

IN THE INDUSTRIAL COURT OF SWAZILAND

In the matter between:

CASE NO. 77/2001

SOLOMON M. NDZINISA

APPLICANT

AND

PARSONS TRANSPORT (PTY) LIMITED

RESPONDENT

CORAM:

NKOSINATHI NKONYANE:AJ

DAN MANGO:MEMBER

GILBERT NDZINISA:MEMBER

FOR APPLICANT:N. MTHETHWA

FOR RESPONDENT:C. MOTSA

JUDGEMENT 14/09/05

The applicant is a former employee of the respondent. He brought an application before the court for the determination of an unresolved dispute in terms of Section 85 of the Industrial Relations Act No. 1 of 2000.

In his application he stated that he was employed by the respondent on the 28<sup>th</sup> October 1996 as a heavy-duty driver. He said that on the 4<sup>th</sup> December 1999 he was arrested whilst in the Republic of South Africa on allegations that he had stolen diesel from the company truck that he was driving.

He said the charges were withdrawn on the 17 April 2000 because of the non-appearance of the state witnesses. When he returned to work the manager that he found there did not give him any work to do. He then left his place of employment because of this conduct of the employer towards him of not giving him work.

His pleaded case was that he was constructively dismissed by the respondent. He reported a dispute, but the matter was not resolved and a certificate of unresolved dispute was accordingly issued and is annexed to his application.

The respondent in its replying papers denied that it instituted criminal proceedings against the

applicant. The respondent's pleaded case was that the applicant absconded from work without exhausting any internal remedies at his disposal.

Two witnesses testified in court. It was the applicant and one respondent's witness by the name of Benedict Dlamini.

The applicant in his evidence told the court that on the 3<sup>rd</sup> December 1999 he was instructed to transport timber from Mondi Forest, Pigg's Peak to South Africa.

He crossed the border at about 8:30 P.M and decided to sleep on the South African side together with his lady friend. He continued with his journey at about 04:00 A.M. He made a stop at Hartbeeskop to drop his lady friend. He accompanied her to her house and left the truck's engine running and the doors unlocked. When they returned they found that the engine had been switched off and the ignition keys missing. He said they went away for about five minutes. They then went to report the matter to the nearest police station, about seven kilometers away.

At the police station they found some people including two white men. The applicant said he did not know these two white men, but later learnt from the police that they were from his company and that they had reported to the police that they found him stealing fuel from the truck. The applicant was told that if he wanted the ignition keys, he should follow the two white men. He then hitchhiked and got a lift from another Parsons truck. Along the way they

were stopped by someone who was driving a white car. That person told them that a driver of the company truck committing a crime. The applicant told him that he was the driver of that truck. The two white men then came to the scene in the company of the police. The applicant was then arrested.

The charges were however withdrawn as the complainant failed to come to court. The applicant said he then returned to work. At work he found a new manager that he did not know. He gave him a copy of the document indicating that the charges had been withdrawn. The manager asked the applicant to give him time to contact the Witbank office. After four days the applicant came back with the intention of resuming work. He was however told that the company did not want to take him back because there was evidence that he committed the crime. The applicant thereafter reported a dispute.

During cross-examination of the applicant it was put to him that he was connected by telephone to a certain person by the name of George who said he saw him stealing the fuel. The applicant denied that. The said George was not called to give evidence in court. It was also put to the applicant that he was suspended by Gert Botha for four days and told to collect a charge sheet at the expiry thereof. The applicant denied that. Gert Botha was not called to give evidence before the court.

The evidence of the applicant about how he was dismissed therefore remained unchallenged.

RW1, Benedict Dlamini's evidence was not helpful at all to the court and did not take the respondent's case any further. It was not clear why he was called as witness at all. He told the court that he was a clerk and that he was not responsible for the company drivers. He said he last saw the applicant in 1999.

The applicant was able to prove that he was an employee to whom Section 35 of the Employment Act No. 5 of 1980 applied.

The respondent has therefore failed to prove that it dismissed the applicant for an offence permitted by Section 36 of the Employment Act in terms of Section 42 (2) (a).

The respondent has also failed to prove that it was fair and reasonable to dismiss the applicant as required by Section 42 (2) (b) of the Employment Act.

The applicant's application must therefore succeed, and that is the order that the court makes.

The amounts claimed by the applicant as his terminal benefits were not in dispute.

The respondent is accordingly ordered to pay to the applicant the sum of E48,194:00 (forty eight thousand one hundred and ninety four Emalangen) as his terminal benefits and compensation for the unlawful and unfair dismissal.

No order for costs is made. The members agree.

NKOSINATHI NKONYANE A.J.

INDUSTRIAL COURT