

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

In the matter between:

**CASE NO. 339/2001**

**SAMUEL P. SIMANGO**

**APPLICANT**

**and**

**SWAZILAND DEVELOPMENT &**

**SAVINGS BANK**

**RESPONDENT**

**CORAM**

**N. NKONYANE: ACTING JUDGE**

**G. NDZINISA: MEMBER**

**D. MANGO: MEMBER**

**FOR THE APPLICANT: P.R. DUNSEITH**

**FOR THE RESPONDENT: Z.D. JELE**

**J U D G E M E N T 11.10.05**

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

The applicant is a former employee of the respondent bank. At the time when the dispute arose he was holding the position of Head of Commercial Credit.

The applicant's claim is that the respondent unlawfully and unfairly withdrew his employment benefit without any prior hearing and without his consent. The applicant wants the court to make an order that the respondent restores the said benefit.

In his statement of claim the applicant stated that he was first employed by the respondent on the 6<sup>th</sup> November 1996 as Senior Manager Risk Management. He said he was allocated a company vehicle, to wit, a Toyota Camry 2L executive sedan, for his personal use both on and off duty. He said the respondent paid the costs of fuel. He said he was being taxed for the private use of the motor vehicle. He said he used the motor vehicle until 25<sup>th</sup> April 2001 when the respondent withdrew the benefit and he was ordered to surrender the motor vehicle to the Administration Manager.

The application is opposed by the respondent. In its reply the respondent said that the applicant's terms and conditions of employment did not provide for a company motor vehicle. The respondent said that the applicant was never allocated a motor vehicle on a personal to holder basis. The respondent averred that the motor vehicle was allocated to the department and placed under the control of the applicant to be used in the carrying out of his duties.

The applicant testified under oath before the court. On behalf of the respondent three witnesses testified.

It was not in dispute that the applicant was using the motor vehicle both on and off duty. It was not in dispute that he was being taxed for using the motor vehicle as an employment benefit. It was also not in dispute that the motor vehicle was eventually withdrawn from the applicant and he was ordered to surrender it to the Administration Manager.

What is in dispute is how the applicant came to use the motor vehicle on and off duty. The applicant told the court that he got permission to use the motor vehicle off duty from the then Acting Managing Director, Alan Dixon. The respondent said the applicant was never granted such permission, as there was nothing in writing to that effect.

The evidence before the court revealed that the applicant used the motor vehicle for about four years before it was withdrawn. During these years management never queried him about the use of the motor vehicle even after hours. The applicant told the court that the other senior expatriate managers at the bank had personal motor vehicles. He raised a query about that with Mr. McNie,

who was the Managing Director at that time. Mr. McNie was a member of a management team called AMSCO. Mr. McNie however left the bank without having resolved the applicant's query.

After Mr. McNie left, a certain Mr. Alan Dixon became the Acting M.D. The applicant pursued the matter with him. At that time it was a certain Mr. P.J. Harvey and the applicant who were senior managers. Mr. Dixon acceded to the applicant's request, and he was allocated the motor vehicle. The applicant was also given petrol coupons. Mr. Harvey and Mr. Dixon also had personal coupon books. The applicant told the court that the other senior managers were aware that he was using the motor vehicle for work and personal errands.

When the applicant was allocated the motor vehicle RW1, Vinah Nkambule was not at Swazi Bank. RW1 told the court that the bank's policy was that all motor vehicles were to be parked at the bank's premises.

During cross-examination RW1 conceded that she did not have knowledge of the direct communication between the parties. She said she depended on the letters on file.

RW2, Mavis Vilane told the court that she was the Senior Manager, Human Resources since 2003. She said it was a question of fact that the applicant was using the motor vehicle off duty. She said when the team of management IDI was leaving and revising the policies of the bank, the taxing of the applicant's benefit was then stopped. She also told the court that the organization chart on page 19 of exhibit "B" was in operation in November 1996. That chart shows that the applicant was one of the three senior managers at that time.

RW3 Justice Thulani Mbuli told the court that he was the Administration Manager at the relevant period. He said he was responsible for the bank's motor vehicles. He said some motor vehicles were allocated to various posts and others to the pool section. He said during the AMSCO term of management of the bank, personal motor vehicles were allocated to the M.D. and the two senior managers who were on contract. He said any other staff member would be written a letter to say whether or not he/she should get a bank's motor vehicle. He said he was never given a letter entitling the applicant to the bank's motor vehicle. He said when he became the

Administration Manager, the applicant was already using the motor vehicle. He said he assumed that he was given the right to use the motor vehicle.

During cross-examination RW3 told the court that although the applicant was a senior manager, he was not however equal to the two other senior managers. He said the other two expatriate senior managers were given personal motor vehicles in terms of their written contracts of employment.

The applicant, RW2 and RW3 were impressive witnesses. RW1 was not an impressive witness. She was not at the respondent's establishment at the relevant time. She rightly told the court that she depended on the correspondence to deal with the issues that arose when she was briefly appointed Acting M.D. of the bank.

The question that the court must determine is whether the applicant had the right to the benefit that he was enjoying. It was argued on behalf of the respondent that he did not have such a right, as it was not part of the terms and conditions of his employment contract.

In support of the respondent's argument, the court was referred to the case of **TITUS NZIMA Vs SWAZILAND POSTS AND TELECOMMUNICATIONS CORPORATION (I.C.)** case No. 139/95. In that case the applicant's contention was that the respondent had unilaterally and unlawfully withdrawn payment of housing allowance, thus the respondent changing the conditions of employment of the applicant. The respondent's contrary argument was that the housing allowance was never a term of the employment contract capable of enforcement. The respondent contended that it was an item that was raised as being under consideration, and that the payment of the allowance was erroneously made to the applicant. The respondent said upon the discovery of the error, the payment was then withdrawn in terms of Section 56 (1) (e) of the Employment Act No. 5 of 1980.

The court's finding in that case was that it was never a term of the contract of employment that the applicant shall be entitled to housing allowance. The application was accordingly dismissed.

That case is however distinguishable from the present one. In the present case the applicant is not relying upon the terms of his contract of employment with the bank. The applicant's contention is not that he was given the motor vehicle to use on and off duty in terms of his written contract of employment.

The applicant, in the pleadings and when giving evidence in court said that he was allocated the motor vehicle to use both on and off duty. The applicant was a senior manager. The other senior managers were allocated motor vehicles for personal and business purposes. The other senior managers were expatriates and the applicant was a local.

The applicant then wrote to the Managing Director and asked that, he also be allowed full access to a company motor vehicle. The Managing Director at that time, Mr. Michael M. McNie, did not accede to this request. Instead, Mr. McNie gave instructions that the motor vehicle be allocated to the department. The senior manager of the department, being the applicant was to have control of the motor vehicle.

The applicant pursued the matter of full access to the company car. Mr. McNie however had to leave the bank. Mr. Alan Dixon became the Acting Managing Director. The applicant again pursued the matter with him. Mr. Alan Dixon eventually acceded to the applicant's request.

The applicant said he was allocated a Toyota Camry 2L sedan. He said the motor vehicle was previously being used by Mr. Alan Dixon and was involved in an accident, and Mr. Dixon had been allocated another motor vehicle.

The respondent is urging the court not to believe the applicant's evidence that he was allocated the motor vehicle mainly for two reasons. One, because it was not a term of his contract of employment. Two, because there was nothing in writing to prove that he was indeed allocated the motor vehicle to use outside of working hours.

The first ground of the respondent's argument will be dismissed forthwith as it was clearly misguided. As already pointed out by the court, the applicant's case is not that he was given the motor vehicle in terms of his employment contract. In paragraph 4 of his application he stated

that after he was appointed Senior Manager, Risk he was allocated the company motor vehicle for his personal use both on and off duty. That was what he also told the court in his evidence.

So, both in his pleadings and in his evidence before the court, his case was that he was allocated the motor vehicle, not that it was given to him in terms of his written contract of employment.

The second ground of the respondent's argument was that it was most unlikely that the authority to use the company motor vehicle for personal and business errands could have been done without reducing it into writing.

The respondent's argument is not that Mr. Dixon had no authority to allow the applicant to use the motor vehicle for both personal and official duties. If that was the respondent's case, the matter would be standing on a different footing before the court. The enquiry then would have been whether or not Mr. Dixon had the authority. If not, *cadit questio*. The application would be dismissed.

Presently, the evidence by the applicant that the motor vehicle was allocated to him to use on and off duty by Mr. Alan Dixon has not been rebutted. It was clear to the court that the respondent was having an uphill battle in trying to rebut that evidence especially because Mr. Dixon and Mr. McNie are no longer working at the bank. There was no evidence however, that it was impossible to have them called to come and testify before the court and rebut the evidence of the applicant.

The court is alive to the fact that the standard of proof in this court is not proof beyond any reasonable doubt. The standard of proof is the balance of probabilities.

The evidence in this case showed that it was known both by the senior managers and other staff members that the applicant was using the motor vehicle on and off duty. Since the other senior managers were expatriates and had special contracts entitling them personal motor vehicles, the court finds that it was unlikely that they would have allowed their local counterpart to also enjoy the same benefit, if it were not for the fact that the Acting Managing Director had approved of it.

Secondly, there was a policy that bank motor vehicles should remain within the bank compound overnight. It is unbelievable that the bank could let the applicant violate this policy for about four years. The only reasonable explanation is that the applicant was not reported or disciplined for violating that policy because it was known that he had the authority to use the motor vehicle on and off duty.

Furthermore, there was no evidence that the applicant was taking the motor vehicle home overnight surreptitiously. If there was such evidence, the court could easily infer that he knew that he had no authority to use the motor vehicle off duty.

Thirdly, the applicant was being taxed for using the motor vehicle. He was taxed because it was regarded as a personal benefit. During the cross-examination of the witnesses, it was being suggested to them that the taxation was done by junior staff members, and therefore could have made an error when they effected the tax on the applicant.

The evidence however revealed that the management was aware of the applicant's taxation. RW2 said that her office consulted with the Administration Manager on the issue. RW1 said there was a general directive from the income tax department, and the bank pinpointed the employees to be taxed.

RW1 during cross-examination said there was no instruction from senior management to tax the applicant. That evidence by RW1 showed again that she was not a credible witness. She was not working at the respondent bank at that time. How could she have known what was going on at the bank. When she was confronted with the letter in exhibit "B" on page 32, she then agreed that senior management was aware that the applicant was being taxed for using the motor vehicle on and off duty. The letter on exhibit "B" page 32 was written by the Senior Manager, Human Resources to the applicant and the subject was "Tax on Benefit."

The evidence clearly showed that the staff members and senior managers of the bank knew that the applicant was using the motor vehicle on and off duty. He was therefore taxed. None of the staff members or the senior managers of the bank raised any query. The knowledge of this fact by the employees means that the bank was aware of the factual position (see **CONNOCK'S**

**MOTOR CO. v. SENTRAAL WESTELIKE KO-OP. (1964 (2) S.A. 47 (T)).** The court will come to the conclusion that no query was raised about the taxation of the applicant because it was known at the bank that the applicant had been given the authority to use the motor vehicle on and off duty, hence his name appeared on the list of people to be taxed at the bank.

Fourthly, there was the unchallenged evidence of the applicant that the issue of the withdrawal of the motor vehicle was raised by Mr. John Whelan who was a member of the IDI management team. The applicant said John Whelan was being motivated by malice because the applicant was instrumental in the sacking of the IDI management team.

The evidence that the applicant was involved in the sacking of the IDI team was further confirmed by RW3 during cross-examination.

If Mr. John Whelan knew or thought that the applicant did not deserve the use of the bank's motor vehicle off duty, why did he not raise the issue immediately and have the motor vehicle withdrawn from the applicant? Why did he wait until the eve of his departure?

From the unchallenged evidence that Mr. John Whelan had a score to settle with the applicant for being involved in the sacking of the IDI team, and his conduct of raising the issue that the motor vehicle be withdrawn on the eve of his departure from Swaziland, the court can only arrive at one conclusion, that he was just being motivated by malice and spirit of revenge.

The evidence revealed that Mr. John Whelan was at the bank for about eighteen months. It is strange that he did not raise the issue for all that period, but only to raise it when he was leaving the country.

In the light of the foregoing observations, the court will come to the conclusion that the applicant has proved on a preponderance of probabilities that he had the right to use the motor vehicle on and off duty because he was authorized by Mr. Alan Dixon, who was at that time Acting Managing Director of the respondent.



The applicant's application must therefore succeed.

Relief: -

*The court was told that the applicant is no longer in the respondent's employ. The applicant is therefore no longer pursuing prayers (a) and (b) of its application. The applicant now only wants compensation for the benefit that was withdrawn from him.*

The court was asked to base the calculations based on exhibit "B" page 6 or alternatively the monthly taxation on the benefit of E572:00. The court will not use the figures appearing on exhibit "B" page 6. Those figures are applicable only when the bank's executive has purchased the motor vehicle using the car scheme. The applicant did not acquire the motor vehicle by using the car scheme. It was the bank's motor vehicle and had been allocated to him.

The court will therefore have recourse to the amount of taxation. In terms of the letter dated 14<sup>th</sup> January 1999, exhibit "B" 30, the tax was set at E572:00 per month. That figure was however recalculated and fixed at E223:08 per month by the letter dated 17<sup>th</sup> February 1999, exhibit "B" 32. The court will therefore use this figure of E223:08.

The 300 litres of fuel consumption per month was not challenged. The court will therefore take the figure of E1,086:00 per month for petrol as it stands. The total benefits per month therefore is (E1,086:00 + E223:08) E1,309:08.

The court was told that the respondent has recently extended a motor vehicle allowance to all managers and senior managers with effect from 01.09.2004.

The court will therefore make an order that the respondent pays the applicant the sum of E1,309:08 per month with effect from April 2001 when the motor vehicle was taken from him until August 2004.

No order for costs.

The members are in agreement.

N. NKONYANE

ACTING JUDGE- INDUSTRIAL COURT