

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 173/94

In the matter between:

VULINCWALA DLAMINI APPLICANT

And

SWAKI INVESTMENT CORPORATION LIMITED RESPONDENT

CORAM:

MARTIN BANDA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

NONZWAKAZI GWIJI : FOR THE APPLICANT

JUDGEMENT

The Applicant seeks compensation for his unfair dismissal by the Respondent from his employment.

The Applicant proved service of the proceedings upon the Respondent by an Affidavit dated 14th December, 1994. The Applicant then sought an order that the matter should proceed ex parte. The order was granted. This is an ex parte trial.

The Applicant testified on oath that he was employed by SWAKI INVESTMENT CORPORATION LIMITED carrying on business as TRACAR at Mbabane and Manzini. He was employed as a mechanic at the Mbabane branch on 1st July, 1992 until 3rd June, 1994. On the 3rd June, 1994 his services were terminated on the grounds of

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having smoked at the workshop. The Applicant stated that on the 19th April, 1994 the Manager of the workshop requested him to stop smoking in the workshop. The Applicant did not take the instruction because it was discriminatory, it was not applied to the other employees. The Applicant stated that when he was employed the Branch Manager told him that he should not smoke inside customer's cars. The workshop does not display a no smoking sign. The Applicant further stated that smoking was not one of the listed offences at Tracar governing the workers which if one did not conform one would be warned or subsequently fired. The Applicant went further to give examples of the listed offences. The first one was theft of company property and the second one is abuse of company property.

No disciplinary inquiry was held on the Applicant's smoking offence. He received a written warning that he should not smoke during working hours. To the knowledge of the Applicant other employees who smoked did not receive warning letters. The Applicant was dismissed by MR. MUSA MAGONGO the Branch Manager of Tracar Mbabane who initially informed the Applicant verbally that his services were being terminated and in the subsequent week following the verbal dismissal it was confirmed in writing.

The Applicant received one month's payment. He did not receive leave pay. In any event the Applicant is not claiming leave pay in his application now before Court. The salary of the Applicant was E825 per month. He is not married. He has four children from different mothers and only one of the mothers is working. The Applicant holds a City and Guilds Part 1,11 and 111 Motor Mechanic qualification. He

is unemployed. Since his services were terminated he has been looking for a job and has not secured one. He is claiming E380.70 as Severance Allowance. He is 29 years old.

The Applicant then lead the evidence of PW2 ELMOT MAMBA employed by Tracar Mbabane Branch as a workshop Foreman.

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PW2 knows the Applicant. PW2 stated that the Applicant was employed by Tracar as a Motor Vehicle Mechanic. PW2 was the Applicant's immediate supervisor at the time of his employment. PW2 stated that the Applicant was accountable to the Workshop Foreman. PW2 stated that the Applicant does smoke and that even when the Applicant was recruited by the Respondent he was smoking. PW2 further stated that there are no restrictions on smoking in the workshop. A restriction came after the Branch Manager found the Applicant smoking in a company vehicle. The Branch Manager warned the Applicant not to do it again. Both the Applicant and the Workshop Manager were smoking. PW2 often worked with both of them and became used to their smoking during working hours and had no problem with either of them smoking. The workshop does not display a NO SMOKING sign even now.

The Respondent has a list of offences regarding the running of Tracar. There are four categories of these offences, These are very serious offences, serious offences, other offences and minor offences. Under very serious offences are gross insubordination and gross negligence. For these offences your services may be terminated forthwith. Under serious offences come failure to report and misuse of procedure. Under other offences fall incompetence after proper coaching or training, negligence of crucial resources, procedures, safety standards. The fourth category minor offences has low productivity, loafing and malingering. The workshop Manager advised PW2 that the Applicant's services had been terminated by the Branch Manager MR. MAGONGO. The Applicant's services were terminated for smoking. PW2 stated that smoking does not appear in the offences under the four categories. PW2 approached the Branch Manager to find out why the Applicant had been fired. He did not get a nice reply and was referred to the Workshop Manager. The Branch Manager told PW2 that his decisions that is the decisions of the Branch Manager were final. PW2 said no inquiry was held in the case of the Applicant.

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This has been an uncontested case. The evidence of the Applicant has not been challenged by the Respondent. The Respondent has not through evidence shown that the termination of the Applicant's services was one permitted by Section 36 of the Employment Act namely that it was fair. The Applicant was not charged for any other offence by the Respondent. There was no inquiry conducted by the Respondent before the services of the Applicant were terminated. The Respondent has thus not shown that it took account of all the circumstances of the Applicant's case. The Respondent has not shown that having taken all the circumstances of the Applicant's case it decided that it was reasonable to terminate the services of the Applicant pursuant to Section 42 (2) of the Employment Act of 1980. The Respondent has thus failed to discharge its burden. On the evidence before us we are satisfied that the termination of the Applicant's services by the Respondent was neither fair nor reasonable it was unreasonable and unfair. The termination of the Applicant's services was unlawful and illegal.

It is the decision of this Court that the Applicant be paid the sum of E380.70 which he claimed as Severance Allowance. The Applicant has lead evidence in pursuance to Section 13 (3) of the Industrial Relations Act of 1980. We thus order that the Respondent do pay him 6 months wages as compensation for the unfair dismissal in the sum of E4950.00.

The Members have concurred.

MARTIN SAMSON BANDA PRESIDENT
- INDUSTRIAL COURT