

IN INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.21/99

In the matter between:

SIPHO NGWENYA

APPLICANT

and

CARGO CARRIERS

RESPONDENT

CORAM

NDERI NDUMA:

PRESIDENT

NICHOLAS MANANA:

MEMBER

JOSIAH YENDE:

MEMBER

MR. A. SHABANGU:

FOR APPLICANT

MR. Z. JELE:

FOR RESPONDENT

JUDGEMENT

08. 06. 2000

The Applicant seeks reinstatement and in the alternative maximum compensation for unfair dismissal. He too seeks various other remedies pursuant to the alleged termination which we shall deal with at a later stage.

In his testimony the Applicant told the court that he was employed by the Respondent as a Driver-trainer on the 28th April, 1978 and was in continuous employment with the Respondent until the 16th August, 1995, when he was dismissed by the Respondent.

That at the time of his dismissal he earned E2,963.93 per month. He told the court he worked four days a week eight (8) hours a day but was usually asked by management to work on Saturdays in addition.

Events leading to his dismissal, were that he was arrested together with an employee from Bromor Foods on charges of theft of sugar.

He was released on bail with the conditions that he was not to communicate with any crown witnesses, not to make contact with Bromor Foods personnel and to surrender his travel documents and report at Manzini Police station every Monday. When he resumed his work, after about two weeks, he was informed by one Rocky Smith that a disciplinary inquiry would be held against him. The Applicant was then suspended pending the inquiry by a letter dated the 3rd August, 1995.

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The Applicant told the Court that he was not informed of the impending charges but had only received a faxed list of witnesses a day prior to the hearing.

It would appear from exhibit 'A' the letter of suspension that the Applicant had been informed of the charges he was to face by a letter dated 25th July, 1995.

The Applicant at the commencement of the hearing raised objections to the effect that the witnesses for the Respondent were also witnesses in the pending criminal trial and therefore it would be a contravention of the bail conditions to speak to the potential crown witnesses.

The Respondent said they would not call these witnesses and the inquiry was adjourned to another day.

He was notified of the new date of the inquiry. Mr. Smith told the Applicant that after consultations they had been informed that they could proceed with the hearing.

The Applicant persisted in his refusal to participate in the proceedings pending the trial.

The proceedings went on in the Applicant's absence and he was dismissed by a letter dated 16th August, 1995 which is exhibit 'A6'.

He was given an option to appeal to the General Manager within 5 working days from the date of the memo.

By a memorandum dated the 18th August, 1995, the Applicant appealed to the General Manager. Complaining inter alia that it was unfair to dismiss him prior to the outcome of the criminal charges. He asked him to consider his 18 years service with the Respondent and his record thereof. He also claimed his notice pay and terminal benefits in the event he was not reinstated. The Applicant persisted in his innocence.

On the 22nd August 1995, the Respondent responded to the memorandum of 18th August 1995 and enclosed a sum of E4,180 which included 12 days basic salary, 10 days leave pay and 7 months bonus.

He was assured that his personal records were considered prior to the taking of the decision to dismiss him. The Respondent declined to pay him any terminal benefits and notice pay.

In terms of the letter dated 25th July 1995, filed by the Respondent in response to a request for further particulars by the Applicant's Attorney, the Applicant was charged with three (3) offences namely that;

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1. In May or June 1995, he received E10,000 from a former employee of Bromor Foods, one Moses Dlamini for assisting him in perpetrating crime related to fraud and/or the sale of stolen sugar in Manzini and Matsapha.

2. On or about 15 May 1995, the Applicant acted both unlawfully and outside the scope of his authority in that he diverted a Cargo Carriers truck (fleet no. 3189) loaded with 35 tons of white sugar ex the Ubombo Sugar destined for Bromor Food Swaziland (Pty) Ltd, the legitimate owner of the load to M & F. Marketing situated at interpark where the load was delivered/sold without the knowledge or authorization of the Legitimate Owner.

3. On or about 20th May 1995 the Applicant acted both unlawfully and outside the scope of his authority in that he intercepted and diverted three Cargo Carriers trucks, (fleet Nos. 1384, 3033 and 1601) respectively loaded with 30.2 tons, 30 tons and 30.162 tons of white sugar ex the Ubombo Sugar Mill and destined for Bromor Foods, the legitimate owner of the loads in question to a warehouse situated in Mhlakuvane Street where they were delivered/sold without the knowledge or authorization of the legitimate owner.

The Applicant denied all the three charges in court, even though he had declined to defend himself at the inquiry for reasons stated earlier.

In Court, no evidence was adduced to support the allegations contained in count one of the charge sheet. The Respondent's counsel did concede as much in the final submissions.

We are basically concerned with the question whether counts two and three were sufficiently proven to justify a reasonable belief by the employer that the Applicant was guilty of the dishonest acts contained thereof and therefore, it was reasonable in all the circumstances of the case to dismiss him as they did.

The Applicant denied that he had been served with the charges as contained in the letter of 25th July, 1995 stating that he only received it after his services had already been terminated.

We are of the view that the Applicant was not truthful in this respect and do find that he actually received the charge sheet dated the 25th July, 1995.

The trial before the Magistrate Court never commenced. It was endlessly postponed and finally was struck off the roll according to the Applicant. The bail money he had deposited was refunded to him.

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He insists therefore he was innocent of the charges and prays for the relief sought especially reinstatement.

Under cross examination the Applicant conceded that the complainant in the criminal trial was not the Respondent but Bromor Foods. The applicant further conceded that he did not know anyone from the Respondent who was implicated in this matter except himself.

It is also apparent from the Applicant's testimony that no witnesses were formally introduced to him in court in respect of whom he was warned not to interfere. We are not satisfied therefore with the reason he gave for not participating in the disciplinary inquiry against himself.

No particular persons were mentioned by the Presiding Officer as witnesses who he was not to interfere with, who were also potential witnesses in his inquiry.

There is no legal basis for the demands by the Applicant that the proceedings against him must await the criminal proceedings. No formal agreement by way of a disciplinary code was produced by the Applicant to render any credence to his position. He alleges that the potential witnesses were shown to him by the Police in the charge office. We do not accept this evidence.

Where there is fear of interference with crown witnesses, the particular witnesses must be introduced in court and the accused warned specifically not to interfere with any one of them. Any procedure short of this would not do.

While under cross examination, the Applicant as opposed to his outright assertion in chief that he had not received the charge sheet dated 25th July, 1995 stated that he could not recall whether he had received it or not but he could remember count one was similar to the criminal case charge.

When pressured further he conceded he had received the charge sheet dated the 25th July, 1995. He too conceded to having received a letter dated 3rd August 1995 which was referring to the one of 25th July, 1995.

The Applicant conceded that he stopped Jerome Mkhathshwa on the 20th May 1995 at KaKhoza robots. He however denied that he directed him to divert sugar destined for Bromor to Sunrise (Pty) Ltd.

He denied meeting Hermon Gumedze at all on 15th May, 1995 at Matsapha depot. He denied he directed Hermon to deliver sugar at M & F Marketing.

In respect of Mkhathshwa he said "maybe I stopped him and boarded his truck but I do not remember this incident".

He said drivers had an ongoing habit of fabricating evidence against him.

He denied too that on the 20th May 1995 he intercepted Ben Msweli and diverted him to Sunrise Manzini to off load sugar. He could not deny however that he stopped him at KaKhoza on that day.

On further cross examination he said he could remember the 20th May 1995 and that he found drivers off loading sugar at Sunrise, He knew Bheki Msweli but he could not recognise the others. This was the same day he had stopped drivers at KaKhoza, he conceded.

The evidence of the Applicant as a whole was a mishmash of contradictions.

For example, he said that he stopped 5 trucks on the 20th May 1995, as he was going to town but all the trucks were headed for Malkems. Later, he said he did not stop the trucks at all.

How do you stop trucks headed for Malkerns and Matsapha and in the same breath say you were headed for Manzini the opposite direction.

When asked why he had gone to the Sunrise Manzini on 20th May 1995 he answered that he had gone there because many of the Respondent's trucks were working around that area on that day. He said Sunrise was opposite the Hub Shopping Mall as one goes towards Bosco Skills Centre.

In the same vein, the Applicant seemed to suggest that it was a coincidence that he passed near Sunrise because he had gone to PM Price shop from KaKhoza on his way to Matsapha.

He had to go to Manzini from KaKhoza because there was no truck to take him to Matsapha and he had no bus fare, it was therefore necessary for him to cash from an ATM at Standard Bank.

When it was put to him that in 1995 there were no ATM machines in Manzini Standard Bank he insisted that they had been installed. He denied that Jerome Mkhathswa found him at Sunrise Warehouse.

It is most curious that the Applicant would find three trucks at Sunrise Warehouse delivering and all he did was greet the drivers and pass on. He was not only a driver instructor but often stopped trucks on spot checks in the course of his duties.

Was it a coincidence that the Applicant was at the scene as sugar was unlawfully off loaded in to the incorrect warehouses, instead of the correct owners Bromor ? We respectfully do not think so.

The Respondent in its defence, called Hermon Gumedze a driver at Cargo Carriers. He told the court that he knew the Applicant well as a driving instructor and acted as controller of transport in the absence of the controller. The duties of a transport controller was to instruct the drivers to certain destinations to make deliveries. He said it was normal to accept orders from Mr. Ngwenya in the course of his duties as Mr. Ngwenya as was his senior.

On the 15th May, 1995 Mr. Gumedze was instructed by his controller at Simunye to collect white sugar from Ubombo Ranches. He was further directed to proceed to the Matsapha Cargo Carriers depot from where he would receive further instructions as to the place of delivery.

At Matsapha depot he expected directions from the Controller Mr. Raymond Khumalo but he was not present. Mr. Ngwenya, the Applicant arrived as he waited in his truck, he appeared as he was in a hurry. The Applicant directed Mr. Gumedze to a warehouse where he was to deliver the sugar. Upon arrival as directed he found other Cargo Carriers trucks off loading into the warehouse. Someone went to him and requested for the delivery note and he signed it. This person then directed that he proceeds to another

warehouse to off-load. He provided him with a guide to the warehouse. The reason he gave was that that warehouse was full hence the need to move to another warehouse. It was the first time for Mr. Gumedze to go to the warehouse he was directed to. He showed the court delivery note No. 99276 which was apparently signed prior to the delivery. The delivery note was handed in as exhibit 'R1'. Upon arrival at the second warehouse, the guide he had been given spoke to a certain man of European decent and thereafter a lady used a Hamster forklift and off loaded the truck.

Mr. Gumedze thereafter proceeded back to Simunye late in the afternoon. He told the court that he was surprised when some days later he was summoned by his superiors and questioned about this delivery. He was sure he had made a good delivery on the material day. It was even more shocking to him to learn that the customer did not receive the sugar. He was together with other drivers when he was summoned to Bigbend. He was subjected to a polygraph test though he could not remember whether he recorded his statement. He was however shown exhibit "R2 " an Affidavit signed by himself which he readily accepted was deposed to by himself. He also handed in a trip sheet of the travel he made on the 15th May 1995 to Matsapha. The trip sheet is extracted from the tachometer records. He told the court that he was not a witness in the criminal proceedings against Mr. Ngwenya. According to the trip sheet he had arrived at Matsapha depot at 14.08p.m. and left the depot to the warehouse he was directed to by Mr. Ngwenya at 14.33 hours. He arrived at the warehouse at 14.45p.m. The warehouse was therefore approximately twelve minutes from Cargo Carriers depot at Matsapha. He insisted that the trip sheet was an accurate record of his journey on the 15th May 1995 save for minor omissions when he was interrupted by Mr. Ngwenya. He completed off loading and left for BigBend.

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In spite of very close cross examination by Mr. Shabangu, Mr. Gumedze was steadfast in his testimony that he was directed to the place of delivery by the Applicant and that he honestly believed that he had made delivery to the correct customer, Bromor Foods at the Matsapha warehouse as indicated in the delivery note.

It was put to him that the kilometres shown in his trip sheet were false and that he in fact had not gone to Matsapha on the material day. The witness however gave a good account of himself on this issue. We are satisfied that he did arrive at Matsapha on the 15th May, 1995. Indeed, it turned out after the investigation that the delivery was actually made at M & F Marketing Warehouse at Matsapha. This vindicates the testimony by the witness that he indeed went to Matsapha on the day in question.

DW2 was Benson Bheki Msweli also a driver of Cargo Carriers. He told the court that he knew the Applicant as a senior staff member of the Respondent stationed at Matsapha depot.

He told the court that on the 20th May 1995 he was instructed by Samuel Myeni at Big Bend Sugar factory to deliver sugar to Bromor Foods at Matsapha. Mr. Myeni told him that at the Matsapha Cargo Carriers depot he would be directed where to deliver the sugar as Bromor Foods had hired new warehouses.

Upon passing Manzini town and in particular at Kakhoza robots, he was waved to stop by the Applicant. The Applicant diverted him to turn back to Manzini town where he would off load his cargo as Bromor Foods had telephoned to say that the Matsapha warehouses were full.

He turned back to a warehouse in town as directed by the Applicant. The Applicant followed him in a company van. At the said warehouse, he found two other trucks off loading. The three trucks off loaded as per instructions. The delivery notes were signed thereof and they reflected that delivery was made to Bromor Foods. He had already prepared the delivery note before he left Big Bend and Mr. Myeni had instructed him to reflect Bromor Foods as the customer. The delivery note was produced and marked exhibit "R4".

After about two weeks the witness told the court that he was summoned to explain where he delivered the said load of sugar and he gave the details similar to that he had told the court.

Thereafter Mr. Ngwenya was suspended from work. He explained that this warehouse was located at Manzini, along Mhlakuvane Street, opposite metro. The warehouse was called "Growmore". He was also subjected to a polygraph test at BigBend. He told the court that indeed Mr. Ngwenya had mentioned the name "GrowMore" warehouse when he diverted him at KaKhoza.

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The witness denied any collusion with the Applicant nor any involvement in the loss of the sugar.

He was candid and unblemished inspite of the thorough cross examination he was subjected to by Mr. Shabangu. We believe his testimony as regards the events of the material day.

The Applicant's blatant denial that he had any sort of authority over the Respondent's drivers sounded hollow and devoid of any truth. The fact of the matter is that, he was a driver instructor, at times acted in place of the controller at Matsapha depot, he often stopped the trucks along the routes for stop checks and undoubtedly gave instructions to the drivers as regards places of delivery when called upon to do so.

Mr. Myeni, the controller at Big Bend was also disciplined for his involvement in the diversion of sugar to the wrong destination. It would appear to us that the drivers unbeknown to them were used as ponies by their superiors to the detriment of the Respondent.

The third Respondent's witness was Jerome Mkatshwa who gave evidence to the effect that on 20th May 1995 he was instructed by Myeni to deliver sugar from BigBend to M & F Marketing at Matsapha. Upon arrival at KaKhoza the Applicant stopped him and diverted him to a warehouse in Manzini town. This was around 11a.m. in the morning. He told him that there was no one where he was supposed to deliver sugar.

He said that he regarded the Applicant as his supervisor as he visited all the depots in the country. He tested their driving skills too. Mr. Ngwenya directed him to Sunrise next to a tyre firm. He also saw DW2 there and another driver by the name of Mabuza. He off loaded his sugar, the delivery note was signed by the person who was operating the forklift and he left for BigBend. He told the court that his truck was the first to be off loaded but was not sure which truck followed. He denied his evidence was a fabrication. He further told the court that Mr. Myeni stopped working for the Respondent prior to his death.

The witness' evidence corroborates that of DW2 in material respects and directly contradicts that of the Applicant.

The Respondent finally called one Joseph Jacobs Pretorius. He worked for Transport Risk Management Services (Pty) Ltd based in Johannesburg. Up to June 1996 he worked for the respondent as Group Loss Control Manager.

In May 1995 he was assigned to investigate loss of twelve (12) loads of sugar amounting to about Three Hundred and Sixty tonnes (360) of sugar. It was a lengthy investigation that took months to complete. He interviewed all the drivers involved in the loss of the twelve loads at BigBend depot.

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He told the court that four drivers out of those questioned, implicated Ngwenya the Applicant in the loss of four (4) loads of sugar.

The witness interviewed the Applicant at Matsapha depot in the presence of one Ian Snerman. He was confronted with the allegations by the four drivers involving the diversion on the 15th May, 1995 and 20th May, 1995. These drivers were Benson Msweli, Simon Mabuza, Jerome Mkatshwa and Herman Gumedze. The witness told the court that the drivers who were diverted on the 20th May 1995 were interviewed separately and they all gave a most convincing and consistent story of how the Applicant

waited for them at KaKhoza robots and diverted them to deliver their loads in town.

The loads that were lost on the 20th May 1995 were destined for Bromor Foods whereas the one lost on the 15th May 1995 belonged to one Mr. Dacunha.

According to this witness, the Applicant in answer to the allegations explained that on the 20th May 1995 he got instructions he gave to the three drivers from the customer. He had received a call at the office from Bromor Foods and was told that Bromor warehouses were full and was advised by the caller to go and divert the trucks to other warehouses, which he did.

As regards the load delivered on the 15th May, 1995 he received a call instructing him to direct the truck to off load at M & F Marketing.

The Applicant told the investigator that the customer who had directed him to divert the trucks was Moses Dlamini, the Orders Clerk at Bromor Foods. He admitted he knew Mr. Dlamini at a personal level and that is why he accepted his telephonic instructions.

He further explained that he had been instructed by Moses Dlamini to go and collect on his behalf E120.000 from M & F Marketing. He did infact collect E90.000 from M & F Marketing and was given E10.000 by Moses Dlamini when he delivered the cash to him. A portion of the E10,000 he was to give to the late Simon Myeni who was the Contracts Controller at BigBend.

The Applicant told him that he had put a portion of the money in an envelope and sent one of the drivers to convey it to Simon Myeni at BigBend.

The Applicant had insisted that he did not suspect any foul play in these transactions and that he was only paid for conveying the E90.000 to Bromor Foods.

In court, the Applicant denied that he made an admission to Mr. Joseph Pretorius insisting that he had no knowledge of the truck diversion and did not participate in it. He also denied ever meeting Mr. Jacobs Pretorius as alleged. He denied receipt of E10.000 from Moses Dlamini and said that he met Moses Dlamini for the first time in court after both of them had been arrested in connection with the theft of sugar.

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Mr. Jacobs Pretorius was candid and forthright in his narration of the findings. His evidence ties together with that of DW1, DW2 and DW3 the drivers he had allegedly interviewed.

The Applicant as we have said earlier was not only evasive but as a whole his demeanour was consistent with that of a person not telling the truth. We do believe the evidence of Mr. Jacobs Pretorius and that of the drivers.

Consequently, we find that the Respondent genuinely and reasonably believed in the culpability of the Applicant in the loss of sugar loads on the 15th May 1995 and the 20th May 1995.

The dismissal of the Applicant was in accordance with Section 36 as read with Section 42 (2) (a) & (b) of the Employment Act No.5 of 1980.

The twelve (12) loads of sugar lost without trace was to the value of E430.000 and the Respondent had to pay E143.000 to the Swaziland Sugar Association towards the recovery of the loss in recognition of its employee's involvement in the diversion and eventual loss of the sugar.

No reasonable employer would have been expected to act otherwise than to dismiss the Applicant in all the circumstances of the case.

We also find that the Applicant was not justified in his refusal to participate in the disciplinary inquiry at the

work place.

His conduct does not in anyway negate the proceedings and the decision taken against him by the Respondent.

There will be no orders as to costs. The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT