

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 60/98

In the matter between:

ANTONIO COSSA

APPLICANT

and

ATLAS MOTORS

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. MNISI

FOR THE RESPONDENT:

MR. M. SIBANDZE

JUDGEMENT

28. 03. 2000

The Applicant seeks maximum compensation for unfair dismissal, terminal benefits namely; notice pay, severance allowance and 10 days leave pay.

The Applicant told the court that he was employed by the Respondent on the 4th February 1991 as a Panel Beater and was in continuous employment with the respondent up to the 10th February, 1998 when he was dismissed. At the time of the dismissal he was earning E2, 831.00 per month.

The Applicant told the court that while he was panel beating a motor vehicle in February 1998 he was verbally abused by a workmate Jabulani Simelane without any provocation whatsoever.

In response the Applicant challenged the said Jabulani Simelane to come out clear on what it is he wanted from him.

That following the incident Jabulani Simelane falsely accused the Applicant of having insulted him in Applicant's mother language (Tonga) by calling him "mnkonkongu wakho" which could be loosely translated to mean a swear word by reference to Jabulani's mother's private parts.

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There was no report of violence between the Applicant and Jabulani Simelane and the incident fizzled out. The two continued to work.

On or about the 10th February 1998 the Applicant was called for a disciplinary hearing wherein the said Jabulani Simelane was the complainant.

The Applicant denied the charges against him but was found guilty.

The Applicant explained that there was a strained relationship between the Mozambican employees and their assistants who were Swazis. The relationship became sour because the Respondent's Personnel

Manager Mr. Andreas Mavuso made the assistants to clean toilets. Mr. Mavuso had insisted that since they were unqualified they should continue cleaning toilets.

As a result of the dispute one toilet was allocated to Mozambicans and another to the Swazis and it was decided that each would take care of their own toilet. This was decided by Andreas Mavuso the Personnel Manager.

The assistants went on strike and demanded that management should dismiss Mr. Mavuso. They too demanded that the Mozambicans should be dismissed as they unfairly occupied the posts that should be held by Swazis.

The Respondent started to localise, but according to the Applicant, the Swazis were not appeased as they were paid less salary than the remaining Mozambicans.

It was against this background that the incident in question is to be viewed.

The Applicant told the court that on the material day, he was working together with one Alfredo Da. Silver and one Thomas Mbebele.

The two were assisting him to lift a mudguard of a car. They were telling stories and then they laughed loudly.

At that point Jabulani Simelane who was about twenty (20) metres away asked furiously why the Applicant was laughing and he called the Applicant "shit".

It was then that the Applicant told him:

"Jabulani, I swear if you want me come to me".

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He was called on the same day at 1 o'clock to the Administrative office. Andreas Mavuso charged him. He was served with a charge sheet to prepare for a hearing the week that followed.

The Applicant admitted that he had used the word "iuhlangu wakho" which in Tonga language meant, he swore by his own mother asking Jabulani to go to him if he wanted him.

He told the court that previously he had on several occasions quarrelled with Jabulani. The last time they had quarrelled was when Jabulani had called him a "shangaan". Indeed Jabulani had continuously abused the Mozambican workers collectively and they reported to the shop steward that the abusive language was affecting their work.

The issue was discussed and the Mozambicans were requested to forgive Jabulani Simelane.

Though the Applicant and his colleagues forgave Jabulani, he continued to call them shangaans.

They reported again to the foreman who further requested them to forgive Jabulani. The initial report was to Mr. Madonsela a shop steward and the second report was to the foreman Mr. Ferrinado. The matter was then referred to the Personnel Manager Andreas Mavuso.

The Mozambicans were asked to write a letter to the company Director by the foreman. They wrote a letter and there was no response. The matter had remained unresolved until the time the Applicant was dismissed.

The Applicant was employed at Capital Motors from April 1998. He had been working continuously since then. He is paid E2,500 per month. It can correctly be said that the Applicant remained unemployed for

about two months after he had been dismissed by the Respondent.

The Applicant under cross examination stated that the relationship between the Mozambicans and Swazis was explosive due to the issue of cleaning toilets and better salaries paid to Mozambicans. He said there were often near physical fights between them from time to time. At that time the unions and the Swazi employees were pushing for localisation.

After the strike wherein the locals demanded localisation, management convened a meeting in an attempt to diffuse the animosity. The Applicant recalled the meeting but

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however disagreed that there was a resolution to dismiss any employee who fanned further disagreements.

On whether "inhlangu waklio" meant "my mother or your mother" the Applicant said that in tonga language there was no difference, the word "wakho" refers to both mine and yours.

We had no expert witness to disprove this allegation by the Applicant. He was persistent in his denial that he had said "mnkonkongu wakho".

Though Alfredo Da. Silva was a Mozambican he was not a Tonga and could not shed new light on this dialectic dispute.

The Applicant told the court further that he had never in his working experience fought or assaulted a fellow employee and it was not his intention to assault Jabulani. That he only wanted to stop Jabulani from abusing him.

He insisted he was unfairly dismissed.

Under further examination by Mr. Manana, a member of the bench, the Applicant reiterated that he himself and his fellow Mozambican colleagues had written to management to raise a complaint about Jabulani Simelane who constantly abused them. That they had first reported the matter to their foreman who was unable to resolve it.

These assertions by the Applicant in chief were not seriously challenged under cross examination.

The Respondent called Jabulani Simelane DW1. He worked for the respondent between 1997 and 1998. He confirmed that the relationship between the Swazis and Mozambicans was sour. He corroborated the Applicant that this conflict started when the assistants who were Swazis were assigned to clean the toilets that were used by the Mozambican mechanics.

That the users, did not have toilet papers but used newspapers, which were then dropped on the toilet floor. That the Swazis were then required to burn the used newspapers. He explained that it was against the Swazi culture for a person to burn excrement as it was believed one might get mad.

The issue was raised as a grievance with management. Initially, management persisted that they continue cleaning toilets. Later Andreas Mavuso, introduced toilet paper and

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the situation became better. The Swazis were also promoted to become panel beaters, but were underpaid as compared to Mozambicans.

The evidence tallies one on one with that of the Applicant.

There was a meeting to resolve the conflict between the members of the two nationalities. This followed a strike by the Swazis.

Jabulani told the court that on the 4th of February 1998 he was repairing a kombi with one Sifiso Matsebula. One Bhekimpi was fixing another motor vehicle.

That he had difficulties in fixing the bolls and after he was successful, he spontaneously shouted "slut". At that point he heard the Applicant telling him that if he wanted him he must talk and he said "mnkonkongu wakho".

That he asked a fellow employee by the name Calisto what the word meant and he was told that it meant "Jabulani's mother's private parts ".

He reported the matter to the foreman who called the Applicant but he denied and that he had called Jabulani Simelane 'mukonkongu wakho' stating that he had said "inhlangu wakho".

When other employees at the scene were questioned about the incident they gave conflicting accounts of what had transpired. An inquiry followed and the Applicant was dismissed.

Jabulani denied that he often insulted Mozambicans and also denied that they had written a letter of complaint against him in his testimony.

When asked whether there was a written complaint under cross examination, he was not candid. He said that he could not remember very well but the Mozambicans were having a problem and intended to meet management.

At the inquiry there was conflicting evidence as to whether the Applicant had uttered the words "inhlangu wakho" or "mnkonkongu wakho".

When Jabulani under cross examination was asked whether the management was the cause of the conflict, he said that this was so because of their failure to employ Swazi panel beaters in preference to Mozambicans.

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He said he was 15 metres away from the Applicant on the material day and there was a lot of noise from the panel beating. He however insisted, he heard the word allegedly uttered by the Applicant.

DW2 was Alfredo Da. Silva, he was working with the Applicant but was currently self employed.

He told the court that the Applicant was dismissed for abusing DW1. He said he did not know the meaning of the word uttered by the Applicant. He said that Jabulani was told by another Mozambican the meaning of the word.

He said he did not hear Jabulani speak to the Applicant prior to the insult though he was working on the same motor vehicle with the Applicant.

DW3 was Andreas Mavuso, he said that there was conflict at the work place over cleaning toilets. He said he investigated the issue and put an end to the practice. The conflict was compounded by the issue of localisation. He corroborated evidence about the use of newspapers and the allocation of different toilets to Swazis and Mozambicans.

Another source of conflict was refusal by the Mozambicans to share their tool kits with the Swazi Assistants and their alleged failure to impart knowledge to the Swazi trainees he testified. He told the court further that management in January 1998, took certain measures to ease the conflict and on the 27th January 1998 the parties resolved to end the quarrels.

It was resolved that anyone who revived the racial tensions would be dismissed. A week after that the

dispute between the Applicant and Jabulani was reported. According to Mr. Mavuso the Applicant was the leader of the Mozambican camp and Jabulani Simclanc was the leader of the Swazi camp.

He said management in the light of the background information looked at the insult very seriously as life was threatened by the continued conflict. The dismissal was warranted as it set a good precedent. There is no more conflicts that are racially motivated since the Applicant's dismissal.

He said that Jabulani Simelanc had shouted 'shit' prior to the insult by the Applicant. On an analysis of the case, we have arrived at the following objective facts.

1. That there was racial tension at the shop floor which emanated from the cleaning of toilets by the Swazi Assistants, low pay to the Swazi panel beaters and slow localisation policy by the Respondent.

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2. That there was an attempt to resolve the conflict along the racial divide which was not successful.

3. That prior to the incident of the 4th February 1998 the Mozambicans had reported to management that Jabulani Simcjanc persistently abused them by calling them shangaans and management had failed to resolve the issue.

4. That the witnesses who were at the scene of the incident between the Applicant and Jabulani Simelane gave conflicting accounts of what the Applicant had said.

5. That non of the witnesses at the scene understood the word allegedly used by the Applicant, as the same was in tonga language.

6. That the conduct of the Applicant was directed at the words "shit" uttered by Jabulani Simclanc.

The versions told by the Applicant during the inquiry and in court and that by Jabulau Simclanc are mutually destructive.

Non of the testimony by other bystanders is reliable enough to resolve the contradictory versions of the events of the day by the two protagonists.

That there were conflicting versions narrated to the inquiry by the eye witnesses compounds the problem. It is common cause that panel beating was in progress and there was a lot of noise in the workshop.

The evidence by Mr. Mavuso that the Applicant and Jabulani Simclane were the key protagonists in the racial dispute put an even bigger responsibility on the disciplinary panel to be cautious and slow to accept one version as told in favour of the other. The witnesses belonged to the separate camps and so not reliable depending on their inclination.

We however do accept as an objective fact that there was a report about Jabulani Simelane's continued abusive conduct against the Mozambican workers.

We find that the management had failed or neglected to resolve this issue.

In the light of this finding it is curious why management was quick to act against the Applicant on basis of conflicting evidence.

We find that the allegations made against the Applicant were not sufficiently proved to warrant the Respondent to dismiss him.

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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 E 19,819.00

One months notice in the sum of	E 2,831.00
Severance Allowance	E 8,088.00
TOTAL	E 20,736.00

There will be no order as to costs.

The members agree.

NDERI NDUMA

PRESIDENT- INDUSTRIAL COURT