INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO.122/2016

In the matter between:

GUGU MALINDZISA Applicant

And

SWAZILAND COALITION OF

CONCERNED CIVIC ORGANISATIONS Respondent

Neutral citation: Gugu Malindzisa vs Swaziland Coalition of Concerned Civic Organisations (122/2016) [2017] SZIC 46 (2017)

Coram: MAZIBUKO J,

(Sitting with A.Nkambule & M.Mtetwa

Nominated Members of the Court)

Last Heard: 10th March 2017

Delivered 10th March 2017 (*Ex Tempore*)

Summary :(1) Employer and employee appeared before a Conciliation, Mediation and Arbitration Commission, on a dispute.

Parties before Commissioner agreed to settle their dispute and concluded agreements on two issues- separately. Employer agreed to pay employee's salary for September and October 2015, and also for November and December 2015- respectively. Employer proceeded to pay the employee salary arrears for September and October 2015. Employer refused to implemented agreement to pay salary arrears for November and December 2015.

(2) Employee applied to Court to have the latter agreement made an order of Court. Employer opposed the application. Employer challenged the validity of the agreement to pay- which was concluded by its Executive Director.

(3) Held: The agreement wherein employer agreed to pay employee's salary arrears for November and December 2015 is valid, was then registered and is therefore enforceable.

(4) Right to representation before Industrial Court. Litigants have a right to choose to be represented by labour law consultants. A successful litigant who is represented by a labour law consultant is entitled to be awarded costs.

REASON FOR RULING

16TH JUNE 2017

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1. The Respondent is Swaziland Coalition of Concerned Civic Organisations, a body corporate with power to sue and be sued operating as such in Manzini town.

2. The Applicant is Gugu Malindzisa a former employee of the Respondent. The Applicant was employed by the Respondent on the 1st May 2012.

3. In April 2015 the Respondent suspected the Applicant to have committed certain misconduct in connection with her work. The Applicant was thereafter suspended from work, in writing and with pay, pending finalization of the investigation. The letter of

suspension is dated 7th April 2015 and is attached to the answering affidavit marked S1.

4. According to the Applicant on the 20th July 2015 she expected to be paid her due- salary but the Respondent failed to pay her. Thereafter the Applicant filed a notice indicating that she was resigning from work with immediate effect. The resignation letter was addressed by the Applicant to the Executive Director of the Respondent and it is marked annexure S2. Annexure S2 reads thus:

"Gugu Malindzisa

P.O. Box 52

Mbabane

20th July 2015

The Executive Director

Swaziland Coalition of Concerned Civic Organisations

Dear Madam

Re: <u>RESIGNATION INTENTION</u>

This letter serves to express my intention to resign with immediate effect, as the Programmes Officer, having served since May 01, 2012.

I profoundly apologise for the short notice and for any inconvenience caused by my resignation as well as thank the contribution of the organisation towards my personal growth and development.

Yours faithfully

Gugu Malindzisa"

(Record page 22)

5. The Applicant testified that she was asked by the Executive Director to withdraw the resignation letter to which she agreed and actually withdrew the intended resignation. The Applicant expected to be paid her monthly salary as promised in the letter of suspension (annexure S1).

6. During the months September and October 2015 the Applicant was not paid her salary. The Applicant wrote the Respondent a letter demanding inter alia –

6.1 an immediate lifting of the suspension,

6.2 waiver of the right to convene a disciplinary hearing,

6.3 payment of current salary and arrears,

6.4 a refund of unauthorized deduction made on previous salaries paid to her,

6.5 alternatively payment of terminal benefits including compensation for automatically unfair dismissal.

The Applicant's letter is marked annexure S3.

7. Annexure S3 was addressed to the Executive Director of the Respondent and it reads thus:

"Re: Demand for unconditional re-instatement to my job

……..

Reference is made to your letter of my suspension from work, dated 10th April, 2015. Further reference is made to our conversations and your several phone calls and in which, for the past six (6) months, you have been promising me that the organization was putting together charges for which I would be invited to a formal disciplinary hearing to

defend myself. But you have never told me what these charges or alleged misconduct was.

In the meantime, you have unlawfully deducted monies from my salary, totaling E4'823.48 during this time, in total violation of Section 54 of the Employment Act of 1980 (as amended), without telling me what these deductions were for. You have also been delaying payment [of] my salary, resulting in my being seriously prejudiced in meeting my monthly commitments, such as rent, household bills and the necessary support to my family. It is therefore, for this reason that I write to you today, demanding for my unconditional re-instatement to my job, without having to face any disciplinary action because I believe that you have waived your right to pursue any actions against me, by your unreasonable delays to charge me; if at all there was any allegation to answer. The delay you have taken in exercising any such right (if there was), has been overtaken by events as I now make my rightful

demand for unconditional re-instatement to work, with seven (7) days after your receipt of this letter.

However, should you find it difficult to re-instate me to my job, then, alternatively, you shall have to pay me the following amounts, also, within the seven (7) days after receipt of this letter:-

1. *Payment of two months' salary (September and October, 2015) = E16'000.00*
2. *Refunds of unlawful deductions = E4'823.48*
3. *One month notice pay = E8'000.00*
4. *24 months compensation for Automatically unfair dismissal = E192'000-00*

   Total amount payable = E220'823.48 (Two Hundred and Twenty Thousand, Eight Hundred and Twenty Three Emalangeni and Forty Eight Cents), as full and final settlement of ALL my claims arising out of my employment with the Swaziland Coalition of Concerned Civic Organizations, it's Trustees and or Directors.

Trusting that you will take this letter in the spirit in which it has been written; to resolve and bring to an end this uncertainty currently surrounding my employment relationship with the organization. I truly have no desire to be fighting an organization for which I have given off my best ever since it was established! Hoping that we can amicably resolve this matter.

Hoping to hear from you soonest.

Yours faithfully,

Gugu Malindzisa

Cc: Acting Chairman of the Board of Trustees, Mandla Hlatshwayo,

Chairman of the Board, Bishop Mnisi."

(Record pages 23-24)

8. During November 2015 the Applicant reported a dispute against the Respondent before the Conciliation, Mediation and Arbitration Commission. Inter alia, the Applicant claimed payment of salary for September and October, 2015. The parties appeared before the

Commissioner for conciliation. On the 7th December 2015 the parties agreed to settle their dispute. In particular the Respondent agreed to pay the Applicant her salary for September and October 2015 in the sum of E12, 421.66 (Twelve Thousand Four Hundred and Twenty One Emalangeni sixty six Cents). A memorandum of agreement was signed by the parties on the 7th December 2015. The Applicant appeared in person before the Commissioner while the Respondent was represented by its Executive Director namely Ms Lomcebo Dlamini. The memorandum of agreement is attached to the founding affidavit marked GM1. The Applicant confirmed in the replying affidavit that the Respondent did pay the agreed amount.

9. On another date unknown to the Court, the Applicant reported another dispute to the Commission against the Respondent; for failure to pay salary for November and December 2015. The parties appeared before the Commissioner and again they agreed to settle their dispute. In particular the Respondent agreed to pay the Applicant her salary for November and December 2015 in the sum

of E12, 421-66 (Twelve Thousand Four Hundred and Twenty One Emalangeni sixty six Cents). The parties signed a memorandum of agreement on the 15th December 2015. The Applicant appeared in person while the Respondent was represented by its Executive Director aforementioned. The memorandum of agreement is marked GM2. The Respondent has refused to pay the Applicant the amount of money that is mentioned in annexure GM2.

10. Thereafter the Applicant took the necessary legal steps to enforce compliance with the agreement. The Applicant applied to Court for registration of the agreement. The application was set down for the 20th June 2016. Section 84(1) and (2) as read with Section 57(1) of the Industrial Relations Act No.1/2000 (as amended) provides as follows:

> *"84 (1) Where a dispute has been determined or resolved, either before or after conciliation, the parties shall prepare a memorandum of agreement settling out the terms upon which the agreement was reached and the memorandum shall be*

lodged with the Court for registration by any of the parties, or by the Commissioner of Labour at the request of the parties.

(2) *Upon registration the memorandum shall have the same force and effect as a registered collective agreement.*

57 (i) *The terms and conditions of a collective agreement registered under section 56 (referred to in this Part as a "registered agreement") shall be binding on the parties"*

(Underlining added)

In order for the agreement (annexure GM2) to have authority to bind the parties, it must be registered with the Industrial Court. Without registration, an agreement entered into in terms of Section 84(1) and (2) of the Industrial Relations Act cannot be enforced.

11. The Respondent has opposed the application for registration of the agreement. The Respondent's answering affidavit is deposed to by a certain Ms Lomalanga Nxumalo who stated that she is the acting

Executive Director of the Respondent, otherwise her substantive post is that of Finance and Administrative Officer. Ms Nxumalo has admitted that the Applicant was suspended in terms of annexure S1.

12. Ms Nxumalo has denied that the Applicant is entitled to payment of the November and December 2015 salary. She further denied that the Applicant was entitled to the September and October 2015 salary even though same was paid by the Respondent. The argument is that the Applicant resigned from work on the 20th July 2015 in terms of annexure S2. With effect from the 20th July 2015 the Applicant ceased to be an employee of the Respondent. Consequently the Applicant was no longer entitled to payment of salary as from the 20th July 2015.

13. According to Ms Nxumalo, the Respondent acted out of ignorance when it paid the Applicant the July and August 2015 salary. The Respondent realised its mistake and in August 2015 stopped payment of the Applicant's salary completely.

14. Ms Nxumalo stated further that the Executive Director was wrong to sign the two (2) agreements (annexures GM1 and GM2) which entitled the Applicant to payment of salary for September and October 2015 and also November and December 2015. By the time the agreements were concluded, the Applicant was no longer an employee of the Respondent and was therefore no longer entitled to payment of salary. The conclusion of the aforementioned agreements was a mistake. According to the Respondent, the two (2) agreements aforementioned are unlawful and as a result thereof the registration of annexure GM2 was opposed.

15. A resignation is a termination of the contract of employment by the employee. According to the Applicant, when she submitted annexure S2 her intention was to resign from work. The Applicant however added that she withdrew the resignation letter when she was requested to do so by the Executive Director. In other words

the resignation letter was withdrawn by agreement between the Applicant and the Executive Director.

16. The legal position is that: a resignation from work can be withdrawn by consent. In the case of RUSTENBURG TOWN COUNCIL VS MINISTER OF LABOUR 1942 TPD 221, the Court stated the legal position as follows at page 224:

> "*The giving of notice [of resignation] is an unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and decline to act upon it. If so, it seems to me to follow that notice once given is final, and cannot be withdrawn – except obviously by consent* …"
>
> (Underlining added)

17. The principle in the Rustenburg Town Council case has been confirmed in other authorities as stating the correct legal position, for instance:

"Resignation has been seen as a unilateral act by an employee ... which does not require the acceptance of the employer <u>and cannot be withdrawn without the consent of the employer</u>."

(Underlining added)

Le ROUX PAK and Van NIEKERK A: THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL, Juta, 1994 at page 86, (ISBN not stated).

18. An employee who has resigned from his employment can withdraw his resignation – with the consent of the employer. The Applicant stated that she withdraw her resignation when she was requested to do so by the employer – duly represented by its Executive Director. The Court noted that this allegation has not been denied, it is accordingly accepted as being factually correct. Consequently the Court finds that the Respondent's defence namely; that the Applicant resigned from work; is not supported by the evidence and is accordingly dismissed. The Respondent's defence ignores the fact that the letter of resignation was

withdrawn by consent. The Respondent further ignores the legal effect of the withdrawal of the resignation.

19. The withdrawal of the resignation meant that the employer – employee relationship that existed on the eve of the 20th July 2015 continued unabated and subsisted on the dates annexures GM1 and GM2 were concluded. This finding is also supported by the conduct of the parties after the 20th July 2015.

20. The Executive Director has not alleged before Court that she signed the aforementioned agreements (annexure GM1 and GM2) while she laboured under a mistake or ignorance, be it of law or fact. The deponent to the answering affidavit has failed to state how did she arrive at the conclusion that the Executive Director signed the said agreements as a result of a mistake or ignorance. The deponent to the answering affidavit is not in a position to know what was in the mind of the Executive Director at the time the latter signed the agreements. This aspect of the evidence of Ms Nxumalo is either hearsay, speculation or conjecture and it is

inadmissible. The Executive Director has not supported the allegation made concerning her especially her state of mind at the time she signed the two (2) aforementioned agreements.

21. The Respondent's evidence is self-contradictory. Ms Nxumalo stated that the Respondent discovered in August 2015 that the Applicant had resigned from work since the 20th July 2015. The Applicant was therefore no longer entitled to payment of salary after July 2015. Consequently the Respondent stopped paying the Applicant salary in August 2015. This evidence is recorded as follows in the answering affidavit:

> "*2.3 Out of ignorance and to the prejudice of respondent, the salary of the applicant continued to rum[run] until August, 2015, when respondent discovered this anormally [anomaly] and stopped the payment of her salary."*
>
> (Record page 16)

22. The evidence of the Respondent's witness Ms Nxumalo is contradicted by the conduct of the Respondent's Executive Director in signing the two (2) agreements, annexures GM1 and GM2. It does not make sense for an employer to agree (on the 7th December 2015), to pay its employee a salary arrears for August and September 2015 yet the employer contends that it discovered in August 2015 that the employee had resigned in July 2015 and therefore was no longer entitled to payment of salary. What makes the Respondent's argument absurd is that it actually paid the Applicant her salary arrears for August and September 2015 after the parties had signed annexure GM1. Furthermore, the Respondent agreed in writing to pay the Applicant's salary for November and December 2015 in terms of annexure GM2. The Respondent's evidence is disingenuous and is calculated to mislead the Court.

23. The finding of the Court is that when the Executive Director signed the aforementioned agreements she thereby consented to the Applicant being paid her salary as an employee of the Respondent

who then was under suspension. The conduct of the Executive Director is consistent with the Applicant's version that the resignation was withdrawn by consent.

24. The crux of the matter before Court is that the Applicant is trying to enforce an agreement and the Respondent is trying to escape the consequences of that agreement. This matter can also be approached from the angle of the *caveat subscriptor* rule. Legal authorities have explained the rule as follows:

24.1 "*The effect of appending a signature is, in general, that the party in question is bound.*"

KERR AJ: THE PRINCIPLES OF THE LAW OF CONTRACT, 6th edition, Butterworths, 2002, ISBN 0 409 03753 2 at page 102.

24.2 "It is a matter of common knowledge that a person who signs a contractual document thereby signifies his assent to the contents of the document, and if these subsequently turn out not to be his liking he has no one to blame but himself.

CHRISTIE RH: THE LAW OF CONTRACT, 4th edition, Butterworths, 2001, ISBN 0 409 01836 8 at page 199.

25. At the time the Executive Director signed the agreement (annexure GM2) she knew that she was concluding a written contract whose terms are clearly spelt out in the contract itself. The Executive Director concluded the contract in her capacity as a representative of the Respondent. The Respondent has not challenged the mandate under which the Executive Director concluded the said contract. The Respondent has since changed its mind and is no longer prepared to perform its obligation in terms of the latter contract. A party to a written contract is bound by the terms stated therein and will not be permitted to escape the consequences of that contract merely because he/she finds same to be inconvenient.

26. The third leg of the Respondent's argument was also aimed at challenging the validity of the written contract; namely annexure GM2. The argument reads as follows:

> *"4.2 As a result the applicant has requested for the arbitration of the matter at CMAC as it will*

appear on annexure "S4" hereto. It is therefore bad in law for applicant to pursue the matter in this manner when she is well aware that the matter failed to be resolved and the reasons clearly stated [sic]."

(Record page 17)

The Court has noted that the manner the answering affidavit was written lacks the skill and draughmanship that is expected of counsel, yet at all times material to this case the Respondent had legal representation.

27. What Ms Nxumalo appears to be saying is that it was wrong for the Applicant and the Executive Director to sign the written agreement (annexure GM2) when in fact they did not reach any agreement at all. In other words an attempt by the parties to settle the dispute for which they had appeared before the Commissioner-failed. Consequently the Applicant had applied that the Commissioner should refer the dispute to Arbitration (under auspices of the Commission). Ms Nxumalo filed annexure S4 as

evidence that the Applicant applied for referral of the dispute to arbitration.

28. Annexure S4 is a request for arbitration dated 2nd June 2016 and signed by the Applicant. The Applicant anticipated the following relief in annexure S4.

> "*1. Notice pay E8, 000.00*
>
> *2. Unlawful deduction E4, 823.48*
>
> *3. Maximum compensation E96, 000.00*
>
> *4. Any other competent relief."*
>
> (Record page 26)

Annexure S4 was served on the Respondent the same day it was issued. There is however no 'Report of Dispute' that has been attached to annexure S4 yet same is necessary to support the Respondent's argument.

29. The Respondent appears to have lost sight of the fact that the written contract (annexure GM2) that forms the basis of the Applicant's claim before Court was concluded on the 15th December 2015. In that agreement the parties had focused their

attention solely on the Applicant's claim for salary for November and December 2015. At the time annexure GM2 was concluded the Applicant was still an employee of the Respondent who was on suspension.

30. The dispute which the Applicant had proposed that it be referred to arbitration in terms of annexure S4 is based on an allegation of unfair dismissal, hence the Applicant claimed, inter alia, payment for maximum compensation. Annexure S4 is a product of a fresh dispute that the Applicant subsequently filed against the Respondent which is completely independent of the agreement that the parties concluded on the 15th December 2015- annexure GM2. In annexure S4 there is no claim for payment of salary for November and December 2015 because that matter was settled by agreement on the 15th December 2015. In addition, annexure S4 was written after the Applicant was dismissed from work. Those two (2) matters are clearly unrelated.

31. The Respondent's latter argument contradicts the provision of the: parol evidence rule. The Respondent is trying to contradict the terms of a written agreement by introducing extrinsic evidence. The rule provides as follows:

> "The general rule is that where a written contract is interpreted, no oral evidence may be received by the court that tends to contradict, alter, add to, or vary the written terms."

GIBSON JTR: SOUTH AFRICAN MERCANTILE AND COMPANY LAW, Juta, 8th edition, 2003 ISBN 0 7021 5809 7 at page 48.

32. The written agreement (annexure GM2) speaks for itself. Its contents cannot be varied or contradicted by extrinsic evidence. The Respondent's latter argument has no legal basis and it is also dismissed.

33. On the 10th March 2017 after hearing arguments, the Court issued an *Ex Tempore* ruling based on the aforementioned reasons. The Court found in favour of the Applicant and granted, inter alia,

prayer 1. The agreement that the parties concluded on the 15th December 2015 (annexure GM2) was accordingly registered as an order of Court.

34. The Applicant had incurred a considerable amount of costs in prosecuting her claim. The Applicant had claimed an award of costs at a punitive scale. The Court exercised its discretion and awarded cost at the ordinary scale. The general rule regarding costs is that:

> "… *Costs must follow the result* …"

MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS VS SAPIRE 2000- 2005 SLR vol 1 at page 208.

35. Thereafter the Court engaged the parties on the practicality of taxing a bill of costs as opposed to them agreeing on a fixed sum of money that would be payable to the Applicant for costs. The purpose for the Court to engage the parties was that the Applicant was not represented by a legal practitioner but by a labour law consultant. The Fourth Schedule to the High Court Rules under

Act no. 20/1954 provides a tariff for taxation of costs for work done at the High Court. The same tariff is used for work done at the Industrial Court. The Industrial Court has no tariff for assessing costs. Provision is made in the tariff for work done by legal practitioners. There is no provision for work done by labour law consultants. Labour law consultants have the same right as legal practitioners to appear before the Industrial Court. The Court was assured by the Applicant's representative that in previous similar cases the Industrial Court Registrar had exercised his/her discretion when taxing a bill of costs where the successful party was represented by a labour law consultant.

Applicant's Attorney	Mr E. Dlamini Labour Law Consultant
Respondent's Attorney	Mr N. Masilela C/o Mr S. Dlamini Attorneys