IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 226/2000

In the matter between:

JEREMIAH MAMBA APPLICANT

And

J. D. GROUP (PTY) LTD t/a

PRICE W PRIDE FURNISHERS RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: N. SIMELANE

FOR RESPONDENT: D. MADAU

J U D G E M E N T - 05/10/05

On the 2 August 2000, the Applicant filed a claim for payment of terminal benefits and compensation for unfair dismissal against the Respondent.

The claim was subsequent to a report of dispute to the Commissioner of Labour in terms of Section 41 (3) of the Employment Act Mo. 1 of 1980 (hereinafter the ˣAcf).

The dispute was conciliated upon but no amicable solution was found. A full report was thus filed with the court for determination of the dispute.

BACKGROUND

The Applicant was employed by the Respondent on the 3rd January 1991 as a Credit Manager in one of their shops trading as Price XN' Pride Furnishers, Manzini. In 1997 the Applicant was promoted to the position of Relief Manager in charge of the Bhunu Mall branch at Manzini. The Applicant had a good record and had no written warning for poor work performance or misconduct.

This was until the month of March 1999 when he was charged with two offences as follows:

1. Poor work performance in that on diverse days between the 18th March 1999, and May 1999 the Applicant permitted a cancellation and a rewrite of a customer's order without backdating the date of the rewritten order to the date when the cancelled order was made.

As a consequence thereof, the customer delayed payment of the supplied goods by at least 3 months to the loss and detriment of the Respondent.

2. Secondly, the Applicant was accused of poor work performance in that he failed to adequately monitor the fuel consumption records of one of the drivers at his station. Due to such failure, the driver made fraudulent petrol fills to the loss and detriment of the Respondent.

The Applicant was hauled before a disciplinary tribunal. He was found guilty on both counts and his services were terminated on the 8th July 1999.

The Respondent called one John Zulu (RW1) to testify in support of its case against the Applicant before court. Mr. Zulu was at the time of the testimony the Regional Manager of J.D. Group of companies at Ermelo. In the year 1999, he was still Regional Manager in charge of Swaziland but had just taken over from another officer.

He told the court that he was alerted to the offences at the time and conducted investigations of the same. The matter was then referred to the forensic Audit department of the company for further investigations.

According to the witness, it was a breach of company policy for the Applicant to cancel and rewrite a customer's order without backdating the date of the rewrite to the date of the original deal. This meant a delay of at least 3 months before the customer started paying her installments yet she had already received the goods. The customer was a staff member of the Respondent and the delay in finalizing the transaction was due to lack of one of the ordered items. The missing item had to be sourced from another shop in South Africa. Meanwhile the customer who had ordered 5 items had received 4 of them and was awaiting the 5th item. She kept the 4 items and did not start paying installments until when the last item was found and supplied to her. This was the fault of the Applicant according to the witness.

The witness did not accept the explanation by the Applicant regarding the rewrite and delay in paying the installments. He however did not consider the transaction as fraudulent even though the failure to backdate payment would have cost the Respondent some money. He considered the misuse of fuel as fraudulent conduct by the driver of the van. The responsibility of the Applicant was ensuring proper supervision and observance of policy and procedures to ensure prompt discovery of any such fraudulent conduct. In this case there was considerable delay in discovering the fraud by the head office. This failure he attributed to the Applicant. He again found the explanation by the Applicant unacceptable. He testified before a disciplinary tribunal that tried and found the Applicant guilty of the two offences.

Witness (RW2) for the Respondent was Peter Richard Warr. He was a Forensic Auditor from the Respondent company. He was charged with the investigations that led to the preference of the two charges against the Applicant. He infact charged and motivated the prosecution. He termed the first charge of rewriting an order for a staff member as less serious than the second one of fraudulent misuse of fuel by a company driver of motor vehicle SD 145TJ - a Toyota Dyna.

The result of the investigations were that, in respect of the first charge, the Applicant was found to have breached company policy in rewriting an order but not backdating the date of payment of the first installment to the date when the order was first made. This led to late commencement of payment by at least 3 months to the loss and detriment of the Respondent.

As regards the second charge, his conclusion was that the irregularities committed by the driver of the Toyota Dyna could have been easily picked by the Applicant. His failure to monitor the controls put in place by the Respondent led to the non detection of the fraudulent transaction by the driver. At times the driver would refill the tank after traveling only 10 kms when infact the average fuel consumption and range for the Dyna was 5-6 hundred kilometres per tank. This went on between January to June 1999 without detection.
He estimated the loss incurred between January and June to have been plus or minus E10,000 (Ten Thousand Emalangeni). The motor vehicle log sheet had only been partly filled and 65% of the fuel slips were missing.

He explained that the Branch Manager was charged with the responsibility to keep the fuel card and monitor every fueling transaction as it occurred. To him the Applicant had failed in his duty. The Applicant had his own company car and had maintained perfect records in respect of the car he used. There was no excuse therefore why he had not done the same in respect of the subordinates' van. He should have checked the odometer reading to determine distance traveled since the last refill.

After preparing the charges for breach of company policy, he initiated the prosecution and led evidence at the disciplinary hearing. The result of the hearing was the dismissal of the Applicant. He appealed the decision but same was confirmed.

He stated that to be appointed a Branch Manager, the Applicant must have had sufficient training and/or adequate experience to perform the basic tasks relating to

the portfolio. He did not think that a reprimand and retraining was sufficient sanction for the offences committed.

The witness was unaware of the Swaziland Employment Act requirement under Section 36 (a) to the effect that an employer may only dismiss for misconduct and/or poor work performance after first giving at least one written warning to the employee concerned.

The provision is meant to ensure that before an employee is dismissed for what may be termed routine errors of omission or commission, he/she has been notified of his shortcomings, counselled and where possible, retrained to avoid a repeat of the transgression. It is only then that an employer would be justified to dismiss the employee in terms of Section 42 (2) (a) and (b) of the Act.

The witness readily admitted that no such written warning had been given to the Applicant prior to the dismissal. He agreed that non of the conduct of the Applicant could be termed fraudulent and/or dishonest. He stated that he could possibly equate his conduct to gross negligence.

He however conceded that the Applicant was not charged for gross negligence but faced charges of breach of company policy amounting to misconduct.

The Applicant in his testimony gave explanation of the conduct complained about by the Respondent. The onus of the Applicant in a case of this nature is that of rebutting the evidence of the Respondent to tilt the scales of probability in his favour.

In that endeavour as he had done before the disciplinary tribunal, the Applicant gave testimony as follows:

That he was employed as a Credit Manager on the 3rd January 1991 by the Respondent. In 1997, he was promoted to the position of a Relief Manager in charge of the Bhunu Mall branch at Manzini. That he did not receive any particular training

upon elevation to this position. He relied solely on his experience as Credit Manager. There was no handover either because the incumbent was not present when he assumed the position.

The events leading to the charge of re-writing an order started when he was instructed by the Field Manager at the time to do an NSP order (to order an item that was not in the line of the shop and therefore was not in stock).
The customer, a staff member by the name of Zodwa Ndzimandze had ordered 5 items, 4 of these were available in the shop. The 5th item was not in stock. He did the order and delivered the 4 items. It was the first time he had been confronted with a complication of this nature. He sought the advice of his superior, the Field Credit Manager who directed him to cancel the order and redo it.

The redone order was again rejected by the computer due to coding complications. He then sought assistance of their sister outlet Joshua Doore, who provided the proper code for the missing item. The order was then redone successfully. These complications caused the delay in initiating payment by the customer so that instead of the 1st installment going through on the 1st May 1999, it commenced on the 1st July 1999. The witness explained that the transaction was fully sanctioned by his superior. It was good business for the Respondent and no loss was sustained as a result because the customer fully paid for the items. After all this was a staff member of the Respondent and was in terms of the company policy obliged to pay for the items in six months time, which she did. He did not do any wrong as far as he was concerned.

With respect to the fraudulent use of petrol by a driver of a delivery van, Mr. Ambrose Dlamini, the Applicant explained as follows:

The driver used a Stannic fueling card as per the company policy. At his branch, he had delegated the Credit Manager to retain possession of the fuelling cards and be in charge of filling the logs and keeping a check on the fueling trends of the drivers. The driver brought fuel slips and in the log sheet was filled the date, the amount of fuel and kilometers covered by the car. The Regional Manager provided the branch

with bank statements from the Respondent's Head office for the purpose of reconciling their figures with the bank statements.
The van driven by Ambrose was new, and statements for the car were not received at the branch until sometimes in April or May 1999. That is when the seniors complained of the discrepancies between the bank statements and the records kept at the Branch.

The Applicant told the court that although the driver used a fuel card from the Manzini branch, he was stationed at the Matsapha Warehouse and was not under his direct supervision. He was therefore not in a position to monitor his daily movement and transactions.

He refuted the evidence by the witnesses for the Respondent that he could not delegate this monitoring function to the Credit Manager. In any event, he had not been trained at all as a branch manager but only used his experience and discretion in the matter. As regards the company car he used personally he never abused petrol or the car at all, a position that was confirmed by the witnesses for the Respondent. He observed that he needed to be trained on the aspect of monitoring fleet but not be dismissed for failure to perform a function he had not been trained to do. After all the Regional Manager, and the Field Credit Manager were equally responsible for monitoring use of motor vehicles in their sphere but were not called upon to account for the conduct of Ambrose. He was the only one punished for it, even though he was only relieving a Branch Manager.

He had not received any written warning nor training for any such misconduct or poor work performance and therefore it was unlawful and unfair for the Respondent to dismiss him after 8 years of clean and dedicated service to the Respondent.

The court has carefully analyzed the evidence of the Applicant and that of RW1 and RW2, the following has been proven:

1. That for the reasons given by the Applicant, he caused a rewrite of an order to a staff member. As a result of the rewrite there was a slight delay in the commencement of monthly installments to the Respondent. That the customer fully

paid for the items received. The delay was due to the difficulty in sourcing a product that was not ordinarily stocked by the Respondent. This was the first time for the Applicant to do such a sourcing of an offline product. He got the assistance and approval of his superior the Field Credit Manager to rewrite the order. Though there was a negligible loss to the company due to the delay in commencing payment, the explanation by the Applicant is reasonable. His conduct was prudent and acceptable to a reasonable employer in the eyes of the court.

2. The Applicant was not trained in the functions of a Branch Manager when he was appointed as a Relief Manager at the Bhunu Mall Branch. There was in the period after the appointment a failure in proper monitoring of the activities of the driver in question resulting into questionable dealings in the use of fuel. No documentation was produced by the Respondent to substantiate the fraudulent transactions by Mr. Dlamini. The Regional Manager had a greater responsibility to orientate the Applicant and ensure that he was fully aware of his functions upon his appointment than he had exhibited. This and lack of handover and proper training largely explains the failure that occurred in monitoring fuel usage than the reasons advanced by the Respondent.

What is crucial is that the Respondent did not comply with the dictates of Section 36 (a) of the Act, in issuing out a written warning with respect to the alleged breach of company policy before dismissing him.

The final result of these factual findings is that the Respondent has failed to prove on a balance of probability that it dismissed the Applicant for a reason provided under Section 36 of the Act.

Furthermore the Respondent has consequently failed to establish that it was fair and reasonable to dismiss the Applicant in the circumstances of the case.

COMPENSATION

The Applicant had served the Respondent continuously for a period of over 8 years in a position of responsibility. He had not before these occurrences been found to be

wanting in his duties. This explains the promotion he got which quickly proved to be his ruin. This was due to the failure by the Respondent to prepare him for the job.

As a consequence of the dismissal, the Applicant lost his means of livelihood. His bright career prospects were dashed overnight. Himself and his dependants suffered financial loss and embarrassment as a direct consequence of the loss of employment.

He was however able to start his own furniture shop in the year 2000 which he runs with his son to-date.

At the time of his dismissal he earned E5,515.00 (Five Thousand Five Hundred and Fifteen Emalangeni) salary per month. Upon dismissal he was paid in lieu of leave days not taken and got his contributions to the Pension fund. This means that he lost the company's contribution to the fund which he was entitled to had he not been dismissed.
This application was lodged prior to the coming into effect of the Industrial Relations Act No. 1 of 2000. In terms of the precedents of this court and the Industrial Court of Appeal, compensation is to be granted in terms of the 1996 Industrial Relations Act that permitted 24 months wages as compensation for the unfair dismissal.

Accordingly, taking all the circumstances of the case into effect, the court awards 12 months salary as compensation for the unfair dismissal in the sum of E66, 180 (Sixty Six Thousand One Hundred and Eighty Emalangeni).

TERMINAL BENEFITS

The Applicant was entitled to one months salary in lieu of notice in the sum of E5,515.00 (Five Thousand Five Hundred and Fifteen Emalangeni); twenty days additional notice in the sum of E5,939.30 (Five Thousand Nine Hundred and Thirty Nine Emalangeni and Thirty Cents) and 70 days severance allowance in the sum of

E14,848.40 (fourteen Thousand Eight Hundred and Fourty Eight Emalangeni and Fourty Cents).

Total amount due to the Applicant as compensation and terminal benefits is E92,482.76 (Ninety Two Thousand Four Hundred and Eighty Two and Seventy Six Cents).

In addition, the Respondent should pay the Applicant all the employer's contribution to the Pension Scheme that was withheld upon his dismissal.

No order as to costs.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT- INDUSTRIAL COURT