

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 207/2006

In the matter between:

MPHIKELELI SIFANI SHONGWE Applicant

and

**THE PRINCIPAL SECRETARY OF THE
MINISTRY OF EDUCATION 1st Respondent**

THE CHAIRMAN CIVIL SERVICE BOARD 2nd Respondent

**THE MINISTRY OF PUBLIC SERVICE
AND INFORMATION 3rd Respondent**

THE ATTORNEY GENERAL 4th Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: S. MADZINANE

FOR RESPONDENTS: NO APPEARANCE

JUDGEMEN T-04/10/06

1. The Applicant instituted proceedings against the Respondents claiming that he had been unfairly dismissed and seeking payment of notice pay, severance allowance and maximum compensation for unfair dismissal.

2. When the matter came before court, the Respondents were represented by the Attorney- General's Chambers. On 24 August 2006, Crown Counsel N. Vilakati informed the court that the Respondents would not be filing any defence in the matter. The matter was accordingly enrolled for an ex-parte trial.

3. The deliberate decision of the Respondents to raise no defence to the Applicant's claims implies a concession that the termination of the Applicant's services was unfair and that the Respondents are liable to pay the Applicant's claims.. Nevertheless, it is incumbent on the court to satisfy itself that the Applicant's claims have a sound legal basis.

4. The court mero motu raised the question whether the Applicant's claims for notice pay, severance allowance and compensation for unfair dismissal may be validly raised in view of the provisions of the Employment Act (Exemption) Order 1989.

5. This Order provides as follows:

"All public officers except those whose posts do not appear in the Government Establishment Register are hereby together with their employers exempted from Parts V, V11, X1 and X111 of the Employment Act 1980."

6. The Applicant was a permanent and pensionable civil servant, employed by the Government as a security guard in the Ministry of Education and stationed at Manzini Library. On the face of it, the Applicant and his employer the Swaziland Government are exempt from the operation of the stipulated parts of the Employment Act 1980.

7. Part V of the said Act deals with Termination of Contracts of Employment. Section 33 of the Act (under Part V) prescribes the minimum notice of termination of employment to which the employee is entitled. Section 34 creates an obligation on an employer to pay severance allowance if the services of an employee are terminated without fair reason. Section 35 (2) provides that "no employer shall terminate the services of an employee unfairly."

8. The court enquired from Applicant's counsel whether the exemption of the Respondents from the provisions of Part V of the Employment Act 1980 did not have the effect of non- suing his client.

Mr. Madzinane for the Applicant responded thus:

8.1. The Employment Act (Exemption) Order 1989 was made by the Minister (for the time being responsible for Labour) under . powers conferred on him by Section 6 of the Employment Act 1980, which states as follows:

" 6 (1) The Minister may, by order published in the Gazette exempt any person or public authority or class of persons or authorities from the operation of all or any of the provisions of this Act or any regulations, order or direction made thereunder."

8.2 Section 6 (2) however states that:

"No exemption shall be made by the Minister under this section

which is incompatible with any International Labour Convention for the time being in force for Swaziland."

35. Exemption of the Government from Part V of the Act is incompatible with ILO Convention 158 (Termination of Employment Convention, 1982).

36. In the premises, the exemption from Part V is ultra vires the Minister and has no legal force or effect.

37. In any event, the Industrial Court may award compensation for unfair dismissal in terms of Section 16 of the Industrial Relations Act 2000, regardless of whether the parties are exempt from the provisions of Part V of the Employment Act 1980 (as amended).

9. On a perusal of Convention 158, it is clear that Part V of our Employment Act arises directly from the standards of general application laid down in the Convention. The Convention requires, inter alia, that:

9.1. the employment of a worker shall not be terminated without valid reason (Article 4).

9.2. the burden of proving the existence of a valid reason rests on the employer (Article 9);

9.3. a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu of notice, unless he is guilty of serious misconduct (Article 11);

9.4. a worker whose employment has been terminated shall be entitled to a severance allowance or other separation or social security benefits, save in the event of termination for serious misconduct. (Article 12).

10. The Convention does allow for categories of employees to be excluded from its application where their terms and conditions of employment "are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention." (Article 2 (4)).

11. The court is not aware of any special arrangements contained in the Civil Service Board (General) Regulations, the Government General Orders or any other regulations or law which provide protection equivalent to that set out in paragraph 9.1 - 9.3 above for public officers who are part of the permanent establishment of Government.

12. With regard to the protection described in paragraph 9.4 above, the Public Service Pensions Order 1993 provides in Section 13 that "if a member is dismissed from the service or forced to retire in consequence of disciplinary procedures taken against him,

he shall be entitled to a refund of his contributions."

13. The Public Service Pensions Order 1993 does not distinguish between members (of the Public Service Pension Fund) who are fairly dismissed for valid reason, and those who are unfairly and unlawfully dismissed without valid reason. In this respect, the provisions of the Order cannot be said to provide protection (in respect of severance allowance or social security benefits) equivalent to that envisaged by Article 12 of the Convention. Article 12 expressly provides for a severance allowance or benefit to be paid to employees (other than employees terminated for serious misconduct) by the employer, or by a fund constituted by employer's contributions.

14. The Respondents did not raise any defence to the effect that Part V of the Employment Act 1980 has no application to the Applicant. The court has been placed in the position of having to consider such defence mero motu in the absence of any legal representation by or for the Respondents.

15. It appears to the court that the exemption of the Government from Part V of the Employment Act was ultra vires the Minister and has no legal force or effect.

16. The Applicant's services were terminated on the grounds that he was guilty of dishonest conduct, in that he stole two fire extinguishers from the Manzini Library.

17. On or about 2nd December 2002 whilst the Applicant was on duty at Manzini Library, a Mozambican man was apprehended whilst attempting to steal two fire extinguishers. He pointed to the Applicant as the person who had sent him to steal the extinguishers. The Applicant denied this allegation, but he was arrested by the Manzini Police.

18. On or about 5th December 2002 the Applicant was taken before the Swazi National Court at Manzini, where he was convicted of theft and sentenced to ten months imprisonment with the option of a fine of E180.00

19. According to the Applicant, evidence was led in court which implicated him in the theft of the fire extinguishers. The Mozambican man was not called as a witness.

20. The Applicant paid his fine and returned to work. Some three months later, he received a letter dated 17th March 2003 from the Director of the Swaziland National Library Service advising him to "remain at home pending finalization of disciplinary action against you by the Civil Service Board".

21. The Applicant remained on suspension on full pay for a further nine (9) months. On 15th December 2003 he received a letter from the Secretary of the Civil Service Board informing him that the Board "has approved your dismissal as Security Guard Grade A3 from the Ministry of Education with loss of all benefits with effect from 1st March 2003."

22. The Applicant told the court he was never invited to attend any disciplinary hearing nor was any disciplinary enquiry ever held by the Civil Service Board.

23. After his dismissal, the Applicant was not paid any terminal benefits. He has not even received a refund of his own contributions to the Public Service Pension Fund.

PROCEDURAL FAIRNESS OF THE DISMISSAL BY THE CIVIL SERVICE BOARD

24 The Civil Service board appears to have taken the view that, because the Applicant had been convicted of theft, it was entitled to dismiss him without further ado from the Civil Service. This view is clearly wrong.

25. It is a fundamental requirement of natural justice that a person must be given a fair hearing before a decision may be taken which adversely affects his interest. The right to a fair hearing includes a proper opportunity to be heard.

26. This fundamental requirement is reflected in the disciplinary procedures prescribed in Part V of the Civil Service Board (General) Regulations, which give a public officer charged with serious misconduct the opportunity to:

26.1. answer to the charges by way of a preliminary statement of exculpation; and

26.2. appear before a formal enquiry should his written exculpation not be accepted as sufficient.

(See Regulations 42 - 44).

27. It is now a well-established principle of labour relations that an employee who faces dismissal for alleged misconduct should be given the opportunity to state his case and to answer the charges against him. The requirement of a fair disciplinary hearing is so fundamental in the context of labour relations that it will be enforced by the Industrial Court as a matter of policy, even where the case against the employee appears to be unanswerable.

See **Thwala v ABC Shoe Store (1987) 8 ILJ 714 (IC) AT 717A.**

28. The position is the same where an employee has been convicted by a criminal court of a criminal offence which also gives rise to disciplinary charges. The employee is entitled to contest the correctness of the decision of the criminal court, and to try and persuade his employer that his defence was not properly presented at the criminal trial, or that there is other evidence which establishes his innocence, or that, for one reason or another, the criminal verdict was mistaken or wrong.

29. The finding of a court that a person is guilty of a criminal offence is an expression of opinion by the court. Where that opinion is expressed by a properly trained judge or

magistrate, aided by long established rules of procedure and evidence, the conviction will usually be afforded due weight at a disciplinary hearing.

30. Whilst the Swazi National Courts have their place in the hierarchy of the judiciary, dispensing a robust justice based on traditional values and principles, the decisions of the National Courts do not enjoy the same status and credibility as those of the Superior and Subordinate Courts. The officers presiding in the National Courts have no formal training, and the conduct of cases is not regulated by any laid-down rules of procedure and evidence. Accused persons are not entitled to legal representation.

31. In the case of **Randburg Town council v National Union of Public Service Workers (1194) 15 ILJ 125**, the Labour Appeal Court found that an employer cannot rely merely on the conviction of an employee for purpose of taking disciplinary action. A disciplinary hearing must be convened, and the record of the criminal proceedings must be produced for critical scrutiny. The Chairperson of the hearing cannot simply confirm that the employee was convicted. He must read the record to satisfy himself that sufficient evidence was led at the criminal trial to justify the finding that the employee committed the offence/misconduct in question. It is not essential that the witnesses from the criminal trial are recalled to repeat their testimony at the disciplinary hearing, provided that the employee had the opportunity at the criminal trial to challenge their evidence. What is required is that the Chairperson must decide, after reading the court record, and after giving the employee an opportunity to state his case and explain why the conviction is wrong, whether on a balance of probabilities the employee is guilty of the misconduct charged.

32. In the matter at hand, the Respondents did not observe the fundamental requirements of justice nor the disciplinary procedures prescribed in Part V of the Civil Service (General) Regulations, since the Applicant was never invited to exculpate himself in writing, and he was never given the opportunity to state his case at a disciplinary enquiry. It was neither sufficient nor fair for the Civil Service Board to terminate the Applicant's services solely on the basis of the conviction, without holding an enquiry.

33. In the premises, the Court rules that the dismissal of the Applicant was procedurally unfair.

SUBSTANTIVE FAIRNESS OF THE DISMISSAL

34. The onus of proving a valid reason for dismissing the Applicant rests squarely on the Respondents in terms of Section 42 of the Employment Act 1980 (as amended). In the absence of any testimony from the Respondents establishing that the Applicant stole two fire extinguishers, or setting out any other valid reason for the termination, the Court must conclude that the dismissal of the Applicant was also substantively unfair.

AWARD

35. The Applicant was entitled to reasonable notice of termination of his employment. The period of such notice is laid down in Section 33 of the Employment Act 1980, namely one month plus four days for each completed year of service after the first year.

36. He was also entitled to be paid a severance allowance in terms of Section 34 of the Employment Act 1980.

37. The Public Service Pension Fund is not a party to this application. The Applicant must recover the refund of his pension contributions in a separate action instituted against the Fund.

38. Section 16 of the Industrial Relations Act 2000 empowers the industrial Court, where it finds that a dismissal is unfair, to order the employer to pay compensation to the employee, in an amount not exceeding the equivalent of 12 months remuneration. The Applicant's remuneration at the date of termination of his services was E 1629.33 per month. Taking into account the Applicant's personal circumstances; his sixteen completed years of service; his loss of permanent, pensionable employment; and the stigma attached to a dismissal on (unproven) allegations of theft, the court considers that an award of ten months remuneration as compensation would be fair and reasonable.

39. The court enters judgement for the Applicant against the Swaziland Government for payment of the following amounts:

Notice pay E1649.33

**Additional notice pay
(4x15x 76.11) 4566.66**

Severance allowance

(10x15x76.11) 11416.50

Compensation for unfair dismissal 16473.30

TOTAL E34.105.79

40. The Applicant is also awarded the costs of the ex parte application.

P.R DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT