



**IN THE INDUSTRIAL COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 13/09**

In the matter between:

**MPHATHI PATRICK MHLANGA**

Applicant

and

**DALCRUE AGRICULTURAL HOLDINGS**

Respondent

**Neutral citation:** *Mphathi Patrick Mhlanga v Dalcrue Agricultural Holdings (13/09) [2018] SZIC 53 (June 19, 2018)*

**Coram:** N. Nkonyane, J  
(Sitting with G. Ndzinisa and S. Mvubu  
Nominated Members of the Court)

**Heard submissions:** 05/06/18

**Delivered judgement:** 19/06/18

**SUMMARY---Labour Law---Applicant disappearing from work for more than three working days--- Applicant resurfacing after employer posted advertisements in the daily newspapers---Respondent failing to hold a disciplinary hearing against the Applicant---Letter of resignation found by employer in Applicant's office---Letter of resignation not tendered to the employer by the Applicant.**

**Held---The Applicant having returned to work it was necessary for the Respondent to convene a disciplinary hearing and the Applicant be given the opportunity to give an explanation for his absence.**

**Held---The Applicant having returned to work any notion that he had deserted his employment was dispelled.**

**Held---Resignation takes place when the employee tenders the resignation letter to the employer. Resignation is a unilateral act that puts to an end the employment contract between the parties.**

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## **JUDGEMENT**

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1. This is an application for determination of an unresolved dispute that was instituted by the Applicant against the Respondent.
2. The Applicant alleged in his statement of claim that he was unlawfully dismissed by the Respondent. The Applicant is claiming

- payment of terminal benefits and maximum compensation as the result of the alleged unfair termination of services.
3. The Applicant's application was opposed by the Respondent. In its Reply the Respondent denied that the Applicant was unlawfully dismissed. The Respondent stated that the Applicant resigned from employment through a resignation letter dated 24<sup>th</sup> September 2007.
  4. The evidence before the Court revealed that the Applicant was employed by the Respondent as a Sales Executive in November 2001. As part of his duties, the Applicant was responsible for selling of the Respondent's products. As a daily routine, the Applicant would go out in the morning to look for customers and take orders from the customers and present these to the Respondent. The Respondent would then supply the products to the customers. The Respondent is involved in the production of agricultural goods. It sells agricultural products to various shopping outlets around the country. The Applicant was paid a fixed salary and was also entitled to a sales commission if the sales figures reached a certain target agreed to by the parties.
  5. During August 2007 the Applicant went on leave. According to the erstwhile Human Resources Manager, he was expected to be back at work on 25<sup>th</sup> August 2007. Both RW1 and RW2 told the Court that the Applicant did not return to work at the expiry of his leave days. The Respondent's Mill Manager, RW2, Enos Masuku told the Court

that he noticed that the Applicant was not around because the sales were not moving. RW2 was able to notice the Applicant's absence because the Mill Department was informed what to produce by the customer orders brought to it by the Applicant. Enos Masuku informed the Human Resources Office about the situation. The Human Resources Manager, RW1, Themba Mgezeni Sibandze started to look for the Applicant as he also realized that he was not coming across the Applicant at the workplace.

6. Themba Sibandze told the Court that he tried to telephonically contact the Applicant but was unable to reach the Applicant. Enos Masuku also told the Court that he did call the Applicant but the Applicant did not answer his cellphone. Themba Sibandze went to look for the Applicant at his house which was situated within the Respondent's premises in the morning and in the afternoon but he did not find him.
7. The Mill Manager, Enos Masuku reduced his concern into writing and wrote a Memorandum, Exhibit C, directing it to the Human Resources Manager dated 08<sup>th</sup> October 2007. Themba Sibandze continued to look for the Applicant and on 12<sup>th</sup> October 2007, he went to the Applicant's office where he found the Applicant's resignation letter dated 24<sup>th</sup> September 2007 on his desk. According to Themba Sibandze, there were no other documents on the desk except for the resignation letter and he therefore came to the conclusion that the Applicant was not at work because he had resigned as per the letter of resignation.

8. Themba Sibandze thereafter caused an advert to be published in the local newspapers informing the readers that the Applicant was no longer an employee of the Respondent. After this advert, the Applicant resurfaced and reported for duty. On arrival at work he was informed by Themba Sibandze that he was no longer an employee of the Respondent. The Applicant did not accept what Themba Sibandze told him and he went to report the matter to the Conciliation Mediation and Arbitration Commission (CMAC) as a dispute. The parties failed to resolve the dispute by conciliation.
9. It is common cause that no disciplinary hearing was held against the Applicant. It is also common cause that no letter of dismissal was served on the Applicant by the Respondent.
10. After the advertisement that appeared in the daily newspapers that the Applicant was no longer an employee of the Respondent, the Applicant wrote a letter to the Respondent addressed to Themba Sibandze the Human Resources Manager dated 01<sup>st</sup> November 2007. This letter is **Exhibit D** of the Applicant's Bundle of Documents. This letter is important because it confirms Themba Sibandze's evidence that the Applicant only resurfaced after he had seen the advertisement in the local daily newspapers.
11. The Applicant however denied that he was not at work during the period stated by Themba Sibandze and Enos Masuku. In support of his version he tendered to Court **Exhibit F**, being two credit notes

from Evukuzenzele Multi – Save Supermarket. The two credit notes are dated 13<sup>th</sup> September 2007 and 28<sup>th</sup> September 2007 respectively.

12. According to the Applicant, the credit notes are a proof that he was at work because one gets such documents from the customers if the customers want a refund for damaged products. Enos Masuku however told the Court that these documents were suspicious as there was no indication that they reached the Finance Department for approval yet they bore the “PAID” stamp. No one from the Finance Department was called to testify about the authenticity of the documents. The Court is therefore unable to make a finding on the authenticity of these documents.
13. The Applicant also relied on fuel vouchers as proof that he was at work. These appear on pages 8 to 15 of the Applicant’s Bundle of Documents. These were presented to Court as **Exhibit “F”**. The summary of the fuel intake is on pages 8 to 9. These documents show that some motor vehicles which the Applicant told the Court that they belonged to him filled petrol on 02, 03 and 05 October 2007. They also show that another motor vehicle filled diesel on 04, 05 and 09 October 2007. Even if these documents were accepted as proof that the Applicant was at work, they only show that he was at work for five days on 02, 03, 04, 05 and 09<sup>th</sup> October 2007.
14. The Applicant also relied on the evidence of AW2, Elsie Mazibuko, the Respondent’s receptionist. According to this witness, she registered telephone numbers when an employee made a telephone

call through the switchboard. She handed to the Court the register for July to October 2007. The document was marked as **Exhibit “G”** and it appears from pages 16 to 26 of the Applicant’s Bundle of Documents. These documents however did not advance the Applicants case any further as they contain largely entries made in July 2007. It was not in dispute that the Applicant was at work during that period. The Respondent’s case is that he took his annual leave on 01<sup>st</sup> August 2007 and was expected back at work on 25<sup>th</sup> August 2007 and that he did not report for work until 01<sup>st</sup> November 2007 after the Respondent had placed an advertisement in the local daily newspapers that he was no longer its employee.

15. The documents show that the Applicants made a telephone request to the receptionist on 01<sup>st</sup> August 2007, on five days in September 2007, and one day in October 2007.
16. Even if these entries were to be accepted as proof that the Applicant was at work on those days, there is still no explanation pertaining to the other numerous days that the Applicant was not at work. According to the entries, the Applicant made one request to the receptionist on 09<sup>th</sup> October 2007. **(See pages 26 of Exhibit “G”)**. This seems to be in accord with Themba Sibandze’s evidence that after he discovered the Applicant’s resignation letter on 12<sup>th</sup> October 2007, the Applicant’s whereabouts were unknown until he resurfaced on 01<sup>st</sup> November 2007. Even the fuel vouchers show that the last fuel intake was on 09<sup>th</sup> October 2007 for diesel.

- 17.** The nature of the work of the Applicant was similar that to of a sales agent. He was on the road most of the time. The Court is therefore prepared to give him the benefit of the doubt that he was at work on the days that showed that he fueled his motor vehicles at the Respondent's fuel depot or pump. That having been said, there was no evidence of any refueling after 09<sup>th</sup> October 2007. The Applicant failed to explain to the Court how he was carrying out his duties if he was not refueling his motor vehicles. Further, the telephone call requests log sheet shows that he made only one request on 09<sup>th</sup> October 2007. There was no explanation as to how he was communicating with the customers if he was at work after 09<sup>th</sup> October 2007.
- 18.** Enos Masuku told the Court that he was able to tell that the Applicant was not around because their duties were interlinked. The Mill Department manufactured products that were ordered by the customers. The Mill Department got the orders from the Applicant. The Applicant was not submitting the orders and production slowed down. Enos Masuku told the Court that in the absence of the Applicant submitting the orders to them, they only made products that were ordered directly by the customers.
- 19.** The Applicant told the Court that Enos Masuku reported his absence merely because there was bad blood between them. Enos Masuku denied this. Themba Sibandze also told the Court that he was not aware of that as the Applicant never raised any grievance with the Human Resources Office.



20. From the evidence led before the Court, the Court will come to the conclusion that the Respondent was able to prove on a balance of probabilities that the Applicant was not at work after the 09<sup>th</sup> October 2007 until he resurfaced after the Respondent had posted advertisements in the local daily newspapers informing the readers that he was no longer an employee at the establishment.
21. It was argued on behalf of the Applicant that the proper person to testify about the Applicant's absence was his supervisor Delisa Kunene who was not called by the Respondent. On the evidence presently before the Court, the Court is satisfied that the Respondent was able to successfully prove that the Applicant was not at work after 09<sup>th</sup> October 2007. The evidence that the production at the Mill Department slowed down because they were dealing only with orders that were placed by the customers directly was not disputed. Themba Sibandze's evidence that the Applicant only resurfaced after the advertisements in the local daily newspapers was also not successfully challenged. Further, all the documentary evidence presented by the Applicant do not show any activity by the Applicant at the workplace after 09<sup>th</sup> October 2007.
22. It was argued on behalf of the Applicant that the Respondent's witnesses contradicted themselves when RW1 said the Applicant's mobile telephone was switched off, whereas RW2 stated in **Exhibit "C"** that the Applicant was not responding through his mobile telephone. This submission has no merit at all. There was no

contradiction in these statements. Whether the Applicant had switched of his mobile telephone or was not responding, it amounted to the same thing, that is, the Respondent's witnesses were unable to reach him through his mobile telephone.

23. The evidence revealed that during the search for the Applicant, Themba Sibandze also went to the Applicant's office. In that office he found a letter on the desk. There was a dispute whether or not the envelop was the only document that was left lying on the Applicant's desk. According to Themba Sibandze there were no other documents, the Applicant had cleaned his desk. The Applicant disputed this evidence and said there were other documents on the desk. RW1 opened the envelop and inside he found the resignation letter of the Applicant. The letter was dated 24<sup>th</sup> September 2007. The Applicant stated therein that the resignation was going to be effective on 30<sup>th</sup> September 2007.
24. After finding the resignation letter and coupled with the Applicant's disappearance, RW1 came to the conclusion that the Applicant was not at work because he had resigned.
25. The question that arises for the Court to determine is; what was the effect of the resignation letter which was not tendered to the employer on the Applicant's employment contract. Resignation brings the contract of employment to an end from the moment it is accepted by the employer.

(See: Grogan J: Workplace Law, 8<sup>th</sup> edition at page 78).

- **Du Toit V Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LAC).**

26. Once the employer accepts the resignation the employee cannot unilaterally withdraw it. (See:- **University of North V Franks & Others (2002) 8 ILJ 1252 (LAC)**). In casu, the Applicant did not dispute that he wrote the letter of resignation. He told the Court however that he changed his mind after he got advice from a friend. He said he therefore decided not to tender the resignation letter to the employer.

27. From the evidence before the Court there is no doubt that the Applicant at some point had the intention to resign. There is also no doubt that he reduced his intention into writing by writing the resignation letter. The resignation letter was not however tendered or presented to the employer. RW1 found the letter in the Applicant's office. It was never brought or presented to him by the Applicant. Dealing with this question, the Court in the case of **Amazwi Power Products (Pty) Ltd V Turnbull (2008) 29 ILJ 2554 (LAC)** in paragraph 30 held that;

*“In summary my view is that the mere fact that an employee expresses an intention to resign does not fall within the concept of resignation and therefore cannot be equated to a notice of intention to terminate the employment relationship. In the present instance it cannot be disputed that the employee did express an intention to resign but never submitted a resignation nor did he, in any other manner*

*unequivocally serve the Applicant with a notice indicating when he would be leaving the employ of the applicant.”*

The Court fully aligns itself with the above observations by the Labour Appeal Court of South Africa. Similarly, *in casu*, the Applicant never submitted or tendered the letter of resignation to the employer.

28. In the present case, the evidence revealed that the Applicant did resurface after the Respondent had published notices in the local daily newspapers to the effect that the Applicant was no longer its employee. The question for the Court to decide is whether his absence amounted to desertion or absenteeism. Absenteeism is different from desertion. Absenteeism is the unexplained and unauthorized absence from work. Desertion is the unauthorized absence with the intention never to return.

***(See:- Alpheous Thobela Dlamini V Dalcrue Agricultural Holdings (Pty) Ltd, case number 123/2005 (IC).***

29. In casu, the Applicant having returned to work on 01<sup>st</sup> November 2007, that dispelled the notion that he had formed the intention never to return. The Applicant having been absent for a number of days without authority however, such absenteeism constituted misconduct in terms of **Section 36(f) of the Employment Act N0.5 of 1980**. That section provides that it shall be fair for an employer to terminate the services of an employee who has absented himself from work for more than a total of three working days in any period of thirty days

without either the permission of the employer or a certificate signed by a medical practitioner.

30. The Applicant having returned to work, the Respondent should have charged the Applicant with absenteeism and convened a disciplinary enquiry where the Applicant would be afforded the opportunity to give his side of the story for his absenteeism. The Respondent did not that.
31. The Applicant however has had the opportunity to explain his absenteeism before the Court. He failed to do that. The Applicant failed to explain his whereabouts after 09<sup>th</sup> October 2007 until he resurfaced on 01<sup>st</sup> November 2007. The evidence before the Court clearly showed that the Applicant absented himself from work in excess of three working days as provided in **Section 36 (f)**. He had no permission from the employer to be absent from work. He did not tender any medical certificate certifying that he was unfit for work on those days that he was absent from work. The Court will therefore come to the conclusion that the Respondent had a fair reason to terminate the services of the Applicant. Taking into account the unexplained absence by the Applicant from work and his apparent cavalier attitude towards his duties as a Sales Executive for the Respondent, the Court will come to the conclusion that the termination of the Applicant's service was reasonable in the circumstances of the case.

32. It is not in dispute that no disciplinary hearing was convened by the Respondent. Although the dismissal of the Applicant was substantively fair, the failure of the Respondent to hold a disciplinary hearing rendered the dismissal to be procedurally unfair. In the case of **Nkosinathi Ndzimandze & Another V Ubombo Sugar Limited case number 476/2005 (IC)**, this Court held that;

*“Even in situations where management is convinced of the guilty of employees, it is still obliged to ensure that fair disciplinary process is observed...”*

The Court is in agreement with the above position of the law. The Court will accordingly come to the conclusion that the dismissal of the Applicant was procedurally unfair as he was not afforded the opportunity to defend himself before a disciplinary hearing tribunal.

33. The Court having come to the conclusion that the dismissal of the Applicant was unfair only because the Respondent did not follow a fair procedure, the Court can only award compensation to the Applicant. The Applicant told a lie to the Court when he said after his dismissal he could not secure any other employment. The evidence before the Court revealed that he was employed by Akani Swaziland Retirement Fund Administrators (Pty) Ltd. From the evidence before the Court it seems that the Applicant was without a job only for a period of eight months. Taking all these factors into account, the

Court will award the Applicant three months' salary as compensation for the procedurally unfair dismissal.

34. The Court will accordingly make the following order;

a) *The Respondent is to pay the Applicant the sum of ( E3,500 x 3)  
E10,500:00 as compensation for the procedurally unfair dismissal.*

b) *There is no order as to costs.*



N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

*For Applicant* : *Mr. T.C. Mavuso*  
*(Attorney from Motsa Mavuso Attorneys)*

*For Respondent:* *Mr. B. Gamedze*  
*(Attorney from Musa M. Sibandze Attorneys)*

