IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 262/2001**

In the matter between:

ZEPHANIA NGWENYA **Applicant**

and

ROYAL SWAZI SUGAR CORPORATION **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**L. SIMELANE**
FOR RESPONDENT	**:**	**M. SIBANDZE**

J U D G E M E N T – 17/01/2007

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1. The Applicant has applied to the Industrial Court for determination of an unresolved dispute. In his particulars of claim he avers that he was unfairly dismissed from work on charges of fighting and causing a disturbance at his work place. He further states that he was not given a fair hearing before his services were terminated. He claims payment of statutory terminal benefits, leave pay, wages for days worked and

minimum compensation for unfair dismissal.

2. The Respondent in its reply pleads that the Applicant's services were fairly terminated after a fair disciplinary hearing. It is alleged that all monies due to the Applicant were paid to him and no other amounts are payable.

3. The Applicant testified in support of his case and the Respondent called four witnesses in support of its defence. At the close of the case, the court heard oral submissions from the parties' counsel, supported by written submissions. The court commends both counsel for their comprehensive summary of the issues supported by relevant authorities for the assistance of the court.

FACTS WHICH ARE COMMON CAUSE

4. The Applicant was employed by the Respondent in February 1980, and he was in the continuous employ of the Respondent for a period of twenty years thereafter. His services were terminated on 18th February 2000 after he had been found guilty by the chairman of a disciplinary enquiry of causing a disturbance at the workplace by kicking a fellow worker in the face. At the time of his dismissal, the Applicant was a crane driver earning E1328-00 per month. He had a clean disciplinary record.

5. In October 1999, about four months before his dismissal, Respondent offered a voluntary retrenchment package to all its employees. The package contained enhanced benefits over and above the statutory retrenchment benefits, including a long service award and an ex gratia payment. In the case of the Applicant, the

long service award amounted to 15% of his basic annual salary per year, and the ex gratia payment was 7 days pay for each completed year of service.

6. The Applicant applied for the package, but his application was turned down because he was regarded as a valuable employee whose services were still required by the company.

7. On 11th February 2000, the Applicant was operating the crane at the respondent's sugar stores. He was working together with a rigger named Petros Shongwe and the rigger's assistant David Mamba. Their task was to remove a defective motor from the top of the sugar bucket elevator machine, and replace it with another motor. Since these motors are heavy, the crane was required to lower the defective motor, and raise the replacement motor, by means of a sling. The Applicant operated the crane, and the rigger's function was to direct the operator and fit the sling.

8. There was an initial lack of consensus between Applicant and the rigger whether the new motor should be lifted before the defective motor had been removed. The rigger wanted the old motor to be removed first. The foreman Mandla Msane agreed with the rigger. The Applicant then extended the boom of the crane to the top of the elevator to remove the defective motor, and the rigger climbed up to guide the boom.

9. There was little space to manoeuver the boom, which knocked against the roof girders. This occurred about three times. The rigger Petros Shongwe then alighted from the elevator and went to stand next to the crane cabin where the Applicant was seated. An altercation

between Shongwe and the Applicant ensued, which culminated in the Applicant kicking the rigger once in the face. The Applicant was wearing heavy safety boots with steel toecaps. The kick caused Shongwe's face to bruise and swell. He did not retaliate, but proceeded to report the incident to the foreman, Mandla Msane.

10. Msane did not attend to the matter immediately because he was on his way to a meeting. He told Shongwe to go to the clinic. After his meeting, he investigated the incident. The Applicant admitted kicking Shongwe, giving the reason that Shongwe had provoked him by shaking his foot and talking to him as though he was a child.

11. Msane suspended the Applicant from work, and charged him with creating a disturbance by fighting at the workplace.

12. The Applicant was served with notice of the disciplinary hearing at 08:45 am on 17 February 2000. The hearing was scheduled for 9.30 a.m. on 18th February 2000. The Disciplinary Procedure of the Respondent provides that 24 hours notice is adequate. At the commencement of the hearing, the Applicant's union representative stated that he had not had sufficient time to prepare for the hearing. He requested a postponement. The chairman refused the postponement because the Applicant had been given the 24 hours notice prescribed by the Disciplinary Procedure.

13. At the conclusion of the disciplinary hearing, the chairman found the Applicant guilty of causing a disturbance by kicking Petros Shongwe in the face, and he imposed the following sanction:
"Zephaniah Ngwenya is dismissed from service, with benefits." Minutes of the disciplinary hearing were recorded and handed into court as an

exhibit.

14. The Applicant appealed against this verdict, on the grounds that it was too harsh. He also challenged the procedural fairness of the hearing. His appeal was dismissed.

15. The Applicant reported a dispute to the Commissioner of Labour in terms of the dispute resolution procedures which then applied under the Industrial Relations Act 1996 (since repealed). Conciliation was unsuccessful, and a certificate of unresolved dispute was issued by the Commissioner.

DISPUTED FACTS

16. The parties advanced contradictory versions regarding the altercation which culminated in the rigger being kicked in the face by the Applicant.

17. Firstly, they placed different emphasis on the disagreement between Applicant and the rigger with respect to the modus operandi to replace the motor on the conveyor. The Respondent's counsel emphasized this disagreement as a significant cause of Applicant's hostility towards the rigger, whilst the Applicant testified to a mere difference of opinion which was resolved without rancour.

18. Regarding the assault on Shongwe, the Applicant stated that he acted under provocation and in self-defence. He said Shongwe came to the crane and seized his left foot, twisting and shaking it vigorously so that he was in danger of falling off the crane. Shongwe asked him in a rude manner why he was damaging the crane, and complained

that the Applicant was going to hurt him. The Applicant then held onto the crane cabin with his hands, rose from his seat, and kicked Shongwe with his right leg. Since Shongwe was standing on the ground, his face was just below the level of the crane cab. The kick struck him above his right eyebrow on the forehead, according to the Applicant.

19. The Respondent called RW1 David Mamba, the rigger's assistant, as a witness. He was the only other eyewitness to the incident. He confirmed that Shongwe climbed down from the elevator and approached the edge of the crane. He never saw Shongwe grab Applicant's foot. He saw Applicant kick Shongwe in the face with his **left** foot. He then ran away to hide because he did not wish to be involved in the incident.

20. Mamba first said he was standing 6 metres away from the crane. Later he corrected this to 2.5 meters. He first said that Shongwe was kicked on the left cheek, then he changed to say it was the right cheek.

21. Mamba said he never heard Shongwe say anything to the Applicant when he approached the crane. Under cross-examination he was referred to his evidence at the disciplinary enquiry, when he said he heard Shongwe ask the Applicant why he was damaging the crane. He conceded saying this at the disciplinary enquiry, but reconciled this discrepancy by saying that Shongwe shouted this to the Applicant whilst he was still on top of the elevator. He persisted that he did not hear Shongwe say anything when he approached the crane cabin.

22. The Respondent's witness RW2 Msane initially denied that the Applicant mentioned Shongwe shaking his foot when he first questioned him.

Confronted with a different version in the minutes of the disciplinary hearing, Msane conceded under cross examination that Applicant did in fact raise this during his first interrogation. He denied however that there was ever any mention of the Applicant's foot being twisted.

23. Msane said Shongwe was injured on the left cheek, which he said was lightly bruised and beginning to swell when he saw Shongwe after the incident. He also said that he was present when the Applicant demonstrated how he kicked the rigger, using his left foot.

24. The Applicant said the chairman of the disciplinary hearing refused to allow him to call his witness, one Bheki Shabangu. The chairman said he did not want an apprentice to give evidence. Applicant retracted this evidence in cross-examination and also conceded that neither he nor his representative had ever interviewed Shabangu and he did not know what Shabangu could say as a witness.

25. The Respondent called Bheki Shabangu as a witness. He confirmed that he was not an apprentice, neither did he witness the altercation between Applicant and Shongwe.

26. The Applicant further claimed that since he had been dismissed "with benefits" he was entitled to be paid notice pay, leave pay and severance allowance. On the question of leave pay, he said he was entitled to 21 days leave per year, and he had not taken any leave since 1997. He said he continued working during the annual shutdown. He could not explain why he was only claiming 21 days leave, when on his version he was entitled to claim for 63 days or more.

27. The Respondent called its Human Resources Services Manager Billie

Mavimbela as a witness. He expressed the opinion that “dismissed with benefits” means “dismissed with notice”, although he said he had never come across this type of sanction before. He produced a Termination of Service Form which indicates that the Applicant was paid eleven days leave pay and one months notice pay. The payment was however set off against deductions for gas and “lusoti fees.

ANALYSIS

28. The Applicant does not deny that he kicked Petros Shongwe in the face. He says he did so under provocation and in self-defence. The only eye-witness evidence of the altercation came from the Applicant and RW1 David Mamba. Petros Shongwe was not called to testify, although he had testified at the disciplinary hearing. Shortly after the Applicant’s dismissal, Shongwe was himself dismissed from the Respondent’s employ for smoking dagga at the workplace during working hours. Apart from the fact that he no longer works for the Respondent, no other reason was given as to why the Respondent did not call Shongwe as a witness. His evidence was certainly central to the Respondent’s defence.

29. The evidence of Shongwe recorded in the minutes of the disciplinary hearing is hearsay, and cannot be tested by cross-examination. It is inadmissible to prove the truth of the facts stated by Shongwe at the hearing. Nevertheless, it has certain circumstantial value which is relevant to the issues before the court.

See **Hoffman: SA Law of Evidence (2nd Ed.) page 90**

30. In the minutes at pages 9 -10, Shongwe is recorded as stating that he had many previous quarrels with the Applicant. He says that he

complained to the foreman Mandla Msane that the Applicant **"wants to hit me with the crane boom often."** When asked what was making the Applicant hit the structures (whilst trying to remove the defective motor), he replies: **"He told my helper that he is going to hit me with the crane."** Later he says there has been bad-blood between the Applicant and himself.

31. No evidence was given at the trial that the Applicant had ever tried to hit Shongwe with the crane, or that any complaint in this regard had ever been made to Msane, or that the Applicant told Mamba that he was going to hit Shongwe with the crane. The minutes of the disciplinary hearing are not admissible to prove the truth of Shongwe's allegations, but the testimony given by Shongwe at the hearing is relevant to show his state of mind at the time of his altercation with the Applicant.

32. The minutes of the disciplinary hearing indicate that Shongwe's state of mind was that of a man who had an axe to grind with the Applicant and believed that the Applicant was deliberately trying to hurt him with the crane. There is no evidence that Shongwe had any reasonable basis for this belief, but the court is satisfied on the probabilities that when he approached the Applicant, he did so as an aggrieved person with a belligerent attitude.

33. When David Mamba was asked why Shongwe had climbed down from the crane and approached the Applicant at the crane cabin, Mamba said he didn't know. Mamba testified that Shongwe said nothing to the Applicant immediately before he was kicked, nor did Shongwe grab the Applicant's foot. According to Mamba's version of events, Shongwe did nothing to provoke the Applicant, who lashed out with his foot for no apparent reason. Asked about the relationship between the Applicant and

Shongwe, he said that to his knowledge there had never been any disagreements between them.

34. The court is of the opinion that Mamba was not a reliable witness. Not only is his version manifestly improbable, but there were other unsatisfactory features in his testimony:

34.1 Mamba said he was standing 6 metres away from the crane when the altercation occurred. Confronted with his evidence at the disciplinary hearing, he corrected this to 2.5 meters. He said that Shongwe was kicked on the left cheek, then he changed to say it was the right cheek. These corrections revealed a witness who glibly retracted facts which he had confidently asserted shortly before.

34.2 Of more significance was Mamba's prevarication regarding the events preceding the Applicant kicking Shongwe. Mamba said he never heard Shongwe say anything to the Applicant when he approached the crane. Under cross-examination he was referred to his evidence at the disciplinary enquiry, when he said he heard Shongwe ask the Applicant why he was damaging the crane. He conceded saying this at the disciplinary enquiry, but tried to reconcile the discrepancy by saying that Shongwe shouted this to the Applicant whilst he was still on top of the elevator. He persisted that he did not hear Shongwe say anything when he approached the crane cabin. A brief scrutiny of the disciplinary hearing minutes exposes the lie. At

page 13 of the minutes, Mamba states:

“PS [Petros Shongwe] went down to the crane. He got to the driver. PS asked the driver why he was damaging the crane.”

35. The only reasonable inference to be drawn from this false testimony is that Mamba deliberately attempted to minimize the role played by Shongwe in the altercation. He deliberately tried to create a false picture of the Applicant assaulting Shongwe without any apparent reason or provocation.

36. The Court prefers and accepts the Applicant’s version, namely that Shongwe approached the crane cabin in a confrontational state of mind, grabbed the Applicant by the foot, and berated the Applicant for trying to damage the crane and hurt him.

37. The court does not however accept the Applicant’s entire version of events. The allegation that Shongwe twisted his foot first surfaced in court, and is clearly an afterthought. He neither mentioned this twisting to Msane after the incident, nor did he mention it at the disciplinary hearing. The court accepts that Shongwe in all likelihood grabbed the Applicant’s foot and shook it, but it is our opinion that the Applicant has exaggerated the extent of this aggression. Bearing in mind that the crane cabin was above Shongwe’s head it is not feasible that the shaking of his foot constituted any real threat to the Applicant. The latter was seated securely above Shongwe with the cabin to hold onto. He felt sufficiently stable to stand up and aim a kick at Shongwe’s head. The court accepts that Shongwe shouted at the Applicant in a belligerent way and grabbed and shook his foot, but it has not been proved that the Applicant was in any pain or that there was any reasonable danger that he would be dislodged from the

crane or otherwise hurt.

SELF-DEFENCE

38. The victim of an unlawful attack is entitled to defend his person. However, before a court will uphold a plea of self-defence the following requirements must be established:

38.1 There must have been an unlawful attack or threatened attack and the victim must have had reasonable grounds for believing that he was in physical danger;

38.2 The means of defence must have been commensurate with the danger, and dangerous means of defence must not have been adopted when the threatened injury could have been avoided in some other reasonable way.

See **NTSOMI v MINISTER OF LAW AND ORDER 1990 (1) SA 512 (C) AT 526**

See also **PICK 'N PAY RETAILERS (PTY) LTD (GALLO MANOR BRANCH) V COMMERCIAL CATERING & ALLIED WORKERS UNION OF SA (1990) 11 ILJ 1352 AT 1355**

39. **McKerron Law of Delict 7th ed at 74** puts it as follows:

'The defendant must show that there was actual presence of imminent danger and a reasonably apparent necessity of taking such action as was taken.'

40. The court is unable to find that the Applicant was acting in self-defence when he kicked Shongwe in the face. The Applicant had no reasonable grounds for believing that he was in imminent danger of physical injury. Even if he subjectively (and unreasonably) believed that Shongwe intended to assault him, his retaliation was an over-reaction and not reasonably commensurate with the threat. He did not try to pull his foot away or kick at the hand which was holding his foot. He did not call for help. Instead he chose to stand up and aim a kick at Shongwe's face. This was not a reasonable or necessary way of reacting to Shongwe's admonishment.

PROVOCATION

41. The next question which arises is whether the Applicant's assault on Shongwe can be justified due to Shongwe's provocation. The general approach of our law is that provocation does not excuse from liability unless it causes a loss of cognitive control to the extent that there is an absence of *mens rea*. However, *"loss of temper, that is to say a failure to control one's emotional reactions, is not to be confused with a loss of cognitive control"* – per Scott JA in **S v Kok 2001 (2) SACR 106 (SCA) at 115j - 116a.**

42. People are expected to control their emotions. Retaliation for harm suffered must be sought through the public criminal process and not by personal self-help.

See **South African Criminal Law and Procedure Vol. 1 by J M Burchell at page 202**.

43. In the case of **Winterbach v Masters 1989 (1) SA 922 (E),** it was held

that provocation is not a defence to an action for damages for assault where self-defence is not involved (but provocation will mitigate damages, and in a proper case even reduce the damages to nothing or nominal damages).

44. Provocation alone cannot render an assault lawful, and unless it can be shown that the provocation amounted to self-defence, or caused the Applicant to lose cognitive control over his actions, the Applicant is guilty of an unlawful assault on Shongwe.

45. The Applicant stated repeatedly in his evidence that he lost his self-control. It is the view of the Court that the Applicant lost his temper, but not cognitive control over his actions. He had a clear recollection of the incident, and his demonstration of how he kicked Shongwe showed that he acted with conscious deliberation. He was subjected to a degree of provocation, but scores of people put up with similar jostling or snide remarks on a daily basis without resorting to violence or self-help. Kicking the rigger in the face constituted an unjustified and inappropriate assault.

CREATING A DISTURBANCE

46. The Applicant's counsel submitted that the Respondent failed to prove the disciplinary charge of 'creating a disturbance by fighting at the workplace'. He argued that kicking Shongwe did not constitute fighting, nor did it create any disturbance.

47. It should be noted that the Respondent's Disciplinary Procedure provides for the social offence of "*creating a disturbance eg. fighting at the workplace."* This is the offence with which the Applicant was charged. It is

a distinctly different offence from the offence of assault, which is listed as a general offence under *Criminal and other offences.* The material element of the offence is the creation of a disturbance at the workplace, which may be committed by fighting or in any other way.

48. The Applicant's assault on Shongwe resulted in the operation to remove the defective motor being temporarily abandoned. The Applicant's unlawful conduct undoubtedly created a disturbance at the workplace.

49. Whether kicking Shongwe in the face was an assault or 'fighting' is simply playing with words. The charge sheet explicitly sets out the particulars of the 'fighting', namely "*that he kicked and injured Petros Shongwe on the left cheek*". The Applicant knew precisely what offence he was alleged to have committed, and he was not prejudiced in the conduct of his defence by the use of the word 'fighting' even if 'assault' would have been a more appropriate term. Employers are not expected to observe the same standards of particularity in disciplinary charges as apply in criminal prosecutions. In any event, even if 'fighting' implies a struggle or mutually aggressive behaviour, the Applicant himself asserts that he kicked Shongwe because the latter grabbed his foot.

REASON FOR TERMINATION

50. The Applicant was dismissed for creating a disturbance at the workplace by kicking his co-worker in the face. The Applicant was by his conduct guilty of unjustified violence towards a fellow employee. In the premises, the Respondent has proved that the reason for the termination of the Applicant's services is one permitted by Section 36 of the Employment Act 1980 (to wit, Section 36(b)).

REASONABLENESS OF TERMINATION

51. The services of an employee shall not be considered as having been unfairly terminated unless the employer proves –

51.1 that the reason for the termination was one permitted by Section 36 of the Employment Act 1980; and

51.2 that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

See Section 42(2) of the Employment Act 1980

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52. The Court now turns to a consideration of whether it was reasonable in all the circumstances to terminate the services of the Applicant. The relevant circumstances to be considered and weighed are the following:

52.1 the Applicant's personal circumstances and service record;

52.2 the nature of the Respondent's undertaking and the workplace itself;

52.3 the disciplinary standards set by the Respondent and contained in the Disciplinary Procedure;

52.4 the seriousness of the offence.

PERSONAL CIRCUMSTANCES AND SERVICE RECORD

53. The Applicant was born in 1945. His employment with the Respondent commenced in April 1980. He was in the continuous service of the Respondent for twenty years. He had a clean disciplinary record throughout this period. At the date of his dismissal in February 2000 he was 55 years of age. He is a family man with a wife and 6 children, 4 of

whom were still schooling when he lost his employment.

54. *"….where an employee has had a long record of good service in the past….this is a factor which may be taken into account by the court in judging the reasonableness of management's decision to dismiss."* –per Hassanali AJP in **Jabhane James Mbuli v Mhlume Sugar Company (IC Case No. 7/1990).**

NATURE OF UNDERTAKING AND WORKPLACE

55. The Respondent operates a sugar mill and ancillary industrial undertakings. RW4 Mavimbela, Respondent's Human Resources Services Manager, stated in his evidence that the Respondent has adopted a strict approach to violence because employees have access at the workplace to dangerous tools which could cause loss of life or limb if used as weapons. Mr. Mavimbela stressed that violence could not be tolerated or condoned because this would compromise the safety of the workplace.

DISCIPLINARY STANDARDS

56. The Respondent's Disciplinary Procedure provides the sanction of immediate dismissal for the offence of creating a disturbance at the workplace. This procedure was negotiated with the Applicant's union representatives and is binding on the Applicant.

57. The inflexibility of a fixed penalty is mitigated by the Disciplinary Procedure, which expressly provides as follows:

57.1 "This code is intended to provide guidelines and should be applied subject to the provision of section 42(2) of the

Employment Act, namely that an employee shall not be dismissed unless:-

(i) *The reason for dismissal is one permitted by section 36.*

(ii) Taking into account all the circumstances of the case it is reasonable to terminate the service of the employee." (See note on page 11)

57.*2* *"The aim of discipline is to help guide the employee towards correcting unsatisfactory job performance and his behaviour in terms of company requirements. Discipline should therefore be applied in a corrective rather than a punitive manner."* (See Article 3.3 on page 2)

58. RW4 Mavimbela testified that the Respondent has a strict approach to violence at the workplace. As was observed in the case of **SACCAWU v Edgars Group of Companies (1993) 2 LCD 91 (ILJ)**, *"an employer is entitled to set reasonable standards to which an employee must comply."* In **SCAW Metals v Vermeulen (1993) 14 ILJ 672 (LAC),** the Labour Appeal Court stated: *"Scaw is entitled qua employer to determine the standard of conduct it demands from its employees, and the court can only intervene if that standard results in unfairness in a specific situation."*

SERIOUSNESS OF THE OFFENCE

59. It must be borne in mind that the Respondent chose to charge the Applicant with creating a disturbance at the workplace, not assaulting a fellow employee. Although both offences carry the sanction of immediate dismissal in terms of the Disciplinary Procedure, and the disturbance was created by the Applicant 'fighting' with a fellow employee, the seriousness

of the offence must be assessed first and foremost by the seriousness of the disturbance.

60. The job being carried out by the Applicant and his riggers was disrupted after Shongwe was kicked, and had to be completed at a later stage. No other work operations or employees were disturbed. The incident was not observed by any employees other than the protagonists and Mamba.

61. The court was struck by the reaction of the Respondent's foreman Msane when Shongwe reported to him that he had been kicked by the Applicant. Msane merely continued to a meeting and advised Shongwe to go to the clinic. He did not take any immediate action to investigate the incident, defuse the situation, or restore work operations. He clearly did not regard the incident as serious.

62. The Applicant kicked Shongwe in the face whilst wearing reinforced safety shoes. The face is a vulnerable part of the body. Fortunately Shongwe was not seriously injured. After lashing out in anger, the Applicant did not persist in the assault. No weapon was used.

63. The assault was a spontaneous and unpremeditated reaction to Shongwe's provocative behaviour and remarks. The court may take into account the fact that the complainant (Shongwe) had himself acted in an aggressive or provocative manner.

See **Grogan: Ricket's Basic Employment Law (2nd Ed.) page 47-48**

64. The chairman of the disciplinary hearing found that the Applicant did show remorse for kicking Shongwe, but only after he had been found guilty of the charge against him.

ANALYSIS

65. Mr. Sibandze for the Respondent referred the court to the following passage in **Le Roux and Van Niekerk: The South African Law of Unfair Dismissal, para. 8.4**:-

> "Assault is another of those forms of misconduct which has an impact both at an individual level and at the level of the enterprise. For the person against whom the assault is perpetrated, the act constitutes a gross violation of personal integrity and dignity.
>
> Where the assault assumes *a serious form, dismissal is warranted even for a first offendor."*

66. Mr. Sibandze submitted that any assault which involves actual physical violence is sufficiently serious to warrant immediate dismissal, particularly where the disciplinary code provides for dismissal even for a first offence. He emphasized the principle adopted in the **Scawu Metal case (supra) at page 676** to the effect that an employer is entitled to adopt a strict approach to violence and that the court will not readily interfere. He also referred the court to the case of **Damane v Print Pak (Cape) NH 11/2/2142 (IC)**, where this principle was also applied.

67. A perusal of the authorities on the topic of assault/fighting, as collected by Le Roux and Van Niekerk in para.8.4 of their book on the law of unfair dismissal, shows that assault at the workplace can run the whole gamut from managers who lock workers in the freezer to disgruntled employees who point firearms at their managers. As the Industrial Court of South Africa put it in **MAWU v Feralloys Limited (1987) 8 ILJ 124 (IC) at 137C**, *"assault can vary from a mere touch to the infliction of serious harm."*

68. Whether the assault is sufficiently serious to warrant instant dismissal

depends in every case on a consideration of all the circumstances. In **Mhlume Sugar Company v Jabhane James Mbuli (Industrial Court Appeal Case No. 1/1991)**, whilst accepting that fighting or violence is well established as a category of misconduct for which a single offence can justify instant dismissal, Rooney J. said:

> '(Y)et it is still a matter for the discretion of the Industrial Tribunal taking into account the element of provocation and any other mitigating circumstances. The employee's length of service and good record should be taken into account by a reasonable employer as extenuating circumstances (Anderman 166)."

69. The chairman of the disciplinary hearing, one Ivan Voight, was not called to testify, so the court must glean from his written remarks what factors weighed with him when he concluded that dismissal was the appropriate sanction for the Applicant. The court notes that his remarks are confined to the assault, and he does not deal at all with the offence with which the Applicant was charged, namely creating a disturbance at the workplace. In the view of the court, the chairman was required to consider the seriousness of the assault <u>in relation to the disturbance it created at the workplace</u>, yet he failed to apply his mind to this aspect at all.

70. The chairman dealt with the issue of provocation in the following manner:

> "I don't believe that there was sufficient provocation for ZN to strike out at PS. I believe that all assaults are provoked in some way, and simple provocation is not sufficient to be considered extenuating. I believe that the provocation must be extreme and physical and the action of striking out must be in self-defence of this physical harm."

71. The chairman is saying in effect that before provocation may be taken into account as an extenuating circumstance, it must itself constitute a physical assault entitling the employee to act in self-defence. He goes on to say:

> "Even if there was physical contact, I don't believe that there was any danger of physical harm."

73. The chairman grossly misdirected himself. It is correct that provocation is not a good defence to a charge of assault where self-defence is not involved (unless it involves a loss of cognitive control) at the stage when guilt is being determined, but when considering the appropriate sanction to impose after a verdict of guilty, any provocation no matter how slight must be taken into consideration as a possible extenuating factor. By limiting provocation to extreme acts of physical violence, the chairman effectively ignored the underlying cause of the incident and closed his mind to a material extenuating factor.

74. The decision of the disciplinary chairman to dismiss the Applicant was irregular and unfair because the chairman failed to consider the appropriate sanction in relation to the disciplinary charge, and moreover failed to take the belligerent conduct of Shongwe into account in mitigation. Nevertheless, the court is still required to determine, on its own consideration of all the circumstances, whether the termination of the Applicant's services was reasonable.

75. The question may be approached by applying the test enunciated in **Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 LAC at 589F-590G**, namely by enquiring whether the disturbance caused by the Applicant kicking Shongwe *'had the effect of destroying, or of seriously damaging, the relationship of employer and*

employee between the parties, so that the continuation of that relationship could be regarded as intolerable."

76. Whilst the Applicant's assault on Shongwe was undoubtedly unacceptable and worthy of condemnation, it was an isolated lapse in an otherwise clean service record over a period of 20 years. The assault did not involve the use of any weapon, and did not result in serious injury or major disruption of the Respondent's operations.

77. The Applicant lost his temper and over-reacted when provoked by Shongwe, who was his subordinate. According to RW1 Mamba, Petros Shongwe acted strangely at work and would sometimes be a difficult person to work with. The Applicant said that Shongwe sometimes came to work drunk and did not behave like a normal human being. Indeed Shongwe was dismissed shortly after the incident for smoking dagga at work.

78. Shongwe told the disciplinary hearing that there were many conflicts and arguments between him and the Applicant, which the foreman had failed to resolve. The relationship between Applicant and Shongwe was not explored in evidence at the trial, but it is clear that there were unresolved tensions between the two workers. An astute foreman should have resolved the underlying tensions before they erupted into physical confrontation.

79. Giving due weight to the Respondent's strict approach to violence at the workplace, and the standard penalty provided as a guideline by the Disciplinary Procedure, the court nevertheless considers that dismissal was an unreasonably harsh sanction for a long-serving employee such as the Applicant. The disturbance created by the Applicant was not so severe

or unpardonable as to irreparably damage the longstanding employment relationship or to render the continuation of the relationship intolerable.

80. In line with its policy that discipline should be applied in a corrective rather than a punitive manner, the Respondent had a number of options available to guide the Applicant towards correcting his behaviour rather than punishing him by immediate dismissal. A final warning, combined with appropriate counseling on anger management, would have ensured that no further incident occurred and that the services of a valuable worker were retained.

81. For these reasons, the court concludes that the termination of the Applicant's services was unreasonable in all the circumstances, and therefore substantively unfair.

82. The court also considers that the refusal of Applicant's request for a postponement of his disciplinary hearing was procedurally unfair:

82.1 An employee has a right to be given adequate notice prior to his disciplinary hearing. The Respondent's Disciplinary Procedure provides as a guideline that 24 hours notice will normally be considered adequate.

82.2 The Applicant was given 24 hours notice, but his representative informed the chairman at the commencement of the hearing that he had not had sufficient time to prepare because the Applicant had only managed to contact him the previous afternoon after he knocked off from work.

82.3 The Chairman refused the postponement in the following

terms:

"You are expected to be given 24 hours notice of a hearing, in order to find a representative. I am happy that you have had 24 hours. We will not postpone the hearing."

82.4 This misguided elevation of a guideline to an immutable commandment resulted in the Applicant being denied proper representation, since the right to be represented includes the right to prepare one's defence in consultation with one's representative.

83. The Respondent's own Disciplinary Code expressly states that the disciplinary procedure should leave the individual feeling that he has had the opportunity to state his case in accordance with his rights. This did not occur.

84. With regard to the sanction imposed by the chairman of the disciplinary hearing, namely dismissal with benefits, it is the view of the court that the 'benefits' referred to are those statutory benefits payable in respect of a dismissal with notice ie. wages for days worked; leave pay; and statutory notice pay (including so-called additional notice pay). The chairman could not have intended the benefits to include statutory severance allowance, since such allowance is only payable in the event of a termination for a reason other than one set out in subsections 36 (a) to (j) of the Employment Act.

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85. The court has found that the reason for the termination of the Applicant's services was one set out in Section 36 of the Employment

Act 1980, but it was nevertheless unreasonable in all the circumstances to terminate the services of the Applicant. The termination is held to have been unfair, both substantively and procedurally.

86. Severance allowance is only payable in terms of Section 34(1) of the Employment Act if the services of the employee are terminated other than under the provisions of Section 36(a)-(j). The Applicant's services were terminated in terms of Section 36(b) of the Act, so the Respondent is under no obligation to pay severance allowance.

87. The Respondent tendered no documentary or other evidence with regard to the Applicant's contractual leave entitlement or the leave pay due to him on termination of his services. The respondent tendered in evidence Exhibit R33, a Termination of Service Form, which sets out the benefits calculated by the Respondent as due on termination. These benefits include an amount of E561.88 in respect of 11 days leave. The document also reflects amounts recoverable from the Applicant in respect of gas, Lusoti membership fees and other advances in the total sum of E2571.41. The document shows a net debit amount of E869.12 owing by the Applicant to the Respondent.

88. The Applicant is entitled to be paid additional notice in the sum of E3882.08. The court also finds on the evidence led that there are at least 10 more leave days payable to the Applicant, amounting to E510.80 in leave pay. The balance of terminal benefits payable to the Applicant is as follows:

Additional notice	E3882.08
Balance of leave	510.80
Total benefits due	4392.88
Less: Deductions	869.12

Total benefits payable E3523.76

89. The Applicant does not seek reinstatement to his former employment with the Respondent, but he claims compensation for his unfair dismissal. After taking into account the Applicant's age and personal circumstances; his service record; the benefits he would have received had his application for voluntary redundancy been accepted; the nature and circumstances of the offence for which he was dismissed; the procedural unfairness of the disciplinary hearing; and the period of one year during which the Applicant was without employment, the court is of the considered view that 8 months salary amounting to E10624.00 constitutes fair and reasonable compensation.

90. Judgement is accordingly entered for the Applicant against the Respondent for payment of the sum of E14147.76, with costs.

The members agree.

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P.R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT