

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 156/2001

In the matter between:

ISRAEL THWALA

APPLICANT

and

BULKTRANS (SWD) (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

L. SIMELANE

: FOR APPLICANT

S. THOMPSON

: FOR RESPONDENT

JUDGEMENT

07/08/03

The Applicant brought this application for determination of unresolved dispute after the matter was certified unresolved by the Commissioner of Labour on the 11th May 2001.

The Application is pursuant to Section 86 (1) of the Industrial Relations Act No. 1 of 2000 and the Applicant seeks twelve months compensation for unfair dismissal, payment in lieu of one month notice and leave pay.

The basis of the suit as narrated by the Applicant is that he was on the 24th January 2001 wrongfully and unfairly dismissed on allegations that he had off loaded 22 litres of diesel illegally from the fuel truck contrary to the company rules. That the act constituted insubordination and/or unauthorized possession of company property.

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The Applicant was employed in September 1999 as a heavy-duty driver and his duties entailed delivery of fuel products such as petrol and diesel to various customers.

On the 27th December 2001 he loaded and delivered six thousand litres (6000) of diesel at a fuel station at Lomahasha as per the order and invoice in his possession.

He told the court that upon delivery of the said amount of diesel, he delivered to the same customer a further 22 litres of diesel that was not Invoiced. He explained that he considered the quantity of 22 litres negligible and therefore did not inform the customer of the extra delivery nor did he invoice the same or get payment for it.

Upon his return to the depot, he did not inform his supervisor about the extra delivery either until Mr. Thembinkosi Mbanjwa questioned him about it the following day. The explanation he gave was considered unsatisfactory and he was charged and suspended pending finalization of the disciplinary

hearing.

Mr. Mbanjwa discovered the delivery of extra diesel from the truck computer readings. If the supervisor had not bothered to make the readings, it would not have been possible to note the anomaly. The chairman of the hearing found the Applicant guilty as charged and he was dismissed from employment. He appealed the decision unsuccessfully.

He reported the dispute to the Labour Commissioner who was unable to resolve it and a certificate of unresolved dispute was issued. He told the court that the value of diesel at the time was about Three Emalangeni (E3.00) per litre. The Applicant added that this was his first offence and deserved a more lenient sentence. At the time of dismissal he earned E2,800 per month. He had worked for the Respondent for a period of one year but had prior to that served Cargo Carriers as a heavy duty driver for fifteen years.

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The applicant was married to two wives and had nine children all-dependent on him. He was 43 years old and had not obtained alternative employment inspite his efforts. At the time of dismissal he was owed leave days and sought payment in lieu thereof. He too claims terminal benefits enumerated in the Particulars of Claim and compensation.

The Respondent called Thembinkosi M. Mbanjwa to testify in support of Its case. He worked as a senior controller at the time and supervised employees of the Respondent including the Applicant. He explained the fuel delivery procedure as follows:

That a metre slip indicates quantity loaded in the truck and the type of product. The slip is declared by the driver to the controller on duty who in exchange issues invoices with names of customers who would receive the loaded fuel. The fuel is owned by Shell Company on whose behalf the Respondent transports. The invoice shows the oil company e.g. Shell, the name and address of the customer, the quantity to be delivered to the customer and the price of the product per litre.

The driver before delivery takes a dip-stick reading showing the quantity in the customer's tank before and after the delivery. The difference is read and the customer charged for it. The customer signs for the product received. If he is a cash customer he would pay upon delivery.

The driver has a trip advice note which shows the fleet number, time of loading and leaving depot, time of offloading and quantity offloaded, quantity remaining in the truck upon return, and if there has been a product loss or product gain. The driver signs the note.

He explained that product loss/gain is a common phenomenon because fuel products expand or shrink depending on the temperature differentiation during the day. Where there is a gain the product must be returned to the depot and/or delivered with permission from the controller to a customer. If it is a cash customer, he must pay upon delivery, if not, then the extra quantity

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would be invoiced. The driver has no authority to make any extra delivery without authorization from the controller.

The Applicant according to the witness committed an offence therefore by delivering 22 litres of product without authority of the controller and compounded the problem by failing to disclose that in the note, as is customary. His conduct amounted to theft of the fuel product. He explained that if such conduct was condoned, the Respondent would end up losing its transport contract with Shell on whose behalf it carries fuel products.

The Respondent views such conduct very seriously and all the drivers are aware that theft of fuel would

lead to automatic dismissal of the driver.

On the material date, according to the trip advice slip, the Applicant returned to the depot at 6.20p.m. and found no controller present. He declared his papers the following day which did not indicate that there was a gain of 22 litres. He had at the time checked the computer and noted the extra delivery. When he confronted the Applicant about it, he denied he had made any extra diesel delivery. He then pulled a slip generated from the computer and the driver admitted the delivery. He asked him to write a statement which he did admitting the unauthorized delivery. The statement was produced as exhibit 'B' and was signed by the Applicant.

The witness visited the customer at Lomahasha to enquire if he had received the extra 22 litres but he denied such delivery contrary to the statement by the Applicant. The driver had clearly helped himself to the product unlawfully, hence the charge and dismissal. On further investigations from the truck metre (computer), he discovered that this was not the first time the Applicant had failed to declare a fuel gain. The metre retained records for up to three months. He gave an example of a delivery of 4 litres delivered but not reported on an earlier date by the Applicant.

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The Applicant continued to deny in his defence that he had stolen any fuel since he had loaded 6,000 litres of fuel and had delivered the whole quantity. He underplayed the issue of gains and losses.

RW2 was Ken Ridgeway who was the Operations Manager for long distance haulage in Swaziland at the time of the incident. He told the court that the Applicant had received all his leave pay due and salary upon dismissal.

He explained that the company policy that was displayed on the walls stated that if one was found guilty of misappropriation of fuel the sentence was dismissal. The company could not compromise on this issue because it could lose its contract with Shell if theft of products continued unabated. This had happened severally both in Swaziland and South Africa and the culprits were dismissed if found guilty.

He explained how fuel products shrink if temperature is low and expand if temperature is high leading to gains or losses of product loaded. It was incumbent on the driver to record a gain or a loss. Any extra delivery would in any event be recorded in the truck metre (computer). The gain could only be delivered upon authorization by a superior officer or else it must be returned to the depot as it remains Shell property and the driver has no discretion to declare or not to declare, it is mandatory that he does so. This loss was picked by chance otherwise the Applicant would have gotten away with it as he had done in the past.

From the adduced evidence, it is clear that the Applicant appropriated 22 litres of diesel product from the truck without authority of his supervisor. He did not declare such delivery and to whom it was made. No payment was received by the Respondent for the 22 litres obtained from the truck. This was dishonest conduct on the part of the driver and the same has been proven by the Respondent on a balance of probabilities.

Accordingly the Applicant was dismissed for a reason permitted by Section 36 of the Employment Act No. 5 of 1980. From the circumstances of the case, it was fair and reasonable to dismiss him.

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The Application must fail in its entirety. The Applicant is not entitled to any compensation or payment in lieu of notice. The court however is satisfied that he is owed E1, 830.75 in lieu of leave days and orders the Respondent to pay accordingly.

There will be no order as to costs. The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT