

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 40/2000**

In the matter between:

**JOSEPH MHLANGA**

**APPLICANT**

and

**SWAZILAND BOTTLING COMPANY**

**RESPONDENT**

**CORAM: NDERI**

**NDUMA JOSIAH**

**PRESIDENT**

**YENDE NICHOLAS**

**MEMBER**

**MANANA**

**MEMBER**

**S. M. KUBHEKA**

**FOR APPLICANT**

**N.J. HLOPHE**

**FOR RESPONDENT**

## **IN THE INDUSTRIAL COURT OF SWAZILAND**

### **J U D G E M E N T - 14/04/05**

This application was filed on the 29 February 2000 in terms of Section 65 (2) of the Industrial relations Act of 1996. This was pursuant to a Certificate of Unresolved Dispute issued by the Commissioner of Labour on the 17<sup>th</sup> February 2000.

The Respondent filed a Reply on the 14<sup>th</sup> March 2000. Later on the 8<sup>th</sup> May 2001, an amended reply to the Application was filed.

The matter was heard and determined by the Industrial Court. An appeal was lodged against the judgement of the Industrial Court. The record was not complete and an order given to start the trial *denovo*.

#### **CLAIM**

The applicant claims reinstatement to his employment and in the alternative maximum compensation in terms of Section 15 (4) of the Industrial Relations Act No.1 of 1996. He also claims terminal benefits, itemized as notice pay, additional notice pay and severance allowance.

The Applicant was employed by the Respondent as a Sign Writer in the Sales and Marketing Department on the 6<sup>th</sup> November 1979. He was in continuous employment until the 8<sup>th</sup> December 1999. He had thus served the Respondent for twenty (20) years.

At the time of the dismissal he earned a monthly salary of Two Thousand Four Hundred and Twenty eight Emalangen Eighty Seven Cents). This figure was

agreed to by consent and it was accepted that the salary outlined in the particulars of claim was erroneous.

The dismissal was in terms of a letter dated the 8<sup>th</sup> December 1999 annexed to the Application as "JMI".

The letter reads as follows:

*"Following the conclusion of the disciplinary hearing involving yourself in the charges of:*

1. *Fraud.*
2. *Transgression of specified rules and policies.*

*I have considered all the facts of the case in charge No. 1. I have found that you have no case to answer. In charge No. 2 I find you guilty and sentence you to summary dismissal".*

The record of the disciplinary hearing was produced and marked R3-R16.

From the proceedings thereof, it is common cause that two children of the Applicant were in possession of two bicycles won from a Coca Cola promotion conducted by the respondent. From page 4 of that record, the Applicant told the hearing that he had been taken ill to hospital at the material time. He resided at his home at Ngwane Park upon discharge from the hospital. He occasionally visited his parental home at Mhlaleni. It was during one of such visits when he found his two kids with the bicycles. He asked them how they had gotten the bicycles. They told him that one bicycle belonged to their uncle and the other to a certain Simelane who was a tenant at the residence. He later discovered that the uncle

was sent by his child who was away in Durban on school trip to go to the Respondent and fetch the bicycle.

He told the hearing that his children knew very well that they were not supposed to take part in the competition and that was the reason why they were hiding the truth from him.

When the child came from Durban he told him that he had bought a winning liner from a shop and gave it to his uncle to fetch the bicycle because he knew he was not eligible to join the competition.

Simelane on the other hand informed him that he got the winning liner from Hlathikhulu. He added that his wife borrowed Simelane's bicycle to be used by his child to get a car to take him to hospital.

The police visited his home and found the kids with the bicycles. They confiscated both bicycles.

In court the Applicant repeated the same version he had told the tribunal.

The narrative had however some discrepancies which he attributed to the lapse of memory due to the fact that he was sick at the time and the passage of time.

He explained further that he was very angry upon discovering the truth and it did not occur to him to immediately contact the Respondent.

In any event the Police arrived a day after and the visit was followed by the suspension from employment.

The Applicant in his testimony before court denied ever allowing his children or relatives to participate in the competition. He said that he was aware such participation violated company policy. This had been explained to them in a meeting that preceded the lodge of the promotion.

He added that when the competition was lodged he was hospitalized and on sick leave for 15 days. At the time the Police and Mr. Clement Dlamini the Security Manager visited his home concerning the two bicycles, he had been discharged from hospital but was bed ridden.

When confronted by the team about the bicycles, he told them that he was not aware how the children got them and that they should ask them.

He could not remember the exact age of the children but told the court that one of them Musa Mhlanga was in Form One at Hillside High School and the other Bongani Mhlanga was in Standard Four at Salesian Primary School.

The team did not question the boys, but they confiscated the bicycles from them. They did not inform him that there were any liners that went missing.

He was served with the letter of suspension produced as "AI" dated 13<sup>th</sup> September 1999.

He told the court that upon his discharge from RFM Nazarene Hospital he saw the bicycles. He enquired about them and the boys told him that one was for Simelane who worked for Ubutfo Swaziland Defence Force (USDF) and the other was for his brother (their uncle) named Majaha.

This is consistent with his testimony before the disciplinary tribunal. Mr. Simelane was a tenant at his parental homestead.

He said that he was ill for about one year and was very sick when the Police visited the homestead. That he could hardly walk at the time.

He was not involved at all in the arrangement of the competition. He had no knowledge where the liners were kept. This was in the knowledge of Senior Managers. He denied ever giving liners to his children or relatives. He had told his children about the rules of the competition on many occasions. This was not the first time.

He said that he did not fail to notify the company upon discovery of the bicycles because he had gotten the truth of the matter after the visit by the Police and he was subsequently suspended.

At the time he had not known that his son Musa had entered the competition.

He was at the time of the hearing 49 years old and was still unemployed. He got piece jobs from time to time as a sign writer. He had lost his means of livelihood. The biggest blow was that the summary dismissal deprived him of terminal benefits that had accrued for a period of twenty (20) years.

He had no record of misconduct prior to this incident. He emphasized that he was innocent and had been wrongfully and unfairly dismissed.

Under cross examination the Applicant told the court that he had owned a shop at Mhlaleni while he was employed but it had since closed.

At the time of the competition, the shop was operational. Mhlaleni area had many shops and it covered Logoba and Kakhoza.

He insisted that when he first saw the bicycles, his children gave him misleading information as to the ownership but had found out the truth later, after the visit by the Police and Clement Dlamini.

He denied having told Clement Dlamini that the two bicycles belonged to his sons who had entered the competition without his knowledge.

He denied having stolen and or given the winning liners to his children. He was not aware that liners had been stolen from Henry Dlamini's office. He added that he was shocked as to why he was charged with fraud.

He explained that when his son used the bicycle to get a vehicle to take him to hospital, it was on one of the regular visits to the hospital. He had already been discharged from hospital at the time.

He said he had no knowledge of the participation of his wife in the transaction. He also did not know she had any knowledge of how the bicycles were obtained. He said he was very sick and had not queried his wife about the matter.

He said he was surprised as to how two competition bicycles were won around his homestead but was given misleading information by his children prior to the visit by the Police. He had believed his sons because they were young and had no identity documents. They could therefore not have collected the bicycles themselves.

He was acquitted of the fraud charges.

The Applicant called Casper Mhlanga (AW2) to testify in support of his case. He was the uncle alleged by his sons to have won one bicycle.

He told the court that he had been given the winning liner by the Applicant's wife. She asked him to go and collect a bicycle from the Respondent. He lived at Mhlaleni and worked at Engen. The wife of the Applicant operated a shop at Mhlaleni.

He went as instructed and collected a bicycle and he rode it back home. At the time Musa was on a school trip so he gave the bicycle to his mother for safe keeping. The Applicant was not present at the time.

He later heard that the bicycle had been repossessed. He told the court that he had lied to the Applicant that the bicycle was won by him, but it was the Applicant's son who had won it.

He denied that the Applicant had given him the liners to claim the two bicycles. He recorded a statement in which he said the liner had been given to him by the Applicant's wife.

He admitted that he had told the Respondent at the time he collected the bicycle that he had won it.

The Respondent called one Sergeant Jabulani Simelane Force No. 1616 to testify in support of its case (RW1).

He told the court that sometimes in September 1999 whilst he was based at Matsapha Police Station one Clement Dlamini arrived. He requested to be accompanied by a police Officer to Ngwane Park at Manzini. He accompanied him there and they found two boys riding bicycles with Coca Cola inscriptions. The boys when questioned said they had won the bicycles. That they had bought winning liners at Mhlaleni.



They took the boys to their home where they found the Applicant and his wife.

They asked the Applicant about the bicycles and he told them his two sons won the bicycles after buying wining liners at Mhlaleni.

When queried how they won because they could not participate in the competition being family members of an employee, the Applicant referred them to his wife saying he was sick.

The wife reiterated that the boys won the bicycles upon buying liners at Mhlaleni. The bicycles were confiscated.

Nobody was charged with any offence relating to the bicycles. Nobody was arrested.

He said the boys were young and estimated their ages to be below 13 years.

RW2 was Henry Dlamini. He was presently working at Neopack. At the material time he was the Production manager for the Respondent Plant. The Applicant was his co-worker. He was aware he had been dismissed following a disciplinary hearing. He explained how the promotion was conducted. It was run for three months. During the first month he discovered liners were missing from a locker in his office. He reported the loss to the Managing Director. Management decided not to stop the competition but stopped issuing the wining liners (seeding).

He explained how the seeding of the control liners was done. He stated that the probability of several control liners going to one area or shop was almost nil. They were alarmed therefore by the large number of wining liners coming form Mhlaleni area. This led to the investigation that led to confiscation of the two bicycles from the Applicant's sons and other would be winners from the same area.

His office was not broken into but he may have left the locker open. He said many employees had access to his office.

The disappearance of liners was reported to the Police. He was present when AW2 claimed the bicycle. He said he had won the liner.

He said he was not in a position to say whether the Applicant was already on sick leave when the competition was lodged.

He also added that the Applicant had no specific role in the promotion. He only did sign writing.

RW3, was Clement Dlamini the Security Director at the time. He was involved in the investigation of the loss of the liners. A report was made to him by RW2 that liners were missing from his office.

He treated RW2 as a suspect in his investigations. Winners were coming from Mhlaleni area at an alarming rate. It was discovered that two sons of the Applicant had won two bicycles. He reported the matter to the Police and visited the homestead of the Applicant accompanied by the Police at Ngwane Park. They met the two children of the Applicant riding the bicycles. The children told them that they had won the bicycles from the Respondent. They took the bicycles and the boys to their homestead. They found the Applicant and his wife.

When queried about the cycles, the Applicant said the children had won them but not himself. He reminded the Applicant that family members were barred from entering the competition. He referred them to his wife who was just next to him.

She told them one bicycle was won by her and the other by her son at Mhlaleni store. RW3 told the court that the wife had refused to talk to them.

The bicycles were confiscated and the Applicant was asked to follow them to the station to record a statement later.

He confirmed that when AW2 collected the bike, he claimed it was his. He queried him later and he changed his story to that the bicycles were for Mrs. Mhlanga, the wife of the Applicant.

Later on he said he was sent by the Applicant. He took him to the Police to record a statement. He compiled a report and submitted it to management.

He claimed that when the competition started the Applicant was at work. His office was adjacent to his. He was taken ill while the promotion ran. It ran for three (3) months.

He said that the competition was not successful contrary to the views of Henry Dlamini, the Production Manager (RW2).

He stated that the Applicant was dismissed because liners got lost and it was thought that he had stolen them.

He had concluded that the Applicant was fully involved in the loss of the liners.

In the final analysis of the evidence before court, the court has arrived at various conclusions as follows:

That the Applicant was found not guilty of the fraud charges against him by the employer.

That the Applicant was found guilty for flouting company procedures by allowing his family members to participate in the promotion.

The conclusion of the investigation was that the winning liners from Mhlaleni area had been stolen. This led to confiscation of the bicycles won by the two sons of the Applicant and all would be winning liners emanating from that area.

The promotion lasted its full course and was described by the Production Manager (RW2) to have been successful.

There was no evidence at all linking the Applicant to the theft of the liners. This is the reason why he was cleared of fraud charges.

There was no evidence at all that he had helped and/or authorized his children to participate in the promotion.

It is common cause that for the better part of the promotion he was seriously sick and admitted at RFM Nazarene Hospital and later bed ridden at his parental home.

The Applicant had queried the children about the bicycles upon seeing them and the two had lied to him about the ownership of the same.

Immediately thereafter Clement Dlamini and the Police confronted him.

There is conflicting evidence as to his explanation when he was confronted. He says he told them he was not aware of the matter and that they should ask the wife and the children.

RW2 and RW3 say that he admitted that the children had won the liners and referred them to his wife as to the details because he was sick. RW2 says the wife refused to talk to them whereas RW3 states that she was co-operative.

If the liners were stolen from the Respondent by persons unknown to the Respondent and if the Applicant was acquitted of any involvement in the said theft, then it cannot be said that he allowed the children to participate in the competition without any positive evidence to that effect. The finding that he allowed the children to participate in the promotion on the face of the conclusion that he had not stolen any liners does not make sense at all.

If any thing, he may be accused of not taking immediate action to report the matter to the Respondent when he first saw the children with the bicycles.

His explanation that he was at the time very sick and that the children had given him false information as to the origin of the bicycles cannot be said to be unreasonable in the circumstances described.

This is a situation that inevitably invited suspicion on the Applicant. Suspicion is however not sufficient to find an employee of twenty (20) years standing who had no record of previous misconduct guilty of having allowed his children to participate in the promotion.

That there was theft of control liners and same were distributed to many people in the Mhlaleni area is a further indication of the danger in finding the Applicant guilty as the Respondent did without any concrete evidence.

Therefore the Respondent has failed to show that it dismissed the Applicant for an offence permitted by Section 36 of the Employment Act. Furthermore the Respondent has failed to demonstrate that the dismissal was fair and reasonable

in the circumstances of the case in terms of Section 42 (2) (b) of the Employment Act.

The Application succeeds

## COMPENSATION

It is not viable to reinstate the Applicant due to the passage of time. The circumstances also indicate a lack of trust by the Respondent which make it unreasonable to order reinstatement.

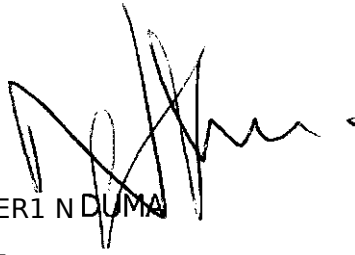
It is common cause that the Application was brought in terms of the 1996 Act. The Applicant has suffered financial embarrassment and job loss following the dismissal. It is difficult for compensation to restore him to his previous position. His dependants have suffered lack of financial support. He has been unable to get permanent employment since the dismissal.

Accordingly, the court grants him fourteen (14) months salary as compensation for unfair dismissal. The agreed monthly salary is E2,428.87 (Two Thousand Four Hundred and Twenty Eight Emalangerii Eighty Seven cents). This adds up to E34,004.18 (Thirty Four Thousand and Four Emalangerii Eighteen Cents). Respondent is also to pay terminal benefits itemized as follows: notice pay E2,428.87, Additional notice and Severance pay to be re-calculated in line with the agreed basic salary.

Immense costs have been incurred in this matter because it had to be retried *denovo*. Although the mess cannot be blamed on either party, it is only reasonable that the winning party is able to recoup part of the costs incurred.

The Respondent is ordered to pay the costs of this hearing but not the previous one.

The Members agree.

A handwritten signature in black ink, appearing to read 'Nderi Nduma', written over the printed name.

NDERI NDUMA

JUDGE PRESIDENT