

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 29/2003

In the matter between:

VUSI BONGANIMASUKU                      APPLICANT

and

SWAZI SPA HOLDINGS LTD              RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: M/S DASILVA

FOR RESPONDENT: N.J. HLOPHE

## J U D G E M E N T - 16/03/05

This is an application for determination of unresolved dispute in terms of Section 85 of the Industrial Relations Act, No. 1 of 2000.

The Applicant approached the court seeking for maximum compensation for unfair dismissal and/or reinstatement to his employment. He further seeks terminal benefits enlisted as, notice pay, additional notice and severance allowance.

At the time of the dismissal the Applicant was earning a monthly salary of One Thousand Four Hundred and Twenty Four Emalangi (E1,424.00), He was employed on the 1<sup>st</sup> July 1998 as a Handyman under the maintenance department and was based at the Nhlngano Sun Hotel owned by the Respondent.

He was in continuous employment until the 23<sup>rd</sup> July 2000. He was therefore an employee protected by Section 35 (2) of the Employment Act No. 5 of 1980.

In terms thereof, the employer could only terminate his services for a lawful reason as particularized in Section 36 of the Act.

The Applicant alleges that this was not the case and therefore reported a dispute to the Commissioner

of Labour. The Commissioner according to the procedure provided under Part VI11 of the Industrial Relations Act No. 1 of 2000 referred the matter to the Conciliation Mediation and Arbitration Commission (CMAC). The Commissioner was unable to resolve the dispute and a certificate of unresolved dispute was issued on the 3<sup>rd</sup> of April 2001.

Before court, the Applicant testified that he was wrongfully dismissed on allegation that he had stolen an old carpet.

He explained that on the day in question whilst he was cleaning the premises, he took a carpet from the store to the garbage dump.

The security personnel saw the carpet and it was returned to the premises, and a report was made to the Applicant's supervisor. He told the court that it was an old carpet, brown in colour, measuring about 5 x 3 metres.

He said that he had gotten it from his supervisor's office to the storeroom a month before the incident. He claimed he had authority to remove the carpet to the garbage dump in the course of his work.

The security personnel made a report to his superior and he was asked to make a written report but he didn't.

A disciplinary hearing was then held in which he was found guilty of a dishonest act and was dismissed.

He told the court that he was a bricklayer and painter. That the company had employed a cleaner but he did the work at times.

He was twenty nine (29) years old and had five children although he was not married.

He also claimed to have had a clean record at work prior to this incident.

He had failed to find alternative employment but did piece jobs from time to time in the housing construction industry and earned an average monthly income of Two Thousand One Hundred Emalangenzi (E2,100.00) per month.

He did not receive terminal benefits upon dismissal and wanted to be reinstated to his job and in the alternative to be given compensation and be paid terminal benefits.

Under cross examination by Mr. N. J. Hlophe for the Respondent, the Applicant admitted that he had been assigned to work at the house of the General Manager on the material day, but not to clean the hotel premises as he opted to do on the morning when he removed the carpet to the garbage tractor for transmission to the garbage dump.

He also admitted that one Matsebula, the garbage tractor driver had told him that he did not require his assistance that morning. Infact, the Applicant also admitted that the cleaning department was separate

from the maintenance department for which he worked.

The instruction to go to the General Manager's house for maintenance work was from one Mr. Ndlovu. The Applicant admitted such instructions but stated that he was already cleaning when Ndlovu gave the instructions.

No one instructed him to remove the carpet from the store, nor did he enquire from the supervisor if he could dispose it off.

The carpet had been removed from the General manager's office to replace it with a new one and he insisted that it was torn and an eye sore.

He pleaded guilty to the charge of theft at the disciplinary hearing and apologized to the employer whilst asking for leniency.

He admitted theft at the work place was a dismissible offence and he was aware of that at the material time.

In it's endeavour to discharge its onus in terms of Section 42 (2) (a) and (b) of the Employment Act, the Respondent called Samuel Killer Ndlovu as RW1. He was the immediate supervisor of the Applicant serving as a Maintenance Manager.

He told the court that cleaning of the premises was under the estate section but not the maintenance

department.

He explained to the court that on the 24<sup>th</sup> April, 2000 in the morning he asked the Applicant to go to the General Manager's house to repair a cupboard.

The Applicant did not take his instruction, which he had repeated to him three times. The Applicant then disappeared for a while. He saw him later aboard a tractor coming from the dumpsite and there was a carpet in the trailer. He was surprised to see the Applicant because he thought he had gone to the General Manager's house.

The Security Manager reported the incident of the carpet to him.

He told the court that he queried the Applicant why he had taken the carpet without the authority of his superiors and without following the company procedures of disposing off old assets.

The Applicant apologized and said that he had been tempted and sought forgiveness. The witness asked the Applicant to seek forgiveness from one Wilson Dlamini who was more senior than him. He however asked the witness to apologize to Mr. Wilson Dlamini on his behalf, which he proceeded to do. Mr. Dlamini declined to listen to the Applicant's plea due to the seriousness of the offence.

The Applicant was then charged, upon which he pleaded guilty and was dismissed.

From the totality of the evidence before the court, the following facts have been proven on a balance of probabilities:

1. That the Applicant unlawfully removed a company carpet from the store, with the intention of stealing it.
2. That he pleaded guilty to the offence.
3. That he mitigated, and the same was taken into account at the disciplinary hearing.
4. He was correctly found guilty and dismissed.

Accordingly, the Respondent dismissed the Applicant for an offence permitted by Section 36 (b) of the Act. That taking into account the circumstances of the case, it was fair and reasonable to dismiss the Applicant.

The application fails in its totality with no order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT INDUSTRIAL COURT