IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 143/2001

In the matter between:

JOHANNES G. HAMMANN APPLICANT

and

UNITRANS SWAZILAND LIMITED RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: P. R. DUNSEITH

FOR RESPONDENT: M. SIBANDZE

JUDGEMENT

08-12-03

The Applicant Johannes Hammann was employed by the Respondent Unitrans Swaziland Limited by a letter of appointment dated 31st July 1998, the employment to take effect from the 4th August 1998. His position was that of depot manager (grade 6) in charge of the Bhunya Depot in Swaziland. He was to report to the Operations Manager Mr. Jim Mason.

Prior to this appointment the Applicant had worked for the Respondent as an Assistant Depot Manager from 1990 to 1991 at Godwana and was promoted to the position of depot manager at Sappi branch. He then had resigned and gone into saw milling business.

Six months later, he was approached by the Respondent and re-employed as a depot manager in Natal, South Coast where he opened a new depot and ran it for three (3) years. He then resigned and went back to his business.

In 1998, he was approached by the Respondent and was recruited to salvage the Bhunya depot in Swaziland because it was under performing and had incurred heavy losses to the company.

The Applicant told the court that the Bhunya depot was in shambles when he arrived. The equipment used was old and not suitable for the purpose. The trucks were in disrepair and the maintenance of trucks was mainly done in open air since the workshop could only take two trucks at a time. Bhunya area experiences heavy rainfall and so the conditions under which the maintenance staff worked were unacceptable. He was determined to turn the situation around.

Sappi penalized the Respondent heavily for not achieving 80% up time hence the depot at the time suffered 2 ½ million loss. The depot was understaffed, those available were always sick due to exposure as they worked in the rain, sun and dust and at times extremely windy conditions.

The workshop itself had a rotten roof, wind brew in from open sides and the situation was untenable.

The Applicant told the court that he wanted better conditions for the employees (20) in number without much success in this direction.

From page 5 of the bundle "R" produced by the Respondent, Tom Fullerton the regional manager acknowledged that the staff at the Bhunya depot had to contend with poor physical conditions especially the workshop. For that reason, prior to June 2000, they had agreed to dismantle Barberton workshop and move it to Bhunya and that had actually happened except that, no attempt was made to erect the shed at Bhunya due to financial constraints but a capital provision was to be included in the financial year 2001 for the purpose. The matter was discussed on the 19th July 2000 between Mr, Fullerton and the Applicant in a meeting wherein Fullerton instructed the applicant not to commence erection of the shed before obtaining three (3) quotations from different engineering firms to enable submission of capital expenditure application (hereinafter referred to as 'capex').

Meanwhile in may 2000 Sappi officials (the contractors) were to visit the Bhunya depot and the general manager authorized general repairs to be made. E91, 000 was consequently spent on roof repairs against quotations and this, though not budgeted for was to be provided for in the 2001 budget.

The Applicant told the court that he was shocked that the senior management were prepared to spent such a large amount of money for cosmetics purposes, yet his request to erect a shed for the employees was being delayed. This money mainly was pent on painting and fencing.

As the depot manager, he was involved in preparing the budget for the depot for the year 2001. He allocated E30, 000 for erection of the shed, which had already been brought from Barberton. With the help of the accountant, he tabled his budget at the Empangeni offices in South Africa. The E30, 000 was under

property maintenance but not 'capex'. The provision for annual property maintenance at the depot for the year 2001 was E72, 000.

The Applicant regarded the shed as top priority at the depot and on the 1st July 2000 he started negotiating with contractors to give him quotations. The big engineering firms e.g. S st B Civils were not prepared to undertake a small job such as erecting the shed so he negotiated with Barry Engineering who gave him comparative rates and then provided a quote for E22, 000. He then gave them a go ahead.

According to the Applicant he had a limit of E72,000 on property maintenance for the year which he could use without higher authorization. He was however limited to a sum of E6.000 per month. In this case he had planned to spread out the payment to Barry Engineering over a period of three (3) months.

The Applicant told the court that at the meeting of the 19th July 2000, the regional manager did not tell him not to commence erection of the shed but admits that he was supposed to get three (3) quotations for the job which he had not obtained at the time he authorized Barry to commence the job. He told the court that having called two (2) to three (3) companies and from his own experience, the quote from Barry was very reasonable and he believed he had saved the Respondent money. All he wanted was to improve the working conditions so as to motivate the workers, reduce incidences of breakdowns and time of repairs hence the overall performance of the depot.

He explained that he worked for long hours and took no leave as he was determined to improve the output of the depot. It was in this spirit that he might have overlooked some procedural requirements in allocating the erection of the

shed to Barry Engineering. In any event he was prepared to take full responsibility for what he considered a minor expense at the depot if push came to shove.

On the 25th July 2000 the regional manger while attending a meeting at the depot noted that work had commenced on the erection of the shed. The Applicant, D. Vander, P. Khumalo, A. Fakudze and S. Magagula attended the meeting chaired by Mr. T. Fullerton under the item Workshop Improvements and the following was recorded:

" work commenced without 'CAP1' being signed off. Enthusiasm welcomed but stick to policies and procedures in future".

It is not in dispute that this minute is a true reflection of what transpired in the meeting, The Applicant was not in that meeting therefore told to stop erection of the shed, yet the construction had just commenced and was in its infancy.

There was no directive given in that meeting to the Applicant not to pay the contractor. Indeed from the words "enthusiasm welcomed" it would appear that the Applicant's decision had been well received by the meeting especially the regional manager.

Subsequent meetings were held on the 8th August 2000 and 29th August 2000. No minutes of the meetings were produced before court and what transpired therein as far as this case goes is the word of the Applicant against that of Mr. Fullerton the regional manager. The regional manager told the disciplinary hearing that in those meetings he told the Applicant to obtain quotations for the erection of the shed. By this time, the erection of the shed was at an advanced stage. Unless Mr. Fullerton wanted the Applicant to obtain cooked quotes, the court does not understand where the Applicant was expected to obtain them if he had not prior to

the commencement of the project. Mr. Fullerton also told the court that after the meeting of the 29th August, he had made it clear to the Applicant that payment should not be made to the contractor until comparative quotes were obtained since construction had proceeded without the 'CAP V being submitted and signed by him and therefore there was no provision for the costs.

The Applicant made it clear that the erection of the shed had been provided for under property maintenance and therefore he had not considered it necessary to follow 'capex' procedure.

The Applicant told the court that by the time the regional manager demanded the quotes, the project was underway, he had granted the job to Barry Engineering and he could not stop it unless there were clear instructions from the regional manager to stop it. The manager had not given such direct instruction to stop the erection but had asked for quotations on the 19th July 2000.

Furthermore on the 8th August 2000, the general manager Mr. Fill Morkel visited the Bhunya depot. There was a meeting on this day. The general manager inspected the premises and saw the shed that was under construction. The Applicant jokingly told him that he was in trouble for starting the shed without following procedure because it was a 'capex' to which Mr. Morkel replied that it was not a 'capex' but was property maintenance. The Applicant told the court that this encouraged him to carry on with the project to completion and pay for it as he considered himself vindicated by the general manager. At the disciplinary hearing, and in court, the general manager was not called to refute the statement aforesaid. Instead Mr. J. Mason sought to place a meaning to Morkel's alleged statement. Mr. Morkel did not ask the Applicant to stop the project and the same was completed and paid for by the Applicant.

From the evidence of all the witnesses, it is clear that the Respondent just let the Applicant go on with the erection of the shed, subject to production of the quotations. As to where such quotations were to come from, the court has no idea.

From the meetings of the 19th July 2000, 25th July 2000, 8th August 2000 and 29th August 2000, there was no indication that he would be punished for erecting the shed. Instead, he received words of encouragement from both the general manager and the regional manager. In the words of the Applicant the charges came to him like a bolt from the blue and even at the hearing itself, he never thought that the Respondent had serious intent of punishing him for erecting the shed, until sometime in the middle of the disciplinary proceedings.

The Applicant faced three charges in all:

1. Gross misconduct, arising from the willful deviation of group policy covering the procurement and payment of company purchases.

2. Gross misconduct, arising from the willful deviation of group policy and specific instructions from the Regional Manager covering the repairs to the workshop and;

3. Poor and unsatisfactory work performance in failing to meet required standards by:

3.1. Not ensuring that defective batteries, still under warranty, were returned for credit.

3.2. Not ensuring that defective alternators, still under warranty, were returned for credit.

3.3. Not ensuring that repaired tachometers, still under warranty, were returned for credit.

The chairman of the disciplinary hearing was]. Mason who had been involved in the investigations of the matters related to the 3rd charge.

In respect of charge 1, he found the Applicant guilty of poor and unsatisfactory work performance.

On charge 2, he found the Applicant guilty for failing to disclose his intended action of building a shed and for willfully disobeying the instructions of Mr. Fullerton given on the 19th]uly 2000 not to start building the shed.

On charge three, he found the Applicant guilty of all three counts.

The chairman ironically acknowledged the problem at the depot as explained by the Applicant and also rioted that the Applicant's enthusiasm and his ability to motivate staff was evidence that he had received support from the Respondent Contrary to his allegations that he was left to his own devises, especially by the operations manager.

On appeal chaired by Mr. Neil Taylor, regional manager, Mpumalanga, the conviction in respect of charge 1 and charge 3 (all 3 counts) was set aside but conviction on charge 2 of building the shed was confirmed. This is therefore the only offence relevant to these proceedings.

The main ground of appeal was that the chairman J. Mason was not impartial as he was privy to the issues for determination having been assigned to investigate the operations of the depot, just before the charges were preferred against the Applicant. The Applicant also stated that he had no adequate time to prepare his defence. That the whole case took him by surprise. When he tried to present the

facts of the case to the chairman of the appeal hearing, he abruptly cut him short and closed the appeal on grounds that the Applicant was trying to re-open the case.

It is instructive that, the appeal chairman in his letter dated 4th November 2000 simply reminded the Applicant that charges 1 and 3 had been withdrawn meaning that they should not have been preferred in the first place. It was argued for the Applicant that, the fact that J Mason found the Applicant guilty of non-existent charges is indicative of his biased mind to the extent that he could not have handled even charge 2 impartially. There was therefore a need to re-open the case, as the Applicant had tried to do but was denied the opportunity by Mr. Taylor.

Mr. Taylor testified before court as RW1. He told the court that he was aware that a shed from Barberton had been brought to Bhunya for erection to improve the working conditions at the Bhunya depot. He said that decisions such as this one were taken by the general manager and if the sector was in financial difficulties as Bhunya was, by the board of directors. He was appointed to hear the appeal of the Applicant as he was removed from the operations in Swaziland and was based at Godwana in South Africa.

Mr. Taylor told the court that he upheld the verdict of dismissal because he had found that the Applicant had disobeyed instructions not to carry on with the erection of the shed without first obtaining three quotes and for paying the contractor contrary to the direct instructions of Mr. Fullerton. He considered that the Applicant had carried on with the project for the good of his staff but what he did was according to Mr. Taylor contrary to good corporate governance. He stated that he did not believe that Mr. Fullerton and Mr. Morkel had condoned the failure by the Applicant to follow instructions adding that the comments by Mr. Morkel must have been with a tongue in the cheek, as it meant that the expenditure on the

shed would bite on the depot's bottom line if it was treated as maintenance costs as opposed to capital expenditure.

Mr. Taylor told the court that he did not deem it necessary for the Applicant to lead evidence afresh. He relied on the minutes of the disciplinary hearing transcribed from the tape recordings. He withdrew charges 1 and 3 as he deemed them baseless but found sufficient evidence to confirm the verdict of guilty on count 2.

Mr. Taylor accepted that the performance of the depot at Bhunya was the responsibility of the Applicant and it was within his powers to make certain decisions including how to expend the money allocated for maintenance. He agreed that the Applicant was within his right to pay up to a maximum of E6.000 per month on expenditure as he did in the case of the shed. He accepted that he did not know that the general manager upon notice that Sappi officials were to visit the depot spent E91, 000 that had not been budget for on window dressing. He said that if the efforts of the Applicant to improve the operations of the depot were being frustrated by his seniors that was unacceptable. He admitted that he was not aware of the prevailing conditions at the Bhunya depot at the time, but disagreed that he should have allowed the Applicant to lead evidence to clarify issues that were not in Mr. Taylor's knowledge that could have helped him to arrive at a fair decision. He did not know for example that the erection of the shed had been budgeted for under property maintenance for the year 2001.

Mr. Taylor added that it was not necessary for the Applicant to stick to the monthly limits of E6.000 provided at the end of the year he did not exceed the total allocated amount of E72, 000 for property maintenance.

RW2 was Jim Mason, the chairman of the disciplinary hearing. He had found the Applicant guilty of all the three charges. He stated that Applicant was not expressly told to stop the construction of the shed but he was instructed not to make any payments before obtaining three quotations.

That he should have obtained the qoutes before commencing work but had not done so. He denied that Mr. Fullerton and Mr. Morkel had condoned the Applicant's conduct. By the 19th July 2000, actual work on the shed had not started though the job had already been given to Barry Engineers and were in preparatory stages.

Mr. Mason acknowledged that senior management at the time were aware of the possibility that the Respondent may loose the transport contract with Sappi but the Applicant was not informed of this in time to stop the on going project in the meetings of 19th July, 25th July, 18th August and 29th August. He said that it was not necessary for the Applicant to be informed of the possible closure yet he was in charge of the depot.

He could not explain clearly if this was the case why senior management had brought the shed in the first place from Barberton to Swaziland stating that the board in principle had not approved the construction. He even stated that Mr. Fullerton had suggested that the Applicant had brought the shed from Barberton without proper authorization. This was not part of the evidence against the Applicant at any stage. He accepted that the Applicant had budgeted for the shed but it was a provision for the future not yet authorized. He contradicted the evidence of Mr. Taylor that it was not necessary for the Applicant to stick to E6.000 limit per month provided he did not exceed his annual allocation of E72, 000. Even if it was a property maintenance item he insisted that Applicant had still to obtain the necessary quotes.

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He accepted that the accountants from the head office approved payments to the contractor adding that there was a loophole that enabled the Applicant to get such payments made.

From the records of the disciplinary and the appeal hearings the following facts emerge:

That the Applicant had budgeted for the erection of the shed and had made a provision of E30, 000. That he contacted several companies for the job but settled for Barry Engineers who agreed to do the job for E22, 000. That by the time of the first meeting on the 19th July with Mr. Fullerton he had awarded the contract and work was in its preparatory stages. That Mr. Fullerton did not ask him specifically to stop the job but had asked him to obtain three quotes to satisfy the 'capex' procedure. That on the 25th July when a second meeting was held, work had started on site but again Mr. Fullerton did not ask the Applicant to stop construction though the Applicant had not obtained the three quotations.

Mr. Fullerton welcomed the Applicant's enthusiasm but asked him to follow procedures in the future. On the 18th August, the general manager Mr. Morkel while touring the depot confirmed to the Applicant that the shed erection was a property maintenance item but not a 'capex' and did not stop the project.

The project was completed and paid for and the shed was put into use by the depot staff. It would appear that soon thereafter the Respondent faced real possibility of closing the depot and management in Swaziland had to explain the erection of the shed when the senior management had known of such possibility.

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It is the court's considered finding that the decision to discipline the Applicant was an after thought when the loss of the Sappi contract became a reality and there was need by the senior management in Swaziland to find a scapegoat, having deliberately failed to stop the construction of the shed in time.

It cannot be gain said that the shed was an absolute necessity at the time. The Applicant was under immense pressure to improve the working conditions at the depot and turn its fortunes around.

It is admitted by Mr. FuIlerton and Mr. Taylor that the Applicant was not aware of the possible closure of the depot. Those in the know failed to warn him of the possibility hence they must bear the consequences of the construction of the shed. At worst the Applicant would have been asked to personally bear Its costs

since he had taken full responsibility for its construction for the sake of the welfare of his staff who had to repair trucks in open air in an area that was windy with very high rainfall.

The Applicant did not exceed his budget for the property maintenance and it was common cause he had authority to utilize money under this head without recourse to any other senior authority.

From the records available indicating what was said by Mr. FuIIerton to the Applicant on the 19th and 25th July 2000, and considering the evidence of the Applicant and that of the two witnesses of the Respondent before court, the Respondent has failed to prove on a preponderance of probability that the Applicant deliberately disobeyed express instructions of his superior. He clearly overlooked the requirement to obtain quotations before giving the job to the engineer. This offence if proved falls under Section 36 (a).

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The evidence of the two witnesses of the Respondent does not disclose gross misconduct on the part of the Applicant. To the contrary, it is accepted that he was enthusiastic, motivated his staff and this was the reason that he went ahead to use the property maintenance funds to erect the shed from where trucks would be repaired. The Applicant had no previous record of misconduct nor did he have a written warning for misconduct or poor work performance prior to this incidence. Failure to disclose his future plans and actions to Mr. Fullerton may be classified as poor work performance, whereas willfully disobeying instructions of a superior is misconduct or gross misconduct depending on the facts of the case. Both offences fall under Section 36 (a) in terms of which the offence only becomes actionable after a written warning. There is no such evidence before court and therefore the Respondent has not satisfied the requirements of Section 42 (2)(a) by showing that the Applicant was dismissed for an offence permitted by Section 36.

There is no evidence that the construction of the shed was over charged by the contractor. To the contrary, the evidence by the Applicant that he had indeed saved the company money was not seriously contradicted. Section 36 (b) does not therefore come to play in the circumstances of the case.

The attempt to fit the dismissal under Section 36 (j) i.e. "for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section" will not do in the circumstances of the case because the offence for which the Applicant was found guilty and dismissed squarely falls under Section 36 (a).

The Respondent has in the circumstances also failed to prove in terms of Section 42 (2) (b) that it was fair and reasonable to dismiss the Applicant in the circumstances of the case. This does not tally with the commendation he had received at the meeting of the 25th July 2000 by Mr. Fullerton, the regional manager.

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The Applicant was head hunted to turn around the poor performance of the depot. His good track record with the company in various stations in South Africa prior to coming to Swaziland was not challenged. He had abandoned his business to take up the job in Swaziland and the dismissal came as a rude shock to him. Senior management did not take him to confidence that the depot was likely to close and they should take full responsibility for the monetary loss associated with the abandonment of the shed by the company when it lost the Sappi contract.

The Applicant was traumatized by the dismissal. He suffered immense financial embarrassment and had to rely on friends to support himself and family for some time. Although he eventually relocated to South Africa, he has clearly not recovered from the loss of employment and the associated mental and financial shock.

The Applicant at the time of dismissal earned E22, 222.58 per month and had served the Bhunya depot for approximately twelve months. He was not given notice upon dismissal nor was he paid other terminal

benefits such as additional notice and severance allowance. He was literally left to his own devices, empty handed in a foreign country to which the employer had brought him.

Accordingly the court grants him ten (10) months compensation for unfair dismissal in the sum of Emalangeni two hundred and Twenty Two Thousand Two Hundred and Twenty Five and Eight Cents (E 222,225.08)

In addition the Applicant is awarded NOTICE PAY	E 22,222.58
ADDITIONAL NOTICE	E 3,921.04
SEVERANCE ALLOWANCE	E 9,802.60

	E 35,946.22
TOTAL SUM	E 222,225.08
	E 35,946.22
	E 258,171.30

No order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT