

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 277/2000

In the matter between:

ABRAHAM SILOLO

APPLICANT

and

P. S. WOODWORK (PTY) LTD

RESPONDENT

CORAM:

NDERINDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

S.SHONGWE

FOR RESPONDENT:

J. WARING

JUDGEMENT

09/08/02

The Applicant was employed by the Respondent as a junior carpenter earning a gross salary of E677.00 a month.

He was in continuous employment until the 7th November, 1997 when his services were terminated summarily for allegedly using physical violence against a fellow worker by the name of Abraham Mndzebele on the 6th November, 1997.

According to Mrs, Tina Nino Jongenes, a director of the Respondent, at about 10.a.m. in the morning of 6th November 1997, Mr. Mndzebele came to her office bleeding on the face. He reported that he had been hit with a fist by the Applicant, blood was streaming from his nose.

At the time Mrs. Jongenes' daughter, a brain surgeon by profession was at home on holiday and she called upon her to examine Mndzebele. The doctor was not available to testify about her findings neither did she prepare

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a report stating the condition of Mndzebele. The court therefore regards statements by Nino on what she was informed by her daughter as hearsay evidence.

Nino however told the court that she called upon the applicant to her office and he admitted that he had hit Mndzebele because Mndzebele had insulted him. At that point in time, her husband was away and so was the other director of the company. She told the court that she was the only lady at the premises and was afraid and therefore she telephoned the co-director in Cape Town and her husband who was in Holland and they both advised her to summarily dismiss the Applicant, which she did. She informed the Works Council of the decision to dismiss the Applicant.

According to the disciplinary procedure of the Respondent which Mrs. Nino admitted she was familiar

with, Clause 1.4 thereof states that "no worker shall be dismissed without an inquiry". She told the court that in this case, there was no need for an inquiry because the fight was in full view of the other workers and none of them was willing to testify. She did not witness the fight herself.

She did not have opportunity to evaluate the full circumstances that led to the fight especially the nature of provocation the Applicant had received from Mndzebele.

The Applicant told the court that Mndzebele accosted him while he was dressing timber with a plank and threatened to assault him. He had continued to push him with a plank when he got hold of it and in the process it hit his face. He denied that he had fisted Mndzebele as alleged by Nino. Mndzebele was a driver and the only reason he confronted him with a plank was because he alleged the Applicant had proposed love to his girlfriend, a lady who had been newly employed at the workplace.

The Applicant was 32 years old and was married. He had not obtained alternative employment and had suffered loss and damage.

He denied that he had taunted Mndzebele over a burn he had received and accused him of using 'muti' to get the new lady employee, Nonhlanhla,

He also denied that he was the aggressor on the material day.

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Cesar Mabuza testified in support of the Applicant and told the court that he saw Mndzebele with a plank. At the time the Applicant was busy slotting planks into a machine. He did not see the Applicant assault Mndzebele but he heard about it later. The applicant was subsequently dismissed for the alleged assault.

On the other hand, Vusi Nzima, a worker who testified for the Respondent told the court that the Applicant and Mndzebele had a quarrel over a lady named Nonhlanhla. They taunted each other to the effect that they were using 'muti to win the girl.

The two employees fought in the morning while the workers were dressing. He did not see who was the aggressor. He separated them and as a supervisor attempted to resolve the problem to avoid Nino's attention being drawn to it. Mndzebele was injured on the face and was bleeding.

Mndzebele himself told the court that the Applicant had approached him and held him by the collar threatening to assault him for allegedly spreading gossip about the Applicant.

The Applicant did not hit him then but the two met in the workshop near his work station and he threatened to assault him again. He invited the Applicant to fight him out of the work place to avoid being dismissed and at that point, the Applicant fisted him on the face.

The co-employees tried to resolve the matter but unfortunately Nino learnt about it, since Mndzebele could not drive. Both were called to Nino's office where he was attended to by Nino's daughter. He denied carrying a plank to attack the Applicant.

The version by the Applicant and that by Mndzebele as to who was the aggressor is mutually destructive. None of the witnesses for the Respondent know who was the aggressor but AW1 supported the Applicant's case that Mndzebele had confronted the Applicant with a plank.

According to the Respondent's regulations, it was a dismissible offence to fight at the work place. It is however lawful in terms of the law of the land to defend one self using reasonable force if attacked by another person in circumstances where one's life and limb is placed in danger.

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Nino did not conduct an inquiry to establish if justifiable reason existed for the assault on Mndzebele. In the least this would have served as mitigation to enable her determine if the penalty deserved was dismissal or not. She was bound by the disciplinary code to conduct such an inquiry but she had failed.

In the circumstances of the case, though violence against a co-worker is an offence for which dismissal is permitted by Section 36 of the Act, the Respondent has been unable to satisfy the court that the penalty of dismissal was fair and reasonable taking all the circumstances of the case into account. The dismissal was thus a result of a procedural irregularity in that the employer did not conduct a hearing to satisfy the requirements of Section 42 (2) (b) of the Employment Act No. 5 of 1980.

In the result, taking into account the period served by the applicant, his age, the reason for the dismissal, the loss and damage he had suffered as a result of the unprocedural dismissal, the court awards him six (6) months salary as compensation for unfair dismissal.

Since the dismissal was only, procedurally unfair, the Applicant is not entitled to payment of severance allowance but will receive notice pay of E677.00 and additional notice in the sum of E649.92.

It is ordered that the Respondent pays a sum of E4,062.00 as compensation. Total sum payable is E5,388.92.

The Respondent will further pay costs of the Application.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT