

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 114/2006

In the matter between:

SANDRINO DU POINT

Applicant

and

MAXI PREST TYRES (PTY) LTD

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : C. MOTSA

FOR RESPONDENT : NO APPEARANCE

J U D G E M E N T – 15/11/06

1. The Applicant instituted legal proceedings against the Respondent in the Industrial Court claiming maximum compensation for unfair dismissal and payment of statutory benefits and certain underpayments.
2. The application was supported by a certificate of unresolved

dispute issued by CMAC in terms of Section 85 (1) of the Industrial Relations Act 2000 (as amended).

3. According to an affidavit of service filed by the Applicant, the application was duly served on the Respondent's manager one Bheki Mathabela on 31st March 2006. Notwithstanding such service, the Respondent did not appear in court to oppose the proceedings and the matter was referred to the Registrar for allocation of a date for *ex parte* trial.
4. The trial proceeded *ex parte* in the absence of the Respondent on the 10th November 2006, and the Applicant testified in support of his case.
5. The court is satisfied on the evidence led that the Applicant is an employee to whom Section 35 applies. He was employed in September 1999 and he worked continuously for the Respondent until he was summarily dismissed on the 23 July 2004.
6. In the year prior to the termination of his services, the Applicant was employed as a sales manager. In his testimony, the Applicant described the frustrations he experienced at work, arising principally from problems in his working relationship with the administration manager and the failure of the Respondent's senior management to effectively resolve these problems. The Applicant was accused of underperforming, and given an ultimatum to either accept his demotion to the position of sales representative, or forfeit his customer accounts and the commission he earned from such accounts. He accepted the demotion, because he needed the

commission to support his family.

7. The Applicant testified that he was discouraged and demotivated by his forced demotion. He considered leaving the Respondent's employ and establishing his own business to refurbish motor vehicles and give them a sporty image with state-of-the-art music systems, spoilers, mag-rims, etc. The intended trade was entirely different from the Respondent's core business of selling and repairing tyres, according to the Applicant.
8. The Applicant and his friend Carlos registered a company, but they had no finance and did not start trading. The company had no licence, no stock and no premises. It existed only on paper and as a dream for the future, according to the Applicant.
9. The Regional Manager of the Respondent, Fred Bridgens, discovered that the Applicant had caused a company to be registered. He confronted the Applicant and wanted to know if it was true. The Applicant admitted the existence of the new company, but explained that it was not trading. He informed Bridgens that he was frustrated at work because his grievances had not been resolved, and the company had been registered as a contingency measure in case he was driven to resign.
10. Bridgens informed the Applicant that he had breached the rules of the company by registering the company. He informed the Applicant that he should either resign to pursue his dream or give up his involvement with the new company and pursue his career

with the Respondent. He sent the Applicant home for a few days to consider his decision.

11. The Applicant states that he returned and informed Bridgens that he had decided to stay with the Respondent and raise his performance level. He agreed to terminate his association with the new company. This was in April 2004.
12. The Applicant states that he immediately resigned from the new company and informed his partner Carlos that he was pulling out. Carlos accepted the position and later refunded the Applicant the money he had spent in registering the company. The new company began trading a few months thereafter under the style Auto City but according to the Applicant he was no longer involved.
13. In June 2004 Bridgens praised the Applicant for improving his work performance as a sales representative for the Respondent.
14. In July 2004 Bridgens requested the Applicant to find out if Carlos was willing to sell him shares in Auto City. Applicant enquired and subsequently informed Bridgens that Carlos was not willing to sell him shares. After a week, Bridgens summoned Applicant to his office and demanded that he resign, because he had set up a company in breach of the company rules. When Applicant protested that he had severed connection with the company at Bridgen's request and saw no reason to resign, Bridgens responded that he had to "cover his arse".
15. The Applicant refused to resign. He was suspended pending a disciplinary hearing.

16. A disciplinary hearing was convened. The Applicant was given the charges at the hearing. His complaint that he did not understand the charges was overridden. The Chairperson was Kevin Haycock, the factory manager. The initiator and complainant was Bridgens, who was senior to the Chairperson. According to Applicant, the chairperson interfered with his cross-examination of Bridgens and answered questions on Bridgens behalf. At the conclusion of the hearing, the Applicant was found guilty of gross misconduct; working against the interests of the company; and destroying the trust relationship between employer and employee.
17. The Applicant thereafter received a letter of dismissal signed by the Regional Manager Fred Bridgens, who was the complainant at the disciplinary hearing.
18. The verdict of the chairperson of the disciplinary hearing states that the Applicant's misconduct consisted in his:
 - opening a business that would be in direct competition with Maxiprest;
 - procuring premises for such business;
 - entering into a venture to flood the market with cheap imported tyres, to the detriment of the Respondent's business.
19. The Applicant denies that the business he intended opening would be in competition with the business of his employer. In any event,

he had not intended opening any business whilst he remained in Respondent's employ. At the instance of Bridgens, the Regional Manager, he severed his connection with the company he had registered together with his friend Carlos and he was not involved in any of the business activities of the new company thereafter. In the absence of the Respondent, this testimony was not challenged.

20. The Respondent as employer bears the burden of proving that the dismissal of the Applicant was for a fair reason, and was reasonable in all the circumstances.
21. The verdict of the disciplinary chairman was not justified, if the evidence of the Applicant is to be believed. Mere formation of a paper company which does not trade cannot be construed as misconduct in the absence of a specific company regulation forbidding such action. According to the Applicant, no such company regulation was ever brought to his notice until his confrontation with Bridgens. At Bridgen's instance, he ceased his involvement in the company. If any company regulation existed, for breach of which he could be disciplined, the company waived its right to take action against him when Bridgens gave him the chance to sever his association with the new company and continue his working career with the Respondent.
22. In these circumstances, the burden of proving the fairness of the Applicant's dismissal has not been discharged.
23. On the unchallenged evidence of the Applicant, it is also established that the dismissal was procedurally unfair due to the Applicant not being given adequate notice of the charges against

him. Also, the appointment of a chairperson junior to the initiator of the charges compromised the ability of the chairperson to ensure that the Applicant had a fair hearing.

24. The Applicant abandoned his claim for underpayments. He is entitled to be awarded his statutory benefits, namely notice pay and severance allowance. He is also entitled to compensation for unfair dismissal.

25. The Applicant worked for the Respondent for almost five years. He had a family to support and his summary dismissal caused him distress and financial hardship. He says that he found another job after about two months, but at a considerably reduced salary. He is still earning E2000.00 less than he earned when he was dismissed.

26. An aggravating feature of the dismissal is the turnabout of the Regional Manager, who initially gave the Applicant the chance to sever his connection with the new company, but later prosecuted the dismissal of the Applicant "to cover his arse."

27. The court considers that compensation of eight months remuneration is reasonable and fair in all the circumstances.

28. Judgement is entered in favour of the Applicant against the Respondent for payment as follows:

Notice pay

E 6 360.00

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Additional Notice	E	4,625.44
Severance Allowance		E11,563.60
Compensation for unfair dismissal		E50 880.00
TOTAL		<u>E73,429.04</u>

The Respondent is to pay the Applicant's costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT