

THE INDUSTRIAL COURT OF SWAZILAND

CASE NO.29/83

In the matter between:

A. NKUNA Applicant

vs

UBOMBO RANCHES LTD Respondent

For Applicant: Mr. S. Earnshaw Attorney

For Respondent: Mr. P. Dodds of the Federation of Swaziland
Employers

Issue in Dispute: Wrongful Dismissal.

AWARD

HASSANALI, J.A.

In this case the applicant is seeking re-instatement for his unlawful dismissal.

The Respondent Company acting under Sec.36(b) of the Employment Act No.5/1980 summarily dismissed the applicant on 25/3/83 on the grounds that he committed an act of violence on one of his fellow workmen. He joined the respondent company on 13/10/1964 and at the time of his dismissal was employed as a Labour Relations Officer on a salary of E490 per month. During this period of his employment he seems to have had a good record of service.

The medical report of Dr. R. Le Roux was admitted by consent. According to it Anthony Dlamini was severely assaulted it is common cause that the assault on Anthony took place in the homestead of the applicant, which was in the premises of the respondent. It is important in this dispute to determine as to the aggressor was and what degree of injuries was sustained by Anthony.

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The dispute between the applicant and the respondent company arose as the result of the applicant assaulting Anthony Dlamini, another employee of the company. According to the applicant, Anthony arrived at his homestead during the early hours of the morning of 7/3/85 at about 2a.m. He awoke him from his sleep saying that he wished to speak to him. He reluctantly admitted him inside and wanted to know as to why he put him up at that hour. Since Anthony did not reply, the applicant requested him to leave the house and went to open the door. At this stage, without any reasons whatsoever Anthony directed several blows at him with his fists but he parried them all. This led to a fight between them in the course of which chairs, fists and sticks were used. Anthony then later jumped out of a window, ran and fell on the fence. He received a number of injuries on his body. According to the applicant, Anthony was drunk.

Anthony's testimony was that he was invited to the applicant's house and was assaulted there. He admitted to his escaping through the window and falling on the fence, but denied that he had consumed any liquor that night, although he was in the company of people who were drinking heavily. He said that he took drinks but on that particular night he had only soft drinks. However I don't believe this story. Therefore I accept the evidence of the applicant that Anthony was indeed drunk.

The question now is who actually started the fight? Why did Anthony visit the applicant at that odd hour? I am inclined to accept the version given by the applicant in preference to that of Anthony. If Anthony had not gone to Applicant's home, the fight need never have started. I am also of the view that it was Anthony who started the fight, although neither of them gave a reasonable explanation for it. It is admitted that Anthony had several injuries but there is no evidence to show as to what

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caused them. It is possible that he may have sustained some injuries when he jumped out of the window.

Under Sec.36(b) of Act No.5 of 1980, an act of violence by one employee on another is a justifiable ground for dismissal. However this depends as to where, how and why the violence was caused. I do not think that it is the intention of the Legislature to impose maximum punishment on each and every person who commits an act of violence. Therefore in my view Sec.36(b) relating to violence, would not apply to employees who are victims of aggression in their own homesteads. In the same way it will also not apply to employees where the employers have laid down the punishment in their own disciplinary code.

Ex.2 sets out the procedure in respect of disciplinary inquiries and its annexure provides a procedure for handling cases of misconduct. As regards assaults on other employees, it is clear that a dismissal is unwarranted in the first instance. In the circumstances in this case the dismissal of the applicant is not in line with the employer's own disciplinary code.

In *Spinning and Weaving Mill Workers Union vs Wellawatta Spinning and Weaving Mills Ltd.* CGG 14-818, it was held that the termination of the services of an employee who assaulted a worker outside the workplace during working hours and who had been previously warned for a similar offence was held to be justified. The court observed -

"I consider an altercation among workmen a serious matter and deserves the highest censure. If workmen cannot settle their affairs peacefully it will eventually end in a breakdown or at least an impairment of the smooth flow of work in their workplace".

As you will note in the above case, a warning was given to the employee in the first instance before he was finally dismissed.

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In my view employers should act more judiciously in cases where an employee commits an act of assault on another. He should in the first instance, issue a letter of warning before taking the drastic step of dismissing him.

On the question of the Domestic Inquiry Mr. Dodds stated that an inquiry was held before the applicant was dismissed. The applicant however denied this. I am inclined to agree with the applicant on this, only because no evidence was placed before court to show that any inquiry was held. I have repeatedly mentioned that a domestic inquiry is always desirable since the principles of natural justice require that a person must be informed of the charges against him and an opportunity be given to him, to meet them. Had this been done in this case, the respondent company could have found out the reasons for the fight that ensued between the two workmen and may have arrived at a different conclusion altogether. It is most unfortunate that the respondent company did not put into operation its own disciplinary code, where a warning is just given in cases of assaults before dismissal.

It appears to me that when the respondent company took its decision to dismiss the applicant, it was only influenced by the injuries sustained by Anthony but failed to take into account the 19 years of faithful service rendered by the applicant to the respondent company. I consider the company's decision to be quite harsh and not in conformity with the principles of natural justice.

Therefore taking all these facts into consideration, I have come to the conclusion that the dismissal of the

applicant was wrongful.

On the question of re-instatement this court has unfettered discretion under Sec.13(1) of Act No.4 of 1980 to do what it considers to be just and fair.

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In making a just and equitable order, one must consider not only the interests of the employers, but also the interest of the employees, and the wider interest of the country, for the object of social legislation is to have not only contented employers but also contented employees.

Ordering re-instatement the court is expected to be inspired by a sense of fairplay towards the employee on the one hand, and considerations of discipline in the concern on the other. The past record of the employee, the nature of his alleged present lapse, and the grounds on which the Order of the Management is set aside are also relevant factors for consideration.

I consider re-instatement of the applicant would be just and fair in view of the following -

- (i) His long and faithful service with the company.
- (ii) Company not directly involved in the dispute in question.
- (iii) Evidence does not suggest that the applicant was the aggressor.
- (iv) A letter of warning could have been given in the 1st instance.

In the circumstances, I make the following order -

- (a) Applicant to be re-instated with immediate effect.
- (b) Applicant to be paid his salaries from 1/4/83 to date of re-instatement.
- (c) Applicant to be restored to the same position with all benefits as if he had never been dismissed.

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I make this order as an Award of this Court.

J.A. HASSANALI

JUDGE PRESIDENT

I agree.

ASSESSOR

I agree.

ASSESSOR