IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 208/2002

In the matter between:

BRUCE KHUNYA APPLICANT

and

NATEX 2000 LIMITED RESPONDENT

CORAM:

NDERINDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: D.MSIBI

FOR RESPONDENT: M.SIBANDZE

JUDGEMENT

17/07/02

This Application was lodged pursuant to a fall report issued by the office of the Commissioner of Labour in terms of Section 41 (3) of the Employment Act No. 5 of 1980.

The Applicant reported a dispute after he was dismissed by the Respondent on the 17th November, 1998 for allegedly committing a dishonest act in the course of his employment in that on the 16th November 1998, he removed fabric from the office of the Respondent's security officer, Mr. Moses Mathabela. That at the time of such removal the Applicant knew that the material constituted exhibits in a charge of theft against co-workers (2 ladies) who the Applicant was due to represent before a disciplinary tribunal on the same day.

The Applicant alleges that on the material day, at about 8 a.m. in the morning he had visited Mr. Mathabela's office and requested that he be allowed to measure the exhibits to help him in mitigating the case of the two ladies. That Mr. Moses Mathabela had agreed to the request but was apprehensive that Mr. Smith the Human Resource Manager, would not be happy if he found out that he had assisted the Applicant as per the request.

The Applicant made arrangements with the inspection supervisor Mr. James Masondo to measure the fabric from the flat table situate in the inspection section. That Moses Mathabela had promised to let him know when they could both go for the taking of the measurement.

The Applicant narrated how he received a call from one Junior Vilakati who informed him that Moses had asked the Applicant to go and collect the fabric for measurement from his office and that he would find him at the inspection section.

He collected the fabric and put it in a black waste bag he had gotten from the inspection department and while he was on his way to the inspection section he met Mr. Smith who demanded that he showed him

what was in the bag.

He explained to Mr. Smith the arrangement he had made with Mr. Mathabela to measure the fabric at the inspection department. Himself and Mr. Smith proceeded to the inspection section but did not find Moses. Mr. Smith told the court that he got suspicious because Moses was not there and when he called him, Moses denied having seen the Applicant that morning.

Mr. Smith further told the court that the Applicant was reluctant to show him what was in the bag until he demanded, as a senior manager to inspect the contents of the bag.

The Applicant told the court that Moses Mathabela denied their earlier arrangement because he was afraid of Mr. Smith.

He told the court that he had no intention to destroy the fabric and he truly believed he had permission to take it for measurement as per earlier arrangement.

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The Applicant was aware that Mr. Smith was not happy that he being a customer service supervisor, and therefore a staff member was involved in representation of unionized employees.

The Applicant explained that he had used the plastic bag as he did not want to draw the attention of fellow employees to what he was carrying.

At the disciplinary tribunal and before court, Mr. Mathabela admitted that the Applicant had gone to his office that morning.

At 3.30p.m. in the afternoon, the Applicant was suspended from work pending investigation of the case against him of tampering with exhibits. The following day, he appeared before the disciplinary tribunal chaired by Mr. B. Bharate. The particular charge was as follows "committing a dishonest act by removing physical evidence of theft from the security office without permission."

The Applicant made an explanation similar to that he gave the court. Junior was called as a witness and he told the tribunal that he had called the Applicant informing him that Mr. Mathabela had requested that the Applicant should take the fabric to the inspection section for measurement.

Junior had been given the message by one Vusi Grama who Mathabela had personally spoken to. Vusi Gama corroborated the evidence of the Applicant and that of Junior Vilakati before the tribunal.

The two witnesses were however not called to testify before court for reasons not clear to the court.

At the tribunal, Moses Mathabela denied giving such instructions to Junior Vilakati. James Masondo also testified before the tribunal and he confirmed that the Applicant had requested to use a table in the inspection section to measure the exhibits. That the Applicant had made the request between 08.15 and 08.30 am in the morning. This corroborates fully the version of the Applicant.

The record of the disciplinary hearing was submitted as exhibit 'A1'.

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In court, James Smith testified as RW1 for the Respondent. He was the Human Resource Manager, He said on the 16th November, 1998 while he went to the toilet he saw the Applicant going to the security office holding a black bag. He was curious and decided to hold on and see what was going on. The Applicant came out with the bag but this time, it looked like there were things in it.

He confronted him and demanded that he showed him the contents of the bag. The Applicant was initially

reluctant but he eventually yielded. Mr. Smith took the bag. The Applicant explained to him that he wanted to measure the exhibits and that he had made such arrangements with Mr. Mathabela the security officer who he expected to be waiting for him at the inspection section. The two proceeded to the inspection section but Mr. Mathabela was not there.

Mr. Smith was suspicious and when he enquired from Mr. Mathabela, he denied such arrangement with the Applicant. Mr. Smith told the court he believed Mr. Mathabela because he was an ex Police Officer.

Mr. Smith had testified against the Applicant at the disciplinary hearing and when the tribunal dismissed the Applicant and he appealed against the decision, the appeal was heard by Mr. Smith who confirmed the decision to dismiss the Applicant.

The issues that arise for determination are as follows:

1. whether the Applicant in terms of Section 42 (2) (a) was dismissed for a reason permitted by Section 36 of the Employment Act.

2. whether in terms of Section 42 (2) (b), it was just and reasonable taking all the circumstances of the case to dismiss the Applicant.

3. whether the version told by Mr. Mathabela which is mutually destructive with that told by the Applicant is reasonably, probably true.

4. whether the failure to call Junior Vilakati and Vusi Gama rendered Applicant's evidence hearsay and therefore in admissible.

In answer to the first issue, the question to be asked is whether the Respondent has proved on a balance of probabilities that the Applicant had

committed a fraudulent act by removing the fabric from Mr. Mathabela's office.

It is common cause that the Applicant committed the actus rheus but what is in question is the Applicant's intention or purpose of removing the fabric.

To determine whether the Applicant had any dishonest intention in doing so, the court has to evaluate his explanation, determine his credibility and seek corroboration of the explanation if any.

The onus is on the Respondent to prove that his intention was dishonest whereas the burden of the Applicant is that of rebuttal and is less onerous.

The crucial evidence is that of Mr. Mathabela to the effect that he had not made any arrangements at all with the Applicant to collect the fabric for measurement in the inspection section. This evidence was countered by that of the Applicant that he had visited Mr. Mathabela first thing in the morning to make the arrangement. That he had proceeded to the inspection section and made further arrangements with Mr. James Masondo to allow him to use the flat table for measurement.

Mr. Smith's evidence does not in any way corroborate the evidence of Mr. Mathabela on the issue as to whether Mr. Mathabela had made any arrangement with the Applicant.

Since no other witnesses were called to testify on the issue, the court looked for corroborative evidence from the exhibit 'AI' which comprised the minutes of the disciplinary hearing.

The Applicant's narration to the disciplinary tribunal was consistent with his evidence in court. More importantly, James Masondo told the tribunal that indeed on the material day, the Applicant had told him

that he was the representative of two lady employees at a disciplinary hearing and sought permission to use the flat table in his section to measure the exhibits.

This witness was not called to testify before court by either party but his evidence before the disciplinary hearing clearly indicated what the intention of the Applicant was that morning. The Respondent did not seem to doubt that such arrangement had infact occurred between Mr. Masondo and the Applicant.

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This evidence was also consistent with that of the Applicant in court regarding the arrangement he had made that morning and his actual intention for doing so.

The Applicant's evidence is more probably true as compared to the uncorroborated evidence of Mr. Mathabela.

What makes Mathabela's evidence suspect even more is the fact that he admits meeting the Applicant that morning, but from exhibit 'Al' at page 3, Mr. Smith told the tribunal that when he called Mr. Mathabela to enquire whether he had permitted the Applicant to take the fabric from his office, he had told Mr. Smith that he had not seen him at all that morning.

The evidence of the Applicant that Mr, Mathabela permitted him to take the fabric but did not want Mr. Smith to know about it, probably explains the reaction of Mr. Mathabela when the Applicant was caught taking the fabric away. That the Applicant immediately explained his mission to Mr. Smith which explanation found support from Mr. Masondo makes it more probable in the circumstances.

It turned out from Mr. Smith's evidence that indeed Mr. Mathabela had discussed the case with him that morning and they were both aware that the Applicant was the representative of the accused ladies.

The fact that the Applicant was a long serving senior employee should have after the explanation he gave to Mr. Smith put his suspicions to rest, but it did not happen.

The Respondent has failed to establish in the light of the foregoing that the Applicant committed any dishonest act. It follows that the Applicant was not dismissed for a reason permitted by Section 36 of the Employment Act as he was merely preparing his defence in a matter he was to conduct for the ladies that morning.

The Applicant's case would no doubt have been fortified by the evidence of Junior Vilakati and Vusi Gama but the two were not called. The Applicant however produced exhibit 'Al' which shows that at the disciplinary hearing, the two corroborated his case in that they told the tribunal that Moses Mathabela had sent Junior who in turn had left a message with Gama to

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convey to the Applicant to go and collect the fabric for measurement as per their earlier arrangement. The record is part of the evidence this court has taken into account in accepting the version of the Applicant as opposed to that of Mr. Mathabela which remains uncorroborated and was not corroborated even at the disciplinary hearing.

The Respondent in addition committed procedural irregularity in allowing Mr. Smith to hear and determine the Applicant's appeal against dismissal, fully knowing that Mr. Smith was the person who arrested the Applicant, had reported the complaint and had testified at the initial hearing against the Applicant. This is a classical case of a person who was actively involved in the prosecution of the Applicant, later on becoming a judge of his fate at the most crucial moment of an appeal hearing.

A fair hearing is an essential ingredient in the employers discharge of his burden in terms of Section 42 (2) (a) and (b) of the Employment Act No, 5 of 1980.

Whereas it is generally accepted that employers cannot be expected to constitute perfect courts at the work place, whatever procedure is followed to determine whether an offence has been committed by an employee, and if so, what penalty should be meted out, must have a modicum of fairness and reasonable independence where circumstances allow.

In the South African case of National Union of Mine Workers v Amcoal Collieries Ltd t/a New Denmark Collieries (1989) 10 ILJ 73 (IC). Following the decision in National Union of Mine Workers & Another v Rand Mines Milling Co Ltd (1980) 7 ILJ 765 (IC).

The court stated that except in very small businesses where an internal appeal would be a farce because everyone in the firm was involved in the disciplinary inquiry, it is desirable that the employee should be able to appeal against the initial decision to a more senior member of management who was not engaged in the founding incident or in the initial inquiry.

The employee, can, of course, waive his right of appeal. Where he chooses to exercise it, however, the employer is bound to comply. The Presiding Officer should not have been in any way involved in the initial hearing.

Appeals at the workplace, unlike those in courts of law ought not to be confined to the record. Often, no records, exist, but should be conducted in a more flexible manner. Where no record exists, an appeal should be treated as a hearing denovo. Where there is a record, however, the employee must be given access to it. See Robbertze v Matthew Rustenburg Retinens (Wadeville) (Edms) BPK (1986) 7 ILJ 64 (IC).

In the case of the Applicant, the Respondent had other senior officers who were not involved in the case, at the investigative stage or at the initial hearing. Common sense dictates that such officers especially the Managing Director should have heard the Applicant's appeal. Mr. Smith was a material witness at the disciplinary hearing stage and was heavily biased to determine the Applicant's case objectively.

In the result, the dismissal of the Applicant was both substantively and procedurally flawed. The Applicant's application succeeds accordingly.

In determining the award to grant the Applicant, the court considers that he was 41 years old with 3 children and had worked for the Respondent as a customer service supervisor for a continuous period of nine (9) years. He had no previous or current record of misconduct at the time of dismissal. He earned a monthly salary of E4,169.00 at the time of the dismissal. He remained unemployed until March 2002 when he was re-employed by a sister company of the Respondent at a lesser salary of E3,500 per month. He was still employed at the time of the trial.

Taking these factors into consideration, the court awards the Applicant six months salary as compensation for unfair dismissal in the sum of E4,169.00

x 6	E25,014.00
Notice Pay	E 4,169.00
Additional Notice	E 6,048.00
Severance Allowance	E15,120.00
TOTAL	E50.351.00

The Respondent will pay costs of the Application.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT