

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 546/07

In the matter between: **NOMSA**

MASUKU

APPLICANT

and

SWAZILAND TELEVISION AUTHORITY

RESPONDENT

CORAM:

NKOSINATHI NKONYANE DAN

MEMBER

MANGO GILBERT NDZINISA

MEMBER

**FOR APPLICANT FOR
RESPONDENT**

**MR. M.C. SIMELANE MR.
S. MASUKU**

JUDGE

JUDGEMENT 17.07.09

[1] The applicant is a former employee of the respondent. She was first employed by the respondent on 28.10.91 as an Assistant Accountant. She moved in rank and was subsequently appointed Chief Accountant. In 1999 she was appointed Acting Financial Controller. She acted in this position for a period of five years. She was dismissed from the respondent's employment on 05.04.06. At the time of her dismissal she had reverted to her substantive position of Chief Accountant.

[2] The applicant was not happy about the way that she was dismissed by the respondent hence she reported a dispute with the Conciliation, Mediation and Arbitration Commission ("CMAC"). The dispute was not resolved at CMAC and she filed the present application for determination of an unresolved dispute with the court.

[3] The applicant in her papers stated that her dismissal by the respondent was unlawful. She stated that the respondent dismissed her on allegations that she went on leave without the authority of the respondent. She denied in her papers that the leave had not been

approved by her supervisor and averred that she was granted the permission to go on leave.

[4] The applicant's application is opposed by the respondent. The respondent stated in its Reply that the applicant was dismissed in terms of **Section 36(f) of the Employment Act, 1980** following her conduct of not attending to work for a period of twenty four (24) days between 14th August and 15th September 2006 without the authority of the employer and without any reasonable explanation.

[5] The evidence led before the court was short and simple. Only three witnesses testified. The applicant testified on her own behalf and two witnesses testified on behalf of the respondent.

[6] The applicant told the court that she was employed by the respondent on 28.10.91 as an Assistant Accountant - She moved up to the position of Chief Accountant in about 1996 or 1997. She first acted in this position and was later confirmed. From 1999 to 2005 she acted in the position of Financial Controller. A new Chief Executive Officer ("CEO") by the name of Vukani Maziya was appointed. The CEO found that there were so many employees who had not utilized their leave days. He recommended that these employees should take their leave days as there was no money to compensate them in lieu thereof. The applicant was one of those employees who had outstanding leave days. She said she had one hundred and forty four (144) outstanding leave days.

[7] The applicant presented two leave application forms to RW2, Mr. Mbusi Dlamini, who was at that time the Acting Financial Controller. The application forms are exhibits "A" and "C" of the applicant's discovered documents. The applicant said the two leave applications were approved by Mbusi Dlamini. Mbusi Dlamini however denied that he approved the two leave applications. He said he only approved one exhibit "C" running from 30.06.2006 to 04.08.2006. The applicant said that it was agreed that she should come to work for one week before she could proceed to take the leave days in the second leave application form, exhibit "A".

[8] The applicant submitted another leave application form, exhibit "B" where she was requesting four days' leave because she wanted to go and take care of a sick relative who had been admitted in Mbabane Government Hospital. At this point a substantive Financial Controller had been appointed. She was Thandi Dlamini. The applicant did not find her in the office when she went to submit the application form, she therefore left it on the table. She said she was able to see Thandi Dlamini later on that day and when the applicant asked her about the leave application, Thandi Dlamini was indignant towards her and told her to go

because it was clear that she wanted to go. In Siswati Thandi is quoted to have told the applicant that "**hamba ke ngobe vele ufuna kuhamba**". The applicant accordingly went away.

[9] The applicant said she was charged for misconduct and/or absenteeism and found guilty and she was dismissed. She appealed and the appeal was dismissed.

[10] RW1, Lucas Gumedze told the court he was the head of administration at the relevant time. He said his office was responsible for advising heads of department and employees of the number of leave days to which an employee was entitled to take. He said once the leave application form was signed by the relevant authorities, it was returned to his office for filing either by the employee or the head of department.

[11] RW2, Mbusi Dlamini told the court that he was employed by the respondent in October 2005 as an Internal Auditor. In November 2005 he was appointed to be the Acting Financial Controller when the applicant was under suspension. He told the court that the applicant submitted two leave application forms for his approval. He said he approved only one leave form, exhibit "6". He said he did not approve the other leave application form because he knew that he would not be in the same position when the applicant would be going on leave in August 2006 as the substantive Financial Controller would have been appointed. RW2 said he saw it proper that the applicant should apply for leave before that person as it would be that person who would know whether it would be convenient to release the officer or not.

[12] RW2 said he does not know if Thandi Dlamini approved the other leave application, exhibit "A". He said he would verbally inform the person making the application for leave if the leave was approved or not.

[13] ANALYSIS OF THE; EVIDENCE:

The applicant's evidence before the court was that the leave was approved by Thandi Dlamini who was the Financial Controller at the time she made the leave application. Thandi Dlamini did not testify before the court. The court was informed that she has since left the respondent and her whereabouts are unknown. The matter was postponed twice in a bid to secure her attendance, but to no avail.

[14] The record of the disciplinary hearing showed that the applicant did state during the

disciplinary hearing *arte* that she was granted the permission to go on leave by Thandi Dlamini. This evidence was important because it shows that the applicant's defence was not an afterthought and that this has been her defence since the charge was put to her. The applicant was a credible and reliable witness. The court therefore accepts the applicant's evidence that she was given the approval to proceed on leave by Thandi Dlamini.

[15] The evidence also revealed that the applicant was acting Financial Controller from 1999 to 2005, a period of about five years. She said she was instructed to go to her substantive position without being given any reasons why she could not be confirmed in the acting position. There was a point where she did not have an office and she used to sit on a sofa designated for visitors in the accounts department. This was the time when the applicant could be expected to have resigned or simply vanish from the place of employment. She did not do that. It is therefore very difficult for the court to believe the respondent's story that the applicant could simply disappear from her place of employment when the evidence show that there was a time when she was really frustrated by the respondent but she did not disappear.

[16] There was no evidence or any suggestion by the respondent as to why a senior officer like the applicant, a Chief Accountant, could simply abscond from work and risk\$ forfeiting all her terminal benefits having worked for the respondent for about fourteen years. The court when weighing the probabilities comes to the conclusion that the applicant's version is more probably than that of the respondent.

[17] The court therefore, taking into account all the evidence led before it and also all the circumstances of the case, will come to the conclusion that the respondent has failed to prove on a balance of probabilities that the dismissal of the applicant was lawful or that it was for a reason permitted by **Section 36(f) of the Employment Act, 1980**. The court will accordingly enter judgement against the respondent.

[18] RELIEF:-

The applicant told the court that she has not managed to secure a job in the formal sector. She said she survives by selling food items to school children. The evidence revealed that the position that she was occupying is no longer available as the respondent underwent a restructuring exercise. In any event she said she was abandoning the prayer for reinstatement. Taking into account the personal circumstances of the applicant and the totality of the evidence before the court, the court will award the applicant an equivalent of ten months salary as compensation for the unlawful ^ismIpral.

[19] Taking into account all the evidence led before the court and all the circumstances of the case the court will order the respondent to pay to the applicant the following:

a)	Notice pay	E8,600:00
b)	Additional notice	E16,053:52
c)	Severance allowance	E40.133:80
d)	Compensation	<u>E86,000:00</u>
	TOTAL	<u>E150,787:32</u>

The members agree.

NKOSINATH1 NKONYANE

JUDGE OF THE INDUSTRIAL COURT