IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 69/2002

In the matter between:

GLORY HLOPHE **APPLICANT**

and

SNIP TRADING PROPIETARY LIMITED **RESPONDENT**

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

P. R. DUNSEITH: FOR APPLICANT

M. SIBANDZE: FOR RESPONDENT

J U D G E M E N T - 05/04/05

Glory Hlophe, the Applicant, is a female Swazi adult of Nhlangano and was employed by the Respondent SNIP trading (Proprietary) Ltd, a company incorporated in terms of the Laws of South Africa and carrying on business in its branch in Nhlangano.

She worked as a manageress from July 1993 and was in such continuous employ until her resignation on the 31st October 2000.

The hand written letter stated that the resignation was in terms of Section 37 of the Employment Act No. 5 of 1980 in that she had been continuously and persistently harassed

and victimized. She termed it constructive dismissal and requested therein that she be paid compensation and terminal benefits. The letter was addressed to the Human Resources Manager, Mr. G. Duvenhage.

In the particulars of claim paragraph 4, she cites the reasons for the decision to resign as follows:

4.1. *The Respondent adopted a harsh attitude towards her after she had requested that more staff be employed to alleviate work pressure.*

4.2. *That Mr. Timothy Crowley, the Regional manager then insulted her in front of the staff and threw stock at her for holding a prayer session in the morning prior to the start of business.*

4.3. *That the Applicant was suspended and falsely accused of having informed the Police that a Mr. Peter Grobbelar and Mr. William Sibiya (Area Manager at the time) worked without permits and hence caused their arrest.*

4.4. *That she overworked from 7.30 a.m. to 11.00 p.m. without any overtime pay.*

The aforesaid conduct according to the Applicant was such that she could no longer be reasonably expected to continue in the employment and accordingly left her employment in terms of Section 37 aforesaid.

At the time of the resignation, she earned Emalangeni Two Thousand Four Hundred and Seventy Four and Ninety Seven Cents (E2,474.97).
The Applicant reported a dispute to the Commissioner of Labour who processed it and forwarded the same to the Conciliation Mediation and Arbitration Commission (CMAC). The institution was unable to resolve the dispute and a certificate of unresolved dispute in terms of Section 85 (1) was issued.

The matter was registered with the court on the 11th March 2002. It has however taken this long to be finalized due to the backlog experienced by the court occasioned by the shortage of judges at the Industrial Court and the fact that regular breaks are experienced whenever the one year contract of the President expires.

The court welcomes the appointment of an Acting Judge in April 2004, and is hopeful that the appointment will be confirmed soon. It is hoped that the future Judges of the Court will be employed on a more reasonable tenure be it on permanent and pensionable basis or for

longer contract periods as the case may be to avoid denial of justice to awaiting litigants on the long queque at the court.

Testimony

In her evidence, the Applicant stated that she was fifty four years old and was a single parent of five (5) children, three of whom were still of school going age at the time she resigned from the employment.

That she initially worked at branch 126 Nhlangano and was later transferred to branch 303 in the same town in 1998.

At the Branch 126, she had four members of staff and it was a smaller operation than Branch 303. Branch 126 only specialized in sale of shoes.
Branch 303, was larger than 126 and stocked garments, shoes, dishes, and cleaning material. The irony was that at Branch 303 she had only two staff members.

As the manageress at Branch 303, she did the cleaning of the store, sales, accounts and bookkeeping, banking and relieved staff when they went off for lunch. She also received and packed stock and helped in the display of merchandise.

She told the court that she hardly had any breathing space and often could not go for lunch. That whenever there was stock delivery she worked until 7.00 p.m. in the evening.

She raised the issue of workload with the employer but was told that she was paid to work. A security officer was however employed to augment the staff capacity.

She told the court that her complaint of heavy workload without extra payment was the beginning of sour relationship with her superiors.

In April 2000, whilst herself and the two members of staff were praying in the morning before starting work, the Area Manager Mr. Timothy Crowley arrived.

It was a Wednesday morning. The Wednesday routine was to hold a short meeting to strategize on the work. This was preceded by a short prayer.

It was whilst they engaged in the prayer session when Mr. Crowley knocked at the door and she opened for him. He immediately asked "*what the fucking are you doing?*"
He took one shoe from the display shelf and threw it at the Applicant stating "*the fucking display was wrong*"*.*

By this time some customers had trickled into the shop and watched in disbelief at the proceedings.

The Applicant told the court that Mr. Crowley often used this kind of language towards the staff.

In May 2000, a shortage was discovered during the stock take. The Applicant and her staff were collected by the Nhlangano Police and taken to the Police Station. It was alleged that they had stolen stock. The Applicant and the staff recorded statements. The three of them were then released and told they had no case to answer. The complaint to the Police was made by the new Area Manager Mr. Peter Grobbelar.

Subsequently, the Applicant received a notice to attend a disciplinary hearing. On the 23rd May 2000 she attended the same.

The hearing did not take place. The Applicant then proceeded on a two (2) months leave during August and September.

The Applicant told the court that she was entitled to one month leave per year but had accumulated leave days, hence the application to take two months leave.

Upon her return on the 29th September 2000, she wrote a letter of complaint to the directors of the Respondent in South Africa concerning the manner she had been recently and persistently treated.
Therein she complained of the following:

1. That her image had been blemished by a charge of theft that was laid against her by management to the Police.

2. That she was stopped by Police Officers in the middle of a street and was told not to talk to any of her staff members and not to set her foot in the shop.

3. That she was suspended from the 5th May 2000 to the 16th May 2000 pending the investigations.

4. That she was forced to do overtime up to 11.00 p.m. at night yet she was not provided with transport or food.

5. She claimed that inspite of her effort she was chased like a dog from the premises.

6. She requested that the false accusations against her to the Police be retracted in writing to safeguard her reputation.

The Respondent did not respond at all to her letter.

In October 2000 the Applicant and one Sibiya, the new Area manager conducted a stock take. On the 24th October at 11.00 a.m. she was summoned to the Nhlangano Police station to record a statement in connection with a shooting incident involving her sister's child.

The Applicant had obtained permission to attend to the issue, and upon her return to the shop, Mr. Sibiya was absent. She was informed that he had been arrested by Immigration officials for working without a work permit he being a South African national.
The Applicant received a telephone call from the Human Resources Director, Mr. Duvenhage. She told the court that Mr. Duvenhage told her to take her bags and "*fuck off from the shop*".

She explained to the court that she was shocked and asked why. Mr. Duvenhage told her that she had reported to the Immigration office that Mr. Sibiya and Mr. Grobbelar worked without permits, she denied ever making such a report to the Immigration department. The Applicant asked Duvenhage to write her a letter communicating what he had just told her. He said he would fax, the letter immediately but she must go out of the shop and wait for it. She waited outside but no fax came.

The next day, she reported to work in the morning and phoned Mr. Duvenhage asking for the letter. After a few minutes, a faxed letter came signed by one Thandi Gumbo. The same was produced as exhibit "A3".

It was a notice to attend a disciplinary enquiry in respect of two charges as follows:

1. Dishonesty i.e. you did not submit your leave form last year 1999.

2. Misrepresentation i.e. when you filled in your leave form this year 2000 you said you were last on leave in 1998.

The notice is dated the 26th October 2000 and the Applicant was to attend the hearing on the 31st October 2000.

The Applicant went to the Labour department to report a dispute that she had been verbally dismissed for having reported her seniors to the Immigration department. That she requested the decision to dismiss her be put in writing but instead received a notice to attend a disciplinary hearing for a completely new allegation related to her leave.

The Applicant however also attended the disciplinary hearing on the 31st October 2000. It was conducted by Mrs. Thandi Gumbo in the shop 303 in the presence of the junior staff and customers. They listened to the proceedings. No witnesses were called. Thandi Gumbo read the charges to her and made the allegations about the leave application. She also chaired the hearing. Thandi presented the particular leave application form to her. She told the court that she explained to Mrs. Gumbo that in the year 1999, she had applied for two months leave in respect of 1998 and 1999. That whilst she was on leave, the Area Manager then, one Mrs. Clara recalled her to relief a staff member who was proceeding on maternity leave. An employee by the name of Christina acted as the relief staff whereas the Applicant returned to manage the shop. By the time she was recalled, she had exhausted only the first month being leave for 1998, and was yet to cover the other month for 1999. She was informed by Mrs. Clara that she could take the remaining leave later on. This is the portion of the leave she was now being accused of having taken. Mrs. Gumbo rejected her version and did not bother to call Mrs. Clara who had first hand information on the matter. Clara at the time was a manager working for the Respondent elsewhere. Mrs. Gumbo had no personal knowledge of the events but persisted that her version was untrue. She acted as the accuser, prosecutor, jury and the judge in the matter.

This was the final straw to the Applicant. She phoned Mrs. Duvenhage and told him that she had resigned because her situation had been made intolerable by management. She followed this telephonic communication with the letter of resignation dated the 31st October 2000 marked exhibit 7\5'. She was assisted by a union representative Selby Dlamini to write the same and faxed it to Mr. Duvenhage on the same day. She then left the workplace.

To buttress her case, the Applicant called one Petrus Simelane (AW2), to testify before the court. He was an employee at the shop 303, under the supervision of the Applicant. He worked at the branch between the year 1999 and 2000.

His evidence was mainly in respect of the incident in April 2000 when the Regional Manager, Mr. Crowley interrupted their prayer session and directed obscenities and a shoe at the Applicant.

He told the court that it was Wednesday morning while they were holding a routine meeting and prayer session before opening the doors to the customers. Mr. Crowley knocked the door, The Applicant opened for him. He entered the shop and said '*why are you fucking sitting here doing nothing*'. He beckoned the Applicant complaining about the display of the stock as follows: "*the fucking display is so bad* " he then took a shoe and threw it at the Applicant. By this time the customers had entered the shop and were watching the events. Some openly expressed their displeasure with the conduct of Mr. Crowley and left the shop. Some asked what was wrong with their boss.

He added that the vulgar language by management was regular occurrence. When the Applicant left the employment of the Respondent, the witness was still working there though he had since left. He recalled the day the Applicant left the employment, Mrs. Thandi Gumbo conducted a disciplinary enquiry against her on the shop floor next to the fitting room. He could hear the proceedings and therefore the customers could hear as well.

He also recalled the year 1999 when the Applicant was recalled from leave by the Area Manager, Mrs. Clara to relief an employee who was on maternity leave.
He was closely cross examined by Mr. Sibandze for the Respondent. This was especially on the reason why he could recall the events that had occurred in 1999, concerning the leave of the Applicant yet he could not recall when he was first employed by the Applicant. He could also not clearly recall whether coworkers or himself had taken leave in 1999 and the year 2000.

It was further suggested to him that the only reason he could recall the Applicant's story is because he had discussed it with her before coming to court.

In the court's view though AW2 could not recall certain events randomly picked by counsel for the Respondent, he was unfaced regarding the relevant and material portion of evidence

touching on this case. He appeared candid and reasonably honest. He corroborated though not word for word the version of the Applicant regarding the obscenities and throwing of a shoe by Mr. Crowley. He also supported clearly the evidence of the Applicant regarding the last day at work. His version on the issue of recall from leave was not fatally shaken.

Section 37 of the Employment Act No. 5 of 1980 reads as follows :

' *When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer*'.

From a plain reading of this provision, the burden of proving that the conduct of the employer towards the employee was such that the employee could no longer reasonably be expected to continue in the employ of such employer rests on the particular employee making the allegations. In the present case, this burden rests on the Applicant. The standard of proof is on a balance of probabilities.
Where the court is of the view that the Applicant has made out a probable case of the conduct of the employer as envisaged by the provision, then the employer must be called upon to rebut the same.

The burden of the employer in such a case is that of casting reasonable doubt on the evidence adduced by the employee. This the employer must do by presenting a truthful version of the events that culminated in the resignation of the employee that tend to show that the employer did not make the working environment of the employee intolerable so as to be said that it was no longer reasonable to expect the employee to continue in the employ of the particular employer.

The burden of rebuttal born by the employer is lighter than that of proof born by the employee.

RESPONDENT'S CASE

The Respondent called Timothy David Crowley (RW1) in support of its case. He told the court that he had served the Respondent for a total of 9 years with a break of 2 years between the year 2000 and 2002. He had resigned from its employ in July 2000.

He knew the Applicant whilst she was the branch manager at Nhlangano. He was the Regional manager for the area for a period of 4 months in the year 1999.

He recalled the incident narrated by the Applicant and AW2 when he visited branch 303 at Nhlangano. He said that the visit took place at about 7.45 a.m. in the morning. He found the shop closed. He went in the shop and found the staff in a meeting.

He asked what they were doing. He was told that they were praying. He left them to continue and went about inspecting the shop. He noticed problems of standard in the display.

After the prayer session, he confronted the Applicant on the state of the shop. He was very irritated. He threw one item from one place in frustration to where it should have been if the display was proper. He had some words with the Applicant and left. He was frustrated that the standards were low, yet she had been with the company for a long time.

He denied he used any profanity and in particular the 'fucking' word. He added that no grievance was reported by the staff about use of profanity by him. He denied that he had thrown the shoe at the Applicant. He also denied that the members of management including himself generally used abusive language against the staff.

He said he was not aware that a meeting was held with one Wendy to discuss use of profanities against staff following a complaint by the Applicant.

He also explained that in all 500 branches of SNIP, all staff including the managers do the cleaning and so it was not unusual for the Applicant and her two members of staff to clean the shop. It was established that the shop was as big as the court room in which the case took place. It was estimated to be 20x10 metres.

The witness was riot candid with respect to the issue of the confrontation between himself and the Applicant. It seems unlikely that the two members of staff made up the story that he

used the 'fucking' word against the Applicant and threw a shoe at her. He admitted he was very irritated and frustrated. This admission is consistent with the conduct described by the Applicant and Mr. Simelane.

RW2 was Thandi Gumbo, the Area Manager of SNIP. She told the court that in the year 1999, she was the Regional Manager of Swaziland. She visited Nhlangano branch and found that the Applicant was on leave for three months.

In the year 2000 she visited Swaziland again and found the Applicant still on leave.

She phoned the Area Manager to find out how many leave days the Applicant had.

She then investigated the matter and found that the Applicant had falsely stated that she had not taken leave in 1999 when the leave form produced as exhibit 'A4' showed the contrary. She said that the Applicant did not explain to her that she had been recalled from leave inspite of having filled the leave form and therefore she took the same leave meant for 1999 in the year 2000. +
She denied that she had conducted any disciplinary hearing at shop 303 against the Applicant. She insisted that the Applicant avoided the intended disciplinary hearing by resigning. She further denied that she had specifically visited Swaziland in the year 2000 under the instructions of Duvenhage to discipline and dismiss the Applicant for reporting Mr. Sibiya and Mr. Grobbelar to the Immigration department.

She told the court that she was completely unaware of such allegations against the Applicant.
She stated that she was not aware of the arrest of Mr. Sibiya by Immigration Officers.

This aspect of Mrs. Thandi's evidence appeared most unlikely because she was the Regional manager at the time.

Two senior managers of the Respondent had to leave Swaziland due to lack of work permits and the Regional Manager told the court that she was totally blank and unaware of the incidents.

In the court's view, the investigations by Mrs. Gumbo about the leave days taken by the Applicant were related to the issue of Mr. Sibiya and Grobbelar and in particular, the accusation by Mr. Duvenhage that she was to blame for the reports to the Immigration.

The ruse played by Mrs. Gumbo in trying to appear independent and oblivious of the happenings at the time failed dismally.

She was in the court's view an untruthful witness and the court cannot rely on her testimony.

The charges of failure to submit a leave form for 1999 were trumped up and a positive act of victimization in revenge to the unfounded accusations that she was responsible for the arrest of Mr. Sibiya for working without a permit.

The Applicant in her entire testimony was collected though labouring under immense emotional pain. She intermetedly shed tears telling the court that she was treated by the Respondent like a 'dog' inspite of her committed service to the company. She endured humiliation at the hands of Mr. Crowley, Duvenhage and Mrs. Gumbo for no apparent reason.

She was candid and consistent throughout her testimony and was no doubt a witness of truth.

She succeeded in showing that the persistent accusations, reports to the Police, abuse and unwarranted suspensions eventually drove her out of the Respondent's employ. She was able to show that she could not reasonably be expected to continue working for the Respondent due to the unrelented persecution and humiliation as clearly and chronologically narrated by her.

The evidence of AW2, well corroborated her testimony.

The two witnesses of the Respondent RW1 and RW2, failed totally to shake her evidence.

The court relied on the doctrine of constructive dismissal as articulated by Lord Denning in the case of Woods v WM Car Services (Peterborough) 1980 IRLR 347 at 350, in the case of Jameson Thwala and Neopac (Swaziland Ltd Industrial Court Case No. 18/98 as follows:

"*it is clearly established that there is implied in a contract of employment a term that employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; Courtlands Northern Textiles Ltd v Andrew (1979) IRLR 84. To constitute a breach of this implied term it is necessary to show that the employer intended any repudiation of the contract; the Tribunals function is to look at the employers conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it; the conduct of the parties has to be looked at as a whole and its cumulative impact assessed*".

Just like we did, in the Thwala case, the court fully embrace this standard of proof. The approach has found favour with South African Labour Court even after the replacement of the LRA 1956 with LRA Act 66 of 1995.

The learned author D. Du-Toit & Others in Labour Relations Law, A Comprehensive Guide 3rd Edition 343 states:

"*The question is whether taking all the circumstances into account there was objective unfairness which drove the employee to believe there was no way out but to walk away. Mere unreasonableness or illegitimate demands by the employer according to this approach do not amount to constructive dismissal as long as the employee retains a remedy against the employers conduct short of terminating the employment relationship*".

See Alderdoff v Outspan International 18 IU 810 (CCMA) where it was held that it was improper for an employee to second guess the outcome of use of procedure arid therefore avoid it.

In this case, the Applicant was humiliated at the Police Station, suspended but not disciplined; profanities hurled at her and told to get out of the shop awaiting a letter of dismissal. An inquiry (that is denied) by Mrs. Gumbo conducted against her in front of customers and her subordinates *inter alia.*

The court finds that taking all the circumstances of the case into account, there was objective unfairness which drove the Applicant to believe there was no way out but to resign.
She had made out a case of constructive dismissal in terms of section 37 of the Employment Act No. 5 of 1980.

COMPENSATION

As stated earlier on, the Applicant is a single parent of five children. She was fifty four years old and unlikely to get any other gainful employment due to her age. She had served the Respondent diligently for a period of about seven years. She became a victim of a management that showed propensity to violate the Immigration Laws of Swaziland regarding work permits. Whenever the law caught up with them, they blamed the local staff and in particular the Applicant.

She was humiliated and as a result appeared traumatized and cried easily before court.

She lost her source of income upon resignation which was a bold step for a single parent. This was a reflection of the level of mistreatment meted on her by the management of the Respondent especially Mr. Duvenhage.

Mr. Duvenhage did not come to court to refute any of the allegations made against him by the Applicant.

This is a case where the appropriate compensation would be the maximum twelve months permitted by the Industrial Relations Act No. 1 of 2000.

The Respondent is therefore ordered to compensate the Applicant for the unlawful and unfair dismissal in the sum of E2,474.96 x 12 = E29,699.52 (Twenty Nine Thousand Six Hundred Six Hundred and Ninety Nine Emalangeni and Fifty Two Cents).
She is further entitled to terminal benefits as follows:

Notice pay	E 2, 474.92
Additional Notice pay	E 2,472.00
Severance Allowance	E 6,180.00
	Ell.126.92

Total amount due from the Respondent to the Applicant is E40,826.44 (Fourty Thousand Eight Hundred and Twenty Six Emalangeni Fourty Cents).

This is a proper case where the Respondent should pay the costs of the application in the interest of fairness and equity. This is in view of the despicable conduct of the Respondent in its treatment of the Applicant.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT INDUSTRIAL COURT