IN THE INDUSTRIAL COURT OF SWAZILAND

HOLDEN AT MBABANE — CASE NO: 7/90

In the matter between:

JABHANE JAMES MBULI — Applicant

VS.

MHLUME SUGAR COMPANY — Respondent

C O R A M:	J.A. HASSANALI		President
	MR MADAU	for	Applicant
	MR FLYN	for	Respondent
	MESSRS. V. DLAMINI		
	AND MR MATSEBULA		Assessors.

A W A R D
(Delivered on 10/9/90)

Hassanali, P.

In this matter the Applicant is claiming from the Respondent Company the following for his unfair termination:-

6 months compensation	E2332.00
1 month's Notice	388.80
Additional Notice	1399.68
Leave Pay	272.16
Ration Allowance	36.00
Compensation for early retirement	46656.00
Severance Allowance	2721.60
	E53,807.04

The Respondent in its reply denied that the termination was unfair and claimed that he was fairly terminated on the following grounds -

(a) that he on or about 20/2/89 stabbed one Qinisile Mamba, an employee of the Company.

(b) that he damaged a Company motor cycle by slashing its tyres.

(c) that he resisted arrest by the Village Guard and threatened to stab him and other company security guards.

At the outset of the trial, Mr. Madau representing Applicant indicated to Court that he was withdrawing the claim of E.46656.00 in respect of

compensation for early retirement.

Before I deal with the above incidents, it is necessary to trace in brief the history of the dispute which has given rise to this application.

The Applicant joined the Respondent Company on 1/2/1962 as a Clerk and worked in that capacity until 22/2/89 when he was dismissed from service on the allegations that he had

(i) stabbed Qinisile Mamba

(ii) damaged the Company motor cycle which was in the possession and control of one Msibi by slashing its tyres and

(iii) resisting arrest by the Village Guard and threatening to stab him and other security guards.

The applicant was drawing a salary of E386/80 per month at the time of his termination. During his service period of 27 years, he had served the company faithfully and diligently and had an unblemished record of service. At this time, he developed a relationship with Qinisile, a co-worker, and two children were born to them. The couple, however lived separately. Nonetheless their relationship which had endured for more than 10 years had been steady and happy. On 20/2/89 sometime between 8.30 p.m. and 10 p.m. Qinisile sustained a stab injury on her neck, alleged to have been caused by the applicant, and was in the Mhlume Clinic for 2 days. The applicant was arrested by the Police but was released the following day. When he reported for work, the Company terminated his services.

I shall now deal with the question as to whether the applicant stabbed Qinisile on the night of 20/2/89.

It is common cause that Applicant and Qinisile were employees of the Respondent Company. It is also common cause that this incident took place at night in the Company Compound. In my view the said incident was purely a

private affair and had no link with their employment. According to the Applicant when he visited Qinisile on the night of 20/2/89 he found her house in darkness and the door locked. Though he knocked at the door he got no response. But hearing a window being opened, he rushed towards the noise. Qinisile on the other hand admitted that the door was locked but denied that the house was in darkness. She said that she did not open the door fearing the applicant would harm her when he found her with Mr. Msibi, though he was there with her only as a friend. It was this fear she said, that prompted her to open the window in order to call the security guards. Having carefully examined her evidence on this particular point, I have some doubts about its veracity. She seemed intent on trying to prove that the presence of Mr. Msibi in her house at that hour of the night was accidental and innocent. Mr. Madau has suggested that Qinisile could have been having an affair with Mr Msibi, and he could be right, in view of the fact that the house was locked and in darkness.

As regards to the stabbing, the only eye witness to it was one Mr. Felix Ndlovu. According to him, the applicant stabbed Qinisile when they were outside in the compound. I am afraid his evidence does not tally at all with the evidence of either the applicant or Qinisile. I do not think he witnessed any of the said incidents. As such he is an unreliable witness and therefore I do not wish to attach any weight to his evidence. The Court now has to rely on the evidence of the Applicant and Qinisile. According to Qinisile, as she opened the window, the applicant who was standing nearby, stabbed her on the neck. The Applicant on the other hand maintained that he did not intentionally stab her, but that she got injured accidentally when she came into contact with the knife, in his hand. There is no evidence to show how serious the injury was except for a letter from the Station Commander Mananga (Ex.B). According to it Qinisile was grievously assaulted. However this matter was subsequently compounded and the case against the Applicant withdrawn. Having observed the injury on Qinisile. I am of the view that it is very unlikely that the injury had been sustained in the manner as

suggested by the applicant. In the circumstances I hold that the applicant did inflict the injury on Qinisile as stated by her, but under extreme provocation.

I now take up the question as to whether the applicant slashed the tyres of the Respondent's motor cycle.

The Respondent's case here depends mainly on the evidence of one Catherine Ndlovu, one of its employees. It is surprising that Mr. Msibi who was in possession and control of the said cycle during the relevant time, and who happned to be the centre of controversey in the stabbing of Qinisile was not called by the Respondent to give evidence, though his evidence, would have been material to this incident. Furthermore one Mr Dlamini, the Induna who Catherine said was present and who saw the applicant slash the tyres was also not called. Though Catherine maintained that she witnessed the applicant slashing the tyres, her evidence remained totally unsupported. Again on the evidence of Mr. Nhleko and Mr Shultz, it appears to me that the applicant was dismissed solely on the question of stabbing and the question of the slashing of the tyres was never discussed at the alleged Inquiry. There is also no evidence that this incident had been reported to the Police, though the Police was summoned to the scene that night. Therefore taking all these factors into consideration, it seems to me that this incident has been added as an after thought to justify the applicant's dismissal. In the circumstances the Respondent's application on this is dismissed.

The next point is whether the Applicant resisted arrest by the Village Guard and threatened and to stab him and other security guards.

In support of this, the Company relied on the evidence of Mr. Nkambule Village Guard, and Mr. Zwane, Security Guard. According to Mr. Nkambule, when he, Mr Zwane and Mr Shongwe advanced towards the applicant, the applicant told them that they should not come near him as he himself was going to report the stabbing to the Security Office. They then left him and went to the office to phone the Police. Mr. Zwane's evidence too was more or less on the same line. Therefore it is plain from their evidence that neither of these witnesses nor the other

security guards made any attempt to arrest the applicant and therefore the question of resisting arrest does not arise. There is also no evidence that the applicant had threatened to stab the Village Guard or the Security Guards. I therefore dismiss the application on this ground too.

I shall now take up the question as to whether the Company instituted a proper Inquiry into the three incidents before it terminated the services of the Applicant.

The Company maintained that an Inquiry was held but the applicant said that he was dismissed verbally without any sort of Inquiry According to Mr Nhleko, only Mr. Shultz the Estate Manager spoke at the Inquiry and communicated the Company's decision to the Applicant. Mr. Shultz however gave a different version. He said that Mr. Nhleko spoke first and thereafter the others including Mr Joseph Dlamini and Catherine Ndlovu. He also mentioned that the incident relating to the slashing of the tyres was not discussed at the Inquiry but at a subsequent one. Mr. Nhleko on the other hand never referred to another meeting. On the evidence of these two witnesses it is also apparent that this alleged Inquiry, had there been one, was conducted without Qinisile and Mr. Msibi, two persons who were directly responsible for the incident. Also no minutes of the proceedings of the Inquiry were maintained.

Therefore taking all these into consideration, I am inclined to agree with the applicant that no Inquiry was held before his dismissal. I have repeatedly mentioned that a proper domestic Inquiry is always desirable since the principles of Natural Justice require that a person must be informed of the charge against him and an opportunity be given to him, to meet them. An Inquiry helps to establish the bona fides of the employer and dismissal without an Inquiry may sometimes be indicative that the employer had acted arbitrarily. Had an Inquiry been held in this case, the Company could have found out the reasons for the stabbing of Qinisile and may be, arrived at a different conclusion altogether.

On another point, I wish to state that although Qinisile and Mr Msibi were equally involved and equally responsible for the incidents on that night, like the applicant, it appears that the Company had ignored their involvement and failed to take any action against them. This in my view is unfair and discriminative.

Finally I will deal with the question whether the Company had acted reasonably towards the applicant when it decided to terminate his services.

As I have already dismissed the applications of the Respondent in respect of Grounds 2 and 3, the Case for the Company now hinges on the evidence adduced in respect of Ground I. Having analysed the evidence on this ground, I have come to the conclusion that the said incident arose after work and was in no way related to their employment. It was a private affair between the Applicant and Qinisile. In this regard it is important to bear in mind the fact that the employer is not the general custodian of the morals of his workmen. Any act however reprehensible or criminal it may be, committed by them in the sphere of their private life cannot be considered as an act of misconduct. In order that a reprehensible act on the part of a workman committed outside the working hours may be regarded as an act of misconduct, it must either be -

(1) inconsistent with the fulfilment of the express or implied conditions of service or

(2) is directly linked with the fulfilment of the express or implied conditions of service or

(3) has a direct connection with the contentment and comfort of the men at work or

(4) has a material bearing on the smooth and efficient working of the concern.

The Applicant when he stabbed Qinisile who had been his girl friend for more than 10 years acted under extreme provocation when he found out that she

had been unfaithful to him. This in my view constitutes a mitigating factor which the Company should have taken into consideration before it decided to terminate his services. Since there is no evidence to that effect, I conclude that the Company had acted unreasonably in dismissing the applicant.

Again where an employee has had a long record of good service in the past, this is a factor that may be taken into account by Court in judging the reasonableness of Managements' decision to dismiss (Vide The Law of Unfair Dismissal by Steven D Anderman Page 146) In this case the applicant had 27 years of unblemished record of service which factor the Company should have taken into consideration. As this was not done, I consider the termination unreasonable and unjust. A written warning under the circumstances would have been just and equitable. I wish to refer to Tabin Vs Sika Contract Ltd (1973) IRLR 12 in which Sir John Claydon, Chairman of the London Tribunal made the following remarks

"Where there is an employee of so long standing as (the employee) and there is under consideration his dismissal for apparently persisting in some conduct which the employer thinks is wrong, it seems to us the only reasonable thing for the employer to do is to ask the employee why he is doing this, to tell the employee that he must not do it and to warn the employee that if he persists in dong it he may have to go."

On the issue of the Inquiry if an employer completely omits an obvious step in an investigation such as an hearing this will cast doubt on the reasonableness of his belief. Or if he goes through the motions of an enquiry but it can be shown that the investigation was faulty this may make the employer's decision unreasonable (Vide Law of Unfair Dismissal by Anderman Page 76)

In this case it is obvious that the Company failed to hold a proper Inquiry before it terminated the services of the applicant. In the circumstances I consider the action of the Company unreasonable.

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Therefore having considered all these factors, I have come to the conclusion that the termination of the Applicant was unfair.

I shall now turn to the question of terminal benefits and Compensation.

The Applicant is 50 years old and unemployed. His chances of finding a job in the future remains rather bleak on account of his age. I am of the view that an Order for maximum Compensation would be just and equitable, taking into consideration the circumstances under which he came to be dismissed from service.

It is common cause that the other claims had not been paid and are not in dispute.

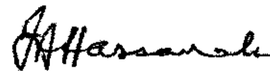
In the circumstances I make the following Order -

The Respondent Company shall pay to the Applicant the following -

6 months compensation	E.2,332.80
1 month's Notice	388.80
Additional Notice	1,399.68
Leave Pay	272.16
Ration Allowance	36.00
Severance Allowance	2,721.60
	E7,151.04

I make this Order as an Award of this Court.

My Assessors agree with my decision.



J.A. HASSANALI,
PRESIDENT