

**IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND
HELD AT MBABANE**

CASE NO. 18/2005

In the matter between:

HUB SUPERMARKET (PTY) LTD **Appellant**

And

ANDREW McCARTER **Respondent**

CORAM:

J. P. ANNANDALE JP

J.M. MATSEBULA JA

S.B. MAPHALALA JA

For the Appellant: ADV. DAVE SMITH, instructed by Cloete Corporate in
association with E.J. Henwood & M. L Dlamini

For the Respondent: MR. P. R. DUNSEITH, of Dunseith attorneys,
Mbabane

J U D G M E N T M A Y 2 0 0 6

[1] Respondent was an applicant in the court *a quo* where he instituted a claim set out below:

(a) The applicant was employed by the Respondent from 1st September 1999 as manager of the Hub Super spar Supermarket, and the in the continuous employ of the Respondent until the 29th November 2004.

(b) In terms of his employment contract, the applicant was entitled to an incentive commission based on a percentage of net profits before tax in each financial year.

A copy of the contract is annexed marked "A".

© The incentive package in terms of Annexure "A" is as follows:

7.5% of the net profits before taxation for the period 1st September 1999 to 30th June 2000 (with a minimum monthly profit bonus of E3,000.00).

7.5% of net profits before taxation for the period 1st July 2000 to 30th June 2001. (With a minimum monthly profit bonus of E14,000.00).

10% of net profits before taxation for the period 1st July 2001 to 30th June 2002 and each financial year thereafter with a guaranteed minimum monthly profit bonus of E5,000.00.

(d) In respect of the financial years ended 30th June 2000, 2001, 2002 and 2003, the respondent misrepresented its net profits before taxation in its financial records and books of accounts by falsely allocating drawings amounting to E11,218,558.17 to purchases, thereby understating its actual net profits for the aforesaid financial years by the said amount of E11,218,558.17.

(e) As a consequence of the understatement of its actual net profits, the Respondent underpaid the Applicant's incentive bonus as follows:

<u>Period</u>	<u>Bonus due</u>	<u>Bonus paid</u>	<u>Balance due</u>
1999/2000	199,557.16	188,901.81	10,655.34
2000/2001	277,333.06	274,925.42	2,407.64
2001/2002	490,034.28	226,496.64	264,537.64
2002/2003	749,457.53	248,303.37	501,154.16
			E777,754.77

(f) The Respondent misrepresented its net profits before taxation

in respect of the financial year ended 30th June 2004 by falsely allocating drawings amounting to E3, 329,452.54 to purchases, thereby understating its actual net profits for the said financial year by the said amount of E3,329,452.54.

(g) The respondent paid a sum of E113,632.81 in respect of the Applicant's incentive bonus for the financial year ended 30th June 2004, but has failed and/or refused to disclose the actual net profits for this year.

(h) The Respondent has underpaid the Applicant's incentive bonus for the financial year ended 30th June 2004 in an amount of at least E332,954.25.

(i) In or about 22 September 2004 the Applicant formally demanded payment of the balance of his incentive bonus for the financial years ended 30th June 2000 -2004.

(j) In response, the managing director of the Respondent :-

- informed the Applicant that he will make continued employment intolerable for the Applicant if he persists in his claim.
- compelled the Applicant to vacate the manager's office and occupy the customer services kiosk at the front door.
- Removed the Applicant as a signatory for cheques and petty cash.
- Suggested that the Applicant resigns from his employment.
- Harassed the Applicant with unjustified accusations, unreasonable instructions and unwarranted disciplinary proceedings.

(k) On 29th November 2004 the respondent summarily terminated the Applicant's services on grounds of mismanagement and insubordination.

(l) The termination of the Applicant's services was unfair and unreasonable in all the circumstances.

(m) The termination of the Applicant's services was contrived and motivated by malice because the Applicant exercised his lawful right to claim his bonus entitlement. In the premises, the termination of Applicant's services was automatically unfair.

(n) At the date of termination of his services, the Applicant's remuneration was E32,500.00 per month.

(o) The Applicant claims the following terminal benefits:
Severance allowance

(4x 10 xE1,300.00)	E52.000.00
Notice pay	E32.500.00
Additional notice pay	
(4 x4xE1,300.00)	E20.800.00
	E105.300.00

(p) The Applicant claims the balance of his bonus for the years ended 30th June 200 - 2003 in the sum of E777.754.77.

(q) The Applicant claims circulation of the balance of his bonus for the year ended 30th June 2004 and payment of such balance in an amount of at least E332,954.25.

(r) The Applicant-claims payment of his pro rata bonus for the 5 months worked in the year ended 30th June 2005 in the sum of E25.000.00.

(s) The Applicant claims maximum compensation for unfair dismissal and/or automatically unfair dismissal,

(t) The Labour Commissioner granted the Applicant an extension of time for reporting a dispute regarding the unpaid incentive bonus. A copy of this certificate is annexed marked "b".

(u) The Applicant duly reported a dispute in respect of all the issues raised in this application, but despite conciliation the dispute could not be resolved. A certificate of unresolved dispute is annexed hereto marked "C".

WHEREFORE the Applicant claims:

(a) Payment of terminal benefits in the sum of E105,300.00

(b) Payment of balance of bonus for the years ended 30th June 2000. - 2003 in the sum of E777.754.77

(c) An order that the respondent pays to the Applicant the sum of E332.945.25 alternatively such amount as this Honourable Court may find to be due in respect of the balance of incentive bonus payable for the financial year ended 30th June 2004.

(d) Payment of E25.000.00 in respect of the pro rata bonus

for the year ended 30th June 2005.

(e) Payment of maximum compensation for unfair dismissal in the sum of E780,000.00

(f) Costs.

(g) Further and/or alternative relief.

[2] Attached to the proceedings in the court a quo was annexure 'C a certificate issued in terms of Section 85 (1) of the Industrial Relations Act No. 1 of 2000.

(a) Annexure 'C sets out concisely the prayers respondent was asking the court to grant in its favour.

(b) Paragraph 3 of annexure 'C tabulates the issues in dispute as advanced by the Respondent.

(c) There is no indication in annexure 'C that appellant had alleged that it had over paid respondent's profit bonuses and that that it was claiming a refund of the overpayment. This, it ought to have done in order for the Commissioner to have deliberated on it and then include his findings in the certificate annexure 'C in terms of Section 80 of the Industrial Relations Act 2000.

(d) Annexure 'C contains only what respondent reported to the Commissioner and no averment or allegations by the appellant there against, one would have expected the appellant to have told the respondent that infact it owed it the amount it now mentioned in its counter claim; and the Commissioner would have focused his attention there at.

[3] During the hearing in the court a quo it appeared that the respondent was and infact it filed a conditional counter claim and relied on the conditional counter claim which is to the effect that Appellant over paid the respondent's profit bonuses during the period 1st September 1999 up until November 2004 and Appellant was claiming a refund of the alleged overpayment.

3.1. As the counter claim was strongly opposed by Mr. Dunseith on behalf of the respondent, it was agreed between Mr. Dunseith an Mr. Smith that the judge should be asked to rule on the objection to the conditional counter claim before dealing with the merits of the case.

3.2. Mr. Smith on behalf of the Appellant also challenged the

jurisdiction of the court *a quo* in dealing with:

3.2.1. Specific performance of a commercial contract.

3.2.2. A claim for damages arising from a breach thereof.

However in the head of argument, Mr. Smith on behalf of the appellant indicated that they would abide by the court's ruling in relation to the lack of jurisdiction and would only persist with the appeal in relation to Appellant's conditional counter claim, on the basis that same was not separately reported to the Labour Commissioner and no certificate of unresolved dispute was issued in regard, thereto..

[4] The court *a quo* handed down its ruling on 30^m September 2005, a very comprehensive ruling I dare say.

4.1. It is against that ruling that the appeal is about. It, the appeal involves the application of Rule 3 (2) of the Rules of the Industrial Court. The learned judge of the court *a quo* in its ruling also dealt with the appellants special plea i.e. that the Industrial court lacked jurisdiction to entertain respondent's claim. This is so because it was only at the commencement of the appeal proceedings that, it was brought to the court's attention that appellant was abiding by that part of the ruling of the court *a quo*.

4.2. This court will thereof be concerned with the appeal relating to appellant's conditional counter claim on the basis that the amount claimed by appellant in its counter claim was never separately reported to the Labour Commissioner and no certificate of unresolved dispute was issued in regard thereto.

4.3. Mr. Smith in his heads first dealt with and referred to the provisions of Rule 3 (2) and stated that in so far as that rule is interpreted to mean that a report of a dispute to the Labour Commissioner is a prerequisite to the jurisdiction of the Industrial Court then that rule will be *ultra vires* the Industrial Relations Act.

4.4. In so far as the Appellant's counterclaim constituting a separate dispute which needed to be referred to the Labour Commissioner separately; Mr. Smith argued very forceful that the Industrial Court

should not approach and follow a very strict and formalistic approach in dealing with industrial disputes. It was Mr. Smith's argument that counsel for the Respondent was having a problem with the counter claim and not that the counter claim was in fact a separate dispute.

4.5. Once the dispute was lodged with the Commissioner, all the facts of it were before the Commissioner and it was not necessary for the appellant to lodge its own counter claim arising from the claim by the Respondent.

4.6. Reference was made by counsel for the Appellant to a plethora of authorities, these included sections of the Industrial Relations Act 1 of 2000 and also RSA decided cases and our Swaziland decided cases.

4.6.1. In the Industrial Relations Act 1 of 2000 a dispute is defined *inter alia* as: (a) "dispute includes a grievance, a grievance over a practice, trade dispute and means any dispute over the:

(i) entitlement of any persons to any benefit under an existing Collective agreement, Joint Negotiation Council agreements or Works council agreements".

(ii) In Williams vs Benoni Town Council 1949 (1) SA 501 9W

Roper J in a dictum said the following "*a dispute exists when one party maintains one point of view and the other a contrary or different one. When that problem has arisen, the fact that one of the disputants, while disagreeing with his*

opponent, intimates that he is prepared to listen to further

argument does not make it any less a dispute". The above

decided cases and many others Mr. Smith referred this court

to correctly reflect what constitutes a dispute. Indeed it

seems to me that the parties, i.e. the Appellant and the

respondent are *ad idem* that the alleged overpayment of E267,497.06 by the Appellant to the respondent is a dispute. If is a dispute, the question to be answered, was it reported.

[5] Mr. Smith argued vociferously and supported his arguments by numerous legal principles and decided cases mostly of RSA origin. It was his submission that the counter claim advanced and pleaded by Appellant should not have been treated separately by the court a *quo*. He argued that the contents of the counter claim are intrinsically linked to the dispute reported by the respondent and in respect of which a certificate in terms of Part V111 of the Industrial relations Act was issued.

5.1 It was Mr. Smith's argument that a dispute such as he was dealing with s composed of various facets and it was not necessary to separate these facets and treat them as different disputes so that each facet needs to be reported separately to the Commissioner.

[6] In regard to whether or not any matter serving before the Industrial Court should first be referred to the Commissioner as a prerequisite before hearing by the Industrial Court, Mr. Smith argued that it was not a prerequisite but a pre jurisdictional requisite.

[7] Mr. Dunseith, on the other hand has argued and supported his argument by local decided cases which have been handed down from time to time.

2. In my judgement these cases state very clearly the legal position as obtains in the industrial work place. The industrial Court had, from its inception been very careful not to cloud its stance with that obtaining in the High Court and the requirement or common law. This is understandable if one takes into account that the establishment of the Industrial Court was solely for the purpose of regulating relationship at the work place. In a sense the court is a special court, created for a specific purposes.

3. The provisions of Section 77 (1) of the Industrial Relations Act 2000 dealing with the contents of the report and notice of dispute are as follows: 77(1) a report of a dispute shall be made in writing, signed by the person making the report and shall specify:-
 4. The parties to the dispute.
 5. The address of each of the parties.
 6. "particulars of all issues in dispute stating as precisely as possible their nature and scope.
 7. what steps, if any, have been taken for settlement of the dispute either in accordance with the provisions of a Joint Negotiation Council Constitution a Collective Agreement registered under part V11, a Works Council Constitution or otherwise", (emphasis my own).

[8] The argument advanced by Mr. Dunseith on behalf of the Respondent is that the subject of the counter claim was never an issue deliberated by the Commissioner because it was never reported to the Commissioner as a dispute.

8.1. The industrial court can therefore not take cognizance of the counter claim arising before if for the first time.

8.2. Mr. Smith on the other hand argues that the Industrial Court can deal with the counter claim notwithstanding that it was never reported to the Commissioner by the Appellant. Mr. Smith based his argument on the basis that in terms of the common law once a litigant submits itself to the jurisdiction of the court it cannot stop the court from dealing with disputes arising from the matter before the court whether reported or not.

8.3. Secondly, argues Mr. Smith that the question of over payment is between the same parties and is closely interwoven such that it is not necessary to report the overpayment separately.

[9] In Industrial Court case No. 33/98 Catherine Udoidunq vs IDM Parker J. dealt with the question of a claim in reconvention head on. The learned judge referred to the case of Ubombo Ranches vs Pan Attendants. Industrial Court Case No. 6/90 where Claseen A.J said following:

"It is the very dispute with which the Labour Commissioner was concerned with because it was incapable of settlement it has to be determined by the Industrial Court, It (the court) cannot resolve disputes which are different from the one which the Labour Commissioner dealt with." (Emphasis my own).

9.1 The learned Judge Classen AJ went on and stated "one *cardinal statement which is apposite in the present matter is this which comes immediately after the above quoted passage in the Ubombo Ranches - The Industrial Court is not vested with inherent jurisdiction like the High Court.*

Indeed, the power of the court to determine a matter is carefully considered by Part V111 of the Industrial Curt to determine the dispute is that the Labour Commissioner should have attempted and failed to secure a settlement of that very dispute". Ubombo Ranches at p 10 (emphasis added).

9.2 If one reads Udoidung's case with Ubombo Ranches one gets the impression that a dispute contained in a claim in reconvention made by a Respondent in answer to the Applicant's claim is a dispute. If not reported to the Commissioner it would amount to a clear disregard of a specific provisions of Part V111 of the Industrial Relations Act.

9.3. The Industrial Court being a creature of statutes cannot ignore the provisions of that statute which created it.

[10] The learned judge of the court a *quo* in his judgement at p62 referred to the contents of the certificate of unresolved dispute. He then made a factual finding to the effect that there was no evidence that the issue of overpaid profit bonuses was reported to the Labour Commissioner and dealt with by a CMAC Commissioner and a certificate of unresolved dispute issued.

10.1. The learned judge then proceeded to reproduce the contents of the certificate of unresolved dispute.

10.2. Referring to the Catherine Udoidung and Swaziland Fruit Cannery (Pty) Ltd vs Phillip Vilakati and Bernard Dlamini Industrial Court Case No.

2/1989 the learned judge in the court a *quo* upheld respondent's objection to Appellant's counter claim and dismissed the counter claim.

10.3. The court took into account all factors and made the final ruling:

- "1. Respondent's special plea is dismissed.
2. The Applicant's objection is upheld.
3. No order for costs".

10.4 (a) After a very careful consideration taking into account all the legal principles and the rationaj[^]in the quoted decided cases. I find the following:

(b) The fact that the issue of overpaid profit bonuses was not reported to the Labour Commissioner and dealt with by CMAC Commissioner and no certificate of unresolved dispute was issued, I am of the view that the court a *quo* correctly held on the authorities that it could not take cognizance of the counter claim.

(c) I am of the view that the appeal should be dismissed with costs. The costs relate to this appeal before this court.

J. P. ANNANDALE JP

J.M. MATSEBULA JA

S.B. MAPHALALA JA