

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 302/2000

In the matter between:

MASWAZI HLOPHE**Applicant**

and

**P. S. WOODWORK/BUILDING
SERVICES (PTY) LTD****Respondent****CORAM:****P. R. DUNSEITH : PRESIDENT****JOSIAH YENDE : MEMBER****NICHOLAS MANANA : MEMBER****FOR APPLICANT : S. MADZINANE****FOR RESPONDENT : B. MLOTSHWA**

J U D G E M E N T – 30/04/07

1. The Applicant was employed by the Respondent company on 2nd August 1997. He was in the continuous employ of the Respondent until his services were terminated in October 1999. At the date of termination, the Applicant was employed as a carpenter at a monthly salary of E1 432.97.

2. The Applicant has applied to court for an order that the Respondent reinstates him to his employment, alternatively that he be paid maximum compensation for unfair dismissal and his statutory terminal benefits.
3. It is common cause that the Applicant is an employee to whom section 35 of the Employment Act 1980 applies. The Respondent therefore bears the burden of proving that the Applicant's services were terminated for a fair reason, and that in all the circumstances it was reasonable to dismiss him – see section 42 of the Employment Act 1980. The Respondent terminated the Applicant's services for alleged "extreme poor workmanship on two wall units". The Respondent alleges that the Applicant's carelessness and poor workmanship caused the Respondent to suffer loss through wastage of materials.
4. The Applicant testified as to the events leading to his summary dismissal. According to his version, the Applicant and a fellow carpenter Thamsanqa Hlophe were constructing two wall units. Although they had not completed the job, they were instructed to give the units to the painters for sanding and painting whilst they constructed the doors.
5. The following day the 20th October 1999, the Applicant and Thamsanqa were called to the paint shop and confronted by Mr. & Mrs. Nino about certain dents on the shelf of one of the units. Mr. & Mrs. Nino are the owners of the Respondent, and Mrs. Nino is the manageress. They were accompanied by the supervisor, Vusi Nzima. The Applicant says the shelves of the unit had been damaged by the painters, not the carpenters, but he was given no

chance to explain. He was instructed to replace the shelf.

6. Whilst he was busy clamping the new shelf into position, Mrs. Nino returned with certain papers. She said these papers were a warning letter for Thamsanqa and a final warning letter for the Applicant. Thamsanqa received his letter and signed for it. The Applicant told Mrs. Nino he could not interrupt what he was doing, and she should put his letter down for him to take when he was finished. Mrs. Nino smacked the Applicant's hand and told him to stop what he was doing. She said the paper would get blown away if she put it down. Applicant continued working, Mrs. Nino put the paper down, and it blew away. She then took the paper and instructed the Applicant to follow her to the office. After waiting at the office, the Applicant was handed a letter and told by Mrs. Nino that he was dismissed. Mrs. Nino told the Applicant to take his tools and wait by the gate for Mr. Nino, to release him. In due course, Mr. Nino came and opened the gate for him and he left.
7. The letter handed to the Applicant by Mrs. Nino was produced in court. It is dated 20th October 1999, addressed to the Applicant, and bears the heading SUMMARY DISMISSAL. It is not signed, but it is on the Respondent's letterhead. The letter states:

“You are charged by Mr. & Mrs. Nino for extreme poor workmanship 2 X wall units. You are charged with:

*incompetence;
negligence;
carelessness leading to loss ;
poor maintenance of standards and wastage of materials.”*

8. In cross examination it was put to the Applicant that this was not a

letter of dismissal and Mrs. Nino explained to him that he would be called for a hearing. The Applicant denied this and insisted that Mrs. Nino told him he was dismissed.

9. Nevertheless, on 25 October 1999 the Applicant received a letter from the Respondent calling him to a hearing with Mrs. Nino the following day. The Applicant attended at the hearing, which was chaired by Mrs. Nino. The Vice-Chairman & Secretary of the Works Council were present, but the Applicant had no opportunity to consult with either of them. Mrs. Nino stated that since the Applicant has three prior warnings, she was confirming his dismissal. There was no discussion of the charges and no evidence led. The Applicant was given no opportunity to say anything or to call any witnesses. He was not advised of any right of appeal. No written notice of dismissal was given to him.
10. The Applicant denies that he had three prior warnings. He says he is only aware of one written warning given to him on 1st March 1999 for poor workmanship, in that he used a plank of wood with a patched hole.
11. The Applicant was not paid his accumulated leave pay. He was however paid for the days he worked up to 20th October 1999. He reported a dispute to the Commissioner of Labour under section 57 of the Industrial Relations Act 1996, which was then in force, claiming that he had been unfairly dismissed on 20th October 1999. The dispute remained unresolved after conciliation.
12. The Applicant was out of work following his dismissal for 5 months.

He is presently employed and he says he no longer wishes to be reinstated to the employ of the Respondent.

13. Under cross-examination, the Applicant persisted in his denial that he was responsible for the damaged shelf of the wall unit. He also denied receipt of any warnings other than that of 1st March 1999. It was put to him that he threatened Mrs. Nino with a chisel when she tried to serve him with the final warning, and that he had to be escorted from the workshop by a security guard. The Applicant said that all these allegations were lies.
14. The Respondent called only one witness, Andrew Makhubu. He is a storeman in the employ of the Respondent, and a shop steward for the union. He impressed the court as a fair and truthful witness.
15. Makhubu said he was called to the paint shop by Mrs. Nino on 20th October 1999, and the poor workmanship on the wall unit was shown to him. The painters refused to paint the unit in that condition. Makhubu produced a small piece of wood to illustrate how the edge of the plank was splintered and split.
16. Mrs. Nino said that both carpenters would get warnings for their bad work. She returned with written warnings. Thamsanqa signed for his, but the Applicant was busy rectifying the mistake on the unit and he did not sign. Mrs. Nino then told the Applicant that since he was refusing to sign, the final warning would change to be a dismissal.

17. In answer to a question posed by the court, Makhubu said that the Applicant did not actually refuse to sign the warning, but he failed to stop what he was doing when Mrs. Nino presented him with the warning.
18. Makhubu confirmed that Mrs. Nino thereafter gave the Applicant a letter of dismissal. Asked by Applicant's counsel if the subsequent disciplinary hearing was not useless since the Applicant had already been dismissed, Makhubu answered : "That is the position."
19. Regarding the disciplinary hearing, Makhubu confirmed that Mrs. Nino was both chairperson and initiator of the charges, and that no evidence was led to establish the charges. He said he could not recall whether the Applicant was given the chance to say anything. He recalled that the Applicant was verbally advised of his right to appeal to Mr. Nino.
20. Makhubu said he had no knowledge of the Applicant ever threatening Mrs. Nino with a chisel, nor had he heard of any such incident occurring.
21. The Respondent did not call Mrs. Nino as a witness. A doctors letter was handed to the court in which it is alleged that she is not fit to appear in court because she is receiving treatment for depression and hypertension. The court will not draw any adverse inference from the Respondent's failure to call Mrs. Nino as a witness, but the obvious consequence is that the Respondent can only rely on the evidence given by the Applicant and Makhubu in order to discharge its burden of proof.

22. The Respondent did not produce any written warnings issued to the Applicant. The Applicant admitted receipt of a written warning on 1st March 1999. Makhubu testified that the Applicant received a final written warning for engaging in an unlawful strike, but he did not state the date of this warning and it is questionable whether the warning was still valid at the date of dismissal. Makhubu stated that the practice of the Respondent is to give three warnings before dismissal. Since Mrs. Nino gave the Applicant a final written warning on 20 October 1999, it is reasonable to assume that this was his third and final warning.
23. Having decided to give the Applicant a final written warning for his poor workmanship, Mrs. Nino then withdrew the warning and gave Applicant the “summary dismissal” letter. Her action in so doing can only be explained as an angry reaction to the Applicant not stopping what he was doing to sign for the warning. There is insufficient evidence, to conclude that the Applicant refused to sign the letter or was insubordinate in not immediately interrupting the work he was doing on Mrs. Nino’s own instructions. In any event, an employee cannot be compelled to sign for a warning that he regards as undeserved. In the view of the court, Mrs. Nino’s reaction was unreasonable and highhanded.
24. The letter of 20 October 1999 is ambiguous. It refers to summary dismissal, but states that the Applicant is “charged” with poor workmanship. On the basis of its contents only, the court would be reluctant to find that this was a letter of dismissal. However, the Applicant’s evidence that Mrs. Nino told him he was dismissed when she gave him the letter stands unchallenged. He was told to

leave the workplace with his tools. This is inconsistent with the letter being a mere notice of disciplinary charges. The Respondent's own witness Makhubu confirmed that the Applicant was dismissed by this letter. In his report of dispute, the Applicant gave 20th October 1999 as his date of dismissal. His testimony that he was only paid up to 20 October 1999 was unchallenged. For all these reasons, the court finds it proved that, as a matter of fact, the letter of 20th October 1999 was intended as a letter of dismissal and the Respondent terminated the Applicant's services on 20th October 1999.

25. The Applicant alleges in his particulars of claim that he was dismissed on 25th October 1999, but he attaches the letter of 20th October 1999 as his "letter of dismissal." The court is prepared to overlook this discrepancy in the pleadings as a simple error which occasioned no prejudice to the Respondent.

26. The disciplinary hearing on 26th October 1999 appears to have been an afterthought, calculated to cover the procedural unfairness of the earlier dismissal. From the summary manner in which the hearing was conducted, the court finds that the hearing was not bona fide. In a small company, it may not always be necessary that the chairperson of the disciplinary hearing had no personal involvement in the incident giving rise to the disciplinary charges, provided that his/her impartiality has not been compromised. Mrs. Nino's emotional reaction and earlier dismissal of the Applicant rendered it impossible for her to maintain an unbiased and fair perspective. It was grossly irregular for her to act as chairperson,

and the hearing was a sham to rubberstamp the previous unprocedural decision.

- 27. The Respondent's witness Makhubu was unable to testify who was responsible for the defective workmanship he observed on the wall unit. Neither Mr. or Mrs. Nino testified on this important issue, and the court is unable to find that the Respondent discharged its onus of proving that the Applicant was guilty of poor workmanship in relation to the wall units.
- 28. The Respondent's counsel in his closing submission relied upon a plethora of facts and circumstances which are not supported by any testimony. The judgement of a court is based on real evidence, not conjecture and oratory.
- 29. The court finds in all these circumstances that the termination of the Applicant's services was substantively and procedurally unfair.
- 30. The Applicant has abandoned his claim for reinstatement. He is entitled to be paid his leave pay and terminal benefits, as follows:

Leave	955.87
Notice	1432.97
Additional Notice	286.60
Severance Allowance	716.50
TOTAL	E3 391-94

- 31. The Applicant was out of work for 5 months. He had a family to

support, who must have endured financial hardship as a result of his dismissal. The events surrounding the dismissal disclose an ill-tempered managerial attitude towards workers that is no longer acceptable in modern labour relations. Workers have a right to fair treatment and respect for their personal dignity. Taking all these factors into account, and bearing in mind that the Applicant only worked for the Respondent for two years, the court considers that an award of six (6) months wages in the sum of E8597-82 would be fair and reasonable as compensation for the Applicant's unfair dismissal.

32. Judgement is entered for the Applicant in the sum of E11,989-76, with costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT