IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

Case No: 124/91

In the Matter between:

ELPHAS DLAMINI	Applicant
AND	
BERAL SWAZILAND (PROPRIETARY)	Respondent
LIMITED	

CORAM:

Martin S. Banda:	President
Vusie Dlamini:	Member
Josiah Yende:	Member
Mr Sipho Motsa:	For the Applicant
Mr Maphanga:	For the Respondent

JUDGEMENT

The Applicant in this matter is claiming compensation for the unfair termination of his services by the Respondent. The Applicants claim is made up as follows:

(i)	6 months wages as compensation	2436-00
(ii)	12 days additional notice	243-60
(iii)	30 days severance allowance	609-00
	Total	E3288-60

The Respondent in his reply admits that the Applicants services were terminated on the 22nd November 1990 but denies that they were unfairly terminated.

The history of this case is as follows:

On the 19th November 1986 the Applicant was employed by the Respondent as a Machine Operator. On the 22nd November 1990 the Respondent terminated the services of the Applicant on the grounds that he had refused to carry out lawful instructions. At the time when the Applicants services were terminated he was earning E406 a month.

The Respondent admits that the Applicants services were terminated on the 22nd November 1990, because he had refused to wear the dust monitoring device despite being instructed by his supervisors. That the conduct of the Applicant was such that the employer could not reasonably be expected to

continue to employ him and that the dismissal was fair in terms of Section 36 (a) and (g) of the Employment Act of 1980.

On the date of trial the Respondent informed the Court that it was not contesting paragraph 13 (ii) of the Applicants prayer and tendered a sum of E243-60 in lieu of the item. Judgment was accordingly granted. The Respondent was ordered to pay the Applicant a sum of E243-00 relating to the 12 days additional notice claimed.

The Applicant testified in Court in support of his claim. The Applicant stated that he was employed by the Respondent on the 19th November 1986 as an Operator. He was operating a machine for drilling linings and making linings.

He recalled the 22nd November 1990 an employee from Bulembu came at work bringing a dust count used to monitor the amount of dust. Before he was given a dust count he asked whether it worked better when it was with him or hanging on the machine. He was not given an answer. The employee from Bulembu went away to report. Mr Shilubane also came and charged the Applicant for having refused to put on the dust count. Mr Kunene the Line Manger came and told the Applicant that from that time he was suspended from work. The Applicant asked him to write a letter of suspension stating the reasons for suspension. He asked Mr Kunene to go with him to a shop steward and suspend him infront of a shop steward as he had failed to give the Applicant a letter of suspension. The Applicant came with a shop steward. Mr Kunene said he was not trying a case but only suspending him Mr. Shilubane is the Loss Control Manager.

The Applicant was told to come on the 23rd November 1990. On the 23rd November 1990 when he reached the office he was asked whether he refused to put on the dust count. He refused. He was found guilty of refusing to take the dust court. The employee of Havelock mine was not present during the hearing. The punishment given to the Applicant was a dismissal from work. The Applicant is married he has 3 children. On the 23rd November 1990 he had 2 children. He prays for reinstatement.

Under cross examination the Applicant stated that he was drilling linings. There were no safety precautions taken in his job. He was asked to wear some protective clothing. These were the overall, gloves, boots and respirator and some glasses. The respirator was for protection of dust as the place was

dusty.

On the 22nd November 1990 the Applicant was approached by someone from Havelock Mine to wear the dust count pump. The Applicant did not know if this person was from Havelock. He was told on the day of the hearing.

After the Applicant had posed his questions to the employee of Havelock mine his supervisor came and charged him. The supervisor charged the Applicant for refusing to wear the dust count. Musa Shonwe never asked the Applicant anything he just suspended him. The Applicant denies that on the 22nd November 1990 the Line Manager asked him to wear the dust count.

The Defence lead its evidence and called witnesses. DW1 Musa Shongwe Supervisor testified that on the 22nd November 1990 people from Bulembu came to check the degree of dust at their company. He knows the Applicant. The Applicant was working in his department under his supervision. The people from Bulembu went to the Applicant and asked him to put on the dust counting machine. He was not present. DW1 after receiving a report went to the Applicant and asked him to put on the dust counting machine as it was against the rules not to put it on. The Applicant said he wont put it on.

DW1 reported the matter to Mr Walter Kunene the Line Manager. He came back with Mr Kunene. He was present when Mr Kunene asked the Applicant to put on the dust count machine. The Applicant said he cannot put the dust count machine on unless the purpose was explained to him.

DW1 conceded under cross examination that the only people who can instruct and employee to put on the dust count machine is the personnel from Havelock Mine.

The defence then called the evidence of DW2 Walter Jabulani Kunene a Line Manager with Beral. He asked the Applicant to put on the dust count machine He refused. He asked the Applicant to click out and come back the following morning at 9 o'clock to discuss the matter.

DW2 stated that employees of Havelock Mine had the right to ask employees to put on the dust count. The Applicant refused to take his instructions. He refused to leave the premises. He phoned Security who came and drove him out of the premises. He went away and came back the following day. The matter was dealt with by the Production Manager Mr David Mdluli.

Under cross examination DW2 said he investigated whether the Applicant refused to put on the dust count. His investigation was simple because the Applicant refused to put on the dust count. He then sent him home because he had failed to take instructions. The Applicant admitted having refused to put on the dust count.

He could not work with someone who was refusing to take instructions. At the time DW2 suspended the Applicant he had finished his investigation.

DW2 knows that the company and the Swaziland Manufacturing and Allied Workers Union have a recognition agreement. He knows the disciplinary procedure of the company entered between the company and the union. In deciding disciplinary matters he is guided by the Disciplinary Procedure Book produced by the Company. He did not use the Disciplinary Procedure shown in the recognition agreement.

DW2 said his investigations were complete. They were not fully complete though. He said it was simple but he still had to look into the matter that is why he sent the Applicant home. He attended the disciplinary hearing. The production Manager presided over the hearing on the 23rd November 1990.

The Defence then lead the evidence of DW3 Stephen Shilubane a Loss Control Manager at Beral. Two weeks before the incident he was asked to explain the purpose of the dust sampling machine. The Applicant was present. The Applicant bombarded him with questions. It was not the first time the Applicant was putting on the dust pump.

On 22nd November 1990 a Havelock crew arrived and chose the Applicant to wear a pump. DW3 was not present. The Applicant told DW3 he was not prepared to wear the dust pump. He was very arrogant.

Under cross examination DW3 said the purpose of having Havelock come to Beral is to help them show that their results are in line because Havelock have professional people. DW3 stated that the Applicant has always been a difficult person to work with. There was no reason for him to refuse to put on the pump. DW3 attended the hearing of the Applicant to give evidence.

The Defence then lead the evidence of DW4 Naphtali Gtimbi a Personnel Manager with Beral Swaziland. He knows the Applicant. He became aware of the Applicants dismissal. On 22nd November 1990 it was reported to him that the Applicant had refused instructions by his superiors.

The Production Manager informed DW4 by way of a dismissal recommendation to the General Manager through him. DW4 made his comments and passed them to the General Manager. DW4 heard the appeal by the Applicant. He found no reason to alter the decision made by the Production Manager. The Applicant then asked that the matter be referred to the General Manager. The Applicant submitted a written appeal The General Manager replied in writing. Secondly the Applicant requested a meeting with the General Manager. The meeting was held. DW4 was present at the sitting. The General Manager

explained that the Applicant was dismissed for refusing to carry out an instruction. The appeal was refused

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DW4 stated that at the time of recruitment every employee is given the disciplinary code of conduct. If an employee refuses instructions he is dismissed instantly.

Under cross examination DW4 stated that he does not approve recommendations for dismissal. He puts on comments. The dismissal is effected by the Department Head. The General Manager approves the dismissal. DW4 does not feature in appeals. The Production Manager Mr David Mdluli chaired the meeting.

The Applicant under cross examination denied that on the 22nd November 1990 his Line Manager asked him to wear the dust count. The Applicant under cross examination said his Loss Control Manager Mr Shilubane charged him for having refused to put on the dust count. He did not ask the Applicant.

It will be noticed that the Applicant denies having been instructed to put on the dust count by an employee of Havelock Mine. Applicant denies that DW1 Musa Shongwe his supervisor never asked him anything he just suspended him. The Applicant denied under cross examination that his Line Manager asked him to wear the dust Count.

DW1 Musa Shongwe says he asked the Applicant to put on the dust counting machine as it was against the rules not to put it on. In the presence of DW1, the Line Manager Mr Walter Kunene asked the Applicant to put on the dust count machine DW2 does not mention the presence of DW1 when he asked the Applicant to put on the dust count machine. DW3 Stephen Shilubane testified that the Applicant told him he was not prepared to wear the dust pump.

It was submitted on behalf of the Applicant that the employee of Havelock Mine has not testified except the Applicant. That the Applicants testimony has not been rebuffed. It was submitted that no one else can issue instructions of the dust count other than the employees of Havelock Mine. That Mr Mdluli held the hearing and recommended the termination of the Applicants services and terminated the Applicants services did not testify. That no evidence was given why Applicants services were terminated. It has been submitted on behalf of the Applicant that no just cause has been established for the termination of the Applicants services. It is the Applicants prayer that the Respondent should pay compensation for unfair dismissal 6 months wages, 12 days additional notice, 30 days severance allowance.

For the Respondent it was submitted that there was a termination. Applicant was an employee. That DW3 Stephen Shilubane points out the background. That the evidence of Musa Shongwe that he received a report from an employee of Havelock Mine to the effect that Applicant had refused to wear a dust count. He confirmed this. It has been submitted on behalf of the Respondent that the Respondent has complied with Section 36 of the Employment Act. That the termination is justified.

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That the employer is under a duty to give a hearing. That a full and proper investigation was carried out. That the Application before Court should be dismissed.

In evidence in chief the Applicant said he recalls the 22nd November 1990 an employee from Bulembu came at work bringing a dust count used to monitor amount of dust. Before he was given a dust count he asked whether it worked better when it is with him or hanging on the machine. He was not given an answer.

Under cross examination the Applicant said he inquired what the article was for. He asked how it counted the dust. They told him it was for counting dust. He was told it counted the dust in a certain time or period. Under further cross examination the Applicant said he did not ask how the machine worked because he

knew.

The Applicant then denied paragraph 5 of his Application. He said it did not represent what he said.

Paragraph 5 of the Applicants application states and we quote:

"(5) When the Havelock Asbestos Mine employee gave the Applicant the dust-count, the later inquired how the equipment is used and why"

The Applicant further stated that he told the Labour Commissioner that what he had written was not what he had said. The Labour Commissioner said in English what he reported was what was shown on the certificate of unresolved Dispute. The Applicant disagreed with him.

The Applicant was referred to paragraph 5 (iii) of the certificate of unresolved Dispute. He said the paragraph was correct.

Paragraph 5 (iii) of the certificate of unresolved Dispute states and we quote:

"(iii) Applicant while conceding that he questioned the Bulembu official on how the "dust count" instrument functioned he denied refusing to take the dust count. He prayed for reinstatment to his job"

This is the paragraph that the Applicant disagreed with. This is the paragraph that the Applicant says was not what he had said. The Applicant under further cross examination stated that he cannot deny that he said he did not wear the dust count because he did not know the reason why.

At the same time the Applicant says paragraph 5 of his application does not represent What he said. The Applicant stated that on the 22nd November 1990 the Line Manager did not ask him to wear the dust count. The Line Manager did not explain to him how it works.

The Applicant further stated under cross examination that a disciplinary hearing concerning his case was conducted on the 23rd November 1990. He was represented

during the hearing. His representatives were Victor Dlamini and Jonathan Myeni. The charges were put to the Applicant on the 23rd November, 1990. He was allowed to answer.

The Applicant knew that a person would be tried for misconduct. He knew that failing to carry out instructions from his seniors was an offence. He was not aware of the penalty for refusing to carry out reasonable instructions and that it amounted to dismissal.

DW4 stated that at the time of recruitment every employee is given the disciplinary code of conduct. If the employee refuses instructions he is dismissed instantly. DW4 further stated that in May 1990 the Applicant was given a final written warning for using abusive language to his supervisor. DW4 stated that the Applicant was dismissed for refusing to carry out an instruction.
Responding to a question from court DW4 stated that the Applicant was dismissed for refusing instructions from Bulembu. The authority for dismissal was taken from Section 36 (g) of the Employment Act.

Section 36 stated and we quote:

"It shall be fair for an employer to terminate the services or an employee for any of the following reasons------

(g) because the employee refuses either to adopt safety measures or follow the instructions of his employer in regard to the prevention of accidents or disease"

The evidence of the Respondents witnesses is that the Applicant refused to carry out an instruction. DW4 says they utilise Section 36 (a) and (g) of the Employment Act. DW1 says the Applicant refused to put on the dust counting machine. DW1 says the Applicant said he refused to put on the dust counting machine because he did not know the use of putting on the dust counting machine. DW2 says the Applicant refused to put on the dust counting machine. DW2 had the power and authority to ask the Applicant to put on the dust counting machine. The Applicant refused to take his instructions while he was the Applicants Manager.

For the Respondent merely to allege that the Applicant refused to carry out instructions by refusing to put on the dust counting machine is not enough. Section 36 (g) of the Employment Act requires evidence relating to the adoption of safety measures or in regard to the prevention of accidents or disease. The Respondent has not placed an aorta of evidence before court evidence enabling it to discharge the expectations and requirements of Section 36 (g) of the Employment Act. Section 36 (g) of the Employment Act cannot be invoked in the present case.

Having failed to satisfy Section 36 (g) of the Employment Act can the Respondent utilise 36 (a) of the Employment Act. The Applicant was charged with

refusing to put on the dust counting machine. The hearing was restricted to matters relating to the refusal to put on the dust counting machine. The Applicant was never charged with the offence that because his conduct has after written warning been such that the employer cannot reasonably be expected to continue to employ him.

The Applicant was never charged with the offence relating to conduct. The Applicant was never asked to defend himself on a charge relating to conduct. The Respondent is precluded from using this alternative prayer. To do so would be a breach of the rules of natural justice.

The Respondent has failed to prove that the reason for the termination of the Applicants employment is one permitted by Section 36 of the Employment Act. The Respondent has failed to prove that taking into account all the circumstances of the case it was reasonable to terminate the service of the employee.

It is ordered that the Respondent do pay the Applicant 30 days severance allowance in the sum of E609-00.

The Applicant is 30 years old.

He is unemployed- He is married. He has 3 children. On 23rd November 1990 he had 2 children. We order that he be paid 6 months wages as compensation in the sum of E2436-00.

We come to the prayer for reinstatement. The Respondent alleges that the reinstatement of the Applicant will not be in the interests of both. We would urge both the employers and employees to properly read the Employment Act of 1980 and the various Collective Agreements. We further urge both parties to abide by the spirit of these documents. An employer should not mete out discipline without abiding to the letter and spirit of the necessary legislation. An enlightened workforce will create problems by insisting that the employ should act within the law.

No justifiable reason has been advanced before us why a recommendation for reinstatement would not be in order. We accordingly recommend that the Respondent do reinstate the Applicant in its employment. In default of such reinstatement the Respondent do pay the Applicant the sum of E2436-00.

The members have concurred.

MARTIN S. BANDA

INDUSTRIAL COURT PRESIDENT