

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

In the matter between:

**CASE NO. 96/2002**

**CHRISTOPHER ZWANE    APPLICANT**

**and**

**THE MBABANE CLUB    RESPONDENT**

**CORAM**

N. NKONYANE: ACTING JUDGE

G. NDZINISA: MEMBER

D. MANGO: MEMBER

FOR APPLICANT: X. HLATSHWAKO

FOR RESPONDENT: Z. JELE

**J U D G E M E N T    19.07.05**

This is an application for the determination of an unresolved dispute brought in terms of Section 85(2) of the Industrial Relations Act No. 1 of 2000.

The applicant is Christopher Zwane a Swazi male adult of Mbabane area. The respondent is a legal person by the name of Mbabane Club situated in Mbabane.

In its papers the applicant stated that he was employed by the respondent in April 1987 as a groundsman. He said he was in continuous employment by the respondent until 22 December

2001 when he was summarily dismissed. He stated that he was summarily dismissed on the ground that he absented himself from duty without authority on 25 October 2001.

At the time of his dismissal the applicant was earning E600.00 per month.

He is asking the court to make an order that the respondent pays him;

1. <i>Maximum compensation for unfair dismissal</i>	<i>E7,200.00</i>
2. <i>Notice pay (1 month)</i>	<i>600.00</i>
3. <i>Additional notice pay (13 x 4 x 30)</i>	<i>1,560.00</i>
4. <i>Severance allowance (13 x 10 x 30)</i>	<i>3,900.00</i>
5. <i>December 2001 pay</i>	<i>600.00</i>
6. <i>December 2001 bonus</i>	<i>600.00</i>
7. <i>Leave pay underpayment (110 days x 30)</i>	<i>3,300.00</i>

The application is opposed by the respondent. In its papers the respondent stated that the applicant was dismissed for deliberate and continuous absenteeism.

The respondent also raise a point in *limine* that this court has no jurisdiction to entertain the claim for leave pay in the sum of E3,300.00 as a period of six months had elapsed since the issue giving rise to the dispute first arose.

The court will deal with this point later in this judgement.

Two witnesses testified before the court. It was the applicant himself and Andre Botha who testified on behalf of the respondent.

The evidence led before the court revealed that the applicant was employed by the Mbabane Club, Golf Section also referred to as the Golf Club. He was employed as a grounds man and tee box cutter.

He was staying at Jubukweni area, across the Mbuluzi river. His homestead was situated at about 2 km away from the bus station.

On rainy days he would arrive at work late because he would walk on foot up to Mbuluzi High School to catch a bus. He said his employer knew about this problem. He told the court that on a pay day, the workers would have a half day, that is, they would leave at 1.00 p.m. to get their money from the bank and report to work on the following day.

He started to have problems at work when the Captain of the Golf Club was Scott McNeill, in the year 2000.

He told the court that the workers did not receive their statements from the Swaziland National Provident Fund (S.N.P.F.). The foreman sent him and Vusi Dlamini to the S.N.P.F. to go and make investigations. The employer got to know about this move and from that time on, the relationship became sour.

The Captain, Scott McNeill told the applicant and Vusi Dlamini that they should consider to leave their employment. They did not do that however. On another occasion Mr. Scott McNeill told them that he wished that they should stop working for the Club.

The applicant was called to a disciplinary hearing held on 28 February 2001. After that hearing he was given a final written warning.

By letter dated Saturday 10 November 2001, the applicant was summarily dismissed. The basis of the dismissal was that the applicant deserted his place of work without authority on 25 October 2001.

During cross-examination of the applicant, his evidence that the strife began when him and Vusi went to the S.N.P.F. to enquire about their statements was not challenged. It was also not denied that on two occasions Scott McNeill told the applicant and Vusi that he wanted them to stop working for the Club.

The applicant in his evidence also told the court that they got permission to have half days on a payday from Mr Blignaut. Mr. Blignaut was not called to testify in court and rebut that piece of evidence.

The applicant told the court that on the 25<sup>th</sup> October 2001 when he left work and did not come back, he had reported to the Foreman. This evidence was not rebutted. The court learnt that the Foreman, Shorty Dlamini and Vusi Dlamini have since passed away.

The applicant was also accused of absencing himself without authority on the 5<sup>th</sup> and 6<sup>th</sup> February 2001. He told the court that he had sought permission on those two days from the Foreman. He told the court that his wife had given birth at home and he had to attend to her and that that child died. That evidence was not rebutted.

The applicant was also accused of falsifying the entries in the time sheet. The applicant denied that and said it was not possible for him to do that as the Foreman also countersigned the time sheet.

He was also accused of failure to report for work on Saturday 24 February and Sunday 25<sup>th</sup> February 2001 after having been given instructions to do so. The applicant denied that he defied instructions. He told the court that he never got the message. The evidence revealed that Mr. Blignaut gave the instructions to the Foreman, Shorty Dlamini. During the hearing on Wednesday 28<sup>th</sup> February 2001, the minutes "R9", reflect that Shorty Dlamini confirmed the applicant's evidence that he (the applicant) had not received the message.

The bulk of the applicant's evidence in court remained uncontroverted. This was due to the fact that relevant witnesses were not called. Some of the important witnesses, namely, Vusi Dlamini

and Shorty Dlamini have passed away. Scott McNeill, the court was told, is overseas. The court is not aware why Mr. Don Blignaut was not called to give evidence in court.

The witness who testified on behalf of the respondent, Andre Botha did not assist the court. He was clearly not a reliable witness. He was prepared to say anything in court that would be in favour of the respondent. For example, he told the court that it was not true that the applicant was not in good terms with Mr. Scott McNeill. He did not say however how did he know that. He told the court that he was told by Mr. Scott McNeill about the actions of the applicant. It seems to the court that this witness was just brought to court by virtue of his position as the Vice Captain, but he seemed not to have first hand information about what was going on between the workers and Mr. Scott McNeill.

During cross-examination Mr. Andre Botha admitted that the time book was co-signed by the foreman. He also admitted that he was told by the Club Captain that the applicant absented himself for two days. When put to him that the applicant did report to the Foreman, he said he got information that that was not done. He further admitted that the instruction that the workers should come to work on certain weekend was given to the Foreman. He agreed that it was possible that the applicant did not get the message.

As already pointed out, this witness' evidence did not assist the respondent as he was not a reliable witness. Most of what he told the court was hearsay evidence as he got it from Mr. Scott McNeill.

From the evidence led before the court, the court is satisfied that the charges levelled against the applicant were ill founded. Mr. Scott McNeill was looking for any reason that he could find in order to get rid of the applicant.

The evidence showed that Mr. Scott McNeill had ill feelings towards the applicant and Vusi Dlamini because they went to the S.N.P.F. to enquire about their contributions as the employees suspected that the respondent was not making the contributions.

Furthermore, the minutes of the disciplinary hearing held on 28<sup>th</sup> February 2001, show that the evidence led there exonerated the applicant from the charges that he was facing. Strangely enough, the Chairman, Mr. Scott McNeill went ahead to find the applicant guilty and issued a final warning.

In light of the foregoing observations, the court will come to the conclusion that the applicant has proved on a preponderance of probabilities that he was dismissed unfairly both procedurally and substantively.

The court will come to the conclusion that the respondent has failed to discharge the onus resting on it in terms of Section 42 (2) (a) and (b) of the Employment Act, No.5 of 1980 namely, that the reason for the termination was one permitted by Section 36 and that, taking into account all the circumstance of the case, it was reasonable to terminate the service of the employee.

#### RELIEF

The applicant listed seven claims in its prayer. Prayer (7) only is being challenged, being the leave pay underpayment of E3,300.00.

It is not the amount that is in dispute. The respondent is simply saying that this court should not entertain the claim because six months have elapsed since the issue-giving rise to this dispute first arose.

The issue-giving rise to the dispute before the court was the dismissal of the applicant by the respondent and not the leave pay underpayment. The applicant was dismissed on 22<sup>nd</sup> December 2001. The applicant claims that the dismissal was unfair. He reported a dispute and the matter was conciliated upon on 22<sup>nd</sup> March 2002, about four months later and clearly within the statutory six months period.

The leave pay underpayment was just one of the claims that the applicant had against the respondent following his unfair dismissal.

No objection was lodged either before the Commissioner of Labour or the CMAC that the claim for the leave pay underpayments was not due to the applicant.

The point in limine is therefore dismissed, as the issue-giving rise to this dispute was the unfair dismissal of the applicant, and not the leave pay underpayment.

**SECTION 76(4) OF THE INDUSTRIAL RELATIONS ACT NO.1 OF 2000 STATES:-**

***"A dispute may not be reported to the Commissioner of Labour if more than six months have elapsed since the issue giving rise to the dispute first arose, but the Commissioner of Labour may subject to subsection (5), in any case where justice requires extend the time during which a dispute may be reported".***

Having reported the dispute on time, the applicant was clearly entitled to reveal to the Commissioner of Labour, the CMAC Commissioner and to the court that he was underpaid his leave pay whilst still working for the respondent.

Since the respondent has not denied that the applicant was being underpaid his leave pay, there is no good reason why it should not be ordered to make good the leave pay arrears.

The court having taken into account the totality of the evidence before it and the personal circumstances of the applicant will make the following order; that the respondent is to pay the following amounts to the applicant as the result of the unfair dismissal;

8. ***Maximum compensation for unfair dismissal (12 x 600)***
- |  |                                  |
|--|----------------------------------|
|  | <b><i>E7,200.00</i></b>          |
|  | <b><i>600.00</i></b>             |
|  | <b><i>1,560.00</i></b>           |
|  | <b><i>3,900.00</i></b>           |
|  | <b><i>600.00</i></b>             |
|  | <b><i>600.00</i></b>             |
|  | <b><i><u>3,300.00 E1</u></i></b> |

9. *Notice pay (1 month)*
10. *Additional notice pay (13 x 4 x 30)*
11. *Severance allowance (13 x 10x30)*
12. *December 2001 pay*
13. *December 2001 bonus*
14. *Leave pay underpayment (110 days x 30)*

***TOTAL***

The members agree.

**N. NKONYANE**

**ACTING JUDGE - INDUSTRIAL COURT**