

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 316/2000

In the matter between:

PHILLIP MBONGISENI SI ME LANE APPLICANT

And

SWAZILAND BREWERIES LTD RESPONDENT

CORAM:

NDERINDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT : L. SIMELANE

FOR RESPONDENT : M. SIBANDZE

J U D G E M E N T - 12/05/05

The Applicant was employed by the Respondent in August 1982. He worked as an Empties Clerk earning a monthly salary of Two Thousand Six Hundred and Twenty Five Emalangeni (E2,625.00). His services were terminated by the Respondent on the 15th January 1997. He had thus served the Respondent for over fourteen years and was therefore an employee protected under Section 35 (2) of the Employment Act.

Section 35 (2) reads:

"No employer shall terminate the services of an employee unfairly".

Section 35 (3) goes on to list categories of circumstances that will be deemed to be unfair reasons for dismissal. On the other hand Section 36 lists down fair reasons for dismissal.

On or about November 1996 the Applicant was charged by the Respondent with three offences namely;

- (a) Committing a dishonest act towards the company;
- (b) Willful failure to carry out a reasonable instruction
- (c) Transgression of specific company rules.

He was called to a disciplinary hearing. He was found guilty as charged.

He was then dismissed. He appealed the decision but the same was confirmed.

The Applicant was not summarily dismissed. He was paid notice pay, additional notice, leave pay and salary for December 1996 and the part of January 1997 he had worked. He received a total sum of Thirteen Thousand Six Hundred Twenty Five Emalangeni and Seventeen Cents (E13,625.17).

The Applicant denies all the charges preferred against him. He states that the dismissal was both substantively and procedurally unfair.

He testified in support of the particulars of claim to the effect that he was not dishonest in his work in that Themba Vilakati had brought the 56 crates of empty bottles on the 1st November 1996. It is these crates which he is alleged to have colluded with others to remove from the company premises under the false pretence that they had been brought by a customer when in fact no such crates had been brought for refilling and/or exchange.

Themba Vilakati testified in support of the Applicant's case both at the disciplinary hearing and before court.

He told the court that on the 1st November 1996 he brought 56 crates of empty bottles to the Respondent premises. He deferred taking drinks in exchange on the day but one Mr. Thwala had to collect the drinks the following day.

The two were confronted with the testimony by the Respondent that no record of Mr. Vilakati driving into the Respondent's premises on the 1st November 1996 existed with the security at the gate who would always have the full particulars of every customer's motor vehicle entering the premises.

Furthermore the Applicant did not check physically the alleged 56 crates but allegedly relied on information given to him by a third party to generate a checkers note produced as exhibit RII. A checkers note was a document generated after customers returned crates with empty bottles to the company.

In this particular case the exhibit shows that a vehicle SD 832 LL dropped 56 crates to the premises on the 1st November 1996.

On the 7th November a customer named Sibusiso Simelane turned up at the premises of the Respondent with the checker's note and tried to redeem 56 crates of empties.

This raised suspicion because there was a rule of practice that checkers notes must be used on the same day they are generated either by redeeming cash or exchanging them with an equal number of full bottles.

To address the issue of suspicion that eventually led to the prosecution and dismissal of the Applicant, the Respondent called various witnesses, the first of whom was Sibusiso Brian Hlanze. He was at the time of the trial the Depot Manager of the Respondent. At the material time leading to the dismissal of the Applicant he was the Warehouse Superintendent. He received a report from the Security Superintendent on the matter at hand.

He noted the following anomalies which drew suspicion on the claim; it was done days after the checkers note was generated which was unusual, the gate register did not reflect entry of the alleged motor vehicle that had delivered the crates and no such record was available on the loading docket at the loading bay.

It was the responsibility of the Applicant to receive a customer with empties and upon checking the number of empties generate a checkers note which was then signed by the Applicant and the customer to acknowledge the number of empties received by the Respondent from that customer.

The Applicant had to do a physical count. This was mandatory. The particulars of the motor vehicle that brought the empties is recorded in the checkers note. The witness explained that the record of the motor vehicle SD 832 LL did not appear on the security register and the loading docket and therefore he concluded that no such delivery took place.

He refuted the evidence of Mr. Vilakati that he had made such a delivery on the 1st November. His other conclusion was that the checkers note generated by the Applicant for 56 crates of empties was fraudulent. This meant that the Applicant was dishonest and his dismissal was fair in the circumstances.

The witness was the supervisor of the Applicant. The reconciliation done by the in house accounting clerk Nonhlanhla confirmed the suspicion that indeed there was a shortage of 56 crates, if the checkers note was genuine.

Nonhlanhla Fakudze testified as RW2. She was the Credit Manager at the time of the trial. In November 1996 she worked as Operations Accountant.

According to her records on the 1st November she did not have any entry of the 56 crates of empties on her reconciliation. Her conclusion was that there were no returns of the 56 crates from the said customer on the 1st November.

She testified at the disciplinary hearing where she gave the same account.

The third witness for the Respondent was Clement Dlamini. He was the Loss Control Manager of the Respondent in 1996.

He checked all the relevant registers and records and there was no evidence that motor vehicle SD 832 LL delivered 56 crates of empties on the 1st November. Accordingly, he concluded that the checkers note raised by the Applicant was fraudulent.

He corroborated the evidence of RW1 and RW2 in all material respects.

The evidence of the three witnesses was mutually destructive with that of the Applicant and his witness Mr. Vilakati.

The records in possession of the court by and large supported the contention by the Respondent that no delivery of 56 crates of empties by Mr. Vilakati was made on the material day.

It is either that the Applicant deliberately and with intention to defraud the Respondent raised the checkers note in question or that he was so grossly negligent on the day that he made a false checkers note of 56 crates of empties to the potential detriment of the Respondent.

The Applicant's case is not credible and is unworthy of belief.

By his conduct the Applicant had compromised the relationship of trust between himself and the Respondent. He could no longer be trusted as a custodian of the Respondent's stock hence the dismissal.

The Respondent through its witnesses has established on a balance of probabilities that it dismissed the Applicant for an offence permitted by Section 36 of the Employment Act in that he had committed a dishonest act against his employer.

Alternatively his conduct engendered the Respondent similar consequences as those contemplated by Section 36 of the Act.

Accordingly the onus placed upon the Respondent in terms of Section 42 (2) (a) of the Employment Act was discharged.

Furthermore considering the entire circumstances of the case, it was fair and reasonable to dismiss the Applicant. The Respondent therefore has also discharged its onus in terms of Section 42 (2) (b) of the Employment Act.

No order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT- INDUSTRIAL COURT