IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 384/19

In the matter between:

SIMANGA NHLEKO Applicant

And

PREMIER LEAGUE OF ESWATINI Respondent

Neutral citation: Simanga Nhleko v Premier League of Eswatini [384/19] [2020] SZIC 104 (28 August 2020)

Coram : B. NGCAMPHALALA - ACTING JUDGE
(*Sitting with N. Dlamini and D.P.M. Mmango Nominated Members of the Court)*

Heard : 30 July 2020

Delivered : 28 August 2020

Summary: Contract of employment. When is a contract of employment concluded? Applicant received written offer of employment. Applicant accepted offer of employment by signing it and delivered same to Respondent.

Held: Contract came to existence the day the employee (offeree) communicated to the employer (offeror) his acceptance of the offer. Withdrawal of an offer of employment. An offer can be withdrawn before acceptance. Once an offer is accepted a contract comes into existence. Once a contract is concluded it is no longer open to the offeror to withdraw the offer. Purported withdrawal of an offer by employer is null and void since by then the offer has already accepted.

JUDGMENT

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[1] The Applicant made an Application before this Court seeking the following order: -

1. ***Compelling the Respondent to adhere to the terms and conditions of the subsisting contract of employment entered into between itself and the Applicant herein on or about 1st September 2018 by allowing the Applicant back to discharge his duties in terms of the contract, with effect from date of Judgement.***

OR ALTERNATIVELY

2. Declaring the purported withdrawal of the offer of employment which was already accepted by the Applicant as of the 1st September 2018 as unlawful, null and void ab initio; and

2.1 Directing the Respondent to pay Applicant through his attorneys as follows: -

2.2 Notice Pay (3 months) E75, 000.00

2.3 Paying Applicant, the remaining months of the fixed term of contract (24 months) E684, 000.00

2.4 Paying Applicant car allowance E38, 000.00

3. Directing the Respondent to pay costs of suit

4. Further and or alternative appropriate relief."

[2] **RAISED POINT IN LIMINE**

The Respondent raised the following Points in Limine: -

2.1 AD LACK OF JURISDICTION

2.2 AD DISPUTES OF FACTS

2.3 AD NON-DISCLOSURE OF MATERIAL FACTS

2.1 AD LACK OF JURISDICTION

The Respondent abandoned this point of law by submitting that this Court has jurisdiction to adjudicate this matter and that it is correctly before it.

2.2 AD DISPUTES OF FACTS

The Respondent submitted that the Application before Court has disputed material of facts and these are:

- That the terms and conditions of the offer made to the Applicant were encapsulated in the Offer of Employment.
- That the Respondent offered the Applicant gratuity and an organizational car
- That the parties agreed to backdate the signatures in the Contract of Employment
- That the Applicant signed the Contract of Employment sometime in April 2019 or anytime thereafter before the offer was withdrawn.
- That the Respondent's Chairman refused to release a copy of the Contract of Employment to the Applicant to sign.

2.3 AD NON-DISCLOSURE OF MATERIAL FACTS

The Respondent submitted that where the Court is faced with opposing affidavits that are irreconcilably in conflict on material facts, the Court is to carefully scrutinize the nature of dispute to establish the following:

- If the fact disputed is relevant or material to the issue for determination in the sense that is so connected to it in a way that the determination of such an issue is dependent on or influenced by it;
- If the fact being disputed, though material to the issue to be determined, but the dispute is such that way by its nature can be easily resolved or reconciled within the averments in the affidavits;
- If the dispute of a material fact is of such a nature that even if not resolved does not prevent a determination of the application on the affidavits;
- If the dispute as to a material fact is a genuine or real dispute.

3. RESPONDENT'S SUBMISSIONS

3.1 The Respondent submitted that it is common cause that the Applicant was offered employment as per the **Offer of Employment** letter dated August 31st 2018 and signed by the Applicant on September 1st 2018.

3.2 It further submitted that the Applicant was in the continuous employ of the Respondent for twelve (12) months until he was informed that he was no longer employed as of August 31st 2019.

3.3 The Respondent submitted that the Applicant refused to sign the Employment of Contract because he was negotiating new terms and conditions. These new terms and conditions that the Applicant was allegedly negotiating with the Respondent gave rise to **"an implied new contract of employment"** which rendered the employment contract that was allegedly signed and back dated to September 1st 2018 to be null and void.

3.4 It was the Respondent's submission that for the period when the Applicant had not signed the employment contract, the Applicant was engaged on a month to month employment contract.

4. APPLICANT'S SUBMISSIONS

It was Applicant's submission that the application before court is for the simple determination of a question of law. The question that arises is whether a withdrawal of an offer is valid or not, in an instance where the offeree has already accepted the offer, rendered services in terms of the offer, and has continued to render services for a continuous period of twelve months in terms of the offer which he accepted.

- It is common cause that the Applicant was employed by the Respondent as Chief Executive Officer.
- That he was in continuous employ of the Respondent for a period of over twelve months until he was informed that he is no longer employed as of August 31st 2019.

[3] The Applicant averred he accepted the offer of employment by signing the letter of offer dated 31st August 2018, which he avers the parties agreed should be dated retrospectively to the 1st September 2018, being the date in which he accepted the offer.

[4] It was further his submission that initially during the verbal negotiations of the terms of his contract of employment with the Respondent it was proposed that he would be paid a salary of E25,000.00, use of company car, communication allowance (between E1,200.00 and E1,500.00), and a suggestion for accommodation allowance of E1,000.00, the issue of gratuity would be negotiated.

[5] However eventually the offer that was made by the Respondent and the contract which he eventually accepted and signed in April 2019 backdated 1st September 2018, comprised of a salary of E25,000.00, accommodation allowance of E1,000.00, communication allowance E1,500.00 and a petrol allowance of E1,500.00.In support of this assertion he submitted a copy of the letter of offer marked annexure A and the contract of employment marked annexure B.

[6] The rest of the issues which included gratuity and the use of a company car the Applicant submitted that it was agreed that he would write to the Respondent and raise his concerns and that same would be deliberated upon by the Respondent, which he indeed do.

[7] It was his further submission that on or about the 30th August 2019 at an executive committee meeting, the chairman suggested abruptly that Applicants contract issues be deliberated. He was requested to excuse the meeting upon his return he was informed that his offer of employment was being withdrawn and he was to return all the property of the Respondent in his possession.

[8] He then wrote a letter dated 30th August 2019 which he emailed to all executive member advising them that there was a signed letter of offer as well as a signed contract of employment.

[9] On the 4th September 2019 the Respondent wrote to the Applicant confirming their withdrawal of offer. It is on these premise that the Applicant has now come before this court seeking the redress stated in its application.

[10] The question before Court is whether or not there was a valid withdrawal of the offer of employment. We will first deal with the points in law raised by the Respondent in detail.

POINT IN LIMINE

AD DISPUTES OF FACTS

10.1 The first point of law raised by the Respondent was that of dispute of facts with regards to the letter of offer of employment. It was Respondents submission that the letter of offer of employment did not encapsulate the terms and conditions offered to the Applicant.

10.2 The contention by the Respondent is particularly of the encapsulation of the terms and condition on the letter of offer of employment.

10.3 This Court is in agreement with fact that the terms and conditions of the Applicant are not articulated in the letter of offer, but in a contract of employment that accompanied the letter of offer. In the third paragraph of annexure A, which is the letter of offer of employment it reads:

"we are confident that you will find this new opportunity both challenging and rewarding. The Contract of Employment attached hereto embodies the proposed terms and conditions of engagement. If you choose to accept this offer, please sign the second copy of this letter in the space provided and return it to us".

10.4 The letter was written by the Respondent's Chairperson and signed by him. In the last paragraph of the letter it reads:

"with the signature below, I Simanga Nhleko, do hereby accept this offer for employment as the Chief Executive Officer of the Premier League of Eswatini."

10.5 The Court has noted that the Respondent has not denied certain aspects of the Applicant's evidence which are pertinent to the issue. In particular the Respondent has not denied:

(i) That the signature on the letter of offer of employment is not the Respondent's chairman's signature, and further the signature on

the contract of employment which accompanied the offer of employment was not that of the Respondent's Chairman.

(ii) By the reading of the third paragraph it is evident that by signing the letter of offer of employment, the Applicant was accepting the terms and conditions of the contract of employment, which accompanied the letter of offer. Paragraph three of the letter specifically articulates to that.

[11] In the case of **Goodman Dlamini vs Financial Services Regulatory Authority Industrial Court Case No. 229/2015**, the Court stated that a contract comes into existence when an offer by one party is accepted by the other. A simple and yet helpful definition of a contract is provided by Solomon J in **Watermeyer vs Murray AD 61 at page 70**, when he states that:

"for every contract consists of an offer made by one party and acceptance by the other."

[12] A contract came into existence between the Applicant and the Respondent on the 1st September 2018 when the Applicant communicated to the Respondent his acceptance of the letter of offer of employment which stipulated that by signing same, the Applicant was accepting the terms as were contained in the contract. Further evidence is that immediately thereafter the Applicant assumed his duties for a period of twelve months before the offer was withdrawn.

[13] The Respondent further argues that the Respondent never offered the Applicant gratuity and an organizational car, that the parties never agreed to backdate the signatures in the Contract of Employment, that the Applicant signed the Contract of Employment sometime in April 2019 or anytime thereafter before the offer was withdrawn and the Respondent's Chairman refused to release a copy of the Contract of Employment to the Applicant to sign.

[14] The Applicant shed light on these issues during its submission, he stated that he accepted the terms and conditions of the contract, as attached to the letter of Offer of Employment. He submitted that the issue of gratuity was agreed would be negotiated together with that of a company motor vehicle. Just like

all employees who have a right to negotiation for better terms of employment, he had the duty to exercise this right.

[15] The Applicant did concede that the contract was not signed on the 1st September 2018, but that it was eventually signed on a different date, and agreed between the parties to backdate it, which is disputed by the Respondent. The Court cannot lose sight of the fact that there is a signed written letter of offer of employment and a signed contract, with Respondents Chairman's signature.

[16] The Respondent affirms that the Applicant was in its employ for a continuous period of 12 months allegedly negotiating with the Respondent, which gave rise to **"an implied new contract of employment"** which rendered the employment contract that was allegedly signed and back dated to September 1st 2018 to be null and void.

[17] No evidence in the form of correspondence has been forwarded by the Respondent to back up its claim. In its Answering Affidavit in the book of pleadings page 63 paragraph 3.11.1 the Respondent submitted that the

Applicant on the 31st August 2019 was advised both orally and in writing that due to his refusal to sign the contract of employment, he was deemed to have rejected the offer of employment. However, the correspondence allegedly written by the Respondent has not been submitted as evidence before this Court, nor supporting affidavits to confirm this assertion.

[18] With no evidence to support this assertion the said statement is hearsay. The general rule is that hearsay evidence is inadmissible as stated, see **Hoffman LH and Zeffertt: The South African law of Evidence, 4TH ed, Butterworth, 1988 ISBN 0 409 03325 1** and **Per Watermeyer J, in Estate De Wet vs De Wet 1924 CPD 1924**. Therefore, the argument that **"an implied new contract of employment** was agreed upon between the parties is inadmissible.

[19] Even if the Court had held that the evidence was admissible and an implied new contract came into existence, and that the Applicant was employed on a temporary basis from month to month **Section 2 of The Employment Act, 1980** stipulates, continuous employment means a period of unbroken service with same employer, including a period of unbroken service as a casual employee with the same employer, and for the purpose of this definition the

following shall not constitute a break in service- a)…….d); and **"continuously employed"** shall be construed accordingly. In the same Act, **Section 27** specifies

> **"no contract of employment shall provide for any employee any less favourable conditions than is required by any law. Any condition in a contract of employment which does not conform with this Act or any other law shall be null and void and the contract shall be interpreted as if the condition there were substituted the appropriate conditions required by law."**

[20] In light of the above this point of law is dismissed.

The second point of law raised by the Respondent was non – disclosure of material facts

AD NON-DISCLOSURE OF MATERIAL FACT

The Respondent pointed out further that there are material dispute of facts in this matter which cannot be resolved on the Affidavits, instead oral evidence should be led on the issues in dispute.

It was the Respondents submission, that the dispute of fact arose from the non-encapsulation of the terms and condition of the employment in the letter

of offer of Employment. Further that the Respondent offered Applicant gratuity and a company car, that the parties agreed to backdate the signatures in the contract of employment. That the Applicant signed the contract of employment sometime in April 2019 or anytime thereafter before the offer was withdrawn and lastly that the Respondents Chairman refused to release a copy of the contract of employment to the Applicant to sign.

In the Supreme Court judgment of **Khanyisile Masuku v J.D Group Swaziland (Pty) Ltd (38/11) [2011] SCZC 48,** the court stated;

> *"It is trite law that "utmost good faith" must be observed by litigants making* ex parte *applications, and, that all material facts must be placed before the court. If any order has been made upon an* ex parte *application, and it appears that material facts have been kept back which might have influenced the decision of the court whether or not to make the Order, the court has a discretion to set aside the Order on the ground of non-disclosure; it is not necessary that the suppression of the material facts be wilfully, negligently or* mala fide. *"Materiality" in this regard means that the facts not disclosed must not only be relevant but should have a bearing on the merits of the* ex parte *application. In the exercise of its discretion, the court should have regard to the extent to which the rule has been breached, the reasons for non-disclosure, the extent to which the court might have been influenced by full disclosure as well as the consequences*

of denying relief to the applicant on the ex parte *order. The court has a discretion even where the non-disclosure was material to dismiss the application or to set aside the proceedings".*

See also the following cases:

- **De Jager v. Habrow and others 1947 92) SA 419**
- **Cargo Carriers Swaziland (Pty) Ltd v. USA Distillers (Pty) Ltd High Court Civil Case No. 2233/2003**
- **Cometal Nometal v. Corlana Enterprises 1981 (2) SA 412 at 414 G-H**
- **Schlesinger v. Schlesinger 1979 (4) SA 342 (W) at 353 C-D**
- **Hall & Another v. Heyns & Others 1991 (1) SA 381 (C) at 397 B-C.**

[21] The Court has already dealt with the non-encapsulation of the terms and conditions in the letter of offer employment and has decided on the issue. The remaining issues as raised by the Respondent in this point of law. The Court finds do not go the gist of the matter, meaning the facts as disclosed by the Respondent are not material, and have no bearing or influence in the outcome of this matter. Therefore, the Respondents assertions do not raise a

material dispute of fact. The issue before this court is capable of being resolved on affidavit and has been resolved.

[22] There is a signed letter of offer of employment before this court, together with a contract which accompanied the letter of offer, this court cannot overlook this and the pronouncement made in this Court on when a contract of employment comes into effect. By the Applicant accepting the offer of employment he automatically accepted the terms of the contract as articulated in paragraph three of the letter of offer of employment. The Respondent has not disputed that the contract was prepared and signed by the Respondent, he disputes the contract was signed on the date as stipulated. He has raised issues of gratuity which the Applicant in his claim has not requested relief for from the Court. The point *in limine* therefore is dismissed.

[23] Having regard to the evidence placed before me and the submissions made on behalf of the parties. I can come to no other conclusion than that the Applicant has made out a proper and sufficient case for the relief claimed in the notice of application. The Applicant in the relief claimed, prayers that the Respondent be directed to comply with the contract signed between the parties and re instate him to his position as Chief Executive Officer. The

Court looking at the time frame and the possibility that the position may have already been advertised and filled, and taking into consideration **Section 27 of the Employment Act, 1980**, the court makes the following order:

The purported withdrawal of the offer of employment which was already accepted by the Applicant as of the 1st September 2018, is unlawful, null and *void ab initio*.

[24] In the circumstances, the Court makes the following order:

The Respondent is to pay the Applicant the following;

(1) Notice pay (1month) E 25,000.00

(2) Remaining months of the fixed term contract 24 months). E 684.000.00

(Basic salary E25.0000, plus E1,500.00 Cellphone allowance, plus Personal allowance E1,500 = E28.000.00 x 24 months

TOTAL = E <u>672.000.00</u>

(3) Each party to pay its own costs.

The Members Agree.

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BANELE NGCAMPHALALA
ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr M. Ndlangamandla (MLK Ndlangamandla Attorneys)

For Respondent: Mr. V.Z. Dlamini (VZ Dlamini Attorneys)