

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 244/2001**

In the matter between:

JACOB YENDE**APPLICANT**

and

UNITED PLANTATIONS LIMITED (SWAZILAND)**RESPONDENT****CORAM:**

NKOSINATHI NKONYANE	:	ACTING JUDGE
DAN MANGO	:	MEMBER
ERNEST HLOPHE	:	MEMBER

FOR APPLICANT	:	X. HLATSHWAYO
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OF SIGWANE & PARTNERS

RESPONDENT

:

M. SIBANDZE**OF CURRIE & SIBANDZE****ATTORNEYS**

J U D G E M E N T - 08/03/06

[1] This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent in terms of Section 85 (2) of the Industrial Relations Act No. 1 of

2000.

[2] The Applicant told the court that he was dismissed by the Respondent on the 25th October 2000. He claims that the dismissal was unreasonable unfair and unlawful.

[3] The Applicant now wants the court to make an order that the Respondent reinstated him or alternatively that the Respondent pays him the following:

-	Notice pay	-	E 2,372.00
-	Additional Notice pay	-	E 2,846.40
-	Maximum compensation	-	E28,464.00
-	Severance pay	-	E 7,116.00

[4] The Respondent denied that the dismissal of the Applicant was unreasonable, unfair and unlawful. The Respondent stated in its replies that the dismissal of the Applicant was fair and was in terms of Section 36 (b) of the Employment Act. The Respondent further stated that the dismissal was reasonable in all the circumstances.

[5] The Applicant has initially included claims for payment of November and December 2000 salaries, and also January 2001 salary and increment. These claims were however abandoned.

[6] The witnesses testified before the court. The Applicant was the only witness for his case. Two witnesses testified on behalf of the Respondent.

- [7] The Applicant told the court that he was employed by the Respondent as a Bookkeeper on the 30th August 1993. In 1996 he assumed the position of Stock Controller. In May 1999 he became the Company Buyer until he was dismissed on the 25th October 2000.
- [8] He told the court that between January and February 1994 the Estate Manager asked him to check the petty cash vouchers as it appeared that the company was being overcharged. The Applicant carried out that task and he discovered that the company had lost about E15,000.00. He also discovered that these petty cash vouchers were authorized by the Estate Accountant. The Estate Accountant was a certain K. K. Shabangu. Two employees who were involved in this misconduct were fired by the Estate Manager.
- [9] The Applicant said Shabangu who was on leave at that time came back in March. The Applicant said Shabangu did not make any comment on the matter. The Applicant said from that time onwards the relationship between him and Shabangu was strained.
- [10] The Applicant was dismissed as Bookkeeper for poor performance in December 1995. He was invited to apply for a new and junior position of Stores Controller, he applied and was re-engaged as a Stores Controller. He performed those duties until the 21st May 1999 when he was moved to the position of

Buyer. He held that position until he was dismissed on the 25th October 2000.

- [11] The Applicant denied that when he was the company Buyer, he also performed the duties of Stock Controller. He denied that he borrowed money from the barman that he never paid back. He admitted that there was an order that was made without following the company procedure. He said that he was sick during that period and that he thought the order did not reach the Head of Department in time.
- [12] On behalf of the Respondent Julius Malambe (“RW1”) told the court that he was employed by the Respondent as a Barman in 1997. He said the Applicant was his supervisor. He said he used to take stock every month end together with the Applicant. RW1 told the court he would sometimes do the stock taking alone when the Applicant did not show up. RW1 said the Applicant would not be present for stock taking for about four to five months in a year. RW1 said the Applicant ordered him to give him sums of money from the day’s takings. He said the Applicant would promise to pay back the money, but ended up not paying it back. RW1 said the Applicant instructed him to cover up the money that he had taken by making an entry in the books that these were allergies.
- [13] By allergies was meant stock which had manufacturing faults like for example, half filled liquor outlets, cracked liquor bottles or squeezed liquor cans.

[14] Sidney Oertel ("RW2") told the court that he chaired the disciplinary hearing. He also took the minutes of the proceedings. He said he did not accept the Applicant's defence. During cross examination he admitted that it was not proper for RW1 to do stock taking alone.

[15] RW1 also told the court that he disappeared from work for about two weeks. He said he was thereafter called to resume work by Shabangu. When he had come back to work, he then made the statement that implicated the Applicant. He also said he was afraid to tell anybody at work and what the Applicant was doing because the Applicant was his supervisor.

[16] The Applicant denied that he ordered RW1 to give him money. The Applicant told the court that he did not and could have done what RW1 told the court that he did as at the relevant time he was no longer involved with stock taking, but was then the company buyer.

[17] The Applicant's defence was supported by documentary evidence. The evidence form annexure "JYD4" shows that on the 21st May 1999 the Estate Administration Manager, Layne Oosthuizen wrote an interoffice memorandum addressed to all heads of Department in which he stated *inter alia*, that:

" Mr. J. C. Yende has moved from being Stock Controller to Buyer and will be handling all of our ordering needs. His new office is located in the workshop building, since we are now moving to a new system of ordering I ask that all people concerned be patient and considerate in their dealings . if you have a problem at any time during the ordering process, please forward your complaints to myself as Mr. Yende is not in a position to change policy."

- [18] The Applicant told the court that his previous duties were taken over by Mr. Oosthuizen. Mr. Oosthuizen was not called to testify and deny this evidence. The Applicant denied that although he was given the post of company buyer, he continued to perform his previous responsibilities of Stock Controller.
- [19] The burden of proof was on the Respondent to prove that although the Applicant was the company Buyer at the relevant time, he was also required to do stock taking for the Beer hall. In terms of annexure "JYD2" when the Applicant was hired as the Bookkeeper, he was given the job description. His job description included *inter alia*: "control of stocks for main stores Beer hall and Fruit Stall".
- [20] In terms of annexure "JYD3", the Applicant failed to perform to the satisfaction of the employer and was accordingly demoted. It is highly unlikely therefore that the Applicant could have continued to do accounting work when it had already been found that he was performing below the expected standard.
- [21] RW1's evidence therefore that the Applicant was his supervisor and they both falsified the Beer hall financial records during stock taking session is rejected by the court as false. The evidence before the court clearly showed that at the time the Beer hall stock taking was carried out for the months of January to September 2000, when the loss of E79, 707.32 was discovered the Applicant was no longer the one responsible for the Beer hall but these duties were taken over by Mr. Oosthuizen.

- [22] The evidence clearly showed that the Applicant stopped being Stock Controller on the 21st May 1999 which he appointed the Company Buyer. He cannot therefore be held responsible for what happened at the Beer hall after that period.
- [23] RW2's evidence was not helpful to the court at all. He said he got information during the weekly meetings that there were complaints about the Applicant's performance, he did not say however as to which period did the complaints relate to. RW2 made numerous reference to minutes of the disciplinary proceedings. Those minutes were recorded by him and are in summary form. He pointed the court to the part of the minutes where he asked the Applicant for stock figures and the Applicant said he was going to produce them, this confirming that the Applicant was still involved in the Beer hall.
- [24] The Applicant however explained to the court that when he said he was going to get the stock sheets, he meant that he was going to look for them in the files where they were being kept.
- [25] The evidence also showed that the Applicant was not present when Shabangu conducted the stock taking showing the loss of E79,707.32 for the months of January to September 2000. The Applicant said he was not in good terms with Shabangu. It is not hard to see why the two could not be in good working relationship. The Applicant made a report that implicated

Shabangu about the loss of E15,000.00 through petty cash vouchers that were authorized by Shabangu.

[26] It is interesting to note that on the charge of theft, the Applicant said he was facing a charge of theft of E15,000.00 from the Beer hall. Indeed from the minutes of the proceedings on page 4 of bundle "R", it is stated there that RW1 said the Applicant's borrowings eventually totaled E15,014.00. Before the court however RW1 failed to produce the record showing the Applicant's borrowings.

[27] When RW1 made the statement implicating the Applicant, he was from his home. He had disappeared from work. It was Shabangu who sent for him to come back to work. RW1 said it was Shabangu who asked him to write the statement of what happened.

[28] The court clearly cannot rely on the statement of RW1 who himself is a self confessed thief. He disappeared after the termination of the offence. He was called back to work by Shabangu, who the evidence has revealed that he was not in good terms with the Applicant. Shabangu asked RW1 to make the statement. The only conclusions that the court can arrive at is that RW1 falsely implicated the Applicant at the request of Shabangu who the evidence has revealed was not in good terms with the Applicant.

[29] It is a mystery why Shabangu was not disciplined by the Respondent for the loss of E15,000.00 as the Respondent did dismiss the two other employees that were involved.

[30] The Applicant admitted that there was an unauthorized purchase voucher that was processed in contravention of the company procedures. The only thing wrong with the order was that it was not signed by the Head of Department. The consignment of wine that been

ordered was however delivered to the Beer hall. There was therefore no loss occasioned by the Respondent as the result of the flouting of the procedure.

[31] In terms of section 42 (b) of the Employment Act, the employer must prove that taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee.

[32] The Applicant told the court that he was a sickly person during that period. That evidence was not denied by the respondent. There was no evidence that there was any other infraction of the company procedure by the Applicant. It cannot therefore be said that it was reasonable for the Respondent to dismiss the Applicant.

[33] The court, taking into account the totality of the evidence before it, will come to the conclusion that the Respondent has failed to show on a balance of probabilities that the Applicant was guilty of negligence and theft entitling it to dismiss him.

[34] The Respondent managed to prove that the Applicant violated company procedure when he processed a certain order. Such violation however was not such as to warrant a dismissal taking into account all the circumstances of the case.

[35] The court will therefore come to the conclusion that the Applicant's application should succeed with costs, and that is the order that the court makes:

[36] **RELIEF:-**

The Applicant agreed that he was terminated and hired afresh in 1996 as a Stores Controller. There was no evidence placed before the court that when he was terminated he received all terminal benefits due to him at that time. The court will accordingly calculated his terminal benefits on the basis that he was employed by the Respondent in 1996.

[37] The Applicant did not tell the court his personal circumstances which the court must take into account when fixing the amount of compensation. He did state that he was married and that his wife was employed by a firm of Auditors. The court, taking into account all these factors will make an order that the Respondent pays the Applicant the following:-

a)	Notice pay	-	E 2,372.00
b)	Additional Notice	-	E 1,836.00
c)	Severance pay	-	E 4,616.35
d)	Compensation for unfair dismissal (E2,373.00 x 10 months)	-	E23,720.00
TOTAL			<u>E32,544.35</u>

The Respondent is to pay the costs.

The members agree.

**NKOSINATHI NKONYANE A-J
INDUSTRIAL COURT**

