IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 168//2002

In the matter between:

SONNYBOY NDZINISA **Applicant**

and

CADBURY SWAZILAND **Respondent**

CORAM:

P. R. DUNSEITH: **PRESIDENT**
JOSIAH YENDE: **MEMBER**
NICHOLAS MANANA: **MEMBER**

FOR APPLICANT: **S. MADZINANE**
FOR RESPONDENT: **Z. JELE**

J U D G E M E N T -28/03/2007

1. The Applicant was employed by the Respondent on 12 September 1989 as a machine operator, and he was in the continuous employ of the Respondent until his services were terminated on the 15th January 1998.

2. The Applicant alleges that the decision to terminate his services was unfair and unduly harsh, and he has applied to court for a reinstatement order alternatively payment of terminal benefits and maximum compensation for unfair dismissal.

3. The Respondent in its defence alleges that the Applicant's services were terminated because he wilfully absented himself from work without permission or reasonable excuse, notwithstanding that he had a current final written warning for absenteeism. Moreover, the Applicant was insubordinate in that he defied an instruction to come to work.

4. The Respondent avers that the termination of the Applicant's services was lawful and fair because:

4.1. the reason for the termination is permitted by section 36 of the Employment Act 1980;

4.2. the decision to terminate was taken after a fair disciplinary hearing; and

4.3. It was reasonable in all the circumstances to terminate the Applicant's services.

5. The Applicant gave evidence at his disciplinary hearing, and he also testified on oath in court. Minutes of the disciplinary hearing were produced in evidence. The Respondent's witnesses Gugu Phiwase Nxumalo arid Bheki Tsabedze testified as to what they were told by the Applicant regarding the reasons for his absence from work.

6. After carefully examining all the evidence, the court finds on a balance of probabilities that the following factual sequence of events occurred.

> 6.1. At the end of his regular shift at 10 p.m. on Friday 12th December 1997, the Applicant went drinking with his friends until the early hours of Saturday morning. On returning home at around 7 a.m., the Applicant's parents sent him to Hlatikhulu to fetch a goat for a family ritual. Due to a vehicle breakdown, the Applicant only returned home from Hlatikhulu at about 1 p.m. He was due to begin his next shift at work at 2 p.m.

6.2. The Applicant was exhausted from his extended trip to Hlatikhulu and lack of sleep. He telephoned the supervisor on duty, Gugu Nxumalo at her home. She was about to leave for work. He requested permission to be absent from work for that shift. After hearing his explanation, Gugu insisted that he report for work, and told him that they could discuss his problem at the factory.

6.3. The Applicant did not consider himself to be in a fit condition for work, so he disobeyed Gugu's instruction that he report for work, and he stayed at home. When he reported for work on the Monday, he was suspended and charged with "failure to arrive at work without acceptable reason".

6.4. A disciplinary hearing was convened on proper notice to the Applicant. The Applicant was represented by a shop steward. On conclusion of the hearing, the Applicant's services were summarily terminated. The chairperson took into account that the Applicant had on at least 6 occasions during 1997 received counseling and warning for absence from work, including a final written warning on 26th August 1997 and further counseling on 17th September 1997.

6.5 The Applicant appealed to the Respondent's general manager on the sole ground that the previous final written warning was not valid as the correct disciplinary procedures had not been followed. The appeal was dismissed, on the basis that the Applicant had acknowledged receipt of the final written warning and had not appealed against it.

7. One aspect of the aforedescribed sequence of events requires further comment, namely the finding that Applicant went drinking with his friends until the early hours of Saturday morning.

7.1. According to the minutes of the disciplinary enquiry, the Applicant stated that at the end of his regular shift he went to the bar until morning on the following day. In his verdict at the end of the enquiry the chairman refers to the Applicant's statement that he "partied through the night." This reference was not challenged on appeal by the Applicant. When the chairman of the appeal hearing asked the Applicant if it was responsible conduct to spend the night drinking and then traveling to Hlatikhulu, knowing that he had to come to work, the Applicant did not deny the alleged conduct.

7.2. In his evidence in chief, the Applicant said that he had not slept the previous night. When his counsel asked him why he had not slept, he replied that he had gone to Hlatikhulu to buy a goat. Under cross-examination the Applicant was asked what he was doing on the Friday night between 10 p.m. and daylight, and he answered that he slept. He denied that he told the disciplinary enquiry that he was in a bar. Asked what reason he gave the enquiry for not getting enough rest on the Friday night, he said he could not remember.

7.3. The Applicant's evidence on this aspect, looked at in its entirety, is evasive, inconsistent and patently false. The version he gave at the disciplinary enquiry was more candid.

8. The court was also unimpressed with the evidence of the Respondent's witness Gugu Nxumalo. On two issues, her evidence in court differed from what she told the disciplinary enquiry, namely :

•where she was when the Applicant telephoned her on the Saturday morning; and

•whether the Applicant gave her a reason for not having slept.

Nevertheless, the material portions of Gugu's evidence were admitted by the Applicant, namely that Gugu refused him permission to absent himself from work, and that she instructed him to report for work.

9. The Respondent's disciplinary code provides for a sequence of warnings. A final written warning is valid for a period of 6 months. Termination of services is considered where a related offence is committed during the validity of a final written

warning.

The Applicant was issued with a final written warning on the 26 August 1997. The Applicant signed the warning to acknowledge receipt. The final written warning was issued for "failure to arrive at work without acceptable reason."

The six-month period of validity of the warning had not expired when the Applicant was charged with the same offence. In terms of the disciplinary code, Respondent was entitled to consider terminating the Applicant's services.

However the Applicant alleges that the final written warning was not valid because, when it was issued, the Respondent did not adhere to the peremptory provisions of the disciplinary code. In particular, the Applicant complains that:

12.1. the prior written warning was not preceded by a "disciplinary discussion" in terms of Article A 2.3.6 of the code and the Applicant was not afforded the right to be assisted by a representative.

12.2. the final written warning was not preceded by a "less formal disciplinary enquiry" in terms of Article A 2.4.4 of the Code and the Applicant was not afforded the right to be assisted by a representative.

12.3. the Applicant was never advised of his right to appeal against the said warnings.

13. The Respondent's shift manager Bheki Tsabedze issued the written warning and the final written warning to the Applicant. He testified that the Applicant was verbally invited to attend the respective "disciplinary discussion" and "less formal disciplinary enquiry", and he must have been verbally advised of his right to representation. He said that the Applicant waived his right to representation and he accepted the warnings.

14. The Respondent submits further that the Applicant cannot at this stage challenge the validity of the warning. He should have done so by way of appeal at the time the warnings were issued.

15. The Court notes from the documents produced in evidence by the Respondent that Bheki Tsabedze was diligent in recording in writing the counseling sessions that he had with the Applicant. The absence of any record of a "disciplinary discussion" or

"less formal disciplinary hearing" indicates that only cursory attention, if any, was paid to these informal disciplinary procedures. The court doubts that proper notice was given to the Applicant of his right to representation.

16. Nevertheless, there appears to be some merit in the Respondent's submission that the Applicant cannot at this stage challenge the validity of the warnings. Mr. Jele for the Respondent referred the court to two cases in which the South African labour tribunals dealt with the issue.

In **Subroyen v Telkom (SA) Ltd (2001) 22 ILJ 2509 (CCMA)** and in **Xaba v Everite Ltd (1992) 1 LCD (IC),** it was held that where an employee has been advised at the relevant time of his right to appeal against the warning and fails to challenge or appeal against the warning, the employee must be taken to have acquiesced to the warning and thereby waived his right to challenge it at a later stage.

17. Mr. Jele submitted that there is good reason for following these rulings: if a final written warning can be challenged for the first time after it has been relied upon for a dismissal, this would qualify or derogate from the finality of the warning - see **AGBRO v Tempi (1993) 2 LCD 24 (LAC)** - and deprive the process of progressive discipline of the important element of certainty.

18. The court agrees with this submission. It is in the interests of good industrial relations that employment disputes and disciplinary action be resolved as soon as possible and with finality. An employee has the right to challenge the issue of a warning, but he must do so within the time permitted by the disciplinary code alternatively within a reasonable time- assuming that he is aware of his right to challenge or appeal. It would be unfair to the employer if the employee were permitted to subvert the process of progressive discipline by reserving his challenge until further steps in the process have been taken.

19. **In the case of PPWAWU & Another v Sappi Fine Papers (1193) 2 LCD 318 (IC)** the SA Industrial Court went so far as to hold that it had no jurisdiction to make a determination whether a previous warning had been fairly issued because this was a separate dispute which had never been referred for conciliation.

20. Both warnings issued to the Applicant state on their face that "the employee is entitled to appeal within 3 working days of the date of issue." The Applicant received

both warnings, and he received proper notice of his right to challenge their validity. He did not do so, and he is now precluded from contesting the validity of the warnings.

21. The Respondent relies on Section 36 (a) of the Employment Act 1980, which provides that it shall be fair for an employer to terminate the services of an employee whose conduct or work performance has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him.

22. The Applicant's services were terminated for chronic absenteeism. He received various prior warnings, including a final written warning which was still valid at the time of termination of his services. The reason for the termination is a fair reason in terms of section 36 of the Act, and the Respondent complied with the procedural requirements of the disciplinary code and fair labour practice.

23. It remains to consider whether the termination of the Applicant's services was reasonable in al the circumstances. The Applicant's counsel submitted that the Applicant's absence from work on the Saturday should be condoned because

23.1. the Applicant was not fit to perform his duties; and

23.2. the Applicant reported that he would be absent.

24. The Applicant was not fit to perform his duties because of his drinking all night and his election thereafter to travel to Hlatikhulu for a goat instead of sleeping. The Applicant inappropriately placed his own interests before his commitment to his employment. A worker who operates a machine and is key to factory production has an obligation to his employer to be reliable. This involves the exercise of personal discipline. The Applicant was given counseling and a series of warnings for absenteeism. He was aware that he was under final warning when he elected to absent himself from work without permission and in disregard of Gugu's instruction that he should at least show up for work. He disrupted the Respondent's production, and exhausted the Respondent's tolerance. The court finds that the termination of his services was reasonable in the circumstances.

25. The Respondent has discharged the onus placed upon it by section 42 of the Employment Act 1980. In the judgement of the court, the dismissal of the Applicant

was lawful and fair.

The application is dismissed.

There is no order as to costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT