

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO: 30/3

In the matter between:

MFANAWEMPHI NKOMONYE

APPLICANT

AND

GUARD ALERT SECURITY SERVICES

RESPONDENT

CORAM

NKOSINATHINKONYANE:AJ.

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR APPLICANT: M. DA SILVA

FOR RESPONDENT: J.M. MAVUSO

## JUDGEMENT 17/02/05

The applicant was employed by the respondent in March 1991 as a security guard. He worked for the respondent until November 2000 when he was dismissed.

The applicant reported a dispute; During conciliation no settlement was reached by the parties. The matter is therefore before the court under a certificate of unresolved dispute issued by a CM AC Commissioner on 19.06.01.

The applicant's case is that he was unlawfully dismissed by the respondent on allegations of theft of property from his duty station at Matsapha Swaziland Electricity Board.

The respondent says it lawfully dismissed the applicant for dishonesty in terms of section 36(b) of the Employment Act No.5 of 1980.

The applicant's evidence revealed that the property involved, a copper dumb bell, got lost during the night shift. He -was- resumed duty on the day shift following the night when the property went missing. He said those who were in the night shift undertook to report the incident at the respondent's office.

After a few days he was picked up by the police for questioning at the police station. He says he told the police that when the property got lost, he was not on duty. He says the police then tortured him until he came up with an untrue story that he stole the property, in order to save

his life.

The respondent also held a disciplinary hearing. The applicant says he told the members that he lied at the police station when he said he stole the property because he wanted to save his life as he was being tortured.

At the hearing there was no any other independent evidence implicating the applicant other than the statement that he masduo the police. The applicant was confronted with that statement.

Two witnesses testified for the respondent. RW1, Luke Ndlala told the court that he went to the police station where he was given the statement made by the applicant. RW1 said he was the chairman of the hearing. He said the applicant also told them during the hearing that he was tortured by the police and that he made the statement to save his life. RW1 said the applicant however also admitted to members that he stole the dumb bell or roll of copper wire.

RW2, Solomon Mkhwanazi said that he was also present during the hearing. He told the court that the applicant never said that he was tortured.

The applicant told the court that they learnt in the morning when they resumed the day shift that there was property that was stolen during the night. The applicant also said he told the police that.

That evidence was not challenged. The police were not called to testify and deny that evidence or the evidence of torture.

The applicant also said that it was the police who told them what to write in the statement.

Again that evidence was not rebutted by the respondent as the police did not testify.

It is a mystery to the court why the applicant, who was not even on duty when the property was stolen became the prime suspect and was eventually dismissed.

If the applicant admitted to the police that he stole the roll of copper wire, it is not known why did the police not take him to a magistrate to make a statement of the confession.

The failure of the police to take the applicant to a magistrate only goes to show that the statement was indeed not made freely and voluntarily, and it confirms the applicant's evidence that he was tortured and made the statement to the police to save his life.

The court will come to the conclusion that the applicant was a credible and reliable witness as he was not shaken during cross examination. The respondent's witnesses on the other hand were not credible as they gave contradictory evidence. RW1 said that the applicant told them during the hearing that he was tortured by the police. RW2 however told the court that the applicant never said that.

Before the court there was no other evidence connecting the applicant to the theft of the dumb bell besides the statement that he made to the police.

The respondent further relied for its case on the evidence that the applicant admitted during the hearing that he stole the dumb bell. The applicant however denied that he admitted the theft of the property. He said during the hearing the statement that he made at the police station was produced and he admitted that he made it, but denied that he stole the property.

The court having already pointed out above that the respondent's witnesses were not credible, it will reject the respondent's evidence and will accept the applicant's evidence that he never admitted the theft of the property during the hearing.

The statement that the applicant made to the police is clearly inadmissible. The police before whom the statement was made was not called as a witness and thus did not rebut the applicant's evidence of torture.

It follows therefore that the respondent has failed to discharge the burden of proof resting on it in terms of section 42 (2) (a) and (b) of the Employment Act, No.5 of 1980, namely; that the reason for the termination was one permitted by section 36, and that taking into account all the circumstances of the case it was reasonable to terminate the service of the employee.

From the evidence before the court, the applicant has proved on a preponderance of probabilities that he was unlawfully, wrongfully and unfairly dismissed.

The court will accordingly enter a judgement in favour of the applicant.

RELIEF.-

The applicant seeks re-instatement and arrear wages from date of dismissal to date of re-instatement.

Alternatively, the applicant seeks notice pay, additional notice, severance allowance and compensation.

From the evidence led before the court it would not be a good idea for the court to make an order for re-instatement. The applicant is now occupying the position of supervisor at Chubb security. At the respondent's place, he was just a security guard.

Furthermore, to make an order for re-instatement with arrear wages would weigh heavily on the respondent.

The court will therefore make an order that the respondent pays the applicant his terminal benefits as follows:-

E 900.00      NOTICE PAY

E 946.88      ADDITIONAL NOTICE PAY

E 2,367.20      SEVERANCE PAY

E10,800.00      MAXIMUM COMPENSATION

E1 5,014.08      TOTAL

The amount is to be payable within fourteen days from the date of this judgement.

No order for costs is made.

The members agree.

N. NKONYANW A.J.

INDUSTRIAL COURT