

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 196/2000

In the matter between:

MOSES K. SHIBA

APPLICANT

And

SWAZILAND MEAT INDUSTRIES

RESPONDENT

CORAM:

NDERI NDUMA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : D. MSIBI

FOR RESPONDENT : Z. JELE

J U D G E M E N T - 04/11/05

The Applicant was charged with the offence of fraud in that on the 15th May 1997, he submitted a claim of an amount of E100.00 and E80.00 in respect of commission for cattle "runners" by the name of Tutu Shiba and Mr. Siboniso Shiba respectively, who upon investigation by the Respondent were found to be non - existent.

It was alleged by the Respondent that two "runners" by the name of Paulos Zwane and Mveli Dlamini who had lawfully assisted the Applicant to buy cattle were as a consequence of the misrepresentation by the Applicant not paid commission due to them in the sum of E30.00 and E50.00 respectively. The two made a complaint to

the Respondent and this led to the investigations that uncovered the fraudulent claims.

The following facts are common cause:

That the Respondent had a system in terms of which cattle buyers sourced "runners" in respective areas to help them source cattle. These "runners" were paid a commission of E5.00 per cow and the buyer also received a commission of E5.00.

The "runners" were paid their commission on a monthly basis and the cattle buyer received his commission with his salary at month end.

The two cheques of E80.00 and E100.00 in respect of a commission due to "runners" were issued in the name of Tutu Shiba and Siboniso Shiba respectively.

The Applicant collected the two cheques from the Respondent and the same were cashed by the drawee.

That the Respondent had received all the 36 cattle in respect of which the commission was paid.

The Respondent while conducting its investigations did not find Tutu Shiba and therefore was not able to question him regarding the allegations made by the Applicant in answer to the charges.

According to the Applicant, on the material day he had bought 20 cattle from Ekupheleni and 16 from Nkhaba. The cattle were bought out of a joint effort from Tutu Shiba, Paulos Zwane of Swaziland Meat Industries (SMI); and one Mveli Dlamini and himself.

As a result, he owed commission to the "runners" as follows:

E30.00 to Paulos Zwane; E50 to Mveli Dlamini and E100.00 to Tutu Shiba.

There were rules that he followed in the recruitment of "runners". They had to be registered as "runners" for the areas in question, and had to have identity documents for purposes of cashing out the cheques.

For that reason and to avoid complications he separated the commission in two and made a claim for Tutu Shiba in respect of the 20 cattle from Ekupheleni and a separate claim for E80.00 in respect of the 16 cattle from Nkhaba. This he made in the name of Siboniso Shiba, for the purposes of identification with the instruction to him to cash the money and hand it over to the Applicant to pay E30.00 to Zwane and E50.00 to Dlamini.

It was only Tutu Shiba who was a registered "runner" at the time, hence he could not have claimed in the name of Mveli Dlamini or that of Paulos Zwane.

He had used their help to source the cattle and was bound to pay them. He had no intention to defraud the Respondent nor deny the two commission in respect of the cattle they had helped him acquire. The only reason they had lodged a complaint was because he had delayed in paying them because he had not returned to their area in time due to personal complications resulting from a breakdown of his motor vehicle. He estimated the delay to have been between 2 - 3 weeks. He eventually paid them the commission.

The Applicant at the disciplinary hearing explained that the rural community often had no documentation for identification. He recalled a case of one Lusekwane Kunene who used his nephew's name Sabelo Dlamini to make out the claims because he had no passport document. There was nothing untoward with these arrangements provided the people concerned eventually received their commission.

In this case, neither Mveli Dlamini nor Paulos Zwane were registered as his "runners". He used the different names of Tutu Shiba and Siboniso Shiba to separate Shiba's commission from that of Zwane and Dlamini.

This arrangement may be difficult to understand by a sophisticated person who did not understand how the community lived, the witness explained. Zwane who was a former employee of the Respondent was paid commission because he had assisted in the acquisition of the cattle.

The Applicant produced an old graded tax certificate to prove existence of Tutu Shiba. In any event, it was not in dispute that the two cheques in Shiba's name had been cashed at the bank with no problem. The two were produced at the trial and had been cashed by the drawee.

After some effort to find Zwane, he testified before the disciplinary tribunal wherein he confirmed that Tutu Shiba was the community cattle "runner" at Ekupheleni. He had introduced the Applicant and Tutu Shiba to the community officially as "runner" and cattle buyer. The two knew each other before. He confirmed that Tutu was present when the cattle was bought and loaded on the material day. Zwane confirmed he knew of the arrangement to pay out commission in Tutu's name. He said the farmers, Magagula Gama, Thomas Shiba, V. A. Ngubeni and Mthimkhulu knew Tutu Shiba well.

There were no rules and regulations in place as to how cattle was to be bought. The Applicant used his discretion.

The story of the Applicant as told at the disciplinary hearing was repeated in court with various variations. These may largely be attributed to the passage of time and the inherent difficulty in detailing these long transactions in exactly the same fashion.

The Applicant was found guilty by the chairman of the disciplinary hearing. This was conducted after an appeal because the initial proceedings had been conducted in the absence of the Applicant.

The conclusion of the chairman was that Tutu Shiba alias Siboniso Shiba was non-existent and therefore, the Applicant had falsely crooked up the names to fraudulently claim commission.

This is inspite of the evidence by Zwane, the SMI employee that he had appointed Tutu Shiba as a "runner" and that he had helped the Applicant to procure cattle. The evidence of a tax certificate in Tutu Shiba's name was rejected as false.

Evidence that the commission was cashed by Tutu was not controverted by any credible evidence. There was evidence that the complainants Mveli Dlamini and Paulos Zwane had been paid commission. That the sum of E180.00 commission in respect of 36 cattle delivered to the Respondent had been fully paid to the "runners" and there were no more complaints.

There were no conventional rules operational at the rural environment where the Applicant bought cattle. He had to use his wit and experience to procure cattle. There was no formal complaint by the authorities of the communities against the Applicant with respect to procurement of cattle and for payment of commission.

The Respondent called several witnesses to prove its case against the Applicant.

RW1 was Trevor P. Wolverson an Engineer by profession. He was the chairman of the disciplinary tribunal that eventually dismissed the Applicant. He told the court that he had worked for the Respondent for 21 years. He chaired the hearing and the complainant/prosecutor was one Fakudze. He told the court that the Applicant made claims in the name of Tutu Shiba and Siboniso instead of Mveli Dlamini and Paulos Zwane.

He could not recall properly the exact explanation given by the Applicant for this, but he had said that Tutu Shiba was his "runner" and was the same person as Siboniso Shiba.

He went to visit the community in question during the hearing and no one could recall Tutu Shiba. The Applicant refused to accompany them because he said he was booked for an interview at Simunye. He produced a graded tax certificate in the name of Tutu Shiba. The Applicant had alleged that he had gotten the certificate from Tutu Shiba's girlfriend at Mahlanya market. He reached the conclusion that the

Applicant had fraudulently paid the commission to his brothers instead of paying the correct "runners". He told the court that Mveli Dlamini and Paulos Zwane did not appear before the tribunal. It is clear however from the record of the disciplinary hearing that Paulos Zwane appeared and testified to the authenticity of Tutu Shiba and the fact that he had already received his commission from the Applicant in respect of the cattle in question.

The witness explained that the Applicant was not charged for not paying Mveli Dlamini and Paulos Zwane but for his misrepresenting that Tutu Shiba And Siboniso Shiba were his "runners" when they were non existent.

RW2 was Kenneth Mfanimpela Fakudze. He was the initiator of the hearing and was the supervisor of the Applicant at work. He had received a complaint that the Applicant did not pay commission to Paulos Zwane and Mveli Dlamini. He refuted the evidence of the Applicant that one Tutu Shiba was a registered cattle runner. The claim for E 100.00 and E80.00 in respect of Tutu Shiba and Siboniso Shiba were therefore false according to him. He confirmed that the Applicant had delivered 36 cattle to the Respondent in respect of which the two commissions were paid.

He concluded that there was fraud. He acknowledged that the two complainants had belatedly received their commission. That there was no direct relationship between the Respondent and the "runners". They were directly recruited and paid by the Applicant.

Several issues fall to be determined as follows:

1. Was the Applicant an employee to whom Section 35 of the Employment Act applied?
2. If so, was there a fair reason for his dismissal in terms of Section 36 of the Employment Act?
3. If there was a fair reason for his dismissal, was it fair and reasonable in all the circumstances of the case to dismiss him?

From the totality of the evidence before us, it is clear that the Applicant had served the Respondent as a cattle buyer from 1992 till he was dismissed on the 8th October 1998. At the time he earned a monthly salary of E1,041.48 per month and received a commission of E5.00 per every cattle he bought for the Respondent. He was authorized to pay E5.00 commission to people who assisted him to look for the cattle he bought for the Respondent.

There was no direct relationship between the people the Applicant selected to assist him buy cattle and the Respondent as such, other than paying the commission of E5.00 to them through the Applicant.

The Applicant was assisted by the local community in the selection of the cattle buying assistants in each community.

There was a misunderstanding between the Applicant and two of the cattle 'runners' due to a delayed payment of the commissions due to them. The two "runners" were eventually paid their commission although after they had already made complaints to the Respondent. There did not appear in the whole to have been any problem arising from the daily purchase transactions conducted by the Applicant since he was employed in 1992. It therefore comes as surprise to the court that what appears to have been a minor spat between the Applicant and his own recruits in respect of the E80.00 commission resulted in his dismissal.

A careful analysis of the explanation given by the Applicant as to why he preferred the commission of E80.00 to be made out in Siboniso Shiba's name appear quite reasonable in the context of the daily transactions he conducted at the community level. It is extremely naive to adopt a know it all, armchair attitude regarding the various relationships between the Applicant and his cattle runners.

The court has reached the conclusion that there was no basis for the Respondent to find that Tutu Shiba did not exist nor was the conclusion that the E 180.00 commission was claimed fraudulently based on any facts at all.

The Respondent had received all the 36 cattle in respect of which the commission of E180.00 was made.

Mr. Paulos Zwane, in his testimony before the disciplinary tribunal confirmed the Applicant's version of events as far as the existence of Tutu Shiba was concerned and the role he had played in the purchase of the cattle and the claim of the commission. After all, the two cheques written in Tutu Shiba's and Siboniso Shiba's name were duly cashed by the drawee (himself) and no complaint came from the bank with regard to the two encashment.

The Respondent in the court's view, for reasons not candidly placed before the court chose to interfere in matters outside of its province, with a view to victimize an employee who had no adverse record, up to the time these spurious allegations were made by his agents.

The charade by the chairman of the disciplinary hearing in visiting and interrogating members of the community where the cattle was bought amounted to unwarranted and misdirected investigations, by an officer who was supposed to act impartially, while chairing the hearing. He instead became the investigator, took over the prosecution from Mr. Fakudze and sat as a judge at the same time. His conclusions that Tutu Shiba and his girlfriend who had provided the tax certificate for Tutu Shiba were fictitious were without reasonable foundation.

This was the basis for imputing fraud on the Applicant. The evidence presented to the court to establish fraudulent conduct by the Applicant was grossly insufficient to establish such a case on a balance of probabilities.

It follows therefore that the Respondent failed to show that it had dismissed the Applicant for an offence permitted by Section 36 of the Employment Act. The Applicant himself established that he was an employee protected by Section 35 (2) of the Employment Act. He could only be dismissed for a fair reason in terms of Section 36. This was clearly not the case in all the circumstances of the case. The Respondent therefore failed the test placed upon it by Section 42 (2) (a) of the Employment Act.

The further onus placed on the Respondent by Section 42 (2) (b) was to prove that the dismissal of the Applicant was fair and reasonable in the circumstances. The Applicant did not commit any offence against the Respondent. He was employed to purchase cattle and had constantly delivered it since 1992. Even on this occasion he bought 36 cattle and claimed commission in respect thereof. The evidence that he had paid his agents was un-controverted. The Respondent could not fairly dismiss him for the delayed payment of his agents. This was because the cattle 'runners:" were not agents of the Respondent and it had no direct responsibility over them. There was no basis for rejecting the plausible narration by the Applicant of the events that took place at Ekupheleni and Nkhaba on the material occasions described.

The dismissal was unwarranted and obviously gross in all the circumstances of the case.

The Applicant had lost his means of livelihood; he had been shamed in the community where he conducted his business of buying cattle. He was over 50 years old and chances of alternative employment were very slim. He was without gainful employment up to the time the case was heard. He had suffered serious financial loss, and his dependants were greatly affected.

As stated earlier, the Respondent had no tangible basis in arriving at the conclusion it had. There was no justification for the frolic by the Respondent out of its jurisdiction to victimize its employee. There was no loss whatsoever to the company nor any evidence of potential prejudice from the track record of the Applicant.

Accordingly, the court finds this to be a proper case for awarding the Applicant sixteen (16) months salary as compensation for unfair dismissal in terms of the 1996 Industrial Relations Act that was operative when this application was filed before court.

The Applicant was not paid any terminal benefits upon dismissal. He claims one month's salary in lieu of Notice in the sum of E1, 041.48

Additional Notice	E 680.00
Severance Allowance	E1, 700.00

Total

E2, 421.48

This would be in addition to the compensation in the sum of $16 \times E1, 048.48 = E16, 663.63$.

Total payment to the Applicant by the Respondent amounts to E19, 085.16
(Nineteen Thousand and Eighty Five Emalangeneni Sixteen Cents)

The costs to follow the result.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT-INDUSTRIAL COURT