

## IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 278/2007

In the matter between:

PHIWOKUHLE ZULU

Applicant

and

THE SWAZILAND CO-OPERATIVE  
TOBACCO COMPANY (LTD)

Respondent

CORAM:

P. R. DUNSEITH:           PRESIDENT

JOSIAH YENDE:           MEMBER

NICHOLAS MANANA:      MEMBER

FOR APPLICANT:          W. MKHATSHWA

FOR RESPONDENT:         P. MSIBI

### J U D G E M E N T -19/11/2007

1. This matter started life as an urgent application brought on notice of motion supported by affidavit. The Applicant claimed payment of her wages for the months of March, April and May 2007 and an interdict restraining the Respondent from unlawfully withholding payment of her wages in future months. A dispute of fact arose on the papers once the Respondent had filed its opposing affidavit, and this dispute was referred to oral evidence by consent of the parties. After hearing oral evidence and legal arguments advanced by the representatives of the parties, the court must now decide whether the Applicant is entitled to payment of her wages for the period in question.

2. It is common cause that the Applicant was employed by the Respondent in 2004 as a cashier. On 13<sup>th</sup> February 2007 she was suspended without pay pending disciplinary action to be taken against her. Subsequent to a disciplinary hearing before an independent chairman which the Applicant failed to attend, she was found guilty of offences which included gross dishonesty, gross insubordination and breach of trust.

3. The chairman's recommendation that the Applicant be transferred to another section and stop working as a cashier was accepted by the Respondent, which redeployed the Applicant as a filling station attendant at the Respondent's filling station at Nhlanguano. The Applicant was instructed to report for duty on Monday 19<sup>th</sup> March 2007 at 2 p.m.

4. The Applicant alleges that she duly reported for work but the Respondent failed to pay her wages at the end of March 2007 or in subsequent months. The Respondent admits failing to pay the Applicant's wages and alleges that it decided not to pay her because she failed to resume her duties on 19<sup>th</sup> March 2007 and subsequent days. In his answering affidavit the Respondent's chairman Mathews Khumalo states that all petrol attendants employed by the Respondent sign a drive way sheet and a daily cashbook when clocking in and out of work. Since the Applicant never signed these documents, the Respondent takes it as a failure to resume duty justifying non-payment of wages on the "no work, no pay" principle.

5. The court referred the factual dispute, as to whether the Applicant resumed duty at the filling station on 1<sup>st</sup> March 2007 and subsequent dates, to oral evidence.

6. The Applicant testified that she reported for work as instructed, but she was not allocated any petrol pumps. She said that there were 9 pumps operating, and these had already been allocated to three attendants. Since the driveway sheet records the pump readings, and the cashbook records the cash received, in respect of the specific pumps allocated to an attendant, the Applicant says she was unable to complete these documents. Instead, she helped the other attendants to man their pumps, and her cash takings were handed to the attendants to be recorded in their cashbooks. The Applicant says she reported for work every day, save that if she had to go to hospital for a check-up - she was four months pregnant - she would furnish a sick note. The Applicant says the chairman of the Respondent was not present when she started working as filling station attendant, but he came on subsequent days and found her working.

7. Under cross-examination the Applicant denied knowledge of a company policy that attendants are not allowed to share pumps. She said in practice the attendants assist each other. She also denied receiving a letter dated 1<sup>st</sup> April 2007 informing her that she would not be paid her wages unless she resumed her duties and signed the driveway sheets and cashbook. She also denied attending a meeting where she told the Respondents' board that she was refusing to work because she was bitter about her transfer. She denied that the chairman allocated pumps 1 and 9 to her, and she said these pumps were being operated by one Mduduzi Zulu.

8. The Applicant called Thoko Dlamini as a witness. Thoko worked for the Respondent at its filling station as a petrol attendant during the period material to this case. She said the Applicant reported for work on a regular basis every day, and she assisted the other attendants in filling cars with fuel. She said the Applicant was not allocated any pumps of her own, so she could not complete and sign driveway sheets or the cashbook. Thoko admitted signing a declaration that she would not share the pumps allocated to her with other attendants, but she insisted that in practice they shared the pumps and their employer was aware of this.

9. The Respondent called Mathew Khumalo to testify. He said that the Applicant showed up at work on 19<sup>th</sup> March 2007 but she never did any work. He then asked Mduduzi Zulu, who had just finished the morning shift, to operate the pumps which the Applicant was supposed to use. On subsequent days the Applicant never did any work, and at the end of April 2007 she disappeared from work. She was eventually dismissed in early August 2007 for fraud.

10. A number of criticisms may be leveled at the evidence of Mathew Khumalo. Firstly the version he gave in oral testimony is significantly different to what he said in his affidavit. The affidavit alleges that the Applicant did not resume her duties nor explain her failure to do so. This is not the same as saying that she reported for work but did not attend to the duties assigned to her. Secondly, Khumalo's evidence was unconvincing on the question whether he allocated specific pumps to the Applicant. He was evasive whenever the issue was broached, and at no stage gave a clear description of when and how the alleged allocation was made.

11. The court also finds it most improbable that an employer would observe its employee doing absolutely no work at the workplace but take no disciplinary action against her. There is no evidence that the letter dated 1<sup>st</sup> April 2007 was ever served on the Applicant, and the evidence of Khumalo was again evasive on this issue. The court has grave doubts as to the authenticity of this letter, the contents of which do not tally with the oral evidence of Khumalo.

12. The Applicant's version is corroborated by the evidence of Thoko Dlamini in all material respects.

13. The Respondent bears the burden of proving on a balance of probabilities that it was entitled to withhold the wages of its employee because she did not carry out her duties. The Respondent has failed to discharge this burden. If an employee reports to work but her work performance is unsatisfactory, the employer may not simply stop payment of her wages. The appropriate action is to give the employee a direct written instruction to carry out her duties. On failure to comply with this instruction, she may be suspended without pay and disciplinary action instituted. In our finding, however, the Applicant was carrying out her duties as a filling station attendant and the Respondent a fortiori had no lawful reason to withhold her wages.

14. The Applicant's counsel applied to amend Applicant's prayers to include a claim for wages for June and July 2007. The Respondent's counsel did not oppose the amendment, which we hereby grant.

15. The Applicant was paid her wages for the period of suspension up to 15<sup>th</sup> March 2007. She is entitled to be paid her wages for the rest of March 2007 and the period April - July 2007.

16. Judgement is entered against the Respondent for payment of the sum of E7776-00 with costs.

The members agree.

**PETER R. DUNSEITH**

**PRESIDENT OF THE INDUSTRIAL COURT**