

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 31/05

In the matter between:

VICTOR MASHININI

Applicant

and

**BRAHBUDAS SHANDRAKAT
C/O CITY BOTTLE STORE**

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : S. DLAMINI

FOR RESPONDENT : NO APPEARANCE

J U D G E M E N T – 09/08/06

[1] The Applicant Victor Mancoba Mashinini applied to the Industrial Court for determination of his claim against the Respondent Brabhudas Shandrakat trading as City Bottle Store for reinstatement alternatively compensation for unfair dismissal, and payment of unpaid wages, leave, overtime, and notice pay.

[2] According to the certificate of unresolved dispute filed of record, the parties attended before CMAC for conciliation. The Respondent

confirmed a prior agreement to pay the Applicant's wages for June 2004, but the rest of the Applicant's claims were disputed.

- [3] The application was served on the respondent personally on the 2nd February 2005, and service was duly proved by affidavit of service. Nevertheless the Respondent did not attend at court on the date notified nor on the postponed date, and the matter was referred to exparte trial.
- [4] On 7th August 2006 the ex parte trial commenced. The Applicant testified under oath, and in the absence of the respondent his evidence was unchallenged.
- [5] He stated that he was employed by the Respondent as a shop assistant at City Bottle Store, Mbabane on 4th November 2002. He worked continuously for the Respondent until his services were terminated on 5th July 2004. At the date of termination he was earning E1013.00 per month.
- [6] According to the Applicant, at the close of business on 5th July 2004 the Respondent told him not to come to work on the following day. The Applicant reported for work on the 7th July 2004, only to find that another shop assistant had been employed in his place. Upon enquiry the Respondent said the Applicant could no longer work there because he was stealing stock from the bottle store and as a result there was a stock shortage.
- [7] No disciplinary enquiry was conducted by the Respondent and the

Applicant was given no opportunity to answer to this allegation of theft.

[8] The Applicant was not paid his wages for June 2004 and the days worked in July 2004, nor was he given any notice of termination of his services. He testified also that he was never granted any leave during his employment nor was he paid in lieu of the 17 leave days due to him.

[9] The Applicant further testified that the normal working week in the retail industry is 48 hours, but he was required to work 57.5 hours per week without being paid overtime.

[10] The court is satisfied that the Applicant, at the time his services were terminated, was an employee to whom section 35 of the Employment Act 1980 (as amended) applied.

[11] In the absence of any lawful justification for the termination of the Applicant's services being provided by the Respondent, as required in terms of section 42 of the employment Act, the court finds that the services of the Applicant were unfairly terminated, both substantively and procedurally.

[12] The Applicant seeks an order for reinstatement to his employment by the Respondent. Section 16 of the Industrial Relations Act 2000 (as amended) empowers the court to make such an order.

[13] It is the view of the court, after careful deliberation, that it is not reasonably practicable to order reinstatement. The Applicant was dismissed and replaced more than (2) years ago. The business where he was employed only has four employees. In all probability the Applicant cannot be economically accommodated in such a small enterprise. Forcing the Respondent to reinstate the Applicant may threaten the viability of the business and the job security of the other

employees.

[14] It is unfortunate that the labour laws of Swaziland do not expressly provide the machinery for interim reinstatement or “status quo” orders. The Applicant’s case is a good example of a matter where an urgent interim reinstatement order could not only have immediately restored the status quo ante an unfair dismissal, but in all likelihood also prompted an internal resolution of the dispute at the workplace.

[15] After the elapse of two years, it is not possible to try and restore the status quo in the circumstances of this application. Nevertheless, the Applicant is entitled to be compensated for the loss of his employment and the arbitrary and humiliating manner in which this came about.

[16] The Applicant is 25 years of age, married with three children. He has been unable to secure fixed employment since his dismissal. His short length of service (17 months) and relatively young age mitigate against maximum compensation being awarded, but the gross unfairness of his summary dismissal without a hearing on unsubstantiated allegations of dishonesty are aggravating features.

[17] The court awards the Applicant 10 (ten) months salary as compensation. He is also entitled to be paid his wages for days worked; his leave pay, overtime arrears; and notice pay.

In money terms, the award of the court is as follows:

Wages for June 2004	E 1013.00
Wages for days worked in July 2004	E 167.00

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Leave days (17 x E38.96)	E 662.00
Overtime (247 hours x E4.87 x 1.5)	E 1804.33
Notice pay	E 1013.00
10 months wages as compensation	E10130.00

TOTAL AWARD **E14789.65**

Judgement is entered for the Applicant in the sum of E14,789.65. The respondent is ordered to pay the costs.

The members agree

P. R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT