IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 326/2000

In the matter between:

MALAWULA GROENING **APPLICANT**

and

CROOKES PLANTATIONS LIMITED **RESPONDENT**

CORAM

N. NKONYANE: ACTING JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. N. MTHETHWA

RESPONDENT: MR. M. SIBANDZE

J U D G E M E N T 25.08.05

This is an application for the determination of an unresolved dispute in terms of Section 85 (2) of the Industrial Relations Act No. 1 of 2000.

It is common cause that the applicant was employed by the respondent in 1982 as sprayer. He was in continuous employ of the respondent until July 2000 when he was dismissed. At the time of his dismissal he was an irrigator. He was earning E784.14 per month.

It is also common cause that the applicant was dismissed after he was found guilty of using a highly toxic chemical, that he sprinkled on cut oranges in order to trap birds.

The applicant denies that he committed the offence, thus his claim that he was unfairly dismissed by the respondent. He now wants the court to issue an order directing the respondent to pay him all terminal benefits and also compensation for unfair dismissal.

The applicant was the only witness for his case. On behalf of the respondent two witnesses testified. The minutes of the disciplinary hearing were also produced in court. There was annexed to the minutes an excerpt from the internet about the use of poison by poachers to kill wildlife. The court will not however consider that document for the purposes of this judgement.

The evidence revealed that on 11.07.2000 the applicant was in the field together with another employee by the name of Mdumiseni Mngomezulu. There were in the field at the instruction of RW1, David Maphalala who was their supervisor and who had instructed them to go and irrigate orange trees. RW1 then decided to go to the field to see if the instructions were being carried out. He did not find the two workers where he expected to find them that is, near the dam. He then started to look for them.

RW1 found the applicant cutting oranges and putting the poisonous chemical called temik. He asked the applicant why he was doing that and the applicant answered him by saying it was a long story. RW1 then went to the office to report the incident. In the office he found Moscow Mkhonta, Zonke Mabuza and Emmanuel Fakudze. They told RW1 to go with Mkhonta to the field.
The two confronted the applicant. The applicant told them that he did not get the chemical from the office but that he scooped it from the ground from one of the fields that had been sprayed on a previous occasion. The applicant directed them to the spot where he got the chemical. The applicant also told them that he used it in order to trap birds.

The applicant also showed them the remainder of the chemical, which was in a tobacco plastic bag that was put in a dried gourd.

The applicant was called to a disciplinary hearing. At the hearing he was represented by a shop steward by the name of Themba Dladla. He was found guilty and was dismissed. He did not appeal. He said he did not appeal because he was given twenty-four hours to do that and that period elapsed on a Saturday and therefore could not lodge the appeal as the offices were closed.

The evidence further revealed that the employees were aware that the chemical was highly toxic. When it had been applied in a particular field warning signs were put up to warn other workers not to get into that field. The evidence also revealed that there was an employee of the respondent who died after having consumed the chemical. The employees were also aware of an incident where two beasts (cows) died after having eaten mealies sprayed with the chemical.

During cross-examination the applicant denied that he was called to a disciplinary hearing. The applicant also said he did not remember the respondent telling the employees that anyone found in possession of the chemical would be dealt with severely. He also denied that he was found by RW1 cutting the oranges and applying the chemical.
The applicant did not deny that he was in the field on 11.07.2000. His defence was that the chemical came with RW1 and RW2, David Mkhonta and the two accused him of having sprinkled it on the oranges.

The tenor of the accused's defence was that the respondent's witnesses were fabricating or making up the story against him. It was argued on his behalf that it was highly improbably that he could have exposed himself to the chemical as he knew that it was extremely toxic.

The court had the privilege of seeing the applicant in court. He told the court that he was illiterate and that he did only grade one at school. He indeed struck the

court as being an unsophisticated somebody in the way that he responded to questions during cross-examination. He was a labourer at the respondent's undertaking. It appears to the court that because of his station in life, even though he knew that the chemical was highly toxic, out of imprudence or carelessness it is possible that he did use the chemical as bait on the oranges in order to catch birds.

The evidence in any case revealed that the applicant when confronted in the field admitted that he was using the chemical on the oranges in order to catch birds. The evidence also revealed that when confronted, the applicant told RW1 that it was a long story. By "long story" RW1 said the applicant meant that he had a lot of explanation to give, as he knew that he was not allowed to deal with the chemical in the manner that he did.

The applicant's story that the chemical came with the respondent's witness is clearly not true as there was evidence that the oranges that were found having been cut, had already been sprinkled with the chemical.
The evidence was that RW1 and RW2 were supervisors and the applicant was a labourer. The court finds that it was highly unlikely that RW1 and RW2 could scheme or concoct a story against the applicant in order to gain any advantage in the eyes of the employer, and no such allegation was made by the applicant in the pleadings or in his evidence in court.

The applicant first denied under cross-examination that a hearing was held. He later admitted that and also said he was represented by a shop steward by the name of Themba Dladla. He also denied that he was served with the subpoena to appear at the hearing. He said he found the document in the office and that it was given to him by a certain Mr. Pretorius. When confronted with the evidence that it could not have been Pretorius who served him as the person who served him wrote in SiSwati that he refused to accept service, he maintained that David Maphalala never served him with the notice to attend the hearing. It is strange therefore how he got to appear at the hearing if he was not served with the notice by Maphalala. This conduct of the applicant of denying clear evidence against him only goes to show

that he is the type of person who denies anything if it is not in his interest even if it is true.

The applicant was clearly not an impressive witness. He had no defence to the case against him, and he resorted to making bare denials of the evidence presented in court. He also failed to successfully challenge the evidence of the respondent's witnesses whose evidence corroborated each other. He approached the trial with a simplistic and old-fashioned type of defence that of simply denying all the evidence connecting him to the charge.

The applicant said he could not appeal because the hearing was held on a Friday and had only twenty-four hours to file the appeal. He said the twenty-four hours expired on a Saturday and the offices were closed.
There was no evidence however that the applicant did draft the appeal and the supervisors refused to accept it because it was a Saturday, or that there was no one superior to the applicant that he could serve with the appeal on that Saturday. There was further no evidence that applicant attempted to file the appeal on the next working day, but was refused because twenty-four hours had elapsed. There was also no evidence that the applicant applied for an extension of time within which to file the appeal and was refused. The evidence showed that on Monday the applicant went to the Labour Office to report a dispute. There was no evidence that the applicant did attempt to exercise his right to appeal at all. In the light of these observations, the failure of the applicant to appeal cannot be held against the respondent.

The court will accept the evidence of the two respondent's witnesses as the correct version of what happened on 11.07.2000 that led to the dismissal of the applicant.

The court will therefore come to the conclusion that the respondent has proved on a preponderance of probabilities that the applicant was dismissed for a reason permitted by **SECTION 36 (D) OF THE EMPLOYMENT ACT NO.5 OF 1980.**

The court will also come to the conclusion that taking into account all the circumstances of the case, it was reasonable for the respondent to terminate the service of the applicant.

The applicant's application is accordingly dismissed.

No order for costs.

The members agree.

N. NK0NYANE

ACTING JUDGE - INDUSTRIAL COURT