

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.133/98

In the matter between:

ELMON JULY MASINA

APPLICANT

and

NGWANE MILLS

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. D. MAZIBUKO

FOR THE RESPONDENT:

MR. Z. JELE

JUDGEMENT

08. 06. 2000

On the 6th January 1992 the Applicant was employed by the Respondent as a Warehouse Supervisor. He remained employed until the 9th January 1998 when he was dismissed by the respondent allegedly for wilful misuse of company property without authority, producing false evidence, and gross negligence.

The Applicant in his testimony denied that he misused company property. He further denied that he produced false evidence and denied too that he acted in a grossly negligent manner.

The Applicant states that the dismissal was without any justification, was unfair and was unreasonable. He contends that he was summarily dismissed without a proper hearing as he was denied opportunity to defend himself or call witnesses to his defence.

At the time of his dismissal the Applicant earned E11,425.00 per month. He reported the dispute to the Commissioner of Labour who failed to resolve it and a certificate of unresolved dispute was issued.

He now prays for reinstatement to his job tailing which he should be paid compensation for unfair dismissal and terminal benefits constituting notice pay, additional notice, severance allowance and leave pay.

The Respondent on the other hand states that the Applicant was dismissed after the Respondent had conducted a fair and reasonable disciplinary enquiry. That at the said

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hearing, the Applicant admitted his guilt and he was found guilty as charged including the charge of presenting false evidence to the enquiry in his defence.

Consequently, the Respondent states that the dismissal was in accordance with Section 36 of the Employment Act.

The circumstances leading to the dismissal of the Applicant were narrated to the court by both parties.

The Applicant told the court that on the 30th December 1997 he was doing monthly stock taking after hours. He was with one Jeremiah Mkhabela whom he had sent to deliver an order to K. T. M. Jeremiah had returned from this errand at 3 o'clock and the Applicant requested him to do overtime after he had clocked out of his normal working day. The Applicant told the court that Jeremiah continued working until 7.00p.m. The Applicant told the court that he requested the night shift supervisor Mr. Siphon Mabuza to allow him company transport to take Jeremiah home. The supervisor apparently consented and opened the gate for the Applicant and gave the Applicant the keys to the motor vehicle to be used for that purpose.

The security at the gate inspected the motor vehicle and he drove off. Along the way he met one Michael Dlamini a supervisor for the Millers. The Applicant stopped and greeted him and he proceeded with his journey. He dropped Jeremiah at his home and on his way back, he stopped at Mahhala to cash some money from an ATM machine and drove back to work. He found the gate closed. The security declined to open saying that he was under instructions from Michael Dlamini not to do so.

The Applicant left the motor vehicle at the gate and continued with his work.

At 10.00p.m. Mr. Cameron the Marketing Manager arrived, he asked the Applicant why the vehicle was outside and the Applicant gave an explanation. Mr. Cameron instructed the security to open the gate and the vehicle was driven in by the Applicant.

On the 9th January 1998 the Applicant was summoned to Mr. Cameron's office. He went with one Kenneth Mndzebele, the chairman of the Workers Council. He had been advised to seek a representative in a hearing to be conducted against him.

In the office was Mr. Cameron, Mr. Lukhelo and Michael Dlamini. Mr. Cameron chaired the proceedings. He told the Applicant that the meeting was an inquiry and not a disciplinary hearing.

The Applicant was asked to explain what transpired on the 30th December, 1997. He did. Michael Dlamini testified also. Kenneth Mndzebele asked Michael Dlamini questions but was often obstructed by Mr. Cameron who advised that the proceedings were just an inquiry but a formal hearing would be conducted later.

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Three days later the Applicant was called. He went with Kenneth Mndzebele. Mr. Cameron then issued him with a letter of dismissal. He referred to previous warnings against the Applicant prior to issuance of the letter. According to the Applicant the warnings referred to had since expired.

The Applicant appealed against the dismissal to the Managing Director Mr. Skipsy. On the 29th January 1998 Mr. Skipsy summoned him. Mr. Cameron, Siphon Mabuza and Michael Dlamini were called to the appeal hearing also, Mr. Kenneth Mndzebele also attended.

The Applicant told the court further that he narrated the whole incident to Mr. Skipsy. Mr. Skipsy asked Mr. Mndzebele how he viewed the matter. Mr. Mndzebele stated that the company had spent a lot of money educating the Applicant. For that reason he should not be easily dismissed. The Applicant and Mr. Mndzebele were asked to leave. The rest remained in the office. The Applicant was called in later and was informed that his appeal had failed.

The Applicant in court insisted that Siphon Mabuza had given him authority to drive the motor vehicle on the 30th December 1997. He said Siphon was not called to testify so was Mr. Mkhabela and he himself was not given a chance to call witnesses. He denied he had given false evidence at the enquiry and stated that he did not admit the offence of gross negligence by leaving the warehouse unattended when

he drove out. He alleged that one Isaiah Mayiscla was in charge of the warehouse while he was away.

Regarding his personal circumstances, he said he was now unemployed and was 37 years old. At the time of his dismissal he was serving as a warehouse supervisor. That he was married with four (4) children. He seeks reinstatement to his work and in the alternative maximum compensation for unfair dismissal and various terminal benefits.

He confirmed that on the 26th February 1997 he had received a final written warning from his employer.

Under cross examination the Respondent put to the Applicant that he had misled Siphon Mabuza that he had authority from Mr. Cameron to drive the truck out. That he did not give a lift to Mr. Mkhabela but was alone when Michael Dlamini met him. The Applicant refuted these allegations.

The Respondent asserted that the Applicant admitted having gone to the ATM to cash some money that was required at home and that indeed on the material evening Mkhabela had left work at 3p.m. and did not do any overtime according to company records.

The Respondent called DW1 Jeremiah Mkhabela. He told the court that he had worked

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at Ngwane Mills Warehouse since 1995. That he worked under the Applicant at the warehouse. He categorically denied that he did any overtime on the 30th December 1997 as was alleged by the Applicant. He said that he had knocked off from work at 3p.m. He denied that the Applicant had taken him home at 7p.m. His clock card showed no overtime worked on that day. He denied also that the Respondent had threatened to fire him if he told the truth. Mkhabela withstood very close cross-examination by Mr. Mazibuko and was steadfast in his assertion. He appeared straight forward and truthful and we accept that on the 30th December 1997 he did not do overtime nor was he driven home by the Applicant.

Siphon Kevin Mabuza testified as DW2. He was employed as a miller since January 1992. He told the court that on the 30th December 1997 the Applicant requested for the gate keys as he was going to pick some workers at K. T. M. He opened the main gate for him. A few minutes later, Michael Dlamini came and asked why the truck was out and the witness explained to him that the Applicant had told him that he had authority from Mr. Cameron the marketing Manager to pick up people at K. T. M. Bakeries, Manzini. He then received instructions not to allow the truck in. He denied the allegation by the Applicant that he had authorised him to drive the truck out. He insisted he only opened the gate as the Applicant had the keys. He denied also that the Applicant had informed him that he was going to drop Jeremiah Mkhabela at home. He only opened the gate upon the assurance that Mr. Cameron had authorised the truck to go to K. T. M Bakeries Manzini to pick up staff.

He was also closely cross examined and withstood it very well. We do accept his testimony regarding what transpired on the material night.

Michael Dlamini DW3, told the court that at around 7.p.m. on the 30th December 1997 he saw a Ngwane Mills truck on his way to work. The Applicant was driving and he greeted him. At the gate, security personnel told him that the truck was going to pick some people at Manzini and that Siphon Mabuza gave authority to open the gate.

He instructed the security people not to open for the truck and he called Mr. Cameron. He met the truck on his way out approximately two hundred metres from the mill.

He said that a disciplinary hearing was held and a charge was put to the Applicant, That he testified and he was asked questions by the chairman and the Applicant's representative.

He said that the Applicant had no authority to take the truck out. This witness was also forthright in his

testimony which largely corroborated that of the other witnesses of the Respondent.

Robert Kelt Skipsy testified as DW4. He was the Managing Director of the Respondent.

He told the court that he heard the Appeal by the Applicant. The Applicant was represented by a workers representative. He told the court that he upheld the decision of the disciplinary committee because the Applicant admitted before him that he took out

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the company truck to cash some money at Matsapha as he was under family pressure. That he had received a call from home slating that someone was sick. He admitted he had done wrong and asked for leniency and that his service record should be taken into account.

The witness told the court that he felt that the Applicant had lied to the disciplinary panel and that he had used company property for personal gain. That he was a senior supervisor in a position of trust. On the material night he was second in command at the mill and he had left the warehouse unattended while he went for personal errands. There was stock and machinery under his care at the mill worth a lot of money and he had disregarded that and therefore abused the trust placed on him. A good precedent had to be set hence the decision to dismiss him.

Again we cannot fault the evidence of this witness.

The Applicant in our considered view is entirely to blame for what he fell him. The evidence against him is overwhelming, We are satisfied that the procedure followed sufficiently afforded Applicant a fair hearing.

The respondent has fully discharged its onus under Section 42 (2) (a) and (b) of the Employment Act, and has shown that the dismissal of the Applicant was both fair and reasonable in all the circumstances of the case.

The Applicant's Application is therefore dismissed with no order as to costs.

The applicant will however be paid E1,425.00 in lieu of leave days not taken prior to the dismissal.

The members agree.

NDERI DUMA

JUDGE PRESIDENT - INDUSTRIAL COURT