

**IN THE INDUSTRIAL COURT OF SWAZILAND****HELD AT MBABANE****CASE NO. 35/2004**

In the matter between:

**ELIJAH ZANDAMELA****Applicant**

and

**MATSAPHA CONSTRUCTION SERVICES  
(PTY) LTD****Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : M. SHABANGU****FOR RESPONDENT : C. MOTSA**

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**J U D G E M E N T -20/03/07**

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1. The Applicant has instituted proceedings in the Industrial Court against the Respondent claiming payment of terminal benefits and maximum compensation for unfair dismissal.
2. It is common cause that the Applicant was employed by the Respondent as a bricklayer in about March 2000, and that he is an employee to whom Section 35 of the Employment Act 1980 (as

amended) applies.

3. It is also common cause that the Applicant requested and was granted leave to attend to his sick wife on 2<sup>nd</sup> and 3<sup>rd</sup> September 2002, and it was agreed that the Applicant would return to work on Wednesday 4<sup>th</sup> September 2002. What happened thereafter is the subject of considerable dispute between the parties.
4. The Applicant testified that he reported for work on the Wednesday, as previously agreed, but the foreman Dan Banda told him that he should return home because he had taken long to return and there was no longer any job for him. The Applicant understood this to mean that his services were being terminated. He went to town and telephoned the Respondent's manager Mickey Figaredo to query whether he was really dismissed. Figaredo promised to investigate and return the call, but the Applicant did not hear from him. After about two weeks, the Applicant telephoned the foreman Banda, but he was told there were still no vacancies. A week later the Applicant went to the Respondent's work site. Banda was not there. He noticed that a new bricklayer had been employed in his place. The Applicant then reported a dispute to CMAC, claiming that he had been unfairly dismissed.
5. A conciliation meeting at CMAC was not convened until January 2003. When the parties met at CMAC, the Respondent said that the Applicant could return to work. He declined this invitation because he had commenced new employment at the end of October 2002.

6. In its Reply, the Respondent denies that the Applicant was dismissed. The Respondent alleges that the Applicant did not report for duty on Wednesday 4<sup>th</sup> September 2002 as agreed. Instead he reported for work more than 12 days later. He absented himself from work without permission for a period of more than 3 days and effectively abandoned his work station.
7. Not a single element of this defence was put to the Applicant in cross-examination. The Applicant's factual account of the events on Wednesday 4<sup>th</sup> September 2002 and his verbal dismissal by Banda was not challenged or contradicted under cross examination, save that it was put to the Applicant that he could not have telephoned Figaredo because the latter was out of the country on 4<sup>th</sup> September 2002.
8. The Applicant called one witness Gcina Gumedze to support his version. Gumedze said he was employed by the Respondent as a bricklayer from 1996 to 2003. He worked together with the Applicant. He remembers that the Applicant was once absent from work on the Monday after pay day in August 2002. He recalls the Applicant returning to work later in that same week, though he does not remember the exact day. There was a discussion between Applicant and the foreman Banda. He could not hear what was discussed, but after the discussion the Applicant left site and never returned to work.
9. The effect of Gcina's evidence is that it corroborates the Applicant's version that he returned to work on Wednesday 4<sup>th</sup> September

2002 and he was turned away by Banda.

10. In cross-examination, Gcina was asked where he was working when he witnessed the discussion between the Applicant and Banda, and he said they were busy extending a house at Eveni. It was put to him that he only started work at Eveni after the Applicant stopped working for the Respondent, but he denied this.
11. The Respondent's witness Dan Banda gave a very different account of events after the Applicant was given leave of absence. Banda said the Applicant was given three days leave, and he was supposed to return on Thursday 5<sup>th</sup> September 2002- but he never showed up. A further period of between 9-12 days elapsed, then the Applicant telephoned. He apologized for his absence, and said there had been problems at home. Banda told the Applicant to come to work so that they could discuss the matter, but he never came. After some days, Banda received a call from a certain Vilakati from the Labour Department, who asked him why he had dismissed the Applicant. Banda denied dismissing him, and said he was free to return to site. The Applicant did not return, and the Respondent was summoned to conciliation at CMAC. The Applicant was invited to return to work, but he refused because he had found another job.
12. Banda was asked how Gumedze could have seen him talking to Applicant on or after Wednesday 4<sup>th</sup> September 2002 if Applicant never returned to work. His response was that Gumedze's evidence is false, because he (Gumedze) left the employ of the Respondent at the end of August 2002. As proof of this assertion,

he produced the Respondent's wages register for 2002. There are two entries in August 2002 in respect of Gumedze, one for the payment of 29 days wages, and a separate entry for the payment of 8 days leave. There are no entries in the months September-December 2002 for Gumedze. Banda states that the register shows that Gumedze stopped working in August 2002 and was paid his leave pay. He must therefore be lying when he says he witnessed a discussion on or after 4<sup>th</sup> September 2002 between Applicant and Banda.

13. None of this was put to the Applicant or to Gumedze in cross-examination when they testified. On the contrary, it was put to Gumedze that he started work at the Eveni site in October 2002. The Respondent applied for Gumedze to be recalled for further cross-examination, and this was allowed by the court in the interests of justice. The Applicant, however, had no opportunity to deal with the issue in his evidence.
14. Gumedze was recalled and cross-examined. He could not remember the date he left the Respondent's employ, but he stuck to his evidence that he worked on the Eveni site until the house was completed, and he witnessed the discussion between Applicant and Banda. He also insisted that Applicant stopped working for the Respondent before him.
15. The Respondent also called Mickey Figaredo, its director. He said that from the end of August to late September 2002 he was in the USA. He could not be sure of the precise dates he was away, but he stated that on 4<sup>th</sup> September 2002 he was in the USA and he

could not be contacted on his cell phone since it did not have a 'roaming' facility. He also had no recollection of receiving a call from the Applicant.

### **ANALYSIS OF THE EVIDENCE**

16. Both the Applicant and Dan Banda presented their testimony in a forthright and convincing manner, and neither of them were materially shaken in cross-examination. Since their versions are mutually destructive, it is necessary for the court to ascertain whether there is any corroboratory evidence, or inherent probabilities, improbabilities or inconsistencies which weight the scales in favour of one or other of the versions.
17. The Applicant's witness Gcina Gumedze can be regarded as an independent witness. No close relationship with the Applicant or other reason to give partisan testimony has been shown to exist. He was very convincing as a witness. He did not "gilt the lily", as witnesses called to give false testimony frequently do, and his recollection of the last time he saw the Applicant at work was credible simply because he did not purport to remember all the surrounding details.
18. The production of the wages register appeared at first blush to destroy Gumedze's evidence, since if he was no longer working for the Respondent after August 2002 he could not have observed the discussion between Applicant and Banda on the 4<sup>th</sup> September 2002. However, the Applicant's counsel highlighted an anomaly in the register, namely that the Applicant's name does not appear in the register for the months of April, May and August 2002, yet he

was working for the Respondent during this period.

19. The Respondent's witnesses were unable to explain this anomaly. The person who completes the register was not called as a witness. Since the register does not accurately record the months when the applicant was at work, it cannot be relied on as an accurate record of the months when Gcina Gumedze was at work either.
20. The payment of leave pay to Gumedze in August 2002 likewise does not reliably prove that he did not work for the Respondent thereafter: The register reflects payment of leave pay to workers in April 2002 who are again registered in May 2002 as "new" employees. Figaredo said in his evidence that the payment of leave pay to Gumedze signified that a particular job had been finished, namely the construction of a wall around the US Embassy. The next job was construction of the house at Eveni, where Gumedze says he was working in the first week of September 2002.
21. In our view, it would be unsafe to rely on the register to prove that Gumedze left the employ of the Respondent at the end of August 2002, particularly in the absence of any evidence from the witness who kept the register and made the entries.

The evidence of Gumedze survives to support the Applicant's version.

22. The court initially considered it most improbable that Banda would grant the Applicant leave, then dismiss him on his return for being away too long. Figaredo testified that the Respondent employs its workers for specific projects, and at the end of a project their services are terminated. This may be the reason why Banda told

the Applicant his services were no longer required, since the US Embassy project had recently been completed. This explains the apparent improbability, but does not justify the termination of the Applicant's services, since it is common cause that the Applicant is an employee to whom section 35 of the Employment Act applies.

23. An inconsistency in the Respondent's Reply weighs against Banda's version of events. In the Reply, Respondent pleads that the Applicant reported for work more than 12 days later than Wednesday 4<sup>th</sup> September 2002. This contradicts Banda's evidence that the Applicant never reported for work on or after 4<sup>th</sup> September 2002. The suggestion by Respondent's counsel that the Reply contains a typing error is less than convincing.
24. Finally there is the denial by Figaredo that he received a telephone call from the Applicant on 4<sup>th</sup> September 2002. Although Figaredo was rather tentative as to the dates of his sojourn in the USA, there is no reason to doubt the bona fides of his assertion that he has no recollection of being called by the Applicant. Figaredo is a busy man and he may simply not remember a call from one of his bricklayers nearly 5 years ago, but even accepting that the Applicant has fabricated this telephone call to Figaredo, we do not believe that this discredits that part of his version which is corroborated by Gumedze.
25. On appraising all the evidence, the court finds it proved, as a matter of fact, that the Applicant returned to work after his leave and that his services were summarily terminated by Dan Banda. Since no fair reasons have been advanced by the Respondent for such



termination, and no hearing was held, we find that the termination of the Applicant's services was substantively and procedurally unfair.

26. The Applicant is entitled to be paid his notice and additional notice pay and severance allowance, as claimed.

27. Taking into account the Applicant's personal circumstances; the fact that he obtained alternate employment within a short time; and the offer made by the Respondent to reinstate him, we consider that an award of 6 months remuneration is reasonable compensation for unfair dismissal.

28. The Respondent is ordered to pay the Applicant as follows:

28.1	Notice pay	810-00
28.2	Additional notice pay	162-00
28.3	Severance allowance	405-00
28.4	Compensation	4860-00
	<b>TOTAL</b>	<b><u>E6,237-00</u></b>

29. The Respondent is to pay the Applicant's costs.

The members agree.

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