

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CASE NO. 157/2001

AARON MATHABELA

APPLICANT

and

FORTUNE PANEL BEATERS (PTY) LTD

RESPONDENT

CORAM

N. NKONYANE: ACTING JUDGE

G. NDZINISA:MEMBER

D. MANGO:MEMBER

FOR APPLICANT FOR RESPONDENT

MR. L. SIMELANE MR. G. MASUKU

JUDGEMENT - 30.05.05

The application before court is for determination of an unresolved dispute brought by the applicant against the respondent in terms of section 65 of the Industrial Relations Act, 1996.

The applicant was employed by the respondent as a spray painter in 1988 and was in continuous employment until he was dismissed in March 1999 on allegations of theft of sandpaper.

It is common cause that no disciplinary hearing was held before the applicant was dismissed by the respondent.

It is also common cause that the applicant did report the dispute to the Labour office in Manzini. A conciliation meeting was held between the parties and was conducted by RW2, Josephine Maziya.

The respondent's case was that after the conciliation a settlement was reached and the applicant was told to resume work but he failed to do so.

The applicant contended to the contrary that no settlement was reached. He also denied that he stole the sandpaper.

The applicant in his evidence told the court that on the day that he was found in possession of the sandpaper, he had gone to the office to ask for newspapers and musking tape to use on the motor vehicle that he was working on.

He said he found the storeman, Mr. Mabuza who allowed him to get in and take the newspapers. On his way out the workshop manager, Ashley Friedmann stopped him and conducted a search. Upon being searched, the batch of sandpaper was found. The workshop manager told him to go home.

RW1, Ashley Friedmann told the court that the applicant got in and went to take the newspapers without seeking permission from him. RW1 said Mr. Mabuza was not present and had been sent to buy paint. RW1 said when the applicant was going out with the newspapers, he noticed that there was something bulging, he asked to inspect the newspapers. He then found the batch of sandpaper.

RW2 Josephine Maziya told the court that she facilitated the holding of the conciliation meeting. She said after the conciliation, the respondent offered to re-instate the applicant. She said she did not know what happened thereafter. She said she did not draft the conciliation report because the applicant would disappear from time to time.

She also said there was nothing that she did to show that the matter was finalized. She said the

certificate of unresolved dispute was issued after she had ceased to work for the Labour Office.

During cross examination she agreed that the procedure was that if parties reached an agreement, a memorandum would be drafted detailing the terms of the agreement, and that that was not done in this case.

When asked by the court why did she not write the report or the memorandum of agreement, she said the matter was left hanging as the applicant left for Mozambique as the re-instatement was conditional on him getting a residence permit.

There was a dispute whether the storeman, Mr. Mabuza was present when the applicant went to collect the newspapers. The applicant said Mabuza was present and that it was him who allowed him to take the newspapers. RW1 said Mabuza was not present at that time when the applicant went to collect the newspapers.

Mabuza was not called to testify on behalf of the respondent so that he could tell the court whether or not he did give the applicant permission to get into the storeroom and take the newspapers.

Furthermore, RW1 told the court that the sandpaper was kept in a locked cupboard. During cross-examination RW1 said the cupboard was not broken but he found it open when he made an inspection.

When asked where were the keys, RW1 said he thought they were with Mabuza.

RW1 also told the court that the only people who had access to the storeroom were Mabuza and himself. This evidence lends credibility to the applicant's version that he got permission to go into the storeroom from Mabuza. Since Mabuza was not called to rebut that evidence, the court will therefore accept the applicant's evidence.

When RW1 asked the applicant about the sandpaper, the applicant told him that he was not aware of the presence of the sandpapers inside the newspapers.

The non-appearance of Mabuza was fatal to the respondent's case. Mabuza should have been called to rebut the evidence of the applicant that he asked permission from him to go into the storeroom. Mabuza would also have clarified for the court whether the cupboard was or was not locked when the applicant went to the storeroom.

The respondent has therefore failed to prove on a balance of probabilities that the applicant went into the storeroom to get the newspapers without permission. If it had been shown that the applicant had no permission to go into the storeroom, the court could then be in a position to make a negative inference against the applicant, that he went to the storeroom without permission because he had an evil intent to steal from the storeroom.

The applicant told RW1 that he was not aware of the sandpaper that was found inside the newspapers. The respondent did not hold a disciplinary hearing on the matter to find out the truth.

It follows therefore that the respondent has failed to prove on a balance of probabilities that the applicant was guilty of theft of the sandpaper.

The respondent's case was further that the decision to summarily dismiss the applicant was reversed and the applicant was offered to come back to work, but he absconded.

The respondent however failed to produce to the court the memorandum of agreement between the parties showing that there was an offer for re-instatement.

The Labour Officer, RW2, told the court that no report of the conciliation was submitted to the Commissioner of Labour. She also told the court that the offer of re-instatement was conditional upon the applicant getting a residence permit.

The applicant cannot therefore be blamed for failing to resume work as he was trying to meet the conditions set by the respondent. The conduct of the respondent was clearly hypocritical. The respondent was able to have the applicant work for it for more than ten years. When asked to re-instate him, the respondent only then remembered that the applicant did not have a residence permit.

It is clear to the court that the respondent was deliberately making it difficult for the applicant to resume his work. The respondent cannot then be heard to be saying the applicant absconded, when it seems that he is unable to meet the condition that was set for him.

It was also argued on behalf of the respondent that the matter was not properly placed before the court as there was no report filed within twenty-one days by the Labour Commissioner to the court as envisaged by section 41(3) of the Employment Act No.5 of 1980.

The respondent failed to raise this point as a preliminary objection before the court. The respondent is represented by a legal practitioner. The court can therefore safely rule that the respondent is to be taken as having waived its right to raise that point as a preliminary objection to the application.

This case is also a sad indictment on the office of the Labour Commissioner. The evidence before the court revealed that the Labour Officer that handled the conciliation did a very shoddy job. She told the court that she did not do anything to show that the matter had been finalized. She said she was unable to find the diary where she recorded the proceedings of the meetings.

From the evidence presented before the court, the respondent has failed to prove that the applicant committed theft. The respondent has also failed to show that the applicant absconded after being offered to resume work because the offer was conditional on the applicant getting a residence permit, a condition that was only meant to make it difficult for the applicant to resume his work.

This court is a court of equity. It will not allow employers to take advantage of workers who are illegal immigrants.

In light of the foregoing the applicant's application must therefore succeed.

The court will therefore make an order that the respondent shall within seven days after this judgement pay the applicant the following amount of money as his benefits and compensation for unfair dismissal :-

NOTICE PAY	E 1'50.00
2. ADDITIONAL NOTICE	E1,350.00
3. SEVERANCE ALLOWANCE	E3,375.00
4. COMPENSATION(E750.00x 15MONTHS	<u>E11,250.00</u>
TOTAL	<u>E16,725.00</u>

No order for costs.

The members agree.

N. NKONYANE

ACTING JUDGE - INDUSTRIAL COURT