

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 117/94

In the matter between

ARMSTRONG DLAMINI	APPLICANT
AND SWAZILAND UNITED BAKERIES LTD	RESPONDENT

CORAM:

MARTIN BANDA	: PRESIDENT
JOSIAH YENDE	: MEMBER
NICHOLAS MANANA	: MEMBER
REUBEN ZONDI	: FOR THE APPLICANT
PATRICK FLYNN	: FOR THE RESPONDENT

JUDGEMENT

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

It is common cause that the Applicant was employed by the Respondent on the 17th August 1987 as a Driver Evaluator and in June 1989 was promoted as sales Manager. His gross salary till April 1994 was E2400 per month. On the 9th May 1994 the services of the Applicant were terminated by the Respondent. The grounds for the termination of the Applicants services was an allegation that he on or about the 5th or 6th April 1994 took E40,000 without the knowledge of senior management and his alleged subsequent failure to return such monies. It being

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alleged that he was suspected to have been involved in the alleged theft of E40,000 from the Respondent. It is common cause that on the 6th April 1994 a sum of E40,000 went missing from the Respondent.

The Applicant gave evidence that on the 9th May 1994 he received a letter from the Respondent informing him that he had been dismissed from employment. The allegation was that on the 5th and 6th April 1994 the Applicant stole E40,000 from the Respondent. He alleged that he was last at work on the 4th April 1994 and did not report for duty on the 5th and 6th April 1994. Phillip Dlamini who was the cashier of the Respondent was also dismissed. The Applicant stated that on Monday the 10th April 1994 he was arrested by the police from his home in Matsapha. He was formally charged. He applied for a bail and was granted. The matter was later struck off the roll on the 3rd May 1994. The Applicant said he never admitted having stolen the money and said he had no access to the money. He was never called to any disciplinary inquiry. He does not know anything about investigations conducted by the Respondent as he was not even at work. Other than this incident the Applicant says he had never received a caution or verbal warning from the Respondent.

The Applicant has abandoned claims relating to the following items:

1. 3months leave E7200-00
2. 12 days public holidays E2215-44
3. Pension Premier Scheme (Entitled to 36 months pay) E86,400-00

4. 12,000km mileage allowance at E0.36/km E4320-00

The Applicant had earlier on abandoned these claims:

- (a) 321 Sundays worked not paid E57,601-44
- (b) Christmas holidays not taken E1 107-22

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He now claims payment for the following heads of claim:

1. 24 months maximum Compensation E57,600-00
2. One month notice pay E2400-00
3. 24 days additional notice E2215-44
4. 60 days severance allowance E5538-60

Under cross examination PW1 said he knows Mandla Philip Dlamini who used to work for the Respondent as a cashier. He is no longer working there. He was dismissed for the same offence that Applicant was accused of. He does not know anything about the E40,000 he is accused of having taken without the knowledge of the management of the Respondent and alleged failing to return it. PW1 denied that Mandla Dlamini handed E40,000 to him which was supposed to be banked and belonged to the Respondent at the bank on the 5th April 1994. He denied going to the home of the General Manager of the Respondent Mr Barnabas Mhlongo on the 6th April 1994. He denied telling Mr Mhlongo that he had been tempted by devil and Mandla Dlamini handed E40,000 to him. He admitted going to the home of Mr Mhlongo on the 10th April in the company of police officers to find out about the allegation of E40,000 and that Mr Mhlongo denied any knowledge of any money missing. He denied asking for 24 hours in order to raise money. He denied admitting the commission of a dishonest act that of taking money from a fellow employee. PW1 admitted that under normal circumstances the cashier Mandla Dlamini would be responsible for the money, he did the banking. He complained about the unfair dismissal and that he was never afforded a hearing. He said there was never an inquiry in his presence. The Applicant said he is not aware of an investigation by Mr Fiddler on the 5th May 1994.

The Applicant then lead the evidence of PW2 Mandla Phillip Dlamini who was employed as a cashier by the Respondent. He stopped working for the Respondent during the Easter holidays of 1994. It was alleged that he had stolen E40,000 from the Respondent. PW2 said this money went missing on the 5th April 1994 when he took it to the bank to deposit it. He denied that he gave the money to the Applicant. He further denied telling Mr Mhlongo the General Manager of the Respondent that Applicant had asked PW2 to give him the money.

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He denied having admitted to anyone that he had given the money to the Applicant. PW2 said at the end of each day truck drivers came to him with the money comprising their sales for the day. He would count the money and after consulting with the driver record the amount then PW2 and the driver would sign. PW2 would then put the money in a safe which was in the cash room. Three people had access to the safe, these are the General Manager, Administration Manager and Sale Manager. The Administration Manager and PW2 had keys to this office where the safe was kept. The safe had a combination lock which was opened by the Sales Manager, Administration Manager, and the General Manager. Other than the three no one else knew the combination for opening the safe.

On the day that the money allegedly went missing the Applicant was not at work according to PW2 and that he was not at work on the 4th, 5th, 6th and 7th April 1994. PW2 said on the 5th April 1994 when he went to deposit the money at the bank he did not meet the Applicant either along the way or anywhere in town. Under cross examination PW2 said he was dismissed. He was not called for an inquiry. He did not make a statement to the police in the matter. PW2 denied making a statement to Detective Elliot Siphanga. PW2 denied that he told the police that the Applicant took the money and promised to bring it later PW2 denied communicating with his seniors after he had been released. He denied writing a letter to Mr Mhlongo. PW2 denied the letter he is alleged to have written to Mr

Mhlongo. He denied writing any other letter to anybody else at the Respondent. He denied writing a letter to Mr Dlamini.

PW2 said on the 6th April 1994 he went to the office of Mr Mhlongo who told him that a certain amount of money was missing. PW2 said he did not know anything. He denied that Mr Richard Dlamini and Stan Nxumalo were present. He denied telling Mr Mhlongo that he gave the money to the Applicant. PW2 said the letter he was alleged to have written to Mr Mhlongo and Mr Richard Dlamini were forgeries. He said he had worked for 11 years for the Respondent and someone might forge his handwriting. He admitted being charged for the E40,000. PW2 was shown a document and asked if it bore his signature. He laughed and said it was not his signature. PW2 then testified on the procedure undertaken when a driver comes in with money. He said every driver hands the money he has collected to PW2 who then records it in a green hard cover exercise book. PW2 said for the 4th April 1994 he recorded the money that came with the drivers. The amounts that are recorded in the exercise book as having been received would be in his hand writing. He would total it up at the end of the day then take it for banking the next day. These figures are recorded in a computer. PW2 does not remember the strong room being opened on the 6th April 1994 in the presence of

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banking the next day. These figures are recorded in a computer. PW2 does not remember the strong room being opened on the 6th April 1994 in the presence of the police.

Under cross examination PW2 said at the time he left employment he was using the Respondents postal address which is Box 175 Mbabane. He said the two letters he is alleged to have written state that he was taken to Sidwashini on 7th April when he was at this time at the police station at the remand centre and that it is not the right date when he was locked up at Sidwashini. He said Mr Mhlongo and Mr Richard Dlamini never called him to discuss these letters with him. He further said the Royal Swaziland Police never discussed these letters with him. He said the first time he was asked about these letters was in court and to see them. PW2 said on the 6th April 1994 he reported for work. He was told not to go to his office. He was told a certain amount of money was missing in his office. This surprised him as he was not aware. He was told by Stan that some money was missing. He found Henry Gama at the cashroom counting some money. PW2 did not get into the cash room on the 6th April 1994. The money that Henry Gama was counting was from the safe. When PW2 arrived on the 6th April 1994 he found the safe had been opened. When he left to do banking on the 5th April 1994 he left the safe locked. He locked it. The door to the cash room was locked. PW2 said besides himself Mr Stan Nxumalo had access to the key to the cash office and the safe and that Stan was using the combination system. PW2 said he would like to have the original FAB which has got the monies collected from the drivers and they bear signatures of the drivers and PW2. The signatures signify an agreement between the driver and the cashier that this is the right amount received by the cashier from the driver. PW2 said the original Fab which has signatures is normally kept by Mr Stan Nxumalo.

The Respondent lead the evidence of DW2 BARNABAS MHLONGO its General Manager who stated that on the 5th April 1994 the cashier Mr Mandla Dlamini went to bank some money and did not return. He returned on the 6th April 1994 and was asked where he had been. The question was asked by DW2 in front of Richard Dlamini and Stan Nxumalo. PW2 told DW2 that on the 5th April 1994 he gave money of the Respondent to PW1. PW2 allegedly told DW2 that PW1 had a deal and he was going to bring back the money. PW2 told DW2 that after a certain amount of PW1 came back and said the money had been taken PW1 allegedly told PW2 that he had been a victim of a conman. At about 1-30 on the 6th April 1994 as DW2 was having lunch at home PW1 came to see him. PW1 told DW2 that he was very sorry in that he was tempted by the devil. PW1 had asked PW2 to give him the money and that he was a victim of a conman in that he

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had given the money to a third person who had disappeared. PW1 allegedly told DW2 that this transaction took place outside the OK plaza and that he needed 24 hours to pay it back to the company. DW2 informed PW1 that the matter had been reported to the police. PW1 next appeared at DW2's house on Friday saying he was finding it very difficult to raise the money. DW2 told PW1 that the company viewed the matter seriously. DW2 next saw PW1 on Sunday in the company of three

police officers. DW2 told the police that he did not want to interfere with their job and that if they wanted to arrest PW1 they could go ahead. The E40,000 that was missing was never recovered. DW2 said he does not know Mandla Dlamini's handwriting but stated that the letter which is alleged to have been written by PW2 was indeed-written by him because it confirmed exactly what PW2 had said to him on the 6th April 1994 where he was saying why should he be blamed because he had given the money to PW1. DW2 said it was difficult for him to say whether the letter was posted or given to him by hand but that it was brought to his desk.

DW2 said an investigation was conducted. He was chairing the investigation. PW1 was not present during the investigation because of his bail conditions. The other reason of non attendance was that PW1 having admitted the offence to DW2 there was no other verdict that would be returned than dismissal. Under cross examination DW2 said in spite of the admission by PW1 they had to conduct an investigation to prove that the money had disappeared and that there was a shortage. When DW2 was informed that PW1 had denied making any confession to him. DW2 said he was disappointed. PW1 was a man he trusted. Nothing would change what PW1 had said to him for the rest of his life. DW2 said PW1 pleaded in front of three police officers that he needed time to go and find the money. DW2 does not know where PW2 was on the 7th April 1994. DW2 does not have personal knowledge of how much money went missing but said the Accountant would know.

Responding to questions from the court DW2 said PW1 was not called to explain before the disciplinary inquiry. The strongest reasons relied on to terminate his services was the admission he made to DW2 and to the accountant. There was no other verdict that DW2 could hand down. DW2 said he personally charged PW1 with taking the money. DW2 is the very person who chaired the investigation. DW2 was asked the following questions by the court and we quote:

"Q. You say you conducted an investigation in which the Applicant was not present and in that investigation you decided to terminate the services of the Applicant is that correct

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A. Yes

Q. Do you think it is fair to discuss an alleged misconduct and you do not give him an opportunity to defend himself or cross examine the witnesses

A. There are certain cases where a person may not be present. Also taking into account the condition of the bail and where there is no other verdict."

The Respondent then lead the evidence of DW3 RICHARD DUMISA DLAMINI its personnel Officer who remembered the events of the 5th and 6th April 1994 during the Easter holidays. DW3 was not at work on those days. He reported for duty after the Easter holidays. Upon resumption of duty on the first morning he found that there was confusion at work. The entrance to the cash room was locked and no one could get in and in order for DW3 to reach the training room he had to use another door. A driver was sent to look for Phillip Mandla Dlamini the cashier. He came. DW3 was called to the administrative Managers office where he found PW2, DW2 and Stanley Nxumalo the Administrative Manager. DW3 said PW2 was asked by DW2 why he was absent on the previous day. PW2 said he had a problem. DW2 asked PW2 what problem he had because even at that moment there was no sign that there was going to be banking of money. PW2 said he had a problem with E40,000. He said PW1 approached him and asked him to give him E40,000. PW2 said he gave the money to PW1. PW2's conditions showed that he did not rest. DW3 asked PW2 if he had not slept that night and PW2 said he had been busy all night trying to chase the person who had given them a raw deal. This was in relation to the money. DW3 was referred to the letter that had purportedly been addressed to him by PW2. He said it came through the post office and it appeared to have been copied to his seniors because at the end it said it had been copied to the seniors. DW3 did not have occasion to discuss this letter with PW2. They used to meet on several occasions or around town on the streets and PW2 told DW3 that he had been dismissed unfairly. DW3 said he knows the handwriting. He recognised the handwriting as that of PW2.

Under cross examination DW3 said he was present in an inquiry which the Regional Human Resource Manager Mr Fiddler had come to talk specifically about PW1. DW3 cannot say what was

being investigated because he was not the person conducting the inquiry. PW1 was not present. DW3 is not sure what part DW2 played in that meeting. DW3 said DW2 did talk in the meeting but DW3 cannot be specific of what he said. He does not remember. He does not remember

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DW2 giving evidence to the effect that PW1 had made a confession to him. He does not remember well what part Mr S. Nxumalo played in that meeting. To his knowledge there was no conclusion reached in that meeting concerning PW1. He did not see a letter written to PW1 dismissing him from employment because PW1 was his senior and anything concerning him would be treated as confidential and his personal file and correspondence was kept by the Personnel Secretary of the General Manager. No correspondence regarding senior staff members was brought to personnel. Personnel department dealt with weekly employed staff DW3 cannot say with what offence PW1 was charged DW3 does not remember seeing any witnesses in that meeting. DW3 was asked this question and we quote both the question and the answer:

"Q. You were present at the inquiry you took part in that meeting you don't know who was chairing you don't know what Mr Mhlongo said in that meeting you don't know what Mr Stan Nxumalo said in that meeting you don't even know what Armstrong Dlamini was being investigated for because as you put it you were not the investigator is all I have said true or false

A. It may be true or false but what I maintain is that what was taking place in this meeting was something senior to my level whether decisions or judgements were taken but I had nothing to say and do."

B.

The Respondent then lead the evidence of DW4 CECIL GREENFIELD a handwriting and document expert who stated that the letter allegedly written by Mandla Phillip Dlamini to Mr Barnabas Mhlongo and Mr Richard Dlamini are not forgeries. Their writing is fluent and spontaneous without hesitation. DW4 said the forger will attempt to produce writing similar with his victim. They are clumsy attempts because of poor line quality. The opinion of DW4 was that the documents titled consumables and the letters allegedly written by Mandla Phillip Dlamini were written by the same person. DW4 went on to state that no ones writing is the same every time. Even if one tried to sign his signature no two signatures will be the same. The writing is bound to vary. Under cross examination DW4 said the documents that he referred to were purported to be

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those of Mandla Phillip Dlamini. He does not know. His evidence did not form part of the reason for which Applicant was dismissed. DW4 did not produce any document or certificate of his qualification as a handwriting and document expert. He said he became a member of the Forensic Science Society of UK and an associate member of the International Association for identification of the USA on recommendation of the chief of the Police in South Africa. His evidence has nothing to do with the unfair dismissal of the Applicant.

The Respondent then lead the evidence of DW5 STAN NXUMALO the Respondents Administrative Controller who due to some sickness has now become the Sales Supervisor. In 1994 DW5 was the Administration Controller his duties were supervising and administering most of the bakery operations in the finance section checking the books by the cashier, supervising delivery drivers checking their sales and cash when they came back from delivery. DW5 knows PW2 who was employed as a cashier. He supervised the duties of PW2. DW5 said on the 5th April 1994 PW2 disappeared. He went to the bank and never came back and only returned on the morning of the 6th April 1994. DW5 said when PW2 came he brought news that on the 5th April 1994 he took some money in the sum of E40,000 and gave it to the Applicant. DW5 said the General Manager Mr Mhlongo and the Personnel Officer Mr Dlamini were present. As a result of this report DW5 telephoned the police because there was also money that PW2 had locked in the company safe when he disappeared. When the police came they asked PW2 to open the safe. He opened the safe. DW5 had the numbered combination of the safe while PW2 had the key. They took out the money and counted it together with PW2 and found that it amounted to E19,241-30 instead of E60,000. An amount of E40.000 was missing.

Under cross examination DW5 said an inquiry was held in which the General Manager, the legal

advisor from the Premier Group. Personnel Officer, and DW5 were present. PW2 was not present because the police advised that they should not interact with him because he was only out on bail. DW5 said as a junior officer he was not involved in dismissals, He subsequently heard that Applicant had been dismissed from Respondents employment. He did not take part in the dismissal of the Applicant. He does not remember if any inquiry was held before the Applicant was dismissed by the company. DW5 does not know if PW2 was called to give evidence during the hearing of Applicants case. He does not remember anything about two shop stewards that were present at the inquiry concerning Applicants dismissal. DW5 said he had no right personally to decide whether Applicant should be dismissed. That is why he was not involved in the inquiry he was too junior. DW5 denied having taken part in the investigation of

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the Applicant that lead to his dismissal.

It is not in dispute that the Applicant was never charged personally before his dismissal. It is not in dispute that there was no disciplinary hearing where Applicant was heard. It is in dispute that he was dismissed without being heard. It is common cause that on the 5th May 1994 there was an investigation where it was alleged that Applicant had stolen E40,000. The investigation proceeded without the Applicant. He was found guilty without being given an opportunity to answer the allegation of theft of money. He was dismissed on evidence presented before the investigation board. The investigation board comprised the following people; the General Manager Mr Barnabas Mhlongo, the Personnel Officer Mr Richard Dlamini, the Administration Controller Mr Stan Nxumalo and two shop stewards Mr P Nkambule and D Simelane, Mr R Fiddler the Regional Human Resources Manager was also present.

The Respondent did not lead evidence to challenge that of the Applicant on the procedure adopted when drivers came in with the days takings and hand them over to PW2. It did not deny the existence of the green cover exercise book in which the money brought by the drivers is recorded then signed for by the driver and PW2, the cashier, confirming that PW2 has received the money. These are in the hand writing of PW2 who then totals them up at the end of the day and takes the money for banking the next day. The allegation by the Applicant that Henry Gama was counting money from the safe on the 6th April 1994 was not challenged by the Respondent. It is not in dispute that the General Manger Mr Mhlongo DW2 was chairing the investigation. DW3 who was a member of the investigating board does not remember what was discussed at the investigation. He does not remember what DW2 said before the investigation or that DW2 had said the Applicant confessed to him. To the knowledge of DW3 no conclusion was reached in that meeting concerning the Applicant. DW3 could not say what offence the Applicant was charged with before the investigating board, he does not remember seeing any witnesses. He emphasized that he had nothing to say or do in this meeting. The evidence of DW4 relates to PW2 and is not in issue before us. In any case this evidence was never put before the investigating board before Applicant was dismissed it is therefore irrelevant to the determination of the issues before us. DW5 denied taking part in the dismissal of the Applicant or the investigation that lead to his dismissal and said he had no right personally to say Applicant should be dismissed. DW2 said there was no other verdict that could be returned other a dismissal because PW1 had admitted the offence to him, yet DW2 said in spite of the admission they had to conduct an investigation to prove that the money had disappeared and that there was a shortage. Can one safely say

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the investigating board was approaching this matter with a clear mind and conscience. What evidence was presented to it to prove that money had disappeared. What evidence was presented to show that there was a shortage. What evidence was presented to show that Applicant had stolen the money of the Respondent. DW2 does not know how much money went missing. In his own evidence DW2 charged the Applicant with taking the money. He then chaired the investigating board.

It was submitted on behalf of the Respondent that there was nothing in exhibit D2 the investigation of theft of company monies amounting to E40,000 held on Thursday 5th May 1994 or. in the evidence to suggest that DW2 was the complainant, judge and investigating officer. The evidence of DW2 is that he personally laid the charge against the Applicant, he then chaired the investigating board. It was submitted that Mr Fiddler investigated the matter and made the decision and that the investigation

was presented with an admission. Exhibit D2 clearly states that Messrs Mhlongo, Dlamini, Nxumalo, Nkambule, Simelane were the investigating board Mr Fiddler was the investigating officer. Mr Dlamini and Mr Nxumalo deny taking part in a decision to dismiss the Applicant. They further deny the participation of Mr Nkambule and Mr Simelane in the decision to dismiss Applicant. This only leaves Mr Mhlongo as the investigating board. He charged the Applicant and chaired the hearing. He allegedly informed the investigation that Applicant had confessed or admitted to him to have taken the money. We refer to the evidence of DW2 that there was no other verdict that could be returned other than a dismissal because Applicant had admitted the offence to DW2. Here was DW2 charging the Applicant, chairing the investigation to hear the charge, testifying to the investigation about an admission made to him and them as reflected in exhibit D2 finding Applicant guilty of theft and deciding that he be summarily dismissed with immediate effect. Exhibit D2 does not support the submission that Mr Fiddler investigated the matter and then made the decision. Rather it refers to Mr Mhlongo, since Mr Dlamini and Mr Nxumalo have denied taking part and have further denied the participation of Messrs Nkambule and Simelane, as having investigated the matter as an investigation board and then made the decision finding Applicant guilty and dismissing him. Mr Mhlongo then wrote the letter dismissing the Applicant from employment on the 9th May 1994. Thus Mr Mhlongo was complainant, judge and investigating officer. On the evidence that has been presented before us the hearing was procedurally irregular as we have pointed out above. The evidence if any that was put before the investigating board did not support or least of all warrant the dismissal of the Applicant from employment. It was substantively irregular. In the circumstances that were presented before the Respondent it was not reasonable to terminate the

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The Respondent has failed to show reasonable cause why it dismissed the Applicant on a preponderance of evidence and in terms of Section 36 as read with Section 42 of the Employment Act

In the circumstances the dismissal of the Applicant was substantively unfair.

In awarding compensation, we have considered that the applicant was employed by Capital Motors two months after the dismissal. That he now earned a lesser salary than he did at the Respondent's undertaking.

He had served the respondent continuously from 1991 until 1998 with no previous antecedents.

We consider that the Applicant was a victim of a volatile racial environment that ought to have been better managed.

In all the circumstances of the case we consider it just and equitable to award him seven (7) months compensation for unfair dismissal in the sum of E19,819.00 One months notice in (he sum of E 2.831,00

Severance Allowance E 8,088.00

TOTAL E20,736,00

I here will be no order as to costs.

The members agree.

NDERI NDUMA PRESIDENT

INDUSTRIAL COURT