## IN THE INDUSTRIAL COURT OF SWAZILAND

**HELD AT MBABANE** 

CASE NO, 336/01

In the matter between:

MSHUMAYELI NDZIMANDZE APPLICANT

And

INTAMAKUPHILA TRANSPORT RESPONDENT

CORAM:

NKOSINATHI NKONYANE : A .J.

GILBERT NDZINISA : MEMBER

DAN MANGO : MEMBER

FOR THE APPLICANT : MR. Z. DLAMINI

FOR THE RESPONDENT : MR. M. MABILA

RULING - 14/12/04

The Applicant brought an application for determination of an unresolved dispute in terms of Section 85(2) of the Industrial Relations Act of 2000. The Applicant told the court that he was employed by the Respondent as a bus conductor in May 1998 and was earning a monthly salary of E500;00. He told the court that

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he was in continuous employment until 10 September 2000 when the Respondent dismissed him.

The evidence by the Applicant revealed that he was dismissed pursuant to a tyre that got lost belonging to the Respondent's bus in which the Applicant was a conductor. The tyre was left at a filling station at Tshaneni for safe keeping. When he came to collect the tyre on another day, it was no longer there.

The Applicant reported the matter to the bus owner. The bus owner told him to go and look for the tyre. He did so but all was in vain. He then reported the matter to the police. The Applicant went to report to the bus owner that he did not find the tyre. The bus owner suspended him on 02 September 2000 and was not told when to come back. On 10 September 2000 he went back to work, but he was on that day dismissed.

During cross examination the Applicant denied that he went to the filling station on his own to collect the tyre. He also denied that a hearing was held before he was dismissed. He also denied that he absconded from work.

After the Applicant's case was closed, the Respondent's attorney moved an application for absolution from the instance. It was argued on behalf of the Respondent that it had not been shown that the Applicant was dismissed by the Respondent and that therefore the Respondent has no case to answer. It was also argued that the Applicant's evidence was full of untruths and contradictions.

The application was opposed by the Applicant's attorney who argued to the contrary and said the Applicant had made out its case requiring the Respondent to answer.

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The question as to when may the court grant an application for absolution from the instance is addressed by the learned authors: Herbstein and Van Winsen in 'The Civil Practice of the Supreme Court of South Africa" (1997) 4th edition pages 681-685. The learned authors on page 681 refer to the case of Gascovne v Paul & Hunter 1917 TPD170 at page 173 where there is the following formulation:

"At the dose of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff?... The question therefore is, at the close of the case for the plaintiff was there a prima facie case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?"

The evidence before the court revealed that the Applicant after having reported the loss of the tyre, he was told to go and look for it .He went to look for the tyre but he did not find it. He came back to report that he had failed to find the tyre, and it was then that he was dismissed.

The Applicant did not abscond when told to go and look for the tyre. He came back to his employer. The employer however told him to go away and not come back to the place of employment.

The court will therefore answer the question raised in the above captioned formulation in the affirmative, and find that there is evidence in this case upon which a reasonable man might find for the Applicant.

From the foregoing observations, it follows that the application was ill-founded and it will have to be dismissed.

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The court will accordingly dismiss the application. No order for costs is made. The members agree.

NKOSINATHI NKONYANE AJ.

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