IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 45/04

In the matter between

PATRICK MASONDO **Applicant**

and

EMALANGENI FOODS **Respondent**

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: Z. MAGAGULA

FOR RESPONDENT: K. MOTSA

JUDGEMENT-12/02/06

1. The Applicant has instituted proceedings for determination of an unresolved dispute, claiming that he has been wrongfully and unfairly dismissed from his employment with the Respondent without any lawful or reasonable cause or excuse. He claims payment of maximum compensation for unfair dismissal, additional notice pay and severance allowance.

2. The Respondent in its Reply avers that it had substantive reasons to dismiss the Applicant, in that:

2.1. It received complaints from various clients such as Spar about

Applicant's merchandising work, and he generally failed to adhere to his duties as merchandiser;

2.2. The Applicant did not turn up for work on Saturday the 11th January 2003 without the Respondent's permission;

2.3. The Applicant in January 2003 refused to continue merchandising unless given a salary increment; and

2.4. Refused an opportunity in January 2003 to be transferred either to the distribution or dispatch department after he refused to continue with merchandising work.

3. Respondent further avers that various disciplinary hearings were held wherein the above issues were put to Applicant.

4. It is common cause that the Applicant was an employee to whom section 35 of the Employment Act 1980 applied. Accordingly the services of the Applicant shall not be considered as having been fairly terminated unless the Respondent proves -

4.1. that the reason for the termination was one permitted by section 36 of the Act; and

4.2. that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the Applicant.
See section 42 (2) of the Act.

5. The Applicant was employed by the Respondent on the 1st or 3rd March 1997 (the precise date being immaterial to this judgement), and he was in the continuous employ of the Respondent until his services were terminated on 29th January 2003. He was employed as a shelf packer or merchandiser, and during the course of his employment he was deployed in the shops of the Respondent's customers in Manzini and Mbabane.

6. A merchandiser promotes the products manufactured by the Respondent. He is stationed in the store of a large customer, and it is his duty to ensure the availability

of sufficient stocks of product, and that the product is properly packed, priced and displayed on the customer's fridges and shelves.

7. The Applicant did not endear himself to the Respondent's customers, who from time to time demanded that the Respondent remove the Applicant as a merchandiser from their store. Nevertheless the Respondent considered him a good merchandiser, apart from his poor timekeeping, and leaned over backwards to accommodate the Applicant and redeploy him.

8. During October 2002, the Applicant was called to a disciplinary hearing on charges of poor timekeeping. During the course of the hearing, the Applicant raised an issue concerning his contractual working hours. It does not appear from the minutes of the hearing that the issue was properly addressed. The hearing was adjourned and never resumed.

9. At another disciplinary hearing on 16 January 2003 on charges of absenteeism, the issue arose again. The Applicant stated that he had not come to work on a particular Saturday because he had already worked the number of hours required of him, from Monday to Friday. Once again, the issue was not properly addressed. The hearing was adjourned for the chairperson to consult with management about the applicant's working hours.

10. On 20th January 2003, the Respondent's general manager Ronnie Egambaram wrote to the Applicant in the following terms:

> *"The following are the working hours:*
> *Monday to Friday 8.00am - 5.00pm (Lunch 1.00pm-2.00pm)*
> *Saturday 8.00am - 1.00pm*
> *The above is the requirement for the **job.***
> *We regret to advise that we will have to retrench you if you are not prepared to comply because these hours are the requirement for the job.*
> *Please advise by 21st January 2003 so that the company can make the necessary arrangements."*

11. On 22nd January 2003 the chairperson reconvened the disciplinary hearing, found the Applicant guilty, and gave him a written warning. On the same day, the Applicant was served with notice of a new disciplinary hearing on the following day.

12. On 23rd January 2003 the Applicant was found guilty on a further charge of absenteeism and given a final written warning. The Applicant refused to sign for the warning, and his representative noted on the form: *"Will only sign document when he has received a copy of company rules and regulations."*

13. On 28 January 2003 the Respondent's general manager called the Applicant to his office and handed him a contract of employment and job description. He requested the Applicant to sign the contract immediately. The Applicant refused and said he wanted time to read the contract. The next day he received a letter from the general manager which *inter alia* contains the following ultimatum:

> *"The purpose of this letter is therefore to advise you that should you not be prepared to work the hours as required by our customers and should you not sign your contract of employment it will be seen by the company that you are not prepared to work the stipulated hours in your contract and you will then leave the company no other option but to terminate your contract of employment."*

12. The new contract of employment spelled out the Applicant's working hours on the same terms as those communicated to the Applicant in the Respondent's letter dated 20th January 2003. It is clear that Mr. Egambaram was extremely keen to commit the Applicant in writing to working the designated hours.

13. According to the evidence of Mr. Egambaram, on the morning of the 29th January 2003 he called the Applicant to his office for a discussion about his conditions of employment. Minutes of this meeting were handed in as evidence. The Applicant however strongly denies that any such meeting took place. According to Mr. Egambaram, he reiterated at the meeting that the designated working hours were an operational requirement. The Applicant replied that he was not contractually obliged to work Saturdays, but he was willing to work the extra day if he received extra pay. He demanded a salary increase from E1005.00 to E2800.00. This was unacceptable to the general manager, who convened a disciplinary hearing for the same afternoon.

14. The Applicant was charged with breach of contract, for refusing to work on Saturdays. The hearing was chaired by the general manager, Mr. Egambaram. It is common cause that the Applicant was not given the minimum of 24 hours notice required by the Respondent's Disciplinary Code and Procedure.

15. The Respondent's witness Cynthia Du Pont testified that the hearing was not really a disciplinary enquiry. She was merely called in to witness a discussion between the Applicant and the general manager. She said that the Applicant confirmed during the discussion that he was not willing to work on Saturdays unless his salary was increased to E2800.00. After that, the general manager terminated the Applicant's services. The Applicant refused to sign the form acknowledging that a disciplinary enquiry had been held. He was informed of his right of appeal.

16. The Respondent produced in evidence a letter dated 29th January 2003 terminating the Applicant's services. The Applicant denied receiving this letter. The letter states as follows:

> *"You have failed to adhere to the contents of my letter dated 28th January 2003 and instead you requested for a salary of E2800.00 per month to continue merchandising. Opportunity was granted for a possible move to either the distribution department or the dispatch department but you seemed reluctant. You want to negotiate the terms.*
> *It leaves me with no alternative but to terminate your services with immediate effect."*

17. The Applicant did not appeal against his dismissal.

18. It is clear from the aforegoing sequence of events that the Respondent's general manager was uncomfortable with the Applicant persistently raising the issue of his contractual working hours. He determined to put the matter to rest by recording the normal working hours for merchandisers in a letter. When this did not silence the Applicant, he prepared a contract document and pressured the Applicant to sign it. The Applicant delayed in signing the contract and tried to negotiate better remuneration terms. The general manager was affronted by the Applicant's lack of cooperation, and terminated his services.

19. In order to assess the fairness of the Respondent's conduct, it is necessary for the court to first examine the contractual position regarding the Applicant's working week.

20. The Applicant testified that when he was employed he was not given any written document detailing the terms and conditions of his employment.

21. According to the Applicant, his working week was Monday to Friday, 8-00 a.m. to 5 p.m. He did not work on Saturdays. He said this continued for about one year. The general manager Ronnie Egambaram then requested him to work on Saturdays and take Wednesdays off. He agreed, and this new arrangement continued for a further year. Thereafter, the general manager requested the Applicant to change to a six day week, Monday to Saturday and said he would be paid for the extra working day. He accepted this arrangement, but the additional remuneration did not materialize. He raised the issue with the general manager from time to time over the next four years without success.

42. The Respondent disputed this evidence regarding the Applicant's contractual working week. The general manager Mr. Egambaram testified that the Applicant's terms and conditions of employment were contained in a written contract entered into at the time of the Applicant's employment. He said such contract expressly prescribes that Applicant's normal working hours were Monday to Friday 8 a.m. -5 p.m., and Saturday 8 a.m. - 1 p.m. The Respondent was however unable to produce such contract in evidence. All that could be produced was an employment form which confirms the appointment of the Applicant as a merchandiser at a salary of E604.00 per month from 3rd March 1997 but fails to designate the prescribed normal hours of work.

43. The Respondent also failed to produce in evidence the statutory employment form prescribed by Section 22 of the Employment Act. This form should by law have been completed and signed by the parties within two calendar months of the engagement of the Applicant. The employer is required to record the employee's normal working hours on the form.

44. The purpose of the section 22 form is to record the essential terms of employment and thereby avoid subsequent disputes such as that which has arisen in this case. The form constitutes prima facie evidence of the matters contained therein. The primary obligation to ensure compliance with section 22 rests on the employer, to the extent that non-compliance constitutes a criminal offence on the part of the employer.

45. Regarding the Respondent's version of a 6 day working week, the evidence of Mr. Egambaram appeared to be based on deductive argument, not personal recollection. The following exchanges during cross examination

illustrate this point:

"Applicant's counsel: Mr. Ronnie when Mr. Masondo was employed by the Respondent was he given any written conditions of employment?

Egambaram: I *cannot see any reason why he was not given any document but unfortunately we didn't (find) anything to prove in our files but I cannot see how any employee that we take on cannot have any document....."*

"Applicant's counsel: Now the Applicant told the court that when he was employed his hours of work were from Monday to Friday and not on Saturdays.

Egambaram: I cannot see any reason for that, to employ someone as a merchandiser from Monday to Friday when all my other merchandisers were from Monday to Saturday and it is a requirement of a supermarket that I have someone there on a Saturday. I can't see any reason why I would make a special exception for this employee only. So the thing that we employed him on a Monday to Friday basis is definitely not true."

26. The Applicant's positive assertion regarding his actual working conditions carries more weight than Mr. Egambaram's deductive argument based on what is unlikely to have occurred.

46. The Respondent also called one Thiemer Phineas Msibi on the issue of working hours for merchandisers. Mr. Msibi said he supervised the merchandisers during the period 1995-2000. He insisted that the Applicant worked from Monday to Saturday. Msibi rather spoiled the effect of his evidence by stating in cross-examination that the Applicant worked from Monday to Saturday from 1995, notwithstanding that the Applicant's employment only commenced in 1997. Msibi is testifying on events which occurred up to ten years ago. It is common cause that the Applicant

worked a six-day week from 1999 onwards. There is a danger that Msibi's recollection that Applicant worked 6 days a week is based on the position that pertained during the last years of his employment with the Respondent.

47. Asked in cross examination whether he kept records of his supervision, Msibi confirmed that there is a merchandiser call sheet which records the clocking times of the merchandisers. Asked to produce a call sheet which shows that the Applicant worked on any Saturday during 1997, he said this could be obtained from the Respondent's files.

48. The court is faced with mutually destructive versions regarding Applicant's contractual working hours up to 1999. The respondent is in possession - or should be in possession - of documentation which could determine the dispute with a high degree of probity, namely the section 22 form and the merchandiser's call sheets. These documents have not been produced in evidence, and no explanation has been proffered.

30. The only documents produced by the Respondent relevant to this issue are salary advice slips generated electronically at the Respondent's head office in South Africa. These slips reflect that the Applicant worked a 26-day month during 1997. No evidence was led as to the origin of the data contained in the slips. If that data was obtained from an employment contract, the slips would be conclusive. If on the other hand a wages clerk at the head office merely assumed that the Applicant as a merchandiser worked a 26 day month, the slips have little probative value. The court is obliged to treat the slips with all the caution afforded to hearsay evidence.

31. Certain inferences can also be drawn from the conduct of Mr. Egambaram in January 2003:

31.1. When the Applicant indicated a reluctance to work on Saturdays unless he received a salary increment to compensate for an alleged extra day worked per week, the general manager's response was to prepare a contract reflecting a 6 day working week and a salary increment of E280.00 per month.

31.2. It is common cause that the Respondent's employees received cost-of-living salary increments in July of each year after the financial year end. Merit increments were awarded to deserving employees in January each year.

31.3. The Applicant had received two warnings for absenteeism in January 2003. The Respondent's customers had demanded that the Applicant be re-deployed elsewhere. It is inconceivable that the increment of E280.00 was awarded to the Applicant on merit, nor was it a cost-of-living increment.

31.4. The only reasonable inference to be drawn is that Mr. Egambaram acknowledged the validity of the Applicant's grievance and the increment offered was in respect of the additional working day, as claimed by the Applicant. The fact that other merchandisers were also given this increment to place them on a par with the Applicant does not mean the inference cannot be drawn.

32. The following factors weigh in favour of the Applicant's version:

32.1. The Applicant advanced a cohesive and credible description of events involving his contractual hours of work. Although his evidence in respect of other issues was not entirely satisfactory, and in many instances was evasive, on this issue there was no reason to believe he was not telling the truth;

32.2. It is improbable that the Applicant would persistently raise a grievance concerning his contractual hours of work without any factual basis whatsoever;

32.3. The contract document relied upon by the Respondent has not been produced and there is no direct evidence that it ever existed;

32.4. Other documents apparently in the possession of the Respondent which could support its version have inexplicably been withheld;

32.5. The conduct of Mr. Egambaram implies an acknowledgement of some validity in the Applicant's version. His argumentative evidence implied a lack of candour;

32.6 The evidence of-Thiemer Msibi and the salary advice slips, standing alone, is not sufficiently reliable or conclusive to discredit the Applicant's version.

33. On the basis of these factors, the court makes the following findings of fact, namely that;

33.1. the Applicant's contractual hours of work for a period of about two years after his engagement as a merchandiser required him to work 5 days

a week.

33.2. the Applicant thereafter agreed to work 6 days a week, on the assurance of the Respondent that he would be remunerated for the extra day.

34. These findings of fact by no means signify that the court condones the Applicant's own conduct. The Applicant agreed as early as 1999 to work a six-day week, inclusive of Saturdays, and he worked those days for four years without demur. The Applicant says that he complained during those four years that he had not received the promised salary increase, but it is clear that he never raised a formal grievance. He seems rather to have raised the issue of the extra work day only as a defence to accusations of poor timekeeping or absenteeism. Even then, he was not consistent: charged with failing to work on Easter Saturday of 2002, the Applicant did not plead that he was not obliged to work on that day. He simply said he had no transport from his home in the rural areas.

35. Furthermore, when Applicant applied for leave in 2002, he claimed 18 days leave, which is the entitlement of employees who work 6 days a week. Not only that, but he calculated the period of his leave (from 1 -20th July 2002), on the basis of six working days per week.

36. It is unfortunate that Mr. Egambaram did not address the Applicant's 'grievance' at an early stage in a direct manner. Faced with a claim for extra remuneration based on a promise which he personally is alleged to have made, he should have convened a grievance hearing before a more senior manager. By failing to do so, he enabled the Applicant to wield his grievance as a defence against disciplinary charges and as a bargaining tool.

37. Instead of resolving the grievance in a proper and fair manner, the general manager resorted to strong-arm tactics: first he fired off a letter laying down the working times; then he tried to pressure the Applicant to sign a contract under threat of retrenchment and dismissal; finally, he convened a mock disciplinary hearing and dismissed the Applicant for refusing to work on Saturdays.

38. If the Applicant was indeed refusing to work on Saturdays, then the Respondent had the simple remedy of waiting for the next instance of absenteeism, then applying a severe disciplinary sanction based on the current final written warning. The court

does not however accept that the Applicant was in fact refusing to work on Saturdays, or refusing to work as a merchandiser. What he was doing was manipulating his perceived claim for extra salary in order to justify his absenteeism, and negotiate better remuneration for himself.

39. The general manager was offended by the Applicant's demand for a salary of E2800.00 per month. Yet there is nothing unusual about an employee negotiating for better wages, and using whatever leverage he has at his disposal to achieve this. Collective bargaining is an integral part of fair labour practice, and in the absence of a recognized union at the Respondent's workplace, individual bargaining is perfectly legitimate. The court does not agree that the Applicant's attempt to use his perceived grievance as a bargaining chip constituted a repudiation of his employment contract.

40. In reality the Respondent dismissed the Applicant because he refused to sign a new contract on the terms dictated by the Respondent. The convening of a mock disciplinary hearing was calculated to disguise the dismissal as a disciplinary sanction, when in fact it was merely a managerial decision based on expediency.

41. Reverting to the defence pleaded in the Respondent's Reply, the court makes the following observations:

> 41.1. The Respondent did not purport to dismiss the Applicant due to complaints received from customers. There was never any internal enquiry to establish the validity of customers' complaints. The Respondent cannot rely on this reason as an afterthought.
>
> 41.2. The Applicant was given a written warning for not turning up for work on Saturday 11th January 2003. He cannot be dismissed for the same offence.
>
> 41.3. As stated earlier, the court does not find that the Applicant refused to continue working, whether as a merchandiser or in any other department. There is evidence of poor timekeeping and absenteeism, but no evidence that the Applicant repudiated his employment contract by refusing to work. On the contrary, he was dismissed for trying to negotiate better working conditions.

42. The Respondent has failed to discharge the onus of proof imposed on it by section 42 of the Employment Act 1980. It is the judgement of this court that the termination of the Applicant's services was substantively and procedurally unfair.

43. Whilst condemning the dismissal of the Applicant as unfair, the court is not unsympathetic to the position of the Respondent. Its customers refused to have the Applicant work in their store. To all intents and purposes, he was redundant as a merchandiser. Nevertheless Mr. Egambaram tried to accommodate him within the structures of the Respondent. The Applicant did not manifest any gratitude for Egambaram's efforts, and chose the time when his job was in jeopardy to absent himself from work and demand an unreasonable salary increase. His conduct was provocative, but the Respondent acted precipitously in dismissing him without fair reason or process.

44. The Applicant is entitled to be paid his additional notice and severance allowance. With regard to compensation for his unfair dismissal, the court considers that the Applicant was to a large extent the architect of his own dismissal. Having been promised a salary increment in 1999, he allowed four years to pass without raising a formal grievance. It was only when the future of Applicant's employment appeared uncertain that he resurrected his grievance as a weapon against his employer. The persistently poor timekeeping of the Applicant and his unpopularity with the Respondent's customers made the ultimate termination of his employment almost inevitable. Taking these factors into account, as well as the personal circumstances of the Applicant and the fact that he has found alternate employment, albeit after 3 years, the court considers that an award of three months salary by way of compensation is appropriate.

45. Judgement is entered in favour of the Applicant against the Respondent for payment of the sum of E5.069.00.

There will be no order for costs. The

members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT