

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 317/2002**

In the matter between

<b>WINIIE DLAMINI</b>	<b>1<sup>st</sup> Applicant</b>
<b>BARNABAS MAVUSO</b>	<b>2<sup>nd</sup> Applicant</b>
<b>MAKHOSONKHE MAKHANYA</b>	<b>3<sup>rd</sup> Applicant</b>
<b>SAM MGABHI</b>	<b>4<sup>th</sup> Applicant</b>
<b>THEMBA MTSETFWA</b>	<b>5<sup>th</sup> Applicant</b>
and	
<b>BUNYE BEMASWATI BUILDING CONSTRUCTION (PTY) LTD</b>	<b>Respondent</b>

**CORAM:**

<b>P. R. DUNSEITH:</b>	<b>PRESIDENT</b>
<b>JOSIAH YENDE:</b>	<b>MEMBER</b>
<b>NICHOLAS MANANA:</b>	<b>MEMBER</b>
<b>FOR APPLICANT:</b>	<b>N. G. DLAMINI</b>
<b>FOR RESPONDENT:</b>	<b>S. HLOPHE</b>

**JUDGEMENT-16/07/07**

1. The Applicants have applied to court for determination of an unresolved dispute. In their particulars of claim, they allege that on 25<sup>th</sup> October 2001, whilst they were in the employ of the Respondent, they were temporarily laid-off and told to return to work on 29 October 2001. On 29<sup>th</sup> October 2001 they were told that they would be called once there was work to be done. To date, they have never been recalled and their terminal benefits have never been paid over to them.

2. The Applicants are claiming reinstatement to their employment alternatively payment of statutory terminal benefits and compensation for unfair dismissal.
3. The Respondent in its reply admits that it laid-off the Applicants, due to scarcity of work and having no money to pay their wages. The Respondent also admits that it has not recalled the Applicants to date because there is still no work available for them.
4. The Respondent alleges in its reply that the Applicants were employees "as and when work was available" i.e. seasonal workers.
5. The Respondent also avers that the 5<sup>th</sup> Applicant was duly paid his terminal benefits.
6. Finally, the Respondent alleges that *"the Applicants do not fall within the provisions of section 40 of the Employment Act 1980 in that they are four in number as the 5<sup>th</sup> Applicant was paid his terminal benefits."*
7. It is common cause on the pleadings that the Applicants were laid-off by the Respondent and told that they would be recalled once work was available, but they have never been recalled.
8. On the pleadings, the issues in dispute that arise for determination are the following:
  - 8.1. were the Applicants seasonal workers;
  - 8.2. did the Respondent's indefinite lay off of the Applicants and subsequent failure to recall them to work constitute an unfair dismissal;
  - 8.3. was the Respondent obliged to comply with the provisions of section 40 of the Employment Act 1980 in respect of a retrenchment of the Applicants;
  - 8.4. was the 5<sup>th</sup> Respondent paid his terminal benefits; and

8.5. are the Applicants entitled to payment of their claims and, if so, to what extent.

9. At the commencement of the trial, the attorney for the Applicants conceded that the 5<sup>th</sup> Applicant had been paid his statutory benefits.

10. The 1<sup>st</sup> Applicant Winile Khanyisile Dlamini testified that she was employed by the Respondent on the 1<sup>st</sup> October 1997, as a secretary. On 25<sup>th</sup> October 2001 she received a letter from the Respondent in Siswati, the contents of which may be translated as follows:

**"Problem of reduction of work**

*You are kindly asked to stop coming to work because of reduction of work and when the situation returns to normal you will be notified. Please leave your telephone number or residential address. We hope you will be cooperative during this hard time we are facing."*

11. The 1 Applicant says that 13 other employees received the same letter. All 14 laid-off employees approached the Labour Department for advice. The Labour Officer called the Respondent to advise that an indefinite lay-off was not acceptable and a date should be fixed when the laid-off workers could return to work.

12. The laid-off workers were subsequently given written notification by the Respondent to "please come and check on 19/11/2001." On 19<sup>th</sup> November 2001 there was still no work available, and they were told to come back on 29 November 2001. On 29 November 2001 they were again turned away because no work was available, but they were not given any date on which to return. Since then the Applicants have never been called back to work.

13. The 1<sup>st</sup> Applicant said that they returned to the Labour Office on 29 November 2001 after being turned away by the Respondent, and they reported to the Labour Officer Ms. Stukie Mamba. Ms. Mamba telephoned the Respondent's director but they had a misunderstanding and Ms. Mamba then prepared a report of dispute on behalf of the Applicants and forwarded it to the Conciliation, Mediation and Arbitration Commission. The dispute could not be resolved and a certificate of unresolved dispute was duly issued by the Commission.

14. Winile Dlamini said that she was unemployed until April 2004 when she found another job. She has never been paid her statutory terminal benefits.

15. Under cross examination, it was put to the 1<sup>st</sup> Applicant that some of the laid-off workers were recalled to work in July 2002, but she said she was not aware of that. She also confirmed that she has continued to occupy her company accommodation at Bhunya since she was laid-off. She received notice from the Respondent on 31 January 2002 to vacate by the end of February 2002, but her attorney advised her to remain in occupation until she is paid her terminal benefits. The notice to vacate states that on failure to vacate before the end of February 2002 the rent will be deducted from the 1<sup>st</sup> Applicant's benefits.

16. The 2<sup>nd</sup> Applicant Barnabas Mthango Mavuso testified that he was employed as a bricklayer in June 1997. He was one of the workers laid-off on 25<sup>th</sup> October 2001. He substantially confirmed the sequence of events as narrated by the 1<sup>st</sup> Applicant. He also received a letter requiring him to vacate his company accommodation by the end of February 2002. He did vacate the flat, notwithstanding that he has never been paid his terminal benefits. He is about 80 years of age, and he does not seek an order for reinstatement as he is too old. He has never been employed since he was laid-off.

17. Under cross-examination, the 2<sup>nd</sup> Applicant confirmed that he wrote a letter to the Respondent on the 17 January 2002 in Siswati. A translation of the contents of the letter reads as follows:

*"I apply to leave the company Bunye Bemaswati. The money I contributed is E2000.00."*

18. It was put to him that by this letter he resigned his employment on 17 January 2002. He responded that he was merely withdrawing as a member of the company. He had been given the option to acquire shares for E5 000.00, and he had contributed E2000,00. He did not intend by this letter to resign from his employment since he regarded himself as already dismissed. His intention was to receive the payment he had made towards the purchase of shares because he no longer wished to take up the shares and he needed the money.

19. The 3<sup>rd</sup> Applicant Makhosonkhe Makhanya testified that he was employed in June 1998 as a general assistant. He was laid-off on 25 October 2001. He regarded his lay-off as a dismissal because no date was set for him to return to work. He substantially confirmed the sequence of events narrated by the 1<sup>st</sup> Applicant. He has never been employed since he was laid-off.

20. In cross examination it was put to him that he was never dismissed by the Respondent, but instead he failed to wait for work to become available. He insisted that he was dismissed by the letter dated 25 October 2001.

21. The 4<sup>th</sup> Applicant Sam Mgabhi testified that he was employed as an assistant bricklayer on 15 July 1997. He was stopped from working on 25 October 2001. Although this Applicant was rather confused as to dates and the sequence of events, he did state that he went back to the Respondent on 19<sup>th</sup> and 29<sup>th</sup> November 2001 to find out if work was available. He considered himself dismissed when no work was available and no date was given when he might return to work. He has been unemployed since he was laid-off.

22. Under cross-examination, the 4<sup>th</sup> Applicant agreed that the Applicants reported a dispute in a form signed by Winile Dlamini on 12<sup>th</sup> November 2001. He agreed that according to such report he had already been dismissed by the 12<sup>th</sup> November 2001.

23. The 5<sup>th</sup> Applicant Themba Lennie Mtsetfwa testified that he was employed in June 1997 as a fence constructor. He was laid-off on 25<sup>th</sup> October 2001. He substantially confirmed the sequence of events described by Winile Dlamini. He said that after the dispute was reported to CMAC, he received payment of his statutory terminal benefits comprising notice pay and severance allowance. He is now claiming his leave pay and maximum compensation for unfair dismissal. He has never been re-employed since he was laid-off.

24. Under cross-examination, the 5<sup>th</sup> Applicant confirmed that the dispute was reported to the Commissioner of Labour on 12<sup>th</sup> November 2001 ex facie the report of dispute. Asked why he reported a case of unfair dismissal when the letter of 25<sup>th</sup> October 2001 refers to a temporary stoppage of work, he said that there were two reasons. Firstly, the Respondent employed casuals to do the Applicant's work after the layoff. Secondly, the lay-off letter did not give any date to return to work. The 5<sup>th</sup> Applicant said he asked for payment of his terminal benefits in January 2002 because

he considered that he had been dismissed.

25. The Applicants also called Stukie Patricia Motsa-Mamba to testify on their behalf. Ms Mamba is a Senior Labour Officer. She was approached by the Applicants for advice after they received Respondent's letter dated 25 October 2001. She telephoned the Respondent and spoke to its director Mr. Mncina. He confirmed that the Applicants had been laid-off due to shortage of work. Ms. Mamba told Mr. Mncina that workers must be laid-off until a specific date. On her advice, the Respondent thereafter told the laid-off workers to return to work on 19<sup>th</sup> November 2001.

26. Ms. Mamba informed the laid-off employees that a lay off should generally not exceed 14 days in terms of the law. After 14 days, the employer was obliged to either restore the employees to work or retrench them. She advised the laid-off workers to wait until the 14 day period had elapsed.

27. The advice given by Ms. Mamba was wrong. Regulation 13 of the Regulation of Wages (Building & Construction Industry) Order, 2000 (issued under section 11 of the Wages Act, 1964) provides:

*Lay off*

*13 (1) Where an employer is unable to provide work for any employee due to:*

*(a) unavailability of working materials; or*

*(b) temporary cessation of work;*

*the employer may, subject to that employer giving the employee not less than twenty four hours notice, lay-off the employee without pay for a maximum period of thirty working days in the circumstances mentioned in sub-regulations (a) and (b).*

*(2) At the expiry of thirty working days the employer shall either provide work for the employee, or terminate his employment under the provisions of the Employment Act."*

28. Ms. Mamba testified that the employees returned to the Labour Office

on 12 November 2001. She advised them to fill in a report of dispute form. Before she formally acknowledged receipt of the report, she checked the relevant wages regulation order and discovered her error, namely that the maximum lay-off period was 30 days, not 14. She then advised the Applicants to delay reporting the dispute until the 30 days period had expired.

29. Ms. Mamba said that on 28 November 2001 the Applicants returned to the Labour Office and informed her that they had been to their workplace and there was still no work for them and the employer had sent them away without giving them a date to return. She called the Respondent's other director Guy Dladla, who disconnected his cellphone. Ms Mamba then assisted the Applicants to complete and file a fresh report of dispute. She gave the Applicants a copy of the report to serve on the Respondent, and she transmitted the report to CMAC on the following day.

30. Under cross examination, Ms. Mamba was shown the actual report of dispute form, her acknowledgement of receipt of the form, the transmission to CMAC form which she completed and signed, and the CMAC acknowledgment of receipt of the dispute. Confronted with discrepancies between her evidence and the contents of the forms themselves, Ms. Mamba departed from her evidence in chief in a number of material respects. Without detailing the various contradictions in her evidence, it suffices to say that her credibility was considerably shaken. She was compelled to admit that she acknowledged receipt of the report of dispute on 12 November 2001, not 28 November 2001 as she earlier stated; also, that she discovered her error concerning the maximum lay-off period after she acknowledged receipt of the report, not before as earlier stated.

31. Ms Mamba could not explain why the same report of dispute delivered to her on 12<sup>th</sup> November 2001 was transmitted to CMAC on 28<sup>th</sup> November 2001 when, according to her earlier evidence, she had assisted the Applicants on 28<sup>th</sup> November 2001 to make a fresh report of dispute. She could not say what became of the alleged second report, and why there was no record of its existence.

32. The Respondent's director Joseph Mncina testified on its behalf. He explained that the Respondent is a building maintenance company which was formed by the retrenched workers of Usuthu Pulp Company. The Respondent is dependent on Usuthu Pulp Company for all its contracts of work. In 2001 Usuthu Pulp Company informed the Respondent that it would only be given limited emergency construction work, and it should urgently reduce its costs. The Respondent was obliged to lay-off 14 of its employees to reduce costs.

46. Mr. Mncina substantially confirmed the Applicant's version of events after the letter of lay-off was delivered on 25<sup>th</sup> October 2001. He confirmed that the Respondent demanded that the Applicants vacate their company accommodation. He said the 1<sup>st</sup> and 2<sup>nd</sup> Applicants refused to vacate and are still occupying the flats allocated to them during their employment.

47. Mr. Mncina confirmed receipt of the letter from 2<sup>nd</sup> Applicant dated 17<sup>th</sup> January 2002. He understood the letter to mean that the 2<sup>nd</sup> Applicant was resigning from the Respondent's employ.

48. He said "some days" after the lay-off the Respondent contacted the 3<sup>rd</sup> and 5<sup>th</sup> Applicants to take them to Manzini for a job, but they refused saying that the matter was now with the Labour office. This allegation was however never put to 3<sup>rd</sup> and 5<sup>th</sup> Applicants when they were cross examined.

49. Mr. Mncina said that the Respondent recalled six of the laid-off workers back to work in February 2002. He said the recalled workers were those who remained in their company accommodation and gave the Respondent their contact details.

37. In cross-examination, Mr. Mncina was asked why 1 and 2 Applicants were not recalled to work, since they continued to stay in their company houses. He replied that the employees who were recalled were those who never reported a dispute to the Labour Officer against the Respondent. He added that "you cannot feed dogs who do not hunt for you but for the neighbours." He described the Applicants as "enemies" of the Respondent because they had reported a dispute.

38. The Respondent also called Jacob Bongani Motsa. He said that he was laid off from his employment with the Respondent in 2001, and eventually he and a few others were recalled to work in February 2002. He could not say what criteria the Respondent used in choosing the workers who were recalled.

39. After considering all the evidence adduced by the parties, the court finds the following facts to be proved:

39.1. The Applicants were employees of the Respondent to whom section 35 of the Employment Act 1980 applied. No evidence was led to show that the Applicants were seasonal workers i.e. employed "as and when work was



available";

39.2. The Respondent was unable to provide work for the Applicants due to temporary cessation of contractual work from Usuthu Pulp Company;

39.3. The Applicants were laid-off indefinitely on 25<sup>th</sup> October 2001. After the intervention of the Labour office, the Applicants were told to return on 19<sup>th</sup> November 2001. On this date no work was available and they were told to check again on 29<sup>th</sup> November 2001. On 29<sup>th</sup> November 2001 they were turned away again without any return date being given.

39.4. The Applicants reported a dispute to the Labour Commissioner on the 12<sup>th</sup> November 2001. The dispute was not however transmitted to CMAC until 28<sup>th</sup> November 2001.

39.5. The report of dispute alleged that the Applicants had been dismissed from work on 25<sup>th</sup> October 2001, and that the lay-off was a disguised retrenchment;

39.6. The Respondent recalled other laid-off workers to work in February 2002 but deliberately omitted to recall the Applicants after they had reported the dispute;

39.7. The Respondent gave the Applicants notice in January 2002 to vacate their company accommodation;

39.8. The 5<sup>th</sup> Applicant demanded and was paid his terminal benefits in February 2002.

40. The Respondent was entitled to lay-off the Applicants without pay for a maximum period of thirty working days. At the expiry of this period, the Respondent was obliged to either provide work for the Applicants or terminate their employment under the provisions of the Employment Act.

41. The normal working week in the building and construction industry is from Monday to Friday consisting of 45 hours. "Working days" do not include Saturdays, Sundays

and public holidays. The thirty working days maximum lay-off period commenced on 26 October 2001 and ended on 6<sup>th</sup> December 2001.

42. Before this lay-off period had been completed, the Applicants reported a dispute to the Labour Commissioner and caused such dispute to be transmitted to CMAC. The Applicants claimed that they had been dismissed. They regarded their services as having been terminated. They claimed reinstatement alternatively payment of terminal benefits and compensation for unfair dismissal. Misguided or ill-advised as the premature reporting of the dispute may have been, in our view it constituted a repudiation of the Applicant's employment relationship with the Respondent, at least after the dispute had been transmitted to and received by CMAC on or about 29<sup>th</sup> November 2001.

43. The Applicants' counsel argued that the Respondent committed an unfair labour practice by selectively re-calling those employees who had not reported a dispute. We consider that the Respondent was not obliged to re-call the Applicants because they had already repudiated the employment relationship.

44. The Respondent's demand in January 2002 that the Applicants vacate their company accommodation is consistent with the Applicants having themselves brought the employment relationship to an end,.

45. The 2<sup>nd</sup> Applicant's decision to obtain repayment of the deposit he paid towards purchase of shares in the Respondent is also consistent with a person who no longer considers himself an employee of the Respondent. Likewise with the 5<sup>th</sup> Respondent's request that he be paid his terminal benefits.

46. It is most unfortunate for the Applicants that they reacted negatively to their lay-off and were not prepared to cooperate with the Respondent, as requested in the lay-off notice. Had they been more patient, they may have been recalled to work, or at least been properly retrenched with payment of benefits.

47. Although it is preferable for an employer to stipulate from the beginning the precise period of lay-off, failure to do so does not imply that the laid-off workers have been dismissed. It is implicit from the building regulation that the lay-off may not endure beyond the applicable maximum period.

48. It should be noted that this judgement deals solely with a lay-off permitted by the

relevant wage regulation order for the building and construction industry. Different considerations may apply to a lay-off not permitted by a similar regulation.

49. The Applicants were not dismissed by the Respondent, they were lawfully laid off. The Applicants repudiated their employment, and the Respondent tacitly accepted the termination of the relationship.

50. In the premises, the Applicants claim for reinstatement alternatively compensation for unfair dismissal has no merit.

51. The Respondent has tendered payment of the Applicants' statutory terminal benefits. This tender is generous in the light of the decision we have reached on the merits of the Applicants' case. It is also fair since the Respondent confirms that it would have been obliged to retrench the Applicants, if they had not jumped the gun, because even today no work is available for them.

52. The Applicants are also entitled to their leave pay.

53. We enter judgement, on the basis of the Respondent's tender and liability for leave pay, for payment as follows:

1 <sup>st</sup> Applicant	E5697.49
2 <sup>nd</sup> Applicant	E 8918.31
3 <sup>rd</sup> Applicant	E4181.66
4 <sup>th</sup> Applicant	E5697.49
5 <sup>th</sup> Applicant (leave pay only)	E3681.90
There will be no order as to costs.	

54. There will be no order as to costs.

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