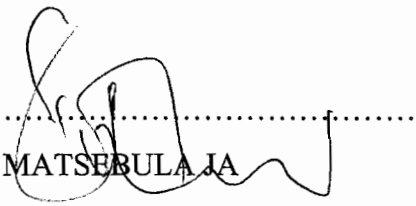
ANNANDALE JP



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MATSEBULA JA