

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 248/99

In the matter between:

PETROS LANGWENYA

APPLICANT

And

POST & TELECOMMUNICATIONS CORPORATION

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: A. LUKHELE

FOR RESPONDENT

: Z. JELE

JUDGEMENT

18/02/03

The Applicant seeks reinstatement and in the alternative maximum compensation for unfair dismissal. The claim emanates from alleged unlawful and unfair dismissal by the Respondent Corporation, Swaziland Posts and Telecommunications.

Further particulars of the claim are that the Applicant was employed by the Respondent in 1976 and was in continuous employ of the Respondent thereafter until the 7th July 1997. It is therefore not in dispute that he was an employee to whom Section 35 of the Employment Act No. 5 of 1980 applied and could only be dismissed for a reason provided under Section 36 of the Act and the decision to dismiss itself should be just and reasonable considering the circumstances of the case.

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On the 7th July, 1997 the services of the Applicant were terminated on the ground that he had been found guilty at a disciplinary hearing of the alleged offences set out in the letter of dismissal annexed to the Application and marked "A".

The letter reads in part as follows:

"1. You are hereby officially Informed of the outcome of the disciplinary enquiry held on the 7th July, 1997 into the alleged offence of misappropriation - willful misuse of Corporation vehicles SD 128 WH in that on several occasions you have used the said corporation vehicle on your personal errands without authority or permission.

Willful misappropriation of property belonging to SPTC in that you failed to pass on tyres to the Stores Department that had been removed from SD 128 WH.

2. Based on the evidence presented at the enquiry, I find you on a balance of probabilities guilty of the offence stated above."

The letter is signed by Mr. 1 B. S. Mngomezulu who chaired the disciplinary hearing. The minutes of the hearing were produced before court. We had the advantage of reading the record of proceedings and will refer to the contents thereof at a later stage.

The Applicant appealed the decision to dismiss him. The appeal was chaired by S. B. H. Richards. The record of the proceedings and the findings of the appeal hearing were also produced.

In summary; the appeal tribunal acquitted the Applicant of the charge of misappropriation of SPTC property in that he had failed to pass on to the Stores Department tyres removed from SD 128 WH. The first charge of misappropriation of Corporation vehicle SD 128 WH on diverse dates by using it on personal errands without authority or permission was confirmed. Equally, the charge of making a false statement in that an SPTC travel authority number 9362 falsely reflected that motor vehicle SD 128 WH was removed

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from the parking yard on Sunday the 11th May 1997 when the Applicant had removed it on the 9th May 1997 was confirmed. The sentence of dismissal was consequently upheld.

The appeal tribunal recommended that the Applicant be paid his terminal benefits including the contributions to the Provident Fund and this was duly paid out to the Applicant.

The Applicant reported a dispute to the Commissioner of Labour. The dispute was not resolved and a certificate of unresolved dispute was issued thereof.

The Applicant testified before court as follows:

That he was at the time of his dismissal, the head post master in charge of Lubombo Region earning a salary of E4,438.66 per month. He was based at Siteki town and his duties involved inspecting all branches in Lubombo Region.

That on the 8th October 1996 while attending a meeting at the Head Office of the Respondent in Mbabane, he requested his supervisor Mrs Irene Sikhosana to allow him to use the office motor vehicle to Hluthi as it was a Friday and she agreed.

That on the 27th October 1996 he was on duty at Konsthingila to look for a colleague on instructions of the General Manager. He used the same motor vehicle.

On the 11th May 1997 he was permitted to attend a funeral of a work mate at Siphofaneni by M/s Sikhosana.

He told the court that these were the three (3) instances for which he was specifically alleged to have misused the Corporation vehicle SD 128 WH without permission hence his dismissal.

The Applicant further told the court that he was alleged to have misused the motor vehicle on other dates not specifically stated yet he used to park the vehicle at Siteki.

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On the 12th May 1997 he received a letter suspending him on full pay, pending a disciplinary hearing which was held in July and was finalized on the 7th July 1997 when he was dismissed. He thereupon appealed and lost.

The applicant emphasized that he should have been charged for misuse of Corporation motor vehicles, but not for misappropriation of Corporation property.

In terms of the Corporation's code, the two were separate offences and the latter was a more serious offence that attracted summary dismissal on a finding of guilt for first offence, whereas the former attracted a warning first.

This contention was rejected by both the initial hearing and the appeal panel. The disciplinary code marked "H1" paragraph 11.03 (d) reads as follows;

(d) unsanctioned use of any Corporation vehicle; The penalties prescribed for the offences are as follows:

1st offence - first written warning 2nd offence - final written warning 3rd offence - dismissal.

Whereas in 'H2' paragraph 11.03 (d) reads thus :

(d) misappropriation - willingly applying or attempting to apply to a wrong use for any unauthorized purpose or for personal gain any funds, assets or property belonging to the Corporation.

The sanction for this offence is dismissal.

Important things to note regarding 'H1' and 'H2' are as follows;

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1. The document 'H1' is headed: property - careless loss, damage or misuse of Corporation property (the employee should have known)
2. The document 'H2' is headed misconduct relating to dishonesty and disorderly conduct.
3. Both 'H1' and 'H2' fall under personal misconduct.
4. Two elements present in offences found in 'H2' are 'dishonesty and disorder' whereas the offences under 'H1' the elements of 'carelessness' and 'knowledge' are present.
5. 11.03 (d) in 'H2' is of a general nature, whereas 11.03 (d) in 'H1' is specific to motor vehicles.

The Applicant believes that he ought to have been charged in terms of document 'H1' 11.03 (d) for unsanctioned use of a Corporation vehicle.

In terms of the letter dated 7th July 1997 which officially informed him of the outcome of the disciplinary enquiry, he was found guilty of willful misuse of Corporation vehicle SD 128 WH in that he had on several occasions used it for personal errands without authority or permission and for willful misappropriation of used tyres removed from SD 128 WH.

When the Applicant appealed the findings of guilt, the chairman of the appeal tribunal Mr. Sam Richards upheld the finding of guilt on the charge of willful misuse of SD 128 WH for personal gain without authority or permission.

The appeal tribunal quashed the finding of guilt on the charge of misappropriation of SPTC property for failing to pass on to the Stores Department used tyres removed from SD 128 WH.

The appeal hearing further found the Applicant guilty of making a false statement as per charge (b) in the charge sheet exhibit 'R5'. He had pleaded guilty to this charge during the disciplinary hearing. This offence was however not reflected on the letter of dismissal dated the 7th July 1997.

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Before I discuss the merits of the employer's decision, the court notes the following misdirection by the chairman of the appeal tribunal;

1. Concerning count (a), willful misuse of Corporation vehicle SD 128 WH, the appeal hearing introduced to the charge a new element that was not in the initial charge sheet and was therefore not dealt with by the disciplinary hearing being that it was alleged that the misuse of SD 128 WH was for "personal gain" see page 2 of the appeal minutes.

No evidence showing personal gain had been adduced before the disciplinary panel nor was the court furnished with any information concerning any material gain derived by the Applicant from the use of the vehicle SD 128 WH.

The Applicant before court and at the disciplinary hearing justified the use of the only motor vehicle he had at Siteki on the material dates as follows:

He was head of the whole region and was required to visit various posts in the course of his duty from time to time. He had no personal vehicle and as a controlling officer in the region, he felt he had a right to drive the Corporation vehicle when performing his duties. The motor vehicle policy of September 1995 did not restrict him from driving the vehicle so long as he had a valid driver's licence. There was staff shortage at Siteki Post Office, and the only driver was also involved in sorting mail, clearing post boxes, stamp letters, load the sacks and deliver them to the station. He also went to Mpaka Post Office to sort mail. Upon his promotion to this post, he was not informed of his rights and limitations in the use of the vehicle.

On the 5th October 1996 he stated he had obtained permission from the management to use the vehicle for private errands. On the 8th November 1996 he attended a meeting at Mbabane and after the meeting he was granted permission by the supervisor to go via Hluti. He wrote a travel authority to that effect on the 27th March 1997.

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After Petros Mantimakhulu was dismissed he was requested to get someone to substitute him, he had to look for the officer at his home using the car.

On the 11th May 1997, the most controversial incident, he stated he had obtained permission to use the motor vehicle on the weekend to prepare and attend the funeral of a colleague. He denies that management had limited the use of the motor vehicle to Sunday, the date of the funeral. He had thus left with the vehicle on Friday to Siphofaneni to assist in the funeral preparations, and spent the night at home. On Saturday he assisted in building the tent at the deceased's homestead and attended the night vigil and worked throughout until Sunday. He had used his discretion as the head of the region.

The driver, Vusi Khumalo did not attend the funeral and did not work on Sundays.

He further stated that he had responded to correspondence written to his predecessor regarding the rise on the mileage.

From exhibit 'R7' written on the 18th October 1996 by M/s Sikhosana to the Applicant, it appears that the Applicant was given guidelines on the use of Corporation motor vehicles contrary to his evidence before court that he had received non. In the letter M/s Sikhosana informed the Applicant that the Regional Heads were only allowed to use Corporation motor vehicles during working hours and after hours and on weekends park the vehicle in the yard. Whenever there were funerals, he had to make arrangements to use the vehicle and also get permission to transport staff to the funeral.

On the 29th December 1996 M/s Sikhosana wrote a warning letter to the Applicant concerning knocking off before time on Fridays. The Applicant responded using unpleasant language. The letter was drawn to

the attention of the then Acting General Manager Mr. Sam Richards, Sam Richards was soon to chair the appeal hearing that dismissed the Applicant for different charges. The relationship of the Applicant with his seniors was not in its best state by the time. This

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in a way may have tilted the scales against him weighed against his strongest point that of having served the Corporation for a period of twenty three (23) years without much adverse history.

The promotion to management level upon reading his correspondence to his seniors may have been unsuitable and inappropriate hence the pitfalls he quickly fell into hardly seven (7) months upon the promotion.

Having said that, persons who are placed on positions of authority have a heavy responsibility to lead by example.

From the evidence of the Respondent and in particular exhibit 'R7', the applicant was fully aware of the limitations placed on the use of Corporation motor vehicles. That notwithstanding, it has been shown on a balance of probabilities that he had used the motor vehicle on diverse dates without proper authorization and had compounded the problem by falsifying dates in the authority documents.

He was well aware of the consequences of failing to adhere to the laid down limits of the use of Corporation property.

The correspondence between him and his supervisor exposes his intransigent disposition which explains his disregard of directives given to him by M/s Sikhosana. On page 6 of exhibit 'R6' the minutes of the appeal proceedings, he admits knowing that he was not supposed to exceed such limitation contrary to his evidence even before the court.

As a witness, he was not candid. He was evasive and outright stubborn at times.

The Respondent by granting him full payment of his terminal benefits and pension contributions, took into account all the mitigating factors of the case. The Applicant should count himself lucky as many in similar predicament have been lawfully dismissed without payment of any benefits.

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Persons placed in positions of trust away from the Corporation headquarters should know better than take advantage of the absence of a close eye of their supervisors. The consequences of such conduct are devastating to such officers when they get caught and in that wake, many innocent dependants suffer the loss of a steady income at the time when getting alternative employment is almost impossible for a man of the Applicant's age.

The Respondent, through the documentary evidence and its witnesses had proven that it dismissed the Applicant for a reason permitted by Section 36 of the Employment Act.

Considering the circumstances of the case, it was fair and reasonable to dismiss the Applicant for his serious transgressions of the company policy.

There will be no order as to costs. The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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