

IN THE INDUSTRIAL COURT OF SWAZILAND HOLDEN AT MBABANE

CASE NO: 19/89

In the matter between:

MUSA KHUMALO

Applicant

VS.

UNITRANS SWAZILAND LTD.

Respondent

CORAM :

J.A. HASSANALI President

MR B. SIMELANE

For Applicant

MR P. FLYN

For Respondent

MR MOKGOKONG AND MATSEBULA Assessors.

AWARD

(Delivered 22nd December, 1989)

Hassanali, P.

The Applicant in this application is claiming from the Respondent Company the sum of E6708/60 being terminal benefits and compensation for unfair termination.

At the commencement of the trial, Mr Simelane representing the Applicant applied to amend the prayer (c) of his application to read as E606/20. Mr Flyn representing the Company raised no objection and as such the amendment was accepted.

At the conclusion of the trial, during the final submissions, Mr Flyn raised an objection to the Conciliation Report annexed to the application and asked the Court to disregard it because the Officer who made it was not called to give evidence. After hearing both Representatives, the Court overruled the objection on the ground that the Report was part of the Applicant's application and that it had been referred to in Paragraph 6 of the Application. Furthermore its contents had been admitted in the Respondent's reply.

I will now deal with the evidence in this case. According to the Applicant he was recruited in 1980 at Matsapa as a general labourer.

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In January 1981, he was transferred to Bhunya with the promise of accommodation there, as soon as the houses that were being constructed, were completed. Meanwhile he was provided free transport from Malkerns to Bhunya and back and this arrangement went on for about 3 months, when one day he was suddenly told that he should find his own transport. As a result he was compelled to use public transport which very often arrived late. This was a source of constant friction between him and Mr Atkinson, the Depot Manager. The already strained relationship was further aggravated when the Applicant realised that the house he was promised was not forthcoming. Mr Shaw, the Operation Manager however flatly denied that a house was ever promised to him but stated that free transport was promised to Applicant for 3 months. Taking into consideration the free transport that had been

provided to the Applicant, it is quite likely that the Respondent may have promised him a house when such a house was ready. Anyway it is of relevance to refer to Sec. 152 of the Employment Act, which casts a duty on an employer to provide accommodation to an employee, if he had been asked to work some distance away from his home. In this case the Applicant lived in Malkerns and his work place was at Bhunya. As such it would have been fair had the Company provided him with some sort of accommodation, which would have eased his financial hardship.

I now turn to the events of 24/6/88 which ultimately led to the Applicant's dismissal. But before I do so, I wish to refer to the letter (Ex.G) which has set out the following reasons for his termination -

- (a) failure to take lawful instructions from his Depot Manager
- (b) threatening to assault the Depot Manager, technical Supervisor and Assistant Depot Manager.
- (c) showing gross insubordination to senior staff members of the Department.

According to Mr. Atkinson, on the day in question the Applicant arrived late to work wearing an overall which he said belonged to Usutu Pulp Co. As it was against the Company policy to wear a different overall, he

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directed him to clock out and come back in the Company overall. The Applicant refused maintaining that he was wearing the Company overall. An argument then ensued between the two in the course of which Mr Atkinson removed the Applicant's clock card and went into the office of the Technical Supervisor. The applicant followed him there and grabbed him by his arms to relieve him of his card.

At this stage Mr Coetzer, the Technical Supervisor, intervened and separated them. Though Mr Atkinson was corroborated on the question of the overall by other witnesses who happened to be Company employees, the labour, Officer who enquired into this dispute, after due investigation has stated in his Conciliation Report that the Uniform (overall) the Applicant wore on the day in question was really an old Company uniform. In view of this, I have some doubts as regards to the correctness of the evidence of the Respondent's witnesses. However under the circumstances a reprimand would have been reasonable without the applicant being ordered to clock out.

Coming now to the attempted assaults on Mr Atkinson, Mr Coetzer, and Mr Percy Khumalo the Assistant Depot Manager, the applicant has denied these allegations. Mr Atkinson maintained, that the applicant did grab him by the arms, with the sole purpose of taking back the card, and his evidence has been sufficiently corroborated by that of Mr Coetzer who had been an eye witness to this incident. In the circumstances I accept Mr Atkinson's evidence. The question is whether the applicant did so with intent to assault. However looking at the evidence it seems to me that the main purpose of grabbing Mr Atkinson was to get back his card and this was admitted by both Mr Atkinson and Mr Coetzer. As such there was no intention of assault and grabbing in this case in my view does not constitute an attempt to assault. Therefore taking this into consideration a warning would have sufficed.

As regards to the attempted assault on Mr Coetzer, Mr Coetzer himself has denied of any such assault. Therefore I accept the Applicant's denial.

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Taking the Attempted Assault on Mr. Khumalo, this incident according to Mr Khumalo took place long after the applicant was dismissed. Hence this has no relevance to the applicant's dismissal.

I now turn to the question whether or not a Disciplinary Inquiry was held. In this respect Mr Philip Dlamini, Personnel Manager, told Court that he conducted a disciplinary inquiry at Bhunya at which

the Applicant, Mr Atkinson and Mr Percy Khumalo were present. Neither Mr. Atkinson nor Mr. Khumalo spoke of any Inquiry in their evidence. Their only reference was to a meeting which did not take place because of the applicant's refusal to attend it. This meeting was to discuss the Applicant's problem regarding the overall and his lateness in getting to work. The applicant on the other hand denied of any such Inquiry. I have very serious doubts as to whether an Inquiry was ever held and this in my view is confirmed by the letter of termination (Ex.G). I wish to quote the relevant extract -
"Following our discussion in my office today, this serves to confirm that your services has been terminated with immediate effect. This follows numerous complaints from the Depot Manager regarding your behaviour and conduct."

This letter does in no way suggest that he had been dismissed as a result of an Inquiry. On the contrary it seems to me that he had been just fired on the complaints made by the Depot Manager, which in my view is an undesirable practice and should be condemned.

On the question relating to "gross insubordination to the Senior Staff members of the Department", I find that no additional evidence had been led by the Respondent to substantiate this allegation except the evidence that had already been led in respect of the other two grounds. These have been already dealt with in my judgment.

Having very carefully considered the evidence in this case in its

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entirety from every possible angle, it inevitably leads to only one conclusion that the Applicant had been unfairly terminated. Granting that the Applicant had been disrespectful to Mr Atkinson, the facts remains that the punishment meted out to him was rather harsh considering his long service to the company and also that the Company itself had been responsible for the situation in which the applicant found himself in.

The applicant is claiming the following from the Respondent for his unfair termination -

| | |
|----------------------------------|---------|
| 1 month's wage in lieu of Notice | 259.80 |
| Additional Notice | 336.00 |
| 10 days severance allowance | 606.20 |
| 6 months Compensation | 1558.80 |
| Bus Allowance | 4074.00 |
| | 6834.80 |

According to the Applicant he had been unemployed since he was dismissed from service. He is married and has 11 children. Taking these and the circumstances under which he came to be dismissed, an order for maximum compensation would be just and equitable.

The Applicant is also claiming bus allowance amounting to E4074.00. Since he did not adduce any evidence as to how he came by this figure, I refuse this claim.

Consequently I order the Respondent Company to pay the Applicant the following -

| | |
|----------------------------------|---------|
| 1 month's wage in lieu of Notice | 259.80 |
| 28 Additional Notice | 336.00 |
| 70 days severance allowance | 606.20 |
| 6 months Compensation | 1558.80 |
| | 2760.80 |

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I enter this Judgment as an Award of this Court.

My Assessors agree with my decision.

J.A. HASSANALI,

PRESIDENT-