

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 302/2002

In the matter between:

AMOS BHEKINKOSI MASEKO

Applicant

and

**SWAZILAND NATIONAL FIRE &
EMERGENCY SERVICES**

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: S. MAGONGO

FOR RESPONDENT: N. MARANGANE

J U D G E M E N T -7/12/2007

1. The Applicant applied to the Industrial Court claiming payment of compensation for unfair dismissal, notice pay and leave pay. At the end of his evidence in chief, this claim was amended without opposition by the Respondent to include claims for additional notice, severance allowance, and reinstatement as an alternative to compensation for unfair dismissal.

2. It is common cause that the Applicant was employed by the Swaziland Government as a fireman in the Department of Fire & Emergency Services based at Siteki Fire Station, with effect from 4th February 1993.

3. It is also common cause that the Applicant absented himself from work for eight (8) consecutive shifts over the period 31st August 1996 to 27th September 1996 without permission.

4. According to the Applicant, he fell ill shortly before 31st August 1996 with dizziness and hallucinations. His co-workers conveyed him to the Good Shepherd Hospital where he was admitted over night. The following day the hospital discharged him, but after a day he suffered a relapse. His neighbours took him to see a traditional healer, since his illness was not a conventional medical condition. He asked the mother of his children to report to his duty station that he was sick and under treatment by a traditional healer at Ludzeludze. The mother of his children has since died, and there is no evidence before the court that she did make this report.

5. The Applicant testified that on the morning of the 30th September 1996 he reported for work. He worked until the late afternoon, when he was called by his supervisor Philemon Dlamini, who was the Station officer in charge of Siteki Fire Station. He found the Station Officer in his office with two Leading Fireman, Zacheus Dlamini and Musa Dlamini. Both these Leading Fireman are since deceased.

6. The Station officer demanded a medical certificate to confirm that the Applicant had been ill. The Applicant explained that he had no medical certificate since he had been treated by a traditional doctor. The Station officer showed the Applicant a letter written by the Divisional Officer, Mpendulo Fakudze. The letter recommended that the Applicant be dismissed because he had absconded from work. The Station Officer then informed the Applicant that he was dismissed. He refused to give the Applicant a copy of the letter recommending his dismissal.

7. The Applicant says that he wished to have some written record that he had been dismissed. He asked Zacheus Dlamini for permission to record that he had been dismissed in the Station's Daily Occurrence Book. Zacheus agreed, and he wrote in the Occurrence Book that he had been dismissed by Philemon Dlamini. He then left his work station and never returned.

8. In 1997 he reported a dispute to the Labour Commissioner. The dispute was referred to conciliation, but the management of the Fire and Emergency refused to reinstate him. A certificate of unresolved dispute was issued, and the Applicant instituted proceedings in the Industrial Court.

9. The Respondent disagrees with the above version of the Applicant in a few important respects:

9.1. Philemon Dlamini testified that during the Applicant's absence from 30th August to 27th September 1996, no word of his whereabouts or explanation for his absence was received from anyone, and it was assumed that he had deserted his employment.

9.2. When the Applicant reported for work on 30 September 1996 and claimed to have been under treatment by a traditional healer, Philemon Dlamini says he offered to drive with the Applicant to the home of the traditional healer but the Applicant did not accept this offer. Philemon then showed the Applicant the letter from the Divisional Officer recommending his dismissal, and advised him to go and get a sick sheet from a medical practitioner.

9.3. Philemon Dlamini insists that he did not dismiss the Applicant. He says that he had no authority to dismiss the Applicant in terms of Government General Orders and the Civil Service Board Regulations and he could not have done so.

9.4 Philemon Dlamini says the Applicant did not return to work after being sent to get a sick sheet. He later went to the Applicant's house to look for him but he was not there. Disciplinary proceedings could not be instituted against the Applicant because he had disappeared.

10. The material disputes of fact which arise from the different versions of the parties may be summarized as follows:

10.1. Whether the Applicant was ill and under treatment by a traditional healer throughout the month of September 1996 when he was absent from work for eight consecutive shifts.

10.2. Whether the Station Officer Philemon Dlamini dismissed the Applicant on 30th September 1996, or merely sent him to fetch a sick sheet to verify his absence due to ill-health and the Applicant thereafter deserted his employment.

11. The Applicant gave a consistent account of his illness, providing the name and

location of the traditional healer. There are no inherent improbabilities in this account. The Respondent did not provide any evidence which suggests that the Applicant was not under treatment by a traditional healer at the relevant time, and the court accepts the Applicant's factual version that the reason for his absence from work for eight consecutive shifts was because he was undergoing treatment by a traditional healer.

12. This does not mean that the Applicant's reason for his absence constitutes an acceptable excuse. Section 36 (f) of the Employment Act 1980 provides that it shall be fair for an employer to terminate the services of an employee where the employee absents himself from work for more than three working days in any period of thirty days without either the permission of the employer or a certificate signed by a medical practitioner certifying that he was unfit for work on these occasions. "Medical Practitioner" refers to a medical practitioner who is registered to practice by the Swaziland Medical and Dental Council in terms of the Medical & Dental Practitioners Act, 1970.

13. An employer is not obliged in law to accept an allegation of ill health as sufficient excuse for absenteeism unless the employee provides a medical certificate certifying him as unfit for work. The Applicant never provided a medical certificate, and the Respondent was entitled to regard him as absent without lawful excuse. In other words, the Respondent had fair reason to dismiss the Applicant in terms of Section 36 (f) of the Act, and was entitled to institute disciplinary proceedings against him with a view to his dismissal from the Civil Service.

14. The Applicant alleges that he was summarily dismissed by the Station officer without proper disciplinary procedures being followed. The Applicant testified that the verbal dismissal was recorded contemporaneously in the Daily Occurrence Book. The Occurrence Book was produced in court. At 1655 hours on 30 September 1996 the following entry was recorded in the book:

"UFM ZF Dlamini reported FM AB Maseko off duty due to instruction from Station Officer PM Dlamini that he had been sacked or dismissed from work."

15. The duty officer who made this entry, one Wesley Maseko, is since deceased. The entry is a record of what was reported to Wesley Maseko by Leading Fireman Zacheus Dlamini as the reason for the Applicant leaving the station. The Respondent's witness Philemon Dlamini confirmed that Zacheus Dlamini was present

during his discussion with the Applicant on 30th September 1996 and that Zacheus was instructed to cause the reason for Applicant leaving the station to be recorded in the Occurrence Book. The entry in the book thus provides substantial corroboration of the Applicant's allegation that he was dismissed from work by the Station Officer Philemon Dlamini in the presence of Zacheus Dlamini.

16. The Respondent's counsel argues that the entry in the Occurrence Book is false. Either Zacheus Dlamini caused a fabricated entry to be made, or the duty officer made a false entry. This is highly improbable. There was no reason at the time why any of these officers, including the Applicant, would want to make a false record that the Applicant had been dismissed. It is also highly unlikely that disciplined officers in the Fire & Emergency Service would fabricate an entry in the Occurrence Book, in the absence of any personal advantage and with the strong likelihood of discovery.

17. The court also regards the Station Officer's evidence that he does not check the entries in the Daily Occurrence Book with a great deal of skepticism. It is part of the Station Officer's duty to keep abreast of occurrences at his station and this requires him to scrutinize the Daily Occurrence Book and verify the entries made. In our view if the entry in the Occurrence Book was fraudulent, the Station Officer would have discovered this and corrected it.

18. There is further corroboration of the Applicant's version. It is recorded in the certificate of unresolved dispute that whilst the matter was under conciliation before the Labour Commissioner, *"the Respondent Department submits that the Applicant was dismissed fairly for absconding from work for a month without a doctor's report for his absence."*

19. Philemon Dlamini confirms that he was present at the conciliation meeting. He denies that he submitted the Applicant had been fairly dismissed, but this is what was recorded at the time by the conciliating officer. The contents of the certificate have never been challenged by the Respondent.

20. The Respondent has not adduced any evidence to corroborate the version of Philemon Dlamini. His version is also inherently improbable. Why would he have sent the Applicant to obtain a medical certificate knowing full well that the Applicant had been treated by a traditional healer, not a medical practitioner? Furthermore, the entry in the Occurrence Book reflects that the Applicant was signed out at 1655 hours. This was in the middle of his 24 hour shift. It is improbable, indeed

unbelievable, that the Station Officer would have sent the Applicant off duty at 5 p.m. in the middle of his shift to obtain a sick sheet. He must have known that hospitals and medical practitioners do not attend to such administrative issues after 5 p.m. Why then release the Applicant in the middle of his shift?

21. Weighing the probabilities, and considering the significant corroboration provided to the Applicant's version by the Occurrence Book entry and the certificate of unresolved dispute, the court is driven to the finding that the Station Officer did as a matter of fact purport to terminate the services of the Applicant after showing him the Divisional Officer's letter recommending his dismissal.

22. Where the Swaziland Government is the employer, the termination of the services of a public officer must comply strictly with the laid down statutory procedures, failing which the termination is a nullity.

Schierhout v The Minister of Justice 1926 AD 99;

Njenje v Swaziland Government 1963-1969 SLR 221.

23. It is common cause, and specifically conceded by the Respondent's counsel, that Philemon Dlamini had no authority to dismiss the Applicant and that none of the formal disciplinary procedures prescribed by Regulations 42-44 of the Civil Service Board (General) Regulations were observed. The purported dismissal of the Applicant was in the circumstances an invalid and unlawful repudiation of the Applicant's contract of employment.

24. Notwithstanding that the Respondent has fair and lawful grounds which justified terminating the Applicant's services in terms of section 36 (f) of the Employment Act 1980, the unlawful and ultra vires manner in which the termination was carried out renders the dismissal substantively and procedurally unfair.

25. The Applicant introduced an alternative claim for reinstatement during the trial. This is not an appropriate case in which reinstatement can be granted. Not only have eleven years elapsed since his dismissal, but in the interim he has been re-employed by the Swaziland Government and again dismissed for absenteeism.

26. In assessing what amount, if any, should be paid to the Applicant as compensation for his unfair dismissal, the court will give due weight to the following factors:

26.1. The Applicant's personal circumstances.

26.2. The inconvenience, hardship and sense of injustice the Applicant must have experienced as a result of the summary and premature termination of his services;

26.3. The proved fact that the Applicant absented himself from work for eight consecutive shifts without permission or lawful excuse;

26.4. The unacceptability of indiscipline and absenteeism in an emergency service.

27. After careful consideration, the court awards the Applicant three (3) months salary in the sum of E4135-11.

28. With regard to the claim for severance allowance, section 34 (1) of the Employment Act 1980 provides that such allowance is only payable if the services of an employee are terminated other than under the provisions of section 36 (a) - (j). Having found that the Respondent had fair reason to terminate under section 36 (f), no severance allowance is payable.

29. The Applicant is entitled to be paid notice and additional notice pay amounting to a total of E1880. He led no evidence to show that any leave was due to him when his services were terminated, and his claim for leave pay must fail.

30. Judgement is entered against the Respondent for payment as follows:

Notice and additional Notice	E1880-00
Compensation	E4135-11
Total	<u>E6015-11</u>

The Respondent is to pay the Applicant's costs.

The members agree.

**PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT**