

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 19/94

In the matter between:

DUMSANI MAMBA Applicant

And

THE TAVERN (PTY) LTD Respondent

CORAM:

MARTIN BANDA : PRESIDENT

VUSI DLAMINI : MEMBER

JOSIAH YENDE : MEMBER

ANDRIES LUKHELE : FOR THE APPLICANT

AUBREY MLAMBO : FOR THE RESPONDENT

JUDGEMENT

The Applicant in this matter claims payment of six months salary as compensation and overtime.

It is common cause that the Applicant was employed by the Respondent on the 1st August, 1989 as a Liquor Stock Controller. The Applicant was in continuous employment of the Respondent until his services were terminated by the Respondent on the 21st April, 1993.

The reason for the termination of the Applicant's services is in issue. The Applicant alleges that his services were terminated on an allegation that he refused to work on public holidays. While the

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Respondent alleges that it terminated the Applicant's employment because he was in breach of a contractual obligation which was detrimental to the Respondent.

The Applicant in his evidence stated that he is 33 years of age and was employed by the Respondent on the 1st August, 1989 as a Stock Controller. His duties were stock taking ensuring that the books balanced setting out a balance sheet to show profit and loss and to supervise the bar attendants in giving them the correct prices. The Applicant's duties also included dispatching stocks to the different departments of the Respondent. He attended requisitions for stock from bar attendants. The Applicant's employment was in writing. He worked 6 days a week. He worked on Gazetted public holidays but was compensated for that by the Respondent. MR MOSES MASEKO was the Applicant's immediate superior. The Applicant worked continuously for the Respondent until April, 1993 when he was dismissed. The dismissal was in writing.

The Applicant received his letter of dismissal on the 21st April, 1993 after lunch. The letter was served by MR. NING who is the owner and Managing Director of the Respondent. The reason for dismissal is not stated in the letter of dismissal. When the Applicant received the letter of dismissal from MR. NING he was not told the reason for his dismissal either orally or in writing. The Applicant does not know of any reason for his dismissal. Before dismissal the Applicant was not called to any disciplinary inquiry. Before his dismissal the Applicant did not receive any letter or written particulars accusing him of any misconduct in the company and no charges were preferred against him. Prior to his dismissal the Applicant remembers one instance when MR. NING told him that as a result of his (applicant) not

coming to work during holidays the Respondents work was being delayed and there was a backlog.

The Applicant stated that after a gazetted holiday in April his payslip did not show the reward for working on a public holiday. The Applicant queried this with MR NING. MR NING's response was that he was no longer going to pay the Applicant for working on public holidays. The Applicant asked MR. NING that if he was not going to be paid for

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The Applicant stated that after a gazetted holiday in April his payslip did not show the reward for working on a public holiday. He does not identify the date in question. Exhibit P1 shows that he worked 21 days in the month of April up to the 21st April, 1993 when his services were terminated. It is not clear to us therefore as to what payslip the Applicant is referring to which he received in the month of April, 1993 which did not show a reward for working on a public holiday. We say this because it appears from the evidence that the month of April, 1993 had not been completed at the time when the Applicant's services were terminated. To add more confusion to this aspect of the case the Applicant says after receiving his payslip for the month of April, 1993 which did not show his reward for working on a gazetted public holiday he stopped working on public holidays in April, 1993. The Applicant makes no effort to inform the Court the date when he stopped working on public holidays. He does not state which public holiday he did not work.

The evidence we have referred to when viewed with further evidence of the Applicant when he stated prior to his dismissal MR NING told the Applicant that as a result of the Applicant not coming to work during holidays the Respondent's work was being delayed and there was a backlog. The Applicant should have made an effort to eliminate the confusion which his evidence had introduced into his claim. He chose not to do so. We are therefore left with unsatisfactory evidence to rely on this aspect of the case. We are aware that it is not for the Applicant to prove that his dismissal was fair or unfair as this onus rests on the Respondent. But having alleged that he was not paid for working on a gazetted public holiday. Having alleged that his payslip for the month of April 1993 did not show a reward for working on a gazetted public holiday. Having further alleged that he stopped working on gazetted public holidays in April, 1993. Having further alleged that his employer had told him that his decision not to work on gazetted public holidays was delaying the work of the Respondent and there was a backlog. The Applicant should have clarified the confusion.

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working on a holiday was he expected to come to work at all on public holidays. MR NING's reply was that the Applicant could do whatever he felt like doing. The Applicant noticed that the other employees were rewarded for working on public holidays. The Applicant then stopped working on public holidays. He stopped in April, 1993. The Applicant did not receive any complaint nor letter charging him for not coming to work on public holidays.

On the day of dismissal the Applicant was paid the following terminal benefits :

1. Wages - 21 days worked - April, 1993 at E23-23 - E487-83
2. Leave - 16 days for 1993 at E23-23 - E371-68
3. Severance pay 20 days at E23-23 - E464-60
4. Notice - one month - E604-00
5. Additional Notice 11 days - E255-53

TOTAL PAID E2183-64

The Applicant stated that he worked overtime during mid month stock taking and during the end of the month stock taking and when there were changes on prices of the goods sold by the Respondent. This would be after 19 hours when bottle stores have closed. The Applicant stated that during 1989 to 1992 he worked overtime. The overtime so worked has been outlined in a schedule annexed and titled Annexure A. The Applicant stated that he worked a total of 618 hours overtime. The Applicant stated that at the time of his dismissal he was earning E460 per month calculated as E2-79 per hour. He is now making a claim of overtime in the sum of E1728-28. The Applicant stated that he used to

work 8 hours per day.

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We have difficulty with the Applicant's claim that he earned E640 per month salary or that his salary was E2-79 per hour. We say this because in his own case he has stated that he was paid wages worked for the month, leave pay, severance allowance, notice pay as well as additional notice pay as reflected on exhibit P1 the letter of dismissal dated 21st April, 1993. The Applicant says he worked 8 hours per day. Exhibit P1 calculates the Applicant's salary as E23.23 per day. The Applicant has not disputed that his salary was E23.23 per day. He only disputes the monthly total which he puts at E640.00 per month while the Respondent pursuant to exhibit P1 puts it at E604.00 per month. If as the Applicant says he worked 8 hours per day and does not dispute the E23.23 per day rate then his rate per hour was E2.90. If he worked 6 days per week then his monthly salary per average was E557.52 for a 20 day month or E580.75 for a 31 day month.

That is at 6 days worked per week in a 30 days month the Applicant would have worked 24 days. Taking the salary rate of E23.23 per day multiplying to the 24 days worked in the month. The total sum worked is E557.52. While in a 31 days month the number of days worked in 25 multiplying it with E23.23 it gives a sum of E580-75. But if we take the rate chosen by the Applicant that he earned E2.90 per hour multiply it with 8 hours worked per day at 6 days per week or 24 days per month. We get a total of E556.80 per month a salary. While in 25 day month at a rate of E2.90 per hour, 8 hours per day the sum is E580.00 per month. It will be noticed therefore that the salary claimed by the Applicant of E640.00 per month is not supported by the figures. We have opted to take the sum of E604 per month salary accepted by the Respondent as it is beneficial to the Applicant instead of the E557.52 or E580.75 which he is legally entitled to.

In any event if the Applicant's calculations were truly correct then he would have found himself in the position that the payment made by the Respondent under exhibit P1 represents an over payment for which a refund would be due and payable to the Respondent.

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The Applicant has not in any way suggested that he raised the question of alleged overtime worked and unpaid with MR NING. This claim arose after the termination of his services. The Applicant is now claiming 6 months salary as compensation. He completed Form 5. He holds an intermediate certificate in book keeping and accounts. He is married. He has 4 children. He is now employed. He obtained employment in October, 1993.

Under cross examination the Applicant's attention was drawn to Clause 2 of the letter dated 1st August, 1989 his letter of employment. The Applicant said he was familiar with the letter. But when Clause 2 was read to him he said he was surprised because he was never one day off. Let in his evidence in chief the Applicant stated that he worked 8 hours per day, 6 days a week.

The Applicant was informed that it was never a term of his contract that he would be compensated at 1.5 for working overtime. His reply was that that is why I have come to this Court to make this claim because while I was still with the employer I was afraid to raise such issues. It was put to the Applicant that he never challenged the Respondent on the question of overtime when he signed the contract. His reply was, why I tolerated all this was because I wanted to secure my job with the Respondent but once he discovered that he was not given days off in lieu of overtime worked then he raised this claim.

Responding to questions from the Court the Applicant stated that there were some mistakes in the calculation appearing on Annexure A which shows hours worked as overtime as 618 hours. After a fresh calculation the Applicant gave 306 hours as overtime.

The Respondent in Defence led evidence of PW1 MOSES MASEKO a Manager in the Beverage Department who testified that his duties are to make orders for beverages and stock taking of same. DW1 stated that the Respondent's policies with regard to a person who has worked overtime

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is that the person who has worked overtime would be compensated by a day off. DW1 stated that the Respondent's policy with regard to work on public holidays is that people in the junior staff would be compensated by a monetary payment which is one public holiday is two days payment. DW1 recalls taking stock with the Applicant. DW1 stated that the Applicant was allowed a Saturday off every month for the time taken on stock take as compensation. DW1 stated that the Applicant would be asked to work about 3 hours two times a month overtime and in turn he would be allowed one Saturday off.

Under cross examination DW1 stated that the Respondent only kept record of the overtime hours worked for the junior staff because they are paid for that. DW1 stated that when the Applicant worked as a junior staff member he was paid for overtime worked but once he joined the senior staff he was not paid instead he was allowed an off day.

Responding to questions put by the Court DW1 stated that they work on public holidays in the hotel industry. Speaking for ourselves and from the evidence given by both the Applicant and DW1 working overtime was never an issue between the parties until the services of the Applicant were terminated. This would further tend to give weight to the Respondent's evidence that the Applicant as a senior staff member was not entitled to be paid for overtime worked but was instead given days off. We are therefore not satisfied that the Applicant after working overtime for the Respondent was not compensated for such overtime by days off. For this reason and the reasons given earlier on we are therefore left no option but to dismiss this head of claim.

We now come to the question of compensation sought. The Applicant said he was not given a written warning during his term of service with the Respondent. He was not charged for any misconduct or accusation by the Respondent. The Respondent did not hold a disciplinary inquiry before terminating the services of the Applicant. No grounds were given for terminating the Applicant's services. Evidence has been led as to the personal circumstances of the Applicant and the circumstances leading

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to the termination of the Applicant's services by the Respondent. We have also looked at the actual loss suffered by the Applicant. We are aware that the Applicant has since secured alternative employment. We are also mindful of the Applicant's age.

We are satisfied that the Applicant was in the continuous employment of the Respondent when his services were terminated. We are satisfied that the Respondent did not give the Applicant any reason for terminating his employment. We are satisfied that no disciplinary hearing was conducted by the Respondent prior to terminating the Applicant's services. We are further satisfied that the Applicant was not charged for any act of misconduct by his employer prior to terminating his services.

The Applicant's case is that his dismissal was wrongful and unfair. The Respondent has not led evidence to show that such dismissal was indeed reasonable or fair. The person that decided to dismiss the Applicant was not called. We do not know what prompted the Respondent to terminate the services of the Applicant nor do we know what evidence the Respondent had before terminating the Applicant's services. We do not know what conclusion the Respondent placed on such evidence. Taking the case in its entirety the Respondent has failed to show that it took into account all the circumstances of the case and decided that it was reasonable to terminate the services of the Applicant. In the circumstances it is our decision that the dismissal of the Applicant by the Respondent was both wrongful and unfair.

We have already tabulated the circumstances leading to the termination of the Applicant's services. It is ordered that the Respondent do pay the Applicant 3 months salary in the sum of E1812.00 by way of compensation.

The members have concurred.

MARTIN SAMSON BANDA PRESIDENT

- INDUSTRIAL COURT