IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 10/98
In the matter between:	
ROBERTO MACHAVA	APPLICANT
and	
ATLAS MOTORS (PROPRIETORY) LIMITED	RESPONDENT
CORAM:	
NDERI NDUMA:	PRESIDENT
JOSIAH YENDE:	MEMBER
NICHOLAS MANANA:	MEMBER
FOR APPLICANT:	P. R. DUNSEITH
FOR RESPONDENT:	M. SIBANDZE

J U D G E M E N T

12/12/02

This is an application for determination of an unresolved dispute instituted in terms of Section 65 of the Industrial Relations Act 1996 on the 27th January 1998. This Act was repealed by Act No. 1 of 2000 but there is consensus, the application as concerns the remedies is to be dealt with in terms of the former Act.

The Applicant was employed by the Respondent on the 15th April, 1985 as a technician in the Radiator Workshop at Mbabane. He was in continuous employment until the 17th October 1997 when he was summarily dismissed by the Respondent. At the time of the dismissal he was in charge of the Radiator Workshop and earned a sum of E5,500.00 per month.

According to the Respondent's Amended Reply, paragraph 2.1, the Applicant was called to a disciplinary hearing on charges of dishonesty in that he had on several occasions drawn parts from the Respondent's stock and made them available to customers at a fraction of the retail price of the motor vehicle part or at no charge at all to the detriment of the Respondent.

The Respondent further avers in paragraphs 2.2 and 3.2 that the Applicant was given a fair opportunity to state his case and to answer to the allegations against him but he had admitted the charges and was dismissed.

On the contrary, the Applicant avers that the dismissal was unfair and unreasonable in all the circumstances in that the Respondent had no lawful reason to terminate his services and no proper disciplinary hearing was conducted.

Reliance is placed by the Respondent on Section 36 (b) of the Employment Act No. 5 of 1980 as the provision permitting the dismissal of the Applicant.

In terms of Section 42 (2) (a), the Respondent bears the burden of showing firstly that the Applicant had

committed an offence for which it was permitted by Section 36 (b) to dismiss him and that in terms of Section 42 (2) (b), it was fair and reasonable to dismiss him in the circumstances.

In the letter of dismissal dated the 17th October 1997, the Respondent stated that the Applicant was dismissed "because of your misconduct of fiddling with the radiator costing system". The charge against the Applicant read as such whereas the certificate of unresolved dispute indicated that the Applicant was fairly dismissed for "fiddling with the prices of radiators."

Up to the point of close of pleadings, there was no suggestion that the Applicant had gone beyond issuing out parts for lesser prices but had stolen the parts or benefited from such transactions.

This first came by way of questions put to the Applicant by counsel for the Respondent and later on this was stated by the witnesses of the Respondent. The evidence was to the effect that the Applicant drew radiator cores from stock but he had failed to make them available to customers and had stolen them himself.

The Applicant denies these allegations adding that he was not dismissed for these reasons and was not presented with opportunity to answer such allegations at all prior to the dismissal. The Applicant states that such allegations took him by surprise and given that about five (5) years had lapsed since he was dismissed, he was not prepared to answer in detail, allegations emanating from job cards he had attended to many years back.

The Applicant further stated that the Respondent did not adduce any direct or actual evidence of dishonesty on the part of the Applicant but relied exclusively on inferences to be drawn from such discrepancies between job cards and core requisitions.

The Applicant explained further that such discrepancies could be explained by clerical errors, miscommunication between Applicant and the Secretary Sarah Mavuso who made entries into the cards and kept records of the radiator jobs, or miscommunication between Mbabane and Ngwenya workshops on the various jobs performed by the Applicant. The pricing of old cores which were cut down also created a grey area which may have been exacerbated by Respondent's lack of a proper system of invoicing.

The Applicant's attorney submitted that on a balance of probabilities, it cannot be held that the Applicant's dishonesty is the most probable inference to be drawn from the discrepancies between the job cards and the requisitions. Therefore the Applicant submitted, the Respondent has failed to prove that it dismissed the Applicant for an offence permitted by Section 36 (b) of the Employment Act.

In the Applicant's view, the difficulty presented by job card A45 relating to the hydraulic oil cooler radiator does not establish a case of

dishonesty especially because the ordering of the core was authorized by the Applicant's manager Mr. Antonio Da Silver, No evidence was produced to show that this core was actually drawn. The customer Inyatsi Superfos was not called to testify on the matter. The Applicant further alleges that this transaction was not raised at the so-called disciplinary hearing nor was it a transaction for which the Applicant was dismissed.

On the issue of "admission"' by the Applicant as recorded in the minutes of the hearing, the "admission" is said to have been in respect to "fiddling with the radiator costing system,"The alleged admission was denounced by the Applicant in court under oath and he stated that he only admitted to having knowledge of the transactions recorded therein but not to any wrong doing. He declined to resign as demanded by the Respondent because he did not accept any wrong doing. It was submitted that no inference of guilt may be drawn from the minutes. It is denied that any proper disciplinary hearing was held, but the

Applicant was simply ambushed and confronted with allegations regarding transactions which he admitted to have knowledge of and was happy to explain if given appropriate opportunity.

The Applicant added that there was no proof that he had obtained any material benefit from the pricing discrepancies canvassed and thus the evidence produced falls far short of proving dishonesty on his part.

On the other hand, the Respondent's case is that the Applicant was fiddling with the radiator costing system which had detrimental consequences to the company property. Examples of the fiddle cited during an alleged disciplinary hearing are as follows:

1. Mr Mandla Dlamini - job card 34805 was charged E600.00 for a radiator core for which the actual selling price was supposed to be E1,965.00.

2. Bayabonga Transport job card 41227 was charged E1,388.00 whilst the selling price for the core was supposed to be E2,977.00.

3. Mr. Hubbert - job card 37706 was charged E800,00 for a core, whilst the actual selling price was supposed to be E3,283.00. and;

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4. Mr, Compopos charged E430,00 whilst the actual selling price was supposed to be E1,325.00.

The undercharging was said to have been detrimental to the financial position of the company, hence the decision to dismiss the Applicant by a letter dated 17th October 1997 produced as exhibit "A47". The dismissal was according to the Respondent for a reason permitted by Section 36 (b) of the Employment Act No. 1 of 1980 which reads as follows:

"36 It shall be fair for an employer to terminate the services of an employee for any of the following reasons:

(b) because the employee is guilty of a dishonest act, violence, threats or ill-treatment towards his employer, or towards any members of the employers family or any other employee of the undertaking in which he is employed."

The conduct of fiddling alleged is equated to dishonest acts, hence the reliance on the aforesaid subsection by the Respondent.

The minutes of the disciplinary hearing are signed by all the parties present including the Applicant. It is important to note that the same are written in English, and are said to have been read, explained, and understood by the signatories.

If this document constitutes evidence of an admission by the Applicant, the question that arises is what he admitted to.

It is not alleged therein that the under charging was done with the intention to benefit the Applicant to the detriment of the company. It is neither stated that the undercharging was dishonestly done. What was meant by fiddling is not explained in the minutes neither did the Respondent state in the Reply to the Particulars of Claim that the under charging was dishonestly done to benefit the Applicant.

The evidence led before court by the Respondent to justify the dismissal was as follows:

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According to exhibit "B19" a job card for Mandla Dlamini, the job to be done was recoring of a radiator. The customer was charged E600,00 for the job. According to exhibit "B18" which the Applicant admits

was in his handwriting a core number 195-115 was drawn from the stores by the Applicant for the same job card. The Applicant told the court that this price was given by Mr. Oliveria but Sarah Mavuso disputed this stating that in all instances, the Applicant was responsible for the pricing of the jobs he did and she recorded the amount herself. According to Mr. Emidio Rodrigues, the proper price of this core was E1,965.00.

What is not clear and is more or less a matter for speculation is why the core was undercharged. The Applicant offered various explanation aforesaid. No evidence was adduced from the customer to explain what actually happened here.

The 2nd allegation before court was that exhibit "B20" was a job card with instruction to recore radiator'. The pricing was personally recorded by Sarah Mavuso. She told the court that she took the price from the Applicant The amount charged for a core No. 570-192 drawn from the stores was E1,388.00 whereas the actual selling price was supposed to be E2,977,00.

The reason for this discrepancy is also a matter for speculation since the Applicant offered similar possible explanations for it. No evidence from the customer was led as to what actually took place.

As concerns the job card No. 37706 for Mr. Hubert, the radiator was for a "cleaned and repair job", but was later changed to recore. A core was drawn from the store and the job was priced E600,00 whereas the selling price of the core drawn was E3,283.00. Sarah Mavuso filled in the job card and the price therein herself. She could not recall what actually happened but she told the court that the price must have been given to her by the Applicant.

The Applicant offered similar possible explanations for the discrepancy to those given in the earlier transaction.

Job card exhibit "A24" was for Mr. Compopos. It was for recoring of a radiator. A quotation of E430,00 was given and the core drawn had a selling price of E1,335.00.

The respondent alleges that the Applicant offered no defence at a disciplinary hearing when confronted with the aforesaid "fiddling with pricing system". It was submitted by the Respondent that given the experience of the Applicant and the task of pricing, it was improbable that the Applicant would have made mistakes on these simple matters of costing, especially because he was in possession of official pricing of each and every core he used at the workshop.

Exhibit "B33" was job card 34675 and the customer was Peak Timbers. Sarah Mavuso had written down instructions to repair a radiator priced at E240,00. She maintained that such instruction must have come from the Applicant.

According to Mr. Emidio, the customer had brought in a Massey Ferguson Forklift with a relatively small radiator but the Applicant drew a core No.540064 for a Mercedes Benz 2219D truck. Mr. Rodriques who testified for the Respondent told the court that the two radiators were totally incompatible as the Mercedes radiator is much larger than the Massey Ferguson Forklift radiator. The core drawn was not recorded on the job card.

The Applicant was hard placed to explain what happened here as these transactions happened several years back. He was placed in a disadvantaged position of trying to explain what would have happened without the advantage of having the records in his possession. This transaction was not one of those cited in the minutes of the alleged disciplinary hearing as having led to his dismissal.

The Applicant contended that he would have drawn the core to cut it as was customary when the customer was in a hurry and could not wait for a new one to be ordered. Mr. Emidio Rodriques dismissed this contention stating that a technician of the Applicant's experience could not have used a Mercedes

core to cut down for a Massey Ferguson

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forklift as the Mercedes core was too big and the waste would be too much. A smaller core would have been drawn in the circumstances,

It was submitted for the respondent that this was the most damning evidence of fiddling by the Respondent.

The question that remains unanswered is whether infact a core was fitted in the Massey Ferguson and if so, what happened to the Mercedes core, that is alleged by the Respondent to be incompatible with a Massey Ferguson forklift. The customer is a big company, still operational in Swaziland. It would have easily explained this transaction, immediately upon discovery by the Respondent of the anomaly. The Respondent did not approach the customer at all for an explanation nor was a representative of the company called to testify in this regard. Various inferences may be drawn from this transaction and the most probable one is not that the Applicant stole the Mercedes core in the absence of any proof. The records may contain erroneous entries for one reason or the other.

What raises the eye brow if the contention of the Respondent are to be believed is how so many transactions were undercharged by margins at times exceeding 60% and no financial implications were immediately noticed by the company especially as concerns the accounts of the stock shop which was not directly under the control of the Applicant until several years down the line when these anomalies were uncovered.

Before court, there was no evidence of how much money or stock the company lost, if at all. Whether any stock was indeed lost remained by and large a matter of conjecture.

Similarly exhibit "B34" where a job card merely required the radiator to be repaired, a core was drawn. The job was charged E240,00 whereas the price of the core would have been E1,294.00. The question is why the instruction on the job card was not changed from repair to recore, when as often happened, a radiator was brought in for repair but upon examination the applicant found that it could not be repaired and changed the job to recore.

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The court's view in the absence of any conclusive evidence as to what happened is that one cannot rule out that the drawn core was fully and separately paid for but the details were not included in the job card. If the customer would have been approached, no doubt, the records would have shown if he received a new core and how much money he paid.

Going by the conflicting evidence between the Applicant and Sarah Mavuso on the job card entries, one cannot reach the conclusion that the Applicant had deliberately fiddled with the job cards and/or any other costing documents of the Respondent. The onus to prove dishonesty lies on the Respondent and as said earlier, dishonesty is not the most probable inference on the part of the Applicant from the evidence available from himself and Sarah Mavuso in particular, whereas the nature of the evidence adduced by Mr. Emidio was speculative. No documents were produced to show dishonest alterations in prices. No evidence of concealment was adduced. It is clear that, if the Respondent conducted thorough investigations, it would have been able to establish what happened to each job and the job card, whether the customer received a new core or not, what amounts were actually paid by the customer, and if such sums tallied with the entries in the job cards and/or with any other company accounting documents.

Evidence of an internal audit to show if there was loss in the stock department would have almost sealed the fate of the Applicant but such evidence was not forth coming.

The only direct evidence implicating the Applicant is the alleged admission which has been repudiated.

The Applicant explained clearly that the discussion was both in English and Portuguese. He was ambushed and was not given opportunity to prepare his case. That he only admitted knowledge of the transactions but not to any theft, dishonesty or fiddling. His testimony under oath is credible, candid and although due to passage of time he could not recall the exact nature of each transaction, his version in our view was reasonably, probably true. He did not bear any burden to prove his innocence

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since the employer in terms of Section 42 (2) (a) and (b) must prove that he was dismissed for an offence permitted under Section 36 and that upon considering all the circumstances of the case, it was fair and reasonable to dismiss him.

The Respondent has failed in both these endeavors as concerns the transactions so far covered.

A lot of emphasis was however placed on exhibit "45", a job card for a large corporate customer by the name of Inyatsi Superfos. The company brought in a cater pillar D7 model for the repair of the hydraulic oil cooler.

During cross examination the Applicant told the court that he ordered a core as per exhibit "44B" upon finding out that the oil cooler could not be repaired. The core ordered was (7 x 10 x 700 x49) in size. The pricing for repair was done by Mr. Emidio but the order of a new one, a much larger one than that required was ordered by the Applicant. Mr. Oliveria and Mr. Emidio dismissed the suggestion that the radiator needed a recore. They further explained that they did not nor had the capacity to recore oil coolers in Swaziland workshops.

This core was ordered from South Africa and the order was approved by the manager of the Applicant. The radiator ordered was a water cooled one and was completely incompatible with the hydraulic oil cooler.

The Applicant was hard pressed to explain why he ordered a water cooled radiator when infact the job card was for repair of a oil cooled one. It was suggested by counsel for the Applicant that the core ordered was of the same type as the hydraulic oil cooler. It was also suggested that the large radiator ordered could be cut down to fit the purpose. The Applicant had not offered such explanation in his evidence. A hydraulic oil cooler for a D7 caterpillar was produced before court as exhibit "R2" and a radiator core the same size ordered by the Applicant was also produced. From the look of the two, the one ordered was almost three times larger than the hydraulic oil cooler.

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No reasonable explanation was offered by the Applicant as to why he ordered the large water cooled radiator to repair an oil cooled radiator.

Again evidence from the customer was not adduced since no explanation was sought to find out if indeed the D7 caterpillar radiator was repaired or whether infact they had received a new one. Transactions which took place more than five years ago were difficult to explain because no immediate investigations were conducted by the Respondent upon discovery of this anomaly. Inyatsi Superfos was not approached to explain what service they had received and how much was paid for the service. No evidence of an audit was produced to prove stock loss or monetary loss to the Respondent emanating from the particular transaction or from any other.

The question whether the customer received the new core and at what price still begs an answer.

The onus to prove dishonesty rests on the Respondent. There is no doubt that the costing system of the Respondent was in a shambles. There is as a consequence no direct evidence from the accounting office of the Respondent concerning each of the transactions covered herein indicating the actual money received from the customer and whether or not the customers did receive the core ordered from the stock

shop internally or from South Africa.

In our view no case has been proven on a balance of probabilities showing that the Applicant appropriated cores for his own benefit and the same did not reach the intended customers. Mere suspicion due to improper keeping of records, discrepancies in the documentation, and possible negligence from the Applicant and/or Sarah Mavuso is not sufficient to establish a case under Section 36 (b) of the Employment Act which permits an employer to dismiss an employee for reasons of dishonesty interalia.

The various possible explanations by the Applicant of what happened cast much doubt on the evidence of the Respondent, sufficient to turn the balance of probabilities in the favour of the Applicant.

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The Applicant was accordingly unlawfully and unfairly dismissed.

As concerns his personal circumstances, he is a Mozambican national resident in Swaziland. He was employed on the 15th April, 1985 as a radiator mechanic. He worked continuously until the 17th October 1997 when he was summarily dismissed. He had served the Respondent for a period of eleven years. At the time of his dismissal he was in charge of the entire operation of the radiator workshop with the assistance of Sarah Mavuso, the Secretary. His work was to repair, fit and recore radiators.

Prior to the present indictment, he had no record of misconduct or poor work performance. Infact the Respondent rated him very highly and entrusted him with the workshop at Mbabane, a job he did for many years.

At the time the trial commenced in the year 2000, the Applicant was still unemployed but did private jobs. He was married with five (5) children. He suffered financial hardship and approximated his income on odd jobs to be approximately El,000 per month. At the time of dismissal, he earned E5,501.00 salary per month. He was not paid terminal benefits upon dismissal. He demands compensation for unfair dismissal and terminal benefits in addition.

Taking the circumstances of the case into account and the provisions of Section 15 (4) of the Industrial Relations Act No. 1 of 1996 i.e actual and future financial loss suffered and likely to be suffered by the Applicant as a result of the termination, his advanced age and very minimal prospects of obtaining equivalent employment in Swaziland and the summary manner in which he was dismissed, we order the following:

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That the Applicant be paid fourteen (14) months salary as compensation for unfair dismissal in the sum of

E5,501 x 14 =	E 77,014.00
and Terminal benefits comprising one month Notice Pay	E 5,501.00
Additional Notice Pay	E 11,169.40
Severance Allowance	E 27,923.50
TOTAL	E121.607.90

There will be no order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT