

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 199/2005**

In the matter between:

**FRASER ALEXANDER (SWAZILAND)**

**Applicant**

and

**JABULANI SHONGWE**

**1<sup>st</sup> Respondent**

**PAT JELE (acting in his capacity as  
Deputy Sheriff)**

**2<sup>nd</sup> Respondent**

**BONGANI D LAM IN I t/a B. S. DLAMINI**

**& ASSOCIATES**

**3<sup>rd</sup> Respondent**

**CORAM:**

**P. R. DUNSEITH:     PRESIDENT**

**JOSIAH YENDE:     MEMBER**

**NICHOLAS MANANA:     MEMBER**

**FOR APPLICANT:     X. HLATSHWAYO**

**FOR RESPONDENT:     B. S. DLAMINI**

**JUDGEMENT -14/07/06**

1. Following an arbitration conducted under the auspices of the Conciliation, Mediation and Arbitration Commission, the arbitrator found that the present Respondent Jabulane Shongwe had been unfairly dismissed and ordered the present Applicant to pay the sum of E7200.00 to

the 1<sup>st</sup> Respondent, comprising :

- notice pay in the amount of E1,600.00
- additional notice in the amount of E800.00
  - compensation for unfair dismissal equivalent to 3 months wages amounting to E4800.00.

2. This award was registered and made an order of the Industrial Court on the 28<sup>th</sup> June 2005.

3. It is common cause that the 1<sup>st</sup> Respondent was paid the sum of E3919.50 on about 10<sup>th</sup> March 2006, and that his attorney caused a writ of execution to be issued for the balance of the judgement in the sum of E3281.00 on the 1<sup>st</sup> June 2006.

4. The Applicant brought an urgent application to court, seeking an order in the following terms:

*1. Dispensing with the time limits and the manner of service prescribed by the Rules of Court.*

*2. Condonation for no compliance with the said Rules of Court.*

*3. That a Rule Nisi issues on a date to be chosen by this Honourable Court, calling upon the Respondents to show cause why an order in the following terms should not be made Fmal:-*

*3.1. Restraining Respondents from advertising and selling by auction or in any other method the goods attached pursuant to the Writ of Execution dated the 1<sup>st</sup> June 2006.*

*3.2. Directing the respondents to deliver back to the Applicant the said goods attached pursuant to the Writ of Execution dated the 1<sup>st</sup> June 2006 forthwith.*

*3.3. Directing that prayers 3.1 and 3.2 operate with immediate interim effect.*

4. *Declaring the Respondents' actions of attaching the said goods pursuant to the Writ of Execution wrongful and unlawful.*

5. *Costs at attorney and own client scale.*

6. *Further and/or alternative relief.*

5. The Applicant cited Jabulani Shongwe as 1<sup>st</sup> Respondent, Pat Jele in his capacity as Deputy- Sheriff as 2<sup>nd</sup> Respondent; and Bongani Dlamini as 3<sup>rd</sup> Respondent.

6. Bongani Dlamini is the attorney of the 1<sup>st</sup> Respondent. In the Founding Affidavit, he is alleged to have :

- made the arbitration award an order of this Honourable Court
- sued out a Writ of Execution on behalf of his client the 1<sup>st</sup> Respondent;
- instructed the 2<sup>nd</sup> Respondent to execute the Writ against the Applicant's property
- engaged in correspondence with the Applicant.

7. These actions constitute the normal professional duties of an attorney, yet the Applicant alleges that in performing these duties the 3<sup>rd</sup> Respondent acted maliciously and in bad faith, and that he is

*"intentionally harassing and frustrating the Applicant for no justifiable and legal reason."*

8. The court carefully scrutinized the Founding Affidavit to ascertain on what factual basis the Applicant presumes to make such serious accusations against an attorney. No such factual basis exists.

9. It appears to the court that the 3<sup>rd</sup> Respondent has been cited in these proceedings, and been made the recipient of unjustified allegations of professional misconduct, because his professional view of the law differs from that of the Applicant.

10. Intact, the court views the citation of the 3<sup>rd</sup> Respondent as a vexatious attempt to

compromise his professional independence, by forcing him into the arena as an interested party, and an endeavour to "punish" him for his refusal to endorse the Applicant's legal position.

11. The court would be failing in its duty if it did not protect legal practitioners from this kind of abuse. Practitioners are entitled to represent their clients and express their professional opinions without being insulted and sued.

12. Before turning to a consideration of the merits of the application, the court has no hesitation in finding that the application as against the 3<sup>rd</sup> Respondent is misconceived and should be dismissed, and the Applicant should pay the 3<sup>rd</sup> Respondent's costs on the attorney-client scale.

13. When the application first came before court on the 6<sup>th</sup> July 2006, a rule nisi was issued by consent of the parties in terms of prayers 3.1, 3.2, 4 and 5 of the notice of application, prayer 3.1 to operate as an interim order with immediate effect.

14. The Respondent's attorney subsequently filed an Answering Affidavit in which he raised the legal issue that the Registrar of the Industrial Court and the Commissioner of Taxes should have been joined as interested parties in the application.

15. The Registrar has no direct or substantial interest in the outcome of the application, and no relief is sought against him. The court holds that there was no need to join him as a party.

16. The situation is more complex with regard to the Commissioner of Taxes. It appears to the court that the Commissioner will have a financial interest in the outcome of the application.

17. The Applicant has explained its failure to pay the Respondent the balance of the judgement debt by stating on oath that:

17.1 a directive was sought from the Commissioner regarding the amount of any tax to be deducted from the award payable to the Applicant;

17.2 the Commissioner issued a directive instructing the Applicant to deduct an amount of E1930-50. 17.3 The Applicant duly paid the said amount to the Commissioner.

18. The court notes that in terms of Section 12 (1) (j) (iii) of the Income Tax Order, 1975 (as amended), amounts payable in lieu of notice, as notice pay, under the Employment Act, 1980 are exempt from normal tax.

19. Furthermore, an amount awarded by order of the court to an employee as compensation for his loss of employment arising from an unfair dismissal does not constitute income and is therefore also not subject to income tax.

20. Prima facie, the tax directive received by the Applicant from the Commissioner of Taxes appears to be erroneous, since neither the notice pay nor the compensation awarded to the 1<sup>st</sup> Respondent is taxable.

21. The Applicant handed up to the court a certain Legal Notice No. 181 of 2004, which purports to have been issued by the Commissioner in exercise of powers conferred on her by the Income Tax Order, 1975. This notice is headed INCOME TAX: TAX TREATMENT OF AMOUNTS PAID IN LIEU OF NOTICE (NOTICE PAY) IN TERMS OF SECTION 12

**(IIa)(i«).**

22. This notice expresses the view of the Commissioner as to the tax treatment of notice pay. Certain of those views, on the face of the Legal notice, appear to be misconceived. For instance, the Commissioner states that "notice only applies where the services of an employee are terminated at either party's initiative, for reasons other than misconduct on the part of the employee."

This view is clearly wrong, because it fails to distinguish between summary dismissal for misconduct and dismissal on notice for misconduct - see Section 33 (8) of the Employment Act 1980.

Based on this wrong understanding of the law regarding notice and notice pay, Legal Notice No. 181 of 2004 argues that an amount paid in lieu of notice to a dismissed employee is not notice pay, and therefore is not exempt from normal tax.

23. The same legal notice also reveals a complete misconception as to the term "additional notice." This term has been applied in industrial relations, employment agreements and court proceedings and judgements without exception, to mean the additional notice calculated in terms of section 33 (1)(c) of the Employment Act 1980. Such additional notice forms part and parcel of the statutory period of notice prescribed by the Employment Act 1980.

Yet the Commissioner, without any apparent legal justification, characterizes additional notice as an amount that the employer gratuitously elects to pay the employee "in excess of the actual notice pay", and thereby dictates that "additional notice pay" is not exempt from normal tax.

24. A further gross misconception is expressed in the notice when the Commissioner states"

*"The payment in lieu of notice must therefore correspond with the period of notice that was agreed in the contract (of employment)."*

It is expressly provided in Section 27 of the Employment Act 1980 that *"no contract of employment shall provide for any employee any less favourable condition than is required by any law."*

The minimum notice period prescribed by Section 33 of the Employment Act overrides the period of notice agreed in the contract and it is quite wrong for the Commissioner to restrict the exemption from tax to only such notice as is contained in the contract, where the statutory minimum notice period exceeds the contractual notice period.

25. It is a matter of concern that tax directives are apparently issued by the Department of Taxes based on such misconceptions of the law as appear in Legal Notice No. 181 of 2004. The court wonders how many employees have been deprived of their rightful exemption from tax which the Income Tax Order specifically provides to cushion the blow of loss of employment.

26. With respect to the matter in hand, the court has already indicated its prima facie view that the tax directive issued to the Applicant was wrong, and that prima facie no tax should have been deducted from the award.

27. The Applicant obtained and complied in good faith with a tax directive. If such directive was made in error, then it follows that:

27.1. The 1<sup>st</sup> Respondent is entitled to be paid the balance of judgement debt and;

27.2. the applicant is entitled to recover the tax erroneously deducted and paid to the Commissioner of Taxes.

28. Before the court makes a final decision regarding the correctness of the tax directive, it is

proper that the Commissioner of Taxes should be given the opportunity to justify her legal position. Although no relief is sought against the Commissioner in this application, a judgement delivered by the court on the basis of its prima facie view that the tax directive was illegal will necessarily affect the Commissioner, not only with respect to this matter but also with regard to future directives which she may issue based on Legal Notice No. 181 of 2004 and compensation awards of the Industrial Court.

29. In the circumstances, the court considers in the exercise of its equitable discretion that it would be fair to join the Commissioner of Taxes as an interested party so that she be given the opportunity if she so wishes to make representations before the court delivers its final judgement on the matter.

30. At the hearing of the matter, the court enquired from counsel for the parties why the amount of the payment made to the 1<sup>st</sup> Respondent, plus the tax deducted, do not add up to the amount of the award, namely E7200.00. There is a shortfall of E 1350.00.

31. No account for this shortfall is disclosed in the papers before court, nor were counsel for the parties able to provide any consensual explanation. Mr. Dlamini for the 1<sup>st</sup> Respondent insisted that it is due and payable by the Applicant and indeed it is included in the amount stated in the Writ of Execution.

32. In the absence of any satisfactory reason why execution should be stayed in respect of the amount of E1350.00, the court is unable to prevent the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from executing for this amount. The court will however give the Applicant an opportunity to pay the amount before its movables are sold in execution.

33. The court makes the following order:

**a) The application as against the 3<sup>rd</sup> Respondent is dismissed with costs on the attorney-client scale;**

**b) The Commissioner of Taxes is joined as an interested party in this application. The Applicant is directed to serve a full set of pleadings together with a copy of this judgement and order upon the Attorney-General in his capacity as legal representative of the Commissioner of Taxes;**

**c) Unless the Applicant pays the sum of E1350.00 to the Respondent by close of business on the 19<sup>th</sup> July 2006, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are authorized to proceed with execution to recover the sum of E1350.00 payable to the 1<sup>st</sup> Respondent;**

**d) The matter is postponed to the 24<sup>th</sup> July 2006 at 9.30 am., and the Commissioner of Taxes is called upon to show cause on such date why she should not be ordered to refund the sum of E1950.50 to the Applicant.**

**e) Subject to (c) above, the rule is extended to the 24<sup>th</sup> July 2006 at 9.30 a.m.**

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