

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 61/98

In the matter between:

PETROS MANTIMAKHULU

APPLICANT

and

POST AND TELECOMMUNICATIONS CORPORATION

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. D. MAZIBUKO

FOR THE RESPONDENT:

MR. L. KHUMALO

JUDGEMENT

06. 06. 20000

In precis, the facts of the case are that on or about the 29th November 1996 a mail bag from Manzini Post office with E4000 and a registered letter for one Father Papini was despatched via a public bus to Luve Post Office where the Applicant was stationed as a Post Master, The mail bag was recorded in a mail list produced in court as despatch 25/11. There is no direct evidence presented to the court as proof of the delivery of the mailbag to the personnel at Luve Post office there being no delivery note signed by the recipient and the bus conductor was uncertain as to whether on the 29th November 1996 he did deliver a mail bag to Luve Post Office and if he did so, who was the recipient of the bag.

At best the Respondent's case is based on purely circumstantial evidence to the effect that Father Papini did receive the registered letter containing an 'RD' cheque which was enclosed in the mail bag together with E4000. The Respondent states that the inescapable conclusion is that the bag did arrive at Luve and the money was appropriated by the recipient who then, sent the letter to Father Papini by way of an ordinary mail which was unprocedural it being a registered item.

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Father Papini himself in his testimony was not sure whether he had received the 'RD' cheque as a registered mail or as an ordinary mail. He had collected the mail from Luve Post Office and there was no slip produced as evidence of registration of this item.

Of importance is the numerous reasonable possibilities that may have happened to the mail bag in the absence of any direct evidence on the point. In this regard, the following questions may be entertained by an inquisitive mind:

- i) Did the mail bag leave Manzini Post Office in the first place?
- ii) If it did which particular conductor handled it?

- iii) Was the bag delivered to the Applicant or his assistant at Luve Post Office?
- iv) If not who received the mail bag at Luve?
- v) How did the registered mail find its way to Father Papini?

A lot of possibilities arise in the circumstance of the case, and it would be far fetched to conclude that any of the Luve personnel received this mail bag let alone Pin it down on the Applicant. Suspicion that the Applicant received the E4000 and appropriated it would be grossly unreasonable in all the circumstances of the case.

Applicant was however not charged for theft or misappropriation of the contents of the despatch in the sum of E4000 but according to exhibit 'R4', the minutes of the disciplinary inquiry, he was charged as follows:

"Schedule of charges. Negligent loss of corporation funds:

It is alleged that on 28th November, 1996 while post master at Luve you sent a telegram to Manzini requesting for remittance of four thousand Emalangeni (E4000) for money order payments.

It is alleged Manzini prepared order advice no. 13929 which remittance was sent to your office on 29th November 1996 in Manzini/Luve despatch no, 25/11 entry no. 2 on the letter bill.

It is further alleged that no report was made to Manzini post office that despatch No. 25/11 from Manzini to Luve dated 29 November, 1996 had not reached its destination.

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It is again alleged that even after receiving despatch No. 26/11 dated 30th November, 1996 you deliberately kept quiet and did not query Manzini about despatch No. 25/11.

These negligent acts by yourself attributed to the loss of corporation funds amounting to Four Thousand Emalangeni (E4000.00). "

The Applicant pleaded not guilty to these charges and maintained in court that he never received this particular despatch.

That he had on the 29th November, 1996, sent the beneficiaries of money orders to be paid at Manzini post office since he had failed to receive the E4000 he had requisitioned for, to pay off these customers.

That these customers proceeded to Manzini where they encashed their money orders. They then reported to him that they were duly paid. The Applicant maintain that he was of the mistaken belief that the Manzini post office had no reason to send the E4000.00 to Luve post office as per his request since they had paid out the customers directly.

It was for this reason that he was not concerned that he had not received the requested money and saw no point in reporting the matter to Manzini as they already knew that the purport for which the money had been requested had been satisfied by themselves.

Furthermore, the Applicant stated that it was month end and he was very busy with month end schedules and this may have contributed to the oversight not to realise that despatch 25/11 was not accounted for even after receiving despatches 26/11, 27/11, 28/11, 29/11 on subsequent dates.

The applicant stated that the telephone was not operational at the material time. The Applicant states that this was a further reason why he had failed to telegraph Manzini post office about his failure to receive E4000.00 before and immediately after they had sent the customers to be paid off at Manzini.

He maintains it was reasonable to regard such direct payment to the Luve customers by Manzini branch as adequate communication that it was no longer necessary to forward further amounts to pay the same customers.

He had expected the despatch on 29th November, 1996 and when it did not arrive he sent the customers to Manzini for payment.

Although it is not clear on what date this happened, it transpired that after the money order holders had arrived at Manzini post office for payment, an officer from Manzini telephoned the Applicant asking why he had sent the customers there. He allegedly had explained that he had no money at Luve post office to pay them off. He was not advised

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by the said officer at that time that Manzini post office had dispatched money to Luve to pay the customers and as a result he reasonably did not expect any.

The damning evidence according to the Respondent is that the mail delivery system has safety features which should have enabled the Applicant to notice a missing delivery in the sequence of the despatch numbers. That the Applicant should have easily discerned that between despatch 24 and 26 there was a gap that needed to be explained. He should have then inquired or advised Manzini post office that he had not received despatch no. 25/11. That the Applicant having had 17 years experience with the Respondent should have been able to take prompt remedial action when such a discrepancy occurred but he failed to do so.

At the inquiry and the subsequent appeal, the Applicant maintained that this was a human error and he prayed for compassion and leniency taking into account his clean record with the Respondent over the years. He offered to be surcharged for the lost sum of E4000 and the same be deducted from his monthly salary but the disciplinary panel and the General Manager Human Resources who heard his Appeal were not amenable to his plea aforesaid. Though certain accounting discrepancies were pointed out to the Applicant by the Chairman of the appeal tribunal, it was not suggested that he had been warned previously or disciplined for any poor work performance or dishonest conduct in the past.

In Court the Applicant explained how the omission on his part occurred and maintained that he would not have deliberately put his job on line in such a manner.

The Applicant conceded that in terms of the Respondent's procedure, communication about a missing bag, ought to have been done by way of a telegram and in the event that the telephone lines were out of order a document should have been placed in subsequent bags to inform the Manzini office that despatch 25/11 was missing. He agreed that he was aware of the said procedure but in this case he had assumed that by sending the Customers to cash the orders at Manzini, that constituted sufficient and reasonable communication to his Manzini counterparts.

The evidence of Dumisa Dlamini, the post office Messenger and cleaner at Luve Post office was that, himself and the Applicant would receive bags from the bus, but the bags were always opened by the Applicant who was the Post Master. He said that only non registered mail was given to him by the Post Master to put into the boxes. Slips of registered items were put into the boxes by the Post Master himself.

He narrated to the court that in the event the bus did not arrive on any one occasion, the post master would phone Manzini and report. Similarly if no bus was available to take mail from Luve to Manzini the post master would phone to report. Clearly, the necessary implication of this evidence was that, not every day of the year was the mail delivered nor was a bus always available to despatch Luve mail to Manzini Post Office.

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There were instances of non delivery. This evidence is consistent with the assertion by the Applicant that he normally communicated by telephone to Manzini. He however conceded that there was a requirement to communicate in writing by way of telegram or a note in the mail bag whenever there was something untoward in the mail delivery, He reiterated that the telephones were out of order, he overlooked sending a note in the bags, just as he had failed to notice the absence of item 25/11 in the mail sequence due to pressure of work at that time of the month.

Midas Magagula the bus conductor whose signature appears on the mail list 25/11 stated that he must have delivered the mail bag to Luve. He was unclear as to whether he had delivered that particular bag to the Applicant or any other member of the post office staff on the material date. He told the Court that for the three years he had worked on the route not even once did he reach Luve without a bag except on Sundays and holidays when the bus did not travel at all.

This assertion turned out to be incorrect as he admitted readily under cross examination that he would be away from time to time, and a different person would deliver the mail, He said that not once did the post master enquire from him about a missing bag or a bag expected by him that had not arrived.

The copy of the mail list allegedly signed by the Luve post officer who received the bag ended up with the conductor and was not returned to the post office of origin at Manzini. Here lies an insurmountable obstacle to the respondent's case because if the return of service document was available, it would have been most helpful in identifying the recipient of the mail bag on the 29th November, 1996 if at all it was off loaded at Luve. Of importance also is the fact that there was nothing out of the ordinary as far as the conductor was concerned to enable him remember the events of the 29th November, 1996 in particular. All he could say, was that he delivered a bag every day, an assertion which in our view proved to be inaccurate.

Philemon Maseko the Regional Postal Manager told the Court that the Applicant never reported the non-receipt of a mail bag until the Head office picked up the discrepancy from the records. Upon investigations he found that on the 29th November, 1996, when the unaccounted for mail bag was allegedly delivered, two other stations along the Luve route namely Mzimpofo and Mliba had received their bags. He said that in the absence of a report of a missing bag from the Luve Post Master, he had no reason to think that Luve did not receive their bag on the material day.

In our view the most appropriate way of confirming delivery is by return of the signed copies of the delivery note to the point of origin of goods delivered. In this case the conductor ought to have returned the mail list signed by the recipient to Manzini for confirmation of delivery.

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The primary obligation to ensure that delivery is completed and to the correct recipient lies with the sender and the messenger and not with the recipient. Granted that the recipient should have noticed a discrepancy on the mail sequence which he did not for reasons he has advanced to the court, the primary obligation on the Respondent should not shift just because it is convenient to certain individuals within the establishment who ought to have known better.

Mr. Maseko's suspicion was raised by the fact that upon interviewing Father Papini, he found out he had received an 'RD' cheque for E250.00 sent by Standard Chartered Bank as a registered item but was not received through the registration procedure. The letter allegedly came through the post box like ordinary mail. Father Papini was unable to confirm this allegation to the court, stating that he could not remember whether he received the R/D cheque as a registered item or not.

The question that is yet to be answered is who received the mail bag no 25/11 on the 29th November, 1996 and what did he do with the contents thereof?

If the mail bag was not received by the post master as he alleges, is there a possibility that someone else

did, appropriated the money and to hide the mischief simply slipped Father Papin's registered letter into his Post Box? Is it not a real possibility worth of consideration?

It must be remembered however that the Applicant was charged in terms of the Swaziland Posts and Telecommunications Corporation Disciplinary code and grievance Procedure. In particular, he was charged in terms of schedule headed "schedule of misconducts" and specifically for contravening clause 11.03 (a) which reads as follows:

"Negligent Loss, Damage or misuse of corporation property (the employee must have known (a) wilful Loss: Any negligent act where an employee knowingly or deliberately loses or causes corporation property to be lost. "

The penalty subscribed for the First commission of the offence is summary dismissal. The Respondent justifies the dismissal of the applicant on this provision.

From the totality of the evidence before the court, the conduct of the Applicant can be objectively summarised as follows:

(i) That on 29th November, 1996, he expected E4,000 from Manzini post office to pay off money order beneficiaries who were already impatient to receive their money.

(ii) On the same date 29/11/96 he decided to sent the said money order customers to encash the orders at Manzini

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(iii) The customers arrived at Manzini and they were duly paid their money and on their way back, they confirmed to the applicant that indeed, they had been paid.

(iv) The Applicant correctly or incorrectly assumed this was sufficient communication to Manzini Post office that it was no longer necessary to send the amount of E4,000 he had requisitioned.

(v) The applicant continued with his work. He received mail bags on the subsequent days after the 29th but failed to notice that there was a break in the sequence of the mail bags in the sense that item 25/11 was missing from the list.

At the disciplinary hearing, there was no suggestion to the effect that the applicant had received E4000 in the mail despatch and utilised it. It was however suggested that he concealed the non receipt of mail bag 25/11 and its loss.

It would appear to us that the disciplinary hearing against the applicant was mainly concerned with the question of the applicant's poor work performance. The issue raised being whether or not applicant had failed in his duty to properly ensure that non receipt of a mail bag containing E4000 was promptly or within a reasonable time reported to the Manzini post office.

It was suggested by the Respondent that upon receipt of despatch 26/11 dated 30/11/96 The Applicant ought to have reported that he had not received item 25/11 which should have preceded it on 29/11/96. The charge as framed implied that this omission was deliberate as follows;

"It is again alleged that even after receiving despatch No. 26/11 dated 30/11/96, you deliberately kept quiet and did not query Manzini about despatch No. 25/11. "

In the same vein the said act is said to have been a result of negligence as it reads thus;

"These negligent acts by yourself attributed to the loss of corporation funds amounting to four thousand Emalangenji (E4,000.00). "

Did the Respondent through the Chairman of the disciplinary inquiry conducted on 21st February, 1997, Mr. John M. Shiba before it dismissed the applicant entertain a reasonable suspicion amounting to a belief in the Applicants guilt of knowingly and deliberately causing loss to the corporation in sum of E4,000?

In determining this question we take most helpful guidance from the words of Hannah C.J. as he then was in the High Court of Swaziland Industrial Court of Appeal Case No. 13/88 between Susan Dlamini and the President of the Industrial Court and another

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wherein the learned Chief Justice adopted the judgement of Arnold J, In *Bullish Home Stores Ltd. V BURCHELL* 1978 1 RER 379 as follows;

"..... It is not relevant, as we think, the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which 'would lead to a certain conclusion on the balance of probabilities or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure'..... the test, and the test all the way through, is reasonableness, and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion. "

We entirely agree on this approach as adopted by the learned C.J. Hannah.

The question we have to determine therefore, is whether the Respondent acted reasonably. There is no requirement to examine the quality of the evidence before the tribunal provided we are satisfied that the Respondent acted reasonably in all the circumstances of the case. For the Respondent to be adjudged to have acted reasonably in the circumstances it must be shown however that it dismissed the Applicant for a reason provided for under Section 36 of the Employment Act and that acting on a genuine and honest belief it found the Applicant to have knowingly and deliberately concealed non receipt of the mail despatch No. 25/11 on the 29th November 1996.

Further for the belief by the Respondent to be adjudged reasonable, it must be considered to have taken into consideration the explanation by the Applicant as regards his culpability and if the explanation was found to be wanting, then in arriving at the appropriate penalty all the extenuating and mitigating circumstances of necessity must have been taken into account.

Our view upon consideration of all the evidence before us is that the Respondent did not act reasonably in the circumstances of the case. The evidence falls far short of establishing that the Applicant "knowingly or deliberately" caused the corporation to lose E4000 allegedly contained in mail bag 25/11.

No reasonable employer would have arrived at the conclusion the Respondent did. The investigation carried out by the Regional Manager Mr. Philemon Maseko, who apparently also was a member of the disciplinary tribunal that dismissed the Applicant and also sat in the appeal hearing against the dismissal was not reasonable at all. It would appear that the real possibility that the eventual loss was wholly a result of an omission by the post office of origin i.e Manzini, was not considered and in our view the end result was that the entire exercise was flawed hence could not be said to constitute a foundation for a reasonable belief in the culpability of the Applicant. We say this upon consideration

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of all the evidence before us especially the participation of Mr, Philemon Maseko in the investigation, the disciplinary hearing and the appeal itself. This in our view compromised the objectivity of the entire process especially the appeal stage.

In the words of Hannah Chief Justice at page 13 of Susan Dlamini's case supra.

" --- to justify a summary dismissal an employer would have to go further than proving facts which give rise to a suspicion or belief that there has been misconduct of such a nature as to justify such a dismissal but would have to prove the actual facts amounting to misconduct. "

In the instant case the Respondent failed to prove that the Applicant was guilty of "deliberately" concealing the despatch No. 25/11 and by so doing caused the loss of Four thousand Emalangen (E4000) to the Respondent.

As we stated earlier the Applicant had risen through the ranks from the post of a postal clerk to the position he held upon dismissal of Post master Luve Post office. His only assistant was a messenger/cleaner Mr. Ndumiso Dlamini. He had served the Respondent for a continuous period of eighteen years without any significant record of misconduct. In our view, without derogating from our findings on the reasonableness or otherwise of the decision taken by the Respondent this record too counts for something, and should have weighed heavily in Applicant's favour in the minds of the Respondent's representatives in evaluating the veracity of the Applicants defence to the charges laid against him.

In this regard, we refer to the case of Swaziland United Transport vs John Mgodlola, High Court of Swaziland, Industrial Court of Appeal case 50/87, wherein Hannah Chief Justice stated at page 8 as follows:

"Where for example a charge of dishonesty is made against an employee and the employee gives an innocent explanation to the employer Harvey's view is that in deciding whether or not to accept such explanation the employer should bring into the balance the fact that the employee has been employed for many years without misconduct if that be the case. If he does not his decision to reject the employee's explanation and dismiss him may be held to be unreasonable".

Even though the learned Chief Justice expressed some misgivings in the aforesaid consideration by an employer while assessing the credibility of a long serving witness, we do find that it is indeed a reasonable approach. There is no acceptable evidence of previous antecedents by the Applicant other than innuendos about cash short falls in 1987 & 1989 alluded to during the appeal. No such evidence was adduced in court though.

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It is noteworthy that no evidence of such shortfalls in 1987 and 1989 was relied upon by the disciplinary tribunal that dismissed the Applicant. The allusion to such incidents during the Appeal stage only served to cloud the minds of the Appeal panel with the result that their evaluation of the case was not objective and hence unreasonable.

In these circumstances the right course is to allow the application the Respondent having failed to satisfy the provisions of Section 42 (2) (a) and (b) of the Employment Act.

The Applicant was dismissed in March 1997 summarily. He had served for about eighteen years continuously without any antecedents. He was forty four years old and was unlikely to obtain alternative employment. Indeed his efforts to seek for employment had not been fruitful. He has seven dependants. Upon dismissal he was not paid any terminal benefits nor any money in lieu of leave.

We do not consider this a suitable case for reinstatement in all the circumstances. We however take into consideration the long service by the Applicant and other factors, alluded to here before and award him eighteen monthly (18) months salary as compensation for unfair dismissal. In the sum of (E2495.76 x 18) = E44, 923.68.

In addition, the Applicant will receive terminal benefits as follows:

(i)	Notice Pay	=	2,495.76
(ii)	Additional Notice	=	7,017.32
(iii)	Severance Allowance	=	17,678.30
(iv)	Leave pay	=	2,495.76
(v)	March salary 1997	=	2,495.76
			32,182.90
	Total Payment to Applicant	=	E77,106.58

The Applicant was employed on permanent and pensionable terms. He had served eighteen (18) years prior to the dismissal. Even though, there is no specific claim regarding his pension dues, we surmise that the Respondent will deem it appropriate to treat him as a retired officer for the purpose of computing any benefits and/or contribution due to him under the Respondent's pension scheme.

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There will be no order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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