IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 40/2000

In the matter between:

JOSEPH MAHLANGA **APPLICANT**

and

SWD BOTTLING COMPANY **RESPONDENT**

CORAM

KENNETH NKAMBULE	:	JUDGE
DAN MANGO	:	MEMBER
GILBERT NDZINISA	:	MEMBER
FOR APPLICANT	:	MR. KUBHEKA
FOR RESPONDENT	:	MR. HLOPHE

JUDGEMENT 29/11/02

The applicant seeks maximum compensation for unfair dismissal and terminal benefits emanating thereof. The application was brought pursuant to a certificate of unresolved dispute issued by the Commissioner of Labour in terms of Section 65 (1) of the Industrial Relationship Act No. 1 of 1996.

The applicant was employed by the respondent company in the sales and marketing department as a sign writer on the 6th November, 1979 and was in the continuous employ of respondent until the 8th December 1999 on which date he was summarily dismissed.

According to the particulars of claim the applicant was dismissed unfairly and/or unlawfully for allegedly "transgression of specified rules and policies". At the time of dismissal the applicant was employed at a monthly salary of E1428.87 (one thousand four hundred and twenty eight Emalangeni and eighty-seven cents).

In its reply the respondent stated that the applicant was dismissed because despite the fact that he was employed by the respondent in its marketing and sales department, and despite his knowledge of the respondent's rules prohibiting employees and their immediate families from participating in respondents promotional competitions, allowed members of his family to participate in a coca cola promotional competition with the result that two bicycles were awarded to the applicants family.

The applicant gave evidence under oath. He told the court that he was employed by the respondent on 6th November 1979 as a sign-writer. He remained employed as such until December 1999 when he was summarily dismissed by the respondent. He was charged with an offence of "transgressing of rules and policies of the company". According to applicant the allegation was that he permitted members of his family to enter certain promotional competitions organised by the company against the standing instruction that staff members and their immediate family and relatives were not allowed to enter for the competition.

According to the applicant prior to the competition there was a meeting at his place of employment for all the workforce. Applicant was present in the meeting. The managing director told the workforce of the rules and regulations of the competition. Amongst other things the managing director told them that employees members of family and relatives were prohibited from entering in the promotional competition.

Applicant told the court that when the competition took off he fell sick and was hospitalised at the Raleigh Fitkin Memorial Hospital. According to the applicant the respondent was aware of this. Applicant had been granted a sick leave.

After the applicant was discharged from hospital he went to his parental home at Mhlaleni. At Mhlaleni he noticed two children playing with the bicycles from his place of employment. He enquired from the children who the two bicycles belonged to. The children said they belonged to their uncle.

At the point in time applicant was still on sick leave. Though he had been discharged from hospital he was attending out patient department for medication. According to him he was still sick and he could hardly walk.

From his parental home applicant went to his home at Ngwane Park. Whilst at home at Ngwane Park one Clement Dlamini an employee of the respondent together with some police officers came. Clement Dlamini, respondent's security manager enquired from applicant how the children he had found playing with the bicycles came to be in possession of the bicycles. Applicant answered and said he did not know how the bicycles came to his homestead. He asked them to enquire from the children how they got the bicycles.

According to the applicant the police and Clement took the bicycles. After the police left one Raymond Simelane came. He had come to fetch one of the bicycles. Applicant told him that the bicycles had been taken by the police. He also told him that the police were in the company of respondent's employees. Raymond then went to respondent's place of employment to claim the other bicycle which he said belonged to him.

According to the applicant Raymond Simelane was a tenant at his parental home at Mhlaleni, but he is not his relative.

AW2 told the court that he is aware of the promotional competition held at the applicant's place of employment. At the point in time AW2 was staying at applicant's parental house. According to AW2 applicant is his cousin. He stated that his home is in Hlatikulu but because he was employed by Engen Filling Station in Matsapa he was staying at Mhlaleni. He used to visit his home in Hlatikulu over weekends.

Likewise on the day in question which was a Monday he had just come from his home in Hlatikulu when applicant's wife sent him to go and collect her son's prize from respondent's place at Matsapa. According to AW2 Applicant's wife told him that the bicycle was won by his son who was on a school trip in Durban. AW2 told the court that he went to respondent's undertaking and claimed the bicycle.

He took the bicycle to Mhlaleni and gave it to applicant's wife. According to AW2 the bicycle was eventually taken by applicant's wife to Ngwane Park.

Applicant went to Hlatikulu over the following weekend. On his return he was asked by the applicant how the bicycle came to be in Mhlaleni because

2/02/05

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 18/98

In the matter between:

JAMESON THWALA APPLICANT

And

NEOPAC (SWAZILAND) LIMITED RESPONDENT

CORAM:

NDERI NDUMA : PRESIDENT
JOSIAH YENDE : MEMBER
NICHOLAS MANANA : MEMBER

FOR APPLICANT : P. R. DUNSEITH
FOR RESPONDENT : M. SIBANDZE

JUDGEMENT – 18/04/02

By a letter dated the 20th February, 1996, the Applicant resigned from his employment with the Respondent wherein he held the position of Stores Clerk under the direct supervision of the production manager, Mr. P. K. Mathunywa. The letter of resignation was addressed to him and partly read as follows:

"I am sorry to inform you that from the 15th March, 1996 my services to the company will be terminated because of your conduct towards me."

Four reasons were listed in the letter for the decision taken and they included:

1. In 1990 he was promoted from machine operator to the position of a supervisor but was not granted 25% salary increase over and above the highest paid subordinate in terms of employment wage regulations in the industry.

2. That in July, 1993 the production manager demoted him from the position of supervisor to a general labourer for no reason, and was reinstated by the Labour Commissioner after a conciliation meeting.

3. That in 1995 the production manager promoted him from the position of supervisor to a stores clerk without any salary increment and;

4. On the 5th February, 1996 the manager wrongfully charged him for absenting himself from work for a day, inspite that he had obtained permission from him the previous day and had filled a leave form. On the 13th February, 1996 he was subjected to a disciplinary hearing chaired by the factory manager (Broadwell) and was exonerated from the offence.

This is cited in his testimony as the last straw that broke the camel's back hence the decision taken in terms of Section 37 of the Employment Act.

It is to be noted that the Applicant did not terminate his employment immediately but deferred it to the 15th March, 1996 approximately three weeks from the date of the letter. The letter was copied to the General Manager, the factory manager, Human Resources Officer and the Labour Commissioner.

On the 27th February, 1996 whilst the Applicant was serving notice, a meeting was convened by the Factory Manager Mr. C. Broadwell sitting with P. Mathunywa, the Production Manager who was his subordinate, Mr. Magagula the Human Resources Manager, Mr. Ndlangamandla and the Applicant himself to try and resolve the dispute between the Applicant and the Production Manager.

In the meeting Mr. Broadwell told him that he was exonerated from the charge of absence by management and should no longer make it an issue. As concerns the issue of promotion from the position of supervisor to stores clerk, it was stated in writing that, it was a parallel movement but not a promotion.

The dispute concerning the demotion was resolved by the Labour Commissioner and he was reinstated.

Mr. Ndlangamandla, who was a member of management appealed to him to reverse his decision to resign stating that management did not want to loose him. This appears on page 18 of exhibit 'A'. The Human Resources Manager also requested Applicant to reconsider his stance.

On the 11th March, 1996 all the parties reconvened as agreed to get a feedback from the Applicant. The Applicant said the following:

"I have thought about it long and hard, I cannot find any reason for changing my decision. Therefore I am going ahead with my resignation."

Management, through Mr. Broadwell expressed disappointment that the Applicant did not change his mind inspite the assurance he had got from him. Mr. Ndlangamandla echoed his position. Mr. Mathunywa did not contribute to the discussion in both meetings.

On the 15th March, 1996 the Applicant received terminal benefits in the sum of E437.13 from the Respondent and left his employment.

He was employed by the Respondent in 1988 and was in continuous employment until he resigned on the 20th February, 1996. At the time he earned E1,437 per month.

He reported a dispute for unfair dismissal in terms of Section 57 (1) of the Industrial Relations Act[1] which was not resolved and a certificate of unresolved dispute was issued in terms of Section 65 (1) of the Act.

He claims compensation for unfair dismissal, notice pay, additional notice pay, leave pay and severance allowance. A claim for unpaid wages (under payments while he was a supervisor) was dismissed after arguments in limine since the claim was reported after expiry of six months from when the dispute arose. The court relied on its earlier decision in the matter of Philemon Matse and Unitrans Swaziland Limited[2]

The Respondent's case was supported by S. Magagula the Human Resources Manager from 1990 – 1997 and Cyril Broadwell, the Factory Manager from

1 No. 1 of 1996

2 Unrept Case No. 122/94

1994 to 2000. Both Officers were no longer working for the Respondent at the time of their testimony.

The witnesses were largely unaware of the friction between the production manager and the Applicant.

The Factory Manager was the next line Manager after the production manager to the Applicant. He told the court that the Applicant did not complain to him about the conduct of Mr. Mathunywa towards him neither did he complain about his pay to him while he was as a team leader.

He further explained that he had personally appointed the Applicant to the position of a stores clerk, and it was a lateral movement from his team leader position but not a promotion. He had worked in a similar position in the past hence his selection.

The Applicant did not complain to him about lack of a salary raise after his appointment to the position as a clerk.

Furthermore, the company had a grievance procedure which Applicant would have used if he had felt aggrieved in any way at the work place. The first time he handled a dispute between the Applicant and Mathunywa was at the disciplinary inquiry concerning the Applicant's absence from work without authority. He dismissed the charges against the Applicant since there was no merit in it. He was surprised when the Applicant resigned after management had absolved him from the charge.

Mr. Magagula on the other hand told the court that in 1999 the Applicant was informed of his shortcomings as a supervisor. Himself and Mr. Mathunywa called him to the office before he was demoted. The General Manager was also dissatisfied with the work performance of the Applicant but he had not instructed that he be demoted. He was aware however that the General Manager had discussed the matter with Mr. Mathunywa. He denied that Applicant was victimized due to his persistent complaints for underpayment.

Mr. Magagula admitted however that as from 1990 when Applicant became a supervisor he should have been paid on the scale of a supervisor but not as

This claim was disallowed for the late reporting but the issue was relevant to the question of constructive dismissal as it was said by the Applicant to constitute one of the cumulative reasons that finally forced him to resign from his employment.

He concurred with Mr. Broadwell that the company had structured the supervisory positions to that of elected team leader hence the Applicant after the demotion and successful conciliation by the Labour Commissioner was reinstated to the position of team leader. He denied that this was designed to underpay the supervisors and the Applicant in particular. The supervisors had collectively agreed to the new arrangement which was part of total production management strategy to optimize production undertaken by the Respondent in all its operations in the South African Region.

The two managers participated in the final attempt to get the Applicant to change his decision but they failed in that endeavour.

The issue for determination is whether the Respondent constructively dismissed the Applicant or did the Applicant terminate the employment of his own accord ?

Section 37 of the Employment Act reads as follows:

"When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer."[3]

The employee has to prove that in his eyes and the eyes of a reasonable employee in his position, the conduct by the employer towards him was such that he could not reasonably be expected to continue the employment relationship, hence the severance of the relationship.

3 No. 5 of 1980

In the case of Jooste v Transnet Ltd t/a S.A. Airways[4] Myburgh J in the Labour court of South Africa dealt with the concept of constructive dismissal before it was introduced into the Labour Law legislation of South Africa. He stated that it was neither a concept known to the common law. His approach was as follows:

"What is constructive dismissal? It is a concept not found in the Industrial Relations Act[5] or any South African statute. It is not a concept known to the common law. In the law of contract if the employer repudiates the contract of employment, the employee is put to an election. He may accept repudiation, thereby terminating the contract and claim damages or hold the employer to the contract. The usual form that the acceptance of the repudiation of contract by an employee takes is a resignation by the employee. The resignation is then 'an election by the employee to treat himself as discharged from his contractual obligations by reason of the employer's breach; Harvey on Industrial Relations and Employment Law Vol. 1 para. 85. Consequently, if the employee resigns after making the election to cancel the contract of employment, he is restricted to a claim for damages. He cannot approbate and reprobate the contract, he cannot cancel the contract and at the same time claim specific performance."

In the United Kingdom, in terms of Section 55 (2) © of the Employment Protection Act of 1978, the common law position was changed so as to treat an employee "as dismissed by his employer if the employee terminates the contract with or without notice in the circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."[6]

The Employment Appeal tribunal of England in Woods v WM Car Services (Peterborough)[7] Lord Denning had this to say:

"It is clearly established that there is implied in a contract of employment a term that employers will not without reasonable and proper cause conduct

4 1995 16 ILJ 629 (LAC)

5 LRA 23 1956

6 JOOSTE v TRANSNET (supra)

7 (1981) IRLR 347 at 350

themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; Coutaulds Northern Textiles Ltd v Andrew (1979) IRR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee 'cannot be expected to put up with it,' the conduct of the parties has to be looked at as a whole and its cumulative impact assessed."

This approach found favour with South African Labour Court even after the repeal of the 1956 LRA and its replacement with LRA Act 66 of 1995 wherein Section 186 (e) of the Act, has introduced the concept of constructive dismissal in its definition of dismissal to include a situation wherein:

"an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

Professor A.A Landman 'constructive dismissal'[3] has defined constructive dismissal as:

"the termination of a contract of employment by an employer under circumstances which make the termination tantamount to, or virtually, or in substance, the termination of employment by the employer."

The wording of Section 186 (e) uses the word 'intolerable' whereas Section 37 of the Employment Act refers to conduct that 'is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment'

It was submitted by Mr. Dunseith for the Applicant that the Swaziland Legislation requires a lesser standard of proof than that placed on an employee by the South African LRA.

I agree with the view expressed by the Author D. Du Toit & Others in Labour Relations Law, A comprehensive Guide [9], that;

"The question is whether taking all the circumstances into account there was objective unfairness which drove the employee to believe there was no way out but to walk away."

'Mere unreasonableness or illegitimate demands by the employer, according to this approach do not amount to constructive dismissal as long as the employee retains a remedy against the employer's conduct short of terminating the employment relationship' See Alderdorff v Oustpan International where an employee did not discharge this onus.[10]

The South African case law after the promulgation of Section 186 (e) is in my opinion applicable to the Swaziland situation. Nothing turns on the different phraseology used in the LRA 1995 and the Employment Act, 1980.

Upon consideration of the facts in the present case, I am not persuaded that the Applicant was indirectly forced to resign from his employment. No reasonable employee in the place of the Applicant would have persisted to terminate his employment after the intervention by the Human Resources Manager and the Factory Manager in the dispute between the Applicant and his immediate supervisor, the production manager.

The issue of underpayment was long standing and cannot be relied upon as a reason for the decision to resign. The matter of demotion was resolved in favour of the Applicant by the Commissioner of Labour while the final grievance against the Production Manager by the Applicant had also been resolved in Applicant's favour by senior management of the Respondent.

The two senior managers (Human Resources Manager and the Factory Manager) went out of their way to persuade the Applicant to reverse his decision to resign as the Respondent still valued his services in vain.

The Applicant quit his employment voluntarily taking all the circumstances of the case into account.

9 3rd Edition 343

10 13 ILJ 810 (CCMA). held that it was improper for an employee to second guess outcome of use of procedure and therefore avoid it.

In Aldendorff and Outspan International Ltd [11] it was held that an employee who chose to resign rather than seeking to resolve matters informally or by making use of the company grievance procedure was not constructively dismissed.

I hold this view, though the Applicant in *casu* followed the various procedures but appeared to have no faith in the determination of the dispute by members of senior management and instead focused on the dispute between himself and his immediate supervisor without at any one time suggesting that he be deployed to another department.

The Applicant will be paid E1,293 in lieu of eighteen (18) unutilized leave days.

The rest of the Application fails in its entirety.

There will be no order as to costs.

One Member Agrees.

NDERI NDUMA
JUDGE PRESIDENT – INDUSTRIAL COURT

[11] 10 supra.